

IN THE SUPREME COURT OF PAKISTAN  
(APPELLATE JURISDICTION)

**PRESENT:**

MR. JUSTICE TASSADUQ HUSSAIN JILLANI  
MR. JUSTICE MIAN SAQIB NISAR  
MR. JUSTICE SARMAJ JALAL OSMANY

**CIVIL APPEAL NOS. 269 TO 275, 1047 & 1048 OF 2011**  
**AND CIVIL PETITION NO. 657 OF 2012**

(On appeal from the consolidated judgment of the Peshawar High Court dated 28.10.2010 passed in WP Nos. 327, 328 & 525 of 2008 & 2745/2010 and consolidated judgment dated 29.6.2011 passed in WP No. 569 of 2011 and WP No. 3975 of 2010 and order dated 28.2.2012 passed in WP No. 184/2010).

Zarai Taraqiati Bank Limited etc

(In all cases)  
... Appellants/Petitioner

**VERSUS**

Said Rehman & others	(In CA 269/2011)
Ali Haider etc	(In CA 270/2011)
Fazli Subhan and others	(In CA 271/2011)
Ali Muhammad and others	(In CA 272/2011)
Muhammad Afsar Khan and others	(In CA 273/2011)
Muhammad Tariq Hussain etc	(In CA 274/2011)
Hidayat ur Rehman etc	(In CA 275/2011)
Hanifullah Khan etc	(In CA 1047/2011)
Muhammad Saleem Khan etc	(In CA 1048/2011)
Syed Muhammad Zahir Shah and others	(In CP 657/2012)
	... Respondents

For the Appellants:

Mian Gul Hassan Aurangzeb, ASC  
Mian Muhammad Hanif, ASC  
Mr. Muhammad Munir Peracha, ASC  
Mr. M. S. Khattak, AOR  
Mr. Hamid Ahmed, Advocate  
Mr. Rashid Sultan, Advocate  
(In all cases)

For the Respondents

Mr. Abdur Rahim Bhatti, ASC  
(In CAs 269 to 275/2011)

For the Respondents:

Mr. Shakeel Ahmed, ASC  
(In CP 657/2012)

Dates of Hearing:

5/6/7/13/19/21/22.11.2012

Date of Announcement:

15.2.2013

## **JUDGMENT**

**TASSADUQ HUSSAIN JILLANI, J.-** Facts giving

rise to these appeals briefly stated are that respondents were at the relevant time serving as Vice Presidents (C.A. No. 275 of 2011) and Assistant Vice Presidents in the appellant Bank (in all the remaining appeals and Civil Petition No. 657 of 2012). They were aggrieved of the recommendations made by the Departmental Promotion Committee in its meeting held in October 2007 vide which they were not recommended for promotion to the next grade. Those orders were challenged in Constitution petitions on the ground that the respondents had secured the requisite qualifying marks for their promotion from Vice President to Senior Vice President/Directors; that they had illustrious careers; that no cogent reason had been given by the said Departmental Promotion Committee for ignoring them; that the procedure adopted by the Departmental Promotion Committee had no sanction in law or the rules inasmuch as there was no provision of interview and for allocation of 25% marks for the interview. The Constitutional petitions have been allowed by the learned Division Bench of the Peshawar High Court vide the impugned judgment on the ground that the procedure provided in the Zarai Taraqati Bank Limited Staff Regulations, 2005 (hereinafter referred to as the Staff Regulations, 2005) could not have been adopted to consider the respondents' promotion; that in view of Section 6 of the Agricultural Development Bank of Pakistan (Reorganization and Conversion) Ordinance, 2002 (hereinafter referred to as the Ordinance, 2002), the respondents are to be governed by the same

Rules and Regulations which were applicable to them prior to the promulgation of the afore-referred Ordinance. The appellant Bank was directed to send their cases of next step promotion back to the Departmental Promotion Committee for consideration afresh in the light of the observations made in the impugned judgment.

2. Leave was granted by this Court in terms of order dated 30.3.2011 which reads as follows:-

*"In the petitions the points which have been raised for consideration of this Court are, (i) that the petitioner bank is a limited company and against which the writ cannot be issued, and (ii) that after the reorganization of Zarai Taraqiati Bank Limited it is not certain that the respondents would be governed by the old rules and regulations on the strength of Section 6 of Agricultural Development Bank of Pakistan (Re-organization and Conversion) Ordinance, 2002, or by the rules and policy so framed by the petitioner/bank.*

*Learned counsel for the respondents has controverted the aforesaid points. However, in order to consider, inter alia, the aforesaid points, leave to appeal is granted. CMAs are allowed and the operation of the impugned judgment is suspended."*

3. Learned counsel for the appellants submitted that the learned High Court has fell in error in not appreciating that in terms of Ordinance 2002, the appellant-bank had become a public limited company; that the employees of this company are governed by non-statutory regulations so far as the issues of promotion are concerned; that the relationship of the appellant with the respondents is governed by the principle of master and servant and in view of the law laid down by this Court in Muhammad Mubeen-us-Salam v. Federation of Pakistan (PLD 2006 SC 602)

and Muhammad Idrees v. Agricultural Development Bank of Pakistan (PLD 2007 SC 681), the learned High Court had no jurisdiction to entertain the petitions. He added that after the promulgation of the afore-referred Ordinance, the respondents are to be governed by Staff Regulations 2005 which is in accord with Section 9 of the Ordinance 2002 and sections 6 and 10 of the said Ordinance could not override the former provision; that they were disentitled to any discretionary relief on account of their conduct as having availed the benefits of Staff Regulations 2005 and having appeared in the interview they could not have taken a somersault claim to be reconsidered under the old Staff Regulations of 1961.

