

IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:

MR. JUSTICE TASSADUQ HUSSAIN JILLANI
MR. JUSTICE NASIR-UL-MULK
MR. JUSTICE ASIF SAEED KHAN KHOSA
MR. JUSTICE SARMAJ JALAL OSMANY
MR. JUSTICE AMIR HANI MUSLIM

CIVIL APPEALS NO. 39/2010, 1150/2010, 1162/2010, 142-K/2009, 177-K/2010, 178-K/2010, 228-K/2010, 57-K/2011, 63-K/2011, 65-K/2011, 66-K/2011, 83-K/2011, 91-K/2011, 135-K/2011, 136-K/2011, 137-K/2011, 188-K/2011, 232-K/2011, 75-K/2012 AND 82-K/2012

CIVIL APPEAL NO. 39/2010

(On appeal from the judgment dated 18.5.2009 passed by the High Court of Sindh, Karachi in Constitution Petition D-1933/2008)

Pakistan Defence Officer Housing Authority and others

... Appellants

VERSUS

Lt. Col. Syed Jawaid Ahmed

... Respondent

For the Appellants: Mr. Khalid Javed, ASC

For the Respondent: Mr. Shoaib Shaheen, ASC a/w respondent in person

CIVIL APPEAL NO. 1150/2010

(On appeal from the judgment dated 26.11.2010 passed by the High Court of Sindh, Karachi in Constitution Petition No. D-1713/2006)

Pakistan International Airline through its Chairman

... Appellant

VERSUS

S.M. Nawaz and others

... Respondents

For the Appellant:

Mr. Khalid Javed, ASC
Sardar Muhammad Aslam, ASC
Mr. Arshad Ali Ch, AOR

For the Respondents:

In person

CIVIL APPEAL NO. 1162/2012
(On appeal from the judgment dated 24.9.2012 passed by the High Court of Sindh, Karachi in Constitution Petition No. D-141/2011)

M/s