4. Tracing the history of the development of law relating to Agricultural Development Bank (which now is Zarai Tarqiati Bank) from the Agricultural Development Bank Ordinance 1961 to the current law i.e. the Agricultural Development Bank of Pakistan (Reorganization and Conversion) Ordinance, 2002, learned counsel submitted that prior to the former Ordinance, two institutions existed to provide financial and credit facilities to the agriculturalists: (i) Agricultural Development Finance Corporation (established through the Agricultural Development Finance Corporation Act 1952 Act XVII of 1952) and (ii) Agricultural Bank of Pakistan (established under Act XXIII of 1956). Section 43 of Act XV of 1952 provided that the Board of the Corporation, with previous sanction of the Central Government, may make regulations not inconsistent with the Act to provide for all matters necessary or expedient for the purpose of giving effect to the provisions of the Act. Section 39 of Act XXIII carried a similar

provision of the power of the Board to make regulations not inconsistent with the Act with prior approval of the Central Government. Both these Acts were repealed with the promulgation of Agricultural Development Bank Ordinance 1961 (Ordinance IV of 1961) in terms of its Section 41. Section 39 of this Ordinance pertained to the power of the Board to make regulations not inconsistent with the Ordinance for the purpose of giving effect to the provisions of this Ordinance and spelt out matters *inter alia* on which the regulations could be framed. The provision of prior approval of the Central/Federal Government contained in Act XVII of 1952 and Act XXIII of 1956 was done away with. The said provision reads as under:-

***“39. Regulations. ----(1) The Board may make regulations not inconsistent with this Ordinance or the rules to provide for all matters for which provision is necessary or expedient for the purpose of giving effect to the provisions of this Ordinance and the efficient conduct of the affairs of the Bank.***

***(2) .....***

*(a) .....*

*(b) .....*

*(c) .....*

*(d) .....*

*(e) the recruitment of the employees of the Bank, the terms and conditions of their service, the constitution and management of Provident Funds for the employees of the Bank and all other matters connected with any of these things;*

*(f) the duties and conduct of employees and agents;*

*(g) .....*

(h) ....."

5. Agricultural Development Bank Ordinance, 1961 was gazetted on 11.2.1961 and the Regulations were drafted immediately thereafter when the Board had yet to be constituted. Those Regulations in absence of the Board were sent to the Government for approval and after Government's approval those were brought into force. It was on 3/4 May, 1961 that those were placed before the Board of Directors and approved. The approval by the Government did not make it statutory as requirement of approval by the Government stood dispensed with in terms of Section 39 of the Ordinance, 1961; that the Agricultural Development Bank Ordinance 1961 (IV of 1961) was, however, amended through Act XII of 1973 and thereby eight Sections of the said Ordinance including Section 39 were amended (relatable to regulations). A proviso was added to Section 39(2) and the requirement of prior approval of the Federal Government for making regulations was reinserted. The said proviso reads as follows:-

*"Provided that no regulation made with respect to the matters mentioned in clauses (e) and (f) shall take effect until it has been approved by the Federal Government".*

6. The effect of the afore-mentioned amendment, according to learned counsel, would be prospective and all regulations framed after 1973 would be statutory as requirement of approval by the Federal Government was made a condition precedent. In support of this submission, he relied on a judgment

of this Court in Anwar Hussain v. Agricultural Development Bank of Pakistan (1992 SCMR 1112).

7. Elaborating his submission, learned counsel added that the Agricultural Development Bank of Pakistan Officers Service (Efficiency & Discipline) Regulation, 1975 were statutory as those were duly approved by the Federal Government.

But in the appeals in hand, he maintained, the issues raised are relatable to promotions whereas the Officers Service (Efficiency & Discipline) Staff Regulations 1975 which are statutory, cater to disciplinary matters. The regulations governing issues of promotion or the Agricultural Development Bank Staff Regulations, 1961 were neither approved by the Federal Government nor it was so required prior to the amendment by Act XII of 1973.

8. The Agricultural Development Bank Ordinance, 1961 was however repealed with the promulgation of the Agricultural Development Bank of Pakistan (Reorganization and Conversion) Ordinance, 2002. The Bank was converted into a corporation, all the employees were transferred and became the employees of the company and it was provided under the Ordinance that these employees shall be governed and subject to same rules and regulations as were applicable to them before the effective date.

9. A close reading of Section 6 of the Ordinance, 2002, according to learned counsel, would indicate that the legislative intent was that the employees of the Bank who stood transferred to the newly created / converted company were to be governed by the

same rules as existed prior to promulgation of new Ordinance and that would mean that so far as the matters pertaining to efficiency and discipline are concerned, the employees would be governed by the Agricultural Development Bank Staff Regulations of 1975 which are statutory. However, the subject of promotions (contained in paragraph 17 of the Staff Regulations, 1961) has not been approved by the Federal Government after the Regulations, 1961 were made by the Board. Therefore, the subject of promotions continues to be non-statutory in nature. He added that after promulgation of the Agriculture Development Bank of Pakistan (Amendment) Act, 1973, no Regulations on the subject of promotions have been made except the Promotion Policy, 1999, which has never been approved by the Federal Government and, therefore, non-statutory.

10. He contended that though Promotion Policy is admittedly non-statutory but assuming without admitting or conceding that regulations pertaining to promotions were statutory in nature, the writ petitions would nonetheless be not maintainable on account of the fact that the writ petitioners had voluntarily and consciously applied for and adopted the ZTBL Staff Regulations, 2005, which have been framed by the Board and not approved by the Federal Government. Paragraph 14(h) of the ZTBL Staff Regulations, as notified vide circular dated 27-06-2007 provided as follows:-

*"Promotion for VP and above shall be based on merit and open competition, interviews and selection by a promotion committee to be constituted by the President. Vacancies for VP and above as such shall be advertised internally and externally."*



11. According to learned counsel the writ petitioners (1) after voluntarily and consciously adopting the Regulations 2005; (2) after taking all the monetary benefits on account of adopting the Regulations 2005 i.e. 100% commutation of pension, which otherwise was not permissible under the ADBP Employees (Pension and Gratuity) Regulations 1981; (3) after sitting or participating in the competitive process for promotion as contemplated by Paragraph 14(h) of the Regulations 2005; and (4) after not scoring the above threshold required for promotion, cannot turn around and claim promotion on the basis of seniority – cum fitness under the Promotion Policy of 1999. Therefore, the writ petitioners were estopped by their own conduct from claiming protection under the Promotion Policy of 1999 or the non-statutory Regulations of 1961 on the subject of promotion.

12. Learned counsel for the respondents-writ petitioners defended the impugned judgment by making following submissions:

1. that after the conversion of Agricultural Development Bank into a corporation by virtue of the Ordinance 2002, the employees became employees of the company. By virtue of Section 6 of the said Ordinance, service terms and conditions which were in field prior to its promulgation were made applicable to the respondent employees. The question of their promotion which was subject matter of the constitutional petitions had to be governed under the

Staff Regulations 1961 and the Promotion Policy 1999;

2. that the Staff Regulations 1961 and the Promotion Policy, 1999 are statutory as those have been adopted by legislative reference. Section 6 of the Ordinance 2002 specifically provides that employees of the company *"shall be subject to the same rules and regulations as were applicable to them before the effective date"*. In support of this contention, learned counsel relied on a judgment of this Court in Masood Ahmad Bhatti Vs. Federation of Pakistan (2012 SCMR 152);
3. that the ADBP Staff Service Regulations, 1961, prior to promulgation of ADBP (Amendment) Act, 1973 were approved by the Federal Government and the same were subsequently approved by the Board of Directors. The legal status of the said Service Regulations came under scrutiny before this Court in the case reported as 1992 SCMR 1112 and the Court authoritatively decided it. A reasonable interpretation of the provisions of this Act, particularly the proviso appended to subsection (2) of Section 39, would therefore, be that the said provision would be applicable prospectively to any regulations made which fall under clauses (e) and (f) in future. In other words, if any regulation on these subjects is framed

after the date of the coming into force of the Amendment Act, prior approval of the Federal Government would be essential for bringing such regulations in effect. But, it will be difficult to construe that it would destroy the regulations which had already come into force prior to the amendment, as obviously that would amount to giving retrospective operation to the provisions of the Amendment Act. It therefore, follows that the remaining Regulations of 1961, other than the substituted Regulations 1995, having come into force prior to the 1973 amendment, when no prior approval of the Federal Government was necessary, shall continue to remain in force and operative notwithstanding the amendment of subsection (2) of section 39;

4. that the 1961 Staff Regulations were framed under Section 39 of 1961 Ordinance (un-amended) by the Board so those were statutory and this Court has already held so in an unreported judgment of this Court (in C.P. 495 of 2010) wherein it has been candidly held as follows:-

*"We have no doubt in our minds that the National University of Sciences and Technology (Enforcement of Academic, Service, and Financial Matters) Statutes, 2005, are statutory in nature as they were framed in accordance with the procedure prescribed in the statute. Since this was the only ground on which leave was granted, the appeal is dismissed."*

5. that the treatment meted out to respondents in matters of promotion is discriminatory and violative of Article 25 of the Constitution inasmuch as while the regulations pertaining to efficiency and discipline are statutory and they can invoke the remedy of filing a petition under Article 199 of the Constitution, but with regard to promotion they have no remedy and they are hit by the principle of master and servant;
6. that if this Court comes to the conclusion that the 1961 Staff Regulations or Promotion Policy of the year 1999 are non-statutory, it would not be in accord with the canons of equity and justice as the said conclusion may render them without any remedy or forum to agitate their grievance. In this context, learned counsel relied on a judgment of this Court in Muhammad Amin Vs. President Zara Taraqiati Bank Ltd (2010 PLC (CS) 710) wherein the Court itself provided a remedy in terms of para 7 of the Esta Code to grant the relief which was prayed by the aggrieved;
7. that in C.P. 427 of 2010, counsel appearing for Zarai Taraqiati Bank had contended that the Service Tribunal had no jurisdiction to entertain the appeal and the Court had repelled the contention holding as follows:-

*"From the above narration, we have no doubt left in our mind that the respondent's services are to be governed by the Rules and Regulations*

*framed under the 1961 Ordinance as in force at the repeal of Ordinance."*

13. In his rebuttal, learned counsel for the appellant submitted as follows:

- 1) that it is incorrect to state that any counsel appearing on behalf of the Zarai Taraqiati Bank had conceded to the proposition that the 1961 Staff Regulations were statutory except in one case (C.P. Nos. 434 and 435 of 2009). In those cases, the matter was remanded and a case decided on concession is not the law declared. He gave a list of other cases wherein concession was made by counsel for the appellant and in all those cases the Regulations/Rules were statutory. The list of those cases is as under:-
  - (i) C.A. 1394 of 1999 etc and C.P. 1208 of 2000
  - (ii) CrI. Org No. 44 of 2010 in CA Nos. 749 to 761 of 2009.
  - (iii) C.P. No. 2726 of 2004
  - (iv) C.P. No. 1135 of 2010
  - (v) C.P. No. 427 of 2010
  - (vi) C.P. No. 1410 of 2009 & CMA No. 2513 of 2009.
- 2) Suggesting a way out he submitted that since there is no provision of regulations in the 2002 Ordinance and Section 9 of the same provides for making rules, a direction can be issued to the Federal Government to amend the said Ordinance and thereafter the Federal

Government may accord the requisite approval in terms of section 39(2) of the 1961 Ordinance.

14. Having heard learned counsel for the parties, the issues which crop up for consideration are as follows:-

- 1) whether the old Staff Regulations of 1961 framed by the Board are non-statutory and if so were the Constitution petitions filed by the respondent employees maintainable?
- 2) whether the respondent employees were disentitled to any discretionary relief under Article 199 of the Constitution on account of their own conduct?

15. Historically statutory rules and orders were the means by which delegated legislation used to be made in United Kingdom. *"The Rules Publication Act 1893 in England defines "rule making authority" to include every authority authorized to make any statutory rules. Statutory rules are defined as rules, regulations or by-laws under any Act of Parliament, in England. Orders are excluded from the statutory definition of statutory rules as being administrative. In England regulation is the term most popularly understood and the one favoured by the Committee on Ministers' Powers, who suggested that regulations should be used for substantive law and rules for procedural law, while orders should be reserved to describe the exercise of executive power or the taking of a judicial or quasi judicial decision (See Craies on Statute Law, 7<sup>th</sup> Ed. At p. 303). The validity of statutory instruments is generally a*

*question of vires, i.e., whether or not the enabling power has been exceeded or otherwise wrongfully exercised<sup>1</sup>."*

16. The "rules" and "regulations" framed under any Act are meant to regulate and limit the statutory authority. All statutory authorities or bodies derive their powers from statutes which create them and from the rules or regulations framed thereunder. Any order passed or action taken which is in derogation or in excess of their powers can be assailed as ultra vires. Rules and regulations being forms of subordinate legislation do not have substantial difference as power to frame them is rooted in the statute. Statutory bodies are invariably authorized under the Act to make or adopt rules and regulations not inconsistent with the Act, with respect to such matters which fall within their lawful domain to carry out the purposes of the Act. This rule making power of such bodies, called 'delegated legislation' has assumed importance in the contemporary age. *"The justification for delegated legislation is threefold. First, there is pressure on parliamentary time. Second, the technicality of subject matter necessitates prior consultation and expert advice on interests concerned. Third, the need for flexibility is established because it is not possible to foresee every administrative difficulty that may arise to make adjustment that may be called for after the statute has begun to operate. Delegated legislation fills those needs<sup>2</sup>."*

17. Broadly the salient characteristics of statutory rules are threefold:

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<sup>1</sup> Sukhdev Singh etc Vs. Bhagat Ram etc (AIR 1975 SC 1331)

<sup>2</sup> AIR 1975 SC 1331

- i) Rules or Regulations are framed by statutory or public body;
- ii) Those are framed under the authority or powers conferred in the statute;
- iii) Those have statutory Governmental approval or statutory sanction.

18. The question as to which rules or regulations are statutory and how they affect the rights of the employees has been a subject of comment in several judgments. In Principal, Cadet College, Kohat Vs. Muhammad Shoab (PLD 1984 SC 170), this Court considered this issue with reference to Sections 17 & 18 of the West Pakistan Government Educational & Training Institutions Ordinance, 1960. Section 17(1) of the said Ordinance provided that the Government may make rules for carrying out the purposes of the said Ordinance and Section 18 provided that the Board of Governors may subject to the approval of the Government, frame regulations *"not inconsistent with the provisions of this Ordinance and the rules made thereunder, to carry out the purposes of this Ordinance."* Since the "rules" framed by the Board of Governors, governing the appointment, promotion, retirement, termination of service and dismissal of staff employed by the Board had not been made by the Government, those 'rules', the Court held *"could not be regarded as "rules" under section 17, nor having been approved by the Government, be treated as Regulations under section 18 thereof. These "rules" therefore could only be regarded to be in the nature of mere instructions issued for the guidance of the Board of*



*Governors and the Principal of the Cadet College, Kohat.*" This view was reiterated in Zia Ghafoor Piracha Vs. Chairman, Board of Intermediate and Secondary Education (2004 SCMR 35) wherein in para 7, it was held as follows:-

*"7. The Service Regulations of the Employees of the Board were framed by the Board. However, as has been determined by the learned Single Judge of the Lahore High Court, the Government, as required by the Act, has not given its formal approval to these Regulations. In these circumstances, these Regulations may be termed as internal instructions or domestic rules having no status of statutory rules. Reference in this regard is made to the case of "The Principal Cadet College, Kohat and another V. Muhammad Shoab Qureshi (PLD 1984 SC 170). In that case, the Government under the West Pakistan Government Educational and Training Institution Ordinance, 1960 was empowered to make Rules for carrying out the purposes of the Ordinance under section 17 thereof. Similarly, under section 18, the Board was also empowered to make Regulations subject to approval of the Government. There was identical situation in the aforesaid case as is now prevailing in the present case because the Regulations though made by the Board but the approval of the Government had not been secured. Similarly, the Government too had not made any Rules as mandated by section 17 ibid."*

19. An identical issue was considered by this Court in Asad Bashir Vs. Chairman Board of Intermediate and Secondary Education, Lahore and others (2006 PLC (CS) 110) and relying on the afore-referred precedent case law, the Court upheld the judgment of the learned Lahore High Court and held that since the rules / regulations governing the service of the appellants were non-statutory, the Constitution petitions were not maintainable.

20. In Muhammad Mubeen-us-Salam Vs. Federation of Pakistan (PLD 2006 SC 602), the question *inter alia* of the remedies available to employees who are governed by statutory rules was a moot point and this Court observed in para 50 as under:-

*"Prima facie, this provision of law, i.e. Section 2-A of the STA, 1973 has not advanced the cause of employees of Corporations, etc. by providing them remedy before the Service Tribunal because initially in the case of a Corporation/body, etc. if it has statutory backing, and rules are framed thereunder, its employees other than the workers, used to invoke the jurisdiction of the High Court under Article 199 of the Constitution i.e. a remedy which is always considered to be speedy, expeditious and inexpensive; whereas the employees governed by the relationship of master and servant rule used to approach the Civil Court for the redressal of their grievance while workers and the workmen were eligible to seek remedy before the local Labour Courts, functioning under the new dispensation of Industrial Relation Ordinance, 2002, at the Divisional level with a right of appeal before the respective High Courts and appeal under Article 185(2) or a petition for leave to appeal under Article 185(3) of the Constitution before this Court, under which this Court enjoys vast jurisdiction, as compared to limited jurisdiction under Article 212(3) of the Constitution."*

21. Similarly in Executive Council Allama Iqbal Open University Vs. Muhammad Tufail Hashmi (2010 SCMR 1484), this Court held as follows:-

*"9. The principle perceived from the above judgments is that the employees of those organizations, which are discharging functions in connection with the affairs of Federation, can approach the learned High Court under Article 199 of the Constitution but subject to the condition if their services are protected under the statutory rules."*

22. Statutory rules create certain rights for employees and impose obligations on the statutory authorities. The statutory authorities and functionaries cannot deviate or act in derogation to those rules or regulations. Any order passed or action taken by a public authority which is in conflict with those statutory rules can be challenged under Article 199 of the Constitution.

23. As explained in para 4 above, the appellant Bank was successor to two institutions (Agricultural Development Finance Corporation and Agricultural Bank of Pakistan) wherein prior approval of the Central Government was required to make the regulations. This requirement was done away with in the Agricultural Development Bank Ordinance, 1961. Under Section 39 of the said Ordinance, the Board of the Bank was empowered to make regulations and there was no requirement of prior approval of the Government. Section 38 provided for making of the rules by the Government and not by the Board. The appellant Bank was established in February, 1961 vide the 1961 Ordinance by amalgamating two institutions (Agricultural Development Finance Corporation and Agricultural Bank of Pakistan). Immediately after the promulgation of the Ordinance, 1961 as the Board had yet to be constituted, the draft regulations were sent to the Government for approval. After the Government's approval they had been brought into force with effect from the date of establishment of Agricultural Development Bank of Pakistan and remained in field till 3<sup>rd</sup> / 4<sup>th</sup> May, 1961, when these were placed before the Board of Directors, ADBP in its first meeting as draft regulations and approved with certain amendments. The regulations thus made by

the Board were known as "Agricultural Development Bank (Staff Service) Regulations, 1961 (Regulations, 1961). The approval of the regulations by the Government prior to the first meeting of the Board may be inconsequential at that stage as there was no statutory requirement for that but it indicated that notwithstanding the deletion of requirement of Governmental approval, the Government continued to exercise central power over the Bank. This was so because there were many enabling provisions in the Ordinance for the Government to do so including the rule making power in terms of Section 38, which reads as follows:-

*"38. Rules.--- (1) The Central Government may make rule for carrying out the purposes of this Ordinance and where the regulations framed under the succeeding section are inconsistent with the rules framed under this section, the rules shall prevail."*

24. Section 39 of the Ordinance, 1961 was however, amended by the Agricultural Development Bank (Amendment) Act, 1973 and following proviso was added, which made prior approval of regulations by the Government mandatory:-

*"Provided that no regulation made with respect to the matters mentioned in clauses (e) and (f) shall take effect until it has been approved by the Federal Government."*

25. The afore-mentioned amendment did not invalidate the regulations made prior to it when there was no requirement of approval by the Federal Government. The legal effect of the addition of the proviso to Section 39 (2) of Ordinance, 1961 was considered by this Court in the case Anwar Hussain Vs.

Agricultural Development Bank of Pakistan (1992 SCMR 1112) and

it was held as follows:-

*“A reference to subsection (2) of section 1 of the Agricultural Development Bank (Amendment) Act (XII of 1973), plainly shows that this Act came into force on the date of its promulgation and not retrospectively. A reasonable interpretation of the 6 provisions of this Act, particularly the proviso appended to subsection (2) of section 39, would therefore, be that the proviso would be applicable prospectively to any Regulations made which fall under clauses (e) and (f) in the future. In other words, if any Regulations on these subjects are framed after the date of the coming into force of the Amendment Act, prior approval of the Federal Government would be essential for bringing such Regulations in effect. But, it will be difficult to construe the provisions of the proviso to destroy the Regulations which had already come into force prior to the amendment, as obviously that would amount to giving retrospective operation to the provisions of the Amendment Act. It therefore, follows that the remaining Regulations of 1961, other than the substituted Regulation 95, having come into force prior to the 1973 amendment, when no prior approval of the Federal Government was necessary, shall continue to remain in force and operative notwithstanding the amendment of subsection (2) of section 39.”*

26. Thus as the amendment in Section 39(2) of the Ordinance, 1961 requiring Federal Government's approval for making regulations was held to have prospective effect, the Staff Regulations, 1961 remained intact. Appellant Bank in 2002 was converted into a company with the promulgation of the Agricultural Development Bank of Pakistan (Reorganization and Conversion) Ordinance, 2002 and Agricultural Development Bank Ordinance 1961 was repealed. Section 6 of the Ordinance, 2002 provided continuation in service to the employees and stipulated

that they shall be subject to the same rules and regulations. It reads as follows:

***“6. Continuation in service of the company.—(1) The employees of ADBP who were in the service of ADBP before the effective date shall stand transferred to and become the employees of the Company as of the effective date on the same terms and conditions and shall be subject to the same rules and regulations as were applicable to them before the effective date.***

***(2) Notwithstanding anything contained in law, contracts, agreement or the conditions of service no person transferred to the Company in pursuant to subsection (1) shall be entitled to any compensation by reason of such transfer.”***

27. The afore-referred statutory provision provided two fold security to the employees i.e. (i) the employees of the Bank stood transferred and became employees of the Company, and (ii) they shall be subject to the same rules and regulations as were applicable to them before the effective date. On account of the afore-referred statutory intervention, the regulations which were non-statutory, acquired a statutory status under the new dispensation and the employees acquired a legal right for their enforcement. The Constitutional petitions were, therefore, maintainable on that score. In none of the precedent cases i.e. Principal Cadet College Kohat supra, Zia Ghafoor Piracah supra and Asad Bashir supra referred to in paras 18 & 19 above, the effect of a statutory intervention on the rules which may have been non-statutory was a moot point. Those cases, therefore, are distinguishable from the case in hand. In Masood Ahmed Bhatti Vs. Federation of Pakistan (2012 SCMR 152), the effect of such an intervention (though under a different law) was considered. In the

said case the Telephone and Telegraph Departments were converted into a Corporation through the Pakistan Telecommunication Corporation Act, 1991 (hereinafter to be called as PTC Act). Section 9 of the PTC Act stipulated that *"notwithstanding anything contained in any law, contract or agreement, or in the conditions of service, all departmental employees shall, on the establishment of the Corporation, stand transferred to, and become employees of the Corporation, on the same terms and conditions to which they were entitled immediately before such transfer, provided that the Corporation shall be competent to take disciplinary action against any such employee."* The Court held that the afore-referred provision would have following effect:

*"9. It is clear from this legal provision, that the rules relating to the terms and conditions of employment of the appellants were given statutory status. This status was on a higher plane than the status of regulations framed by way of subordinate legislation under section 20 of the PTC Act. Consequently, whatever rules were in place governing the employment of the appellants in the T&T Department, were adopted by reference in the statute itself and were made applicable to and binding on the Corporation. There can be little doubt that by virtue of section 9 ibid such rules acquired statutory status having been sanctified by the PTC Act itself. We can, therefore, conclude without difficulty that the rules of employment which were applicable to the appellants during their service with the Corporation were statutory rules."*

28. In Civil Appeal Nos. 1416 & 1417 of 2009 & Civil Petition No. 176-Q/2009 (Muhammad Tariq Badr etc Vs. National Bank of Pakistan), this Court considered the effect of a similar

provision in the Bank Nationalization Act, 1974. Section 13 of the said Act *inter alia* stipulated that "*all officers and other employees of a bank shall continue in their respective offices and employment on the same terms and conditions*". This Court found that on account of this provision the employees shall continue to be governed under the rules in vogue prior to the amendment in law. The Court observed "*it is an admitted and undisputed factual reality that before the commencing day of 1974 Act, 1973 Rules were validly in force and for all intents and purposes were serving as the conclusive terms and conditions of service of the employment for the N.B.P. officers etc. Thus, by virtue of the Section 13(1), such rules were specifically saved, guarded and shielded instead of having been displaced/replaced/rescinded or overridden. The language of the Section 13(1) without any shadow of doubt, spells out the clear intendment of the legislature to preserve the earlier terms and conditions of the nationalized bank, which in the present case undoubtedly were 1973 Rules, rather than being obliterated.*"

29. The effect of Section 6 of the Ordinance, 2002 on the Staff Regulations, 1961 and the Promotion Policy, 1999 is similar to the effect of Section 9 of the PTC Act on the Telephone and Telegraph Department Rules or of Section 13 of the Bank Nationalization Act, 1974 i.e. on account of the statutory intervention those rules acquired a statutory status. In Civil Petition No. 2726/2004 (Muhammad Amin Vs. President Zarai Taraqiati Bank Ltd (2010 PLC (CS) 710), the moot point *inter alia* before this Court was whether the employee of the appellant Bank (Deputy Director of Agricultural Development Bank) was governed



by statutory rules and a three Members Bench of this Court held that those were statutory. In Civil Petition No. 427/2010, Zarai Taraqiati Bank Limited was the petitioner and the questions before this Court *inter alia* were the effect of Section 6 of the Ordinance and whether the Rules and Regulations were statutory? The Court while dismissing the petition held as under:-

"5. The plain reading of section 6 of the Ordinance, 2002, reproduced above, admits of no other interpretation but that the employees of the erstwhile A.D.B.P., who were transferred by operation of law to Z.T.B.L and had not opted to be governed by the Service Rules of the latter were to be governed by the terms of service embodied in 1961 Ordinance and Rules framed thereunder. The learned counsel for the petitioner also made no attempt to give a different construction to the said statutory provision.

6. Thus the respondent, whose services were transferred from A.D.B.P to Z.T.B.L was to be governed by the Rules and Regulations framed under the 1961 Ordinance. Upon the repeal of the 1961 Ordinance, the Rules and Regulations framed thereunder are no longer subject to any amendment or change. This is also clarified by section 66 of the Ordinance, 2002, which says "..... and shall be subject to the same rules and regulations as were applicable to them before the effective date." "The effective date" is the date specified by the Federal Government under sub-section 1 of section 4 of the Ordinance 2002 for the transfer of assets, contracts and liabilities etc from the A.D.B.P to Z.T.B.L. The terms and conditions of service of the officers of Z.T.B.L, falling in the same category as the respondent, are to be regulated by the Rules and Regulations that were in force on the 'effective date' mentioned in Ordinance 2002.

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8. From the above narration, we have no doubt left in our mind that the respondent's services are to be governed by the Rules and Regulations framed under the 1961 Ordinance as in force at the repeal of the Ordinance." **(Emphasis is supplied)**

30. Section 6 of the Ordinance, 2002, Section 13 of the Bank Nationalization Act, 1974 and Section 9 of the PTC Act discussed in the preceding paras are all instances of legislation by reference. Unlike legislation by incorporation, provisions of some other law are not specifically incorporated in the new Act but those would be read into the said Act. *Corpus Juris Secundum* explains this principle in terms as follow:-

*".... Where the reference in an adopting statute is to the law generally which governs the particular subject, and not to any specific statute or part thereof ... the reference will be held to include the law as it stands at the time it is sought to be applied, with all the changes from time to time, at least as per on the changes are consistent with the purpose of the adopting statute."*

31. In Wood's Estate case [1886] 31 Ch D 607, the Court while commenting upon this mode of legislation observed that "*if a subsequent Act brings into itself by reference some or the clauses of a former Act, the legal effect of that, as has often been held, is to write those sections into the new Act just as if they had been actually written in it with the pen or printed in it and the moment you have those clauses in the later Act, you have no occasion to refer to the former Act at all.*" In Rajya Vs. Gopikabai (AIR 1979 SC 79), the Indian Supreme Court, highlighted the broad categories of legislation by reference and opined as under:

*"Broadly speaking, legislation by referential incorporation falls into two categories: First where a statute by specific reference incorporates the provisions of another statute as of the time of adoption. Second, where a statute incorporates by general reference the law concerning a particular subject as a genus. In the case of the former, the subsequent amendment made in the referred statute cannot automatically be read into the adoption statute. In the case of latter category, it may be presumed that the legislative intent was to include all the subsequent amendments also made from time to time in the general law on the subject adopted by general reference. This principle of construction of a reference statute has been aptly summed up by Sutherland thus:*

*A statute which refers to law of a subject generally adopts the law on the subject as of the time the law is invoked. This will include all the amendments and modifications of the law subsequent to the time the reference / statute was enacted.*

32. Appellants' learned counsel could not dispute the fact that the expression used in Section 6 of the Ordinance, 2002 that the employees "*shall be subject to the same rules and regulations as were applicable to them before the effective date*" is legislation by reference but he maintained that it refers only to those rules which had been duly approved by the Central Government i.e. the Zarai Taraqiati Bank Limited Staff Regulations, 2005 and not the Agricultural Development Bank Staff Regulations, 1961 or the Promotion Policy of 1999 as those were non-statutory having not been approved by the Federal Government. This argument would not be tenable. First, because there is nothing in the language of Section 6 of the Ordinance, 2002 to warrant such an inference and second, in the precedent case law to which reference has been made in para 29 above, this Court has held otherwise and there is

nothing on record to indicate that the said judgment (Civil Petition No. 427/2010) was ever challenged in review.

33. In the light of what has been discussed in the preceding paras, the Staff Regulations, 1961 and the Promotion Policy, 1999 stand incorporated by way of legislative reference and thereby have acquired a statutory status for the respondent employees who stood transferred and became employees of the company in terms of Section 6 of the Ordinance, 2002. The writ petitions which sought enforcement of those regulations were maintainable.

34. This brings us to the issue No. 2 i.e. whether the respondent employees were disentitled to any discretionary relief under Article 199 of the Constitution on account of their own conduct?

35. To appreciate this issue, it would be pertinent to keep in mind the Regulations / Policy which was in vogue prior to the promulgation of Ordinance 2002 i.e. Regulation No. 17 of the Agricultural Development Bank Staff Service Regulations, 1961 & Promotion Policy, 1999 under which respondent employees wanted their cases of promotion to be considered. Regulation 14(h) of the Zarai Taraqiati Bank Limited Staff Regulations, 2005 (notified on 27.6.2007) may also be kept in *juxta* position under which their promotion matters have been processed. This is necessary so as to appreciate whether the procedure laid therein in substance is the same as in Promotion Policy, 1999 and whether employees were likely to be prejudiced.

Agricultural Development Bank Staff Service Regulations, 1961	Zarai Taraqati Bank Limited Staff Regulations, 2005
<p><b>"17. Promotion:-</b> (a) Promotions to Class I and Class II shall be made on merit and no employee shall have a claim to be promoted to these posts by virtue of seniority alone. Promotions to class III and class IV posts shall be made on the basis of seniority-cum-fitness except in cases where a post is declared as a selection post by the Chairman in which case promotion shall be made on merit. Should an employee officiating in a higher post shows signs of deterioration while he is so officiating, he shall be liable to immediate and summary reversion to the lower post previously held by him.</p> <p>(b) For promotion to the posts for which special qualifying examinations or other conditions have been specifically laid down, only the employees who passes such examination and fulfills such other conditions shall be eligible and no relaxation shall be made in this behalf except, in special cases, by the competent authority.</p>	<p><b>14(h)</b> Promotion for VP and above shall be based on merit and open competition, interviews and selection by a promotion committee to be constituted by the President. Vacancies for VP and above as such shall be advertised internally and externally."</p>

Promotion Policy

"1. Promotions of the bank employees to the next higher grade will be made with immediate effect instead of retrospective effect.

2. *Promotions against 95% of vacancies shall be made on seniority-cum-fitness basis.*

3. *Promotions against 5% vacancies may be made on accelerated basis with the approval of Board of Directors.*

*"25% of the quota for accelerated promotion shall be for HO employees and 75% be reserved for field personnels. The criteria for accelerated promotion as laid down hereunder be strictly adhered to.*

*Persons posted in the field offices should have atleast 95% recovery rate for at least 03 years out of last 05 years and must have scored 85 marks in aggregate in the cadre and have earned very good (A-I) ACRs during the last 03 years. As regards the officers and staff posted in the field but not directly related with the recovery operations, the criteria would be the same as applicable for the employees posted in Head Office.*

*For employees posted in HO: they should have scored at least 85 marks in aggregate in the cadre and have earned very good (A-I) ACRs during the last 03 years."*

4. *The employees on deputation to Government Departments or other organizations, will be considered for promotion, but their promotion shall take effect from the date they return to the Bank. However, the employees who have gone out of Bank and have kept their lien with the Bank, will only be considered for promotion after they join back and have earned atleast one Good ACR in the Bank.*

5. *In case of an employee who has been superseded on account of minor penalty imposed in the present grade or for adverse ACR etc will be considered for promotion next year strictly on the basis of promotion criteria.*

6. *While determining the total length of service of an employee in a particular cadre, the period of extra*

ordinary leave will be excluded from the total service of such employee in the cadre.

7. Recovery Division, in the month of July every year, shall fix recovery targets for each region for consideration at the time of promotion keeping in view the total recoverables and pattern of growth so that the area recovery parameters are available for guidance of the DPC for each financial years. The officer who fails to achieve these targets shall not be promoted.
8. Those who have joined on reinstatement after termination of service or on punishment of down gradation will be considered for promotion if they have atleast served three years after reinstatement or down-gradation provided they fulfill the promotion criteria.
9. The employees getting promotion as Officers will be posted in the Province / Place of their domicile provided clear vacancies are available.

**Professional Qualification**

10. In order to promote professionalism and encourage employees and officers to pass DAIBP Part-I & Part-II, a weightage of 5 marks for Part-I and 10 marks for both the parts has been kept in evaluation qualification effective for promotion upto the level of Directors due in year 2001.
- 10(A) The officers of the following categories would be required to serve compulsorily in the field on promotion and promotion will only be effective subject to joining at the new place of posting:-

	<u>For promotion from</u>	<u>Minimum field service required</u>
i)	EAD to AD	2 years in the Cadre
ii)	AD to DD	1 year in the Cadre
iii)	DD to JD	1 year in the Cadre"

36. Regulation No. 17 of the Agricultural Development Bank Staff Service Regulations, 1961 was superseded by Promotion Policy of the year 1999. A bare perusal of the said Policy

would indicate that the promotion was to be based on seniority, qualification and competence. The objective being to ensure "*advancement of employees in career on the basis of achievement and experience*" and eligibility criterion was laid. Promotions to 95% of vacancies were to be made on seniority-cum-fitness basis, against 5% vacancies accelerated promotion was envisaged on the basis of approval by the Board of Directors, the past performance of employees reflected in the recovery of loan, Annual Confidential Reports of the preceding three years and detailed guidelines were provided for various categories in terms of paras 4 to 10(A). Para 14(h) of the Zarai Taraqiati Bank Limited Staff Regulations, 2005 stipulate the following:

- i) promotion for VP and above shall be based on merit and open competition, interviews and selection by a promotion committee to be constituted by the President;
- ii) vacancies for VP and above as such shall be advertised internally and externally.

37. Although the common element in both the above provisions is the same i.e. promotion on merit based on competition, the mode envisaged to gauge the merit is distinct. The distinguishing features of the mode of determining merit in terms of the afore-mentioned provision of the Zarai Taraqiati Bank Limited Staff Regulations, 2005 are open competition, interview and selection by a promotion committee to be constituted by the President and advertisement (both internal and external) for the



post of Vice President. Neither under Regulation 17 of the Staff Regulations, 1961 nor under the Promotion Policy, 1999, there was any provision for a Selection Committee or 25 marks for the interview or for internal or external advertisements as given in the Regulation 14(h) of the Staff Regulations, 2005. The procedure laid down reflects evaluation of the employees for purposes of promotion on the basis of their performance in interviews and their performance during service seems not to have been given much weightage. The argument of appellant's learned counsel that the criterion laid down in Regulation 14(h) and Promotion Policy are substantially the same is not tenable.

38. Section 6 of the Ordinance, 2002 *inter alia* mandated that the employees of the newly created Company "*shall be subject to the same rules and regulations as were applicable to them before the effective date*", the respondent employees acquired a statutory right to be considered for promotion in accord with the mode of promotion laid down in the Regulations which were in vogue prior to the promulgation of the Ordinance. Admittedly, their promotion cases were not considered in terms of the Promotion Policy, 1999, which had the approval of the Board of Directors of the Agricultural Development Bank. In Sajid Hussain Vs. Muhammad Latif (1992 SCMR 468), a Full Bench of the Supreme Court of Azad Jammu & Kashmir upheld the judgment of the Service Tribunal which had allowed the appeal of the aggrieved employee as his case of promotion had not been dealt with in accordance with the prescribed rules and held as follows:-

*"It is provided in section 4 of the Civil Servants Act that appointment to a civil service or a civil post shall be made in the prescribed manner by the Government, or by a person authorised by it in this behalf. The word 'prescribed' is defined in section 2 of the Act to mean 'prescribed by rules'. The scheme of Civil Servants Act shows that if a person is promoted to a post this is termed as an appointment by promotion. In the AJ&K Civil Servants (Appointment and Conditions of Service) Rules, 1977 (hereinafter to be referred to as the Rules of 1977) rule 3(1) provides in specific terms that an appointment to a post shall be made by promotion, transfer or initial recruitment. . . . .*

*These Rules eliminate to a great extent arbitrary exercise of powers by the concerned authority in the matter of appointment and promotion of civil servants. The wording in which the Rules referred to above have been couched show, in unmistakable words that these Rules are mandatory. Therefore, the conclusion is that the post of Secretary cannot be legally filled up whether by promotion or otherwise unless there exist rules conforming to the requirement of rule 10 mentioned above. We, therefore, uphold the view of the Service Tribunal in this aspect."*

39. So far as the argument that respondents having derived all monetary benefits of Regulations 2005 and therefore, they could not have invoked discretionary jurisdiction is concerned, the same would not be tenable in the facts and circumstances of this case. First because there is no estoppel against law. Second, no document has been placed on record to indicate that the option exercised was voluntary. If it was a *fait accompli*, this would not prevent them to seek enforcement of the procedure laid down in Regulations for promotions which were in vogue prior to the promulgation of Ordinance, 2002. Third, they challenged the entire impugned process at the earliest before formal orders could take effect and fourth the monetary benefits

received by the respondents could be adjusted by the Bank if so advised.

40. For what has been discussed above, we do not find any merit in these appeals and in petition, which are dismissed.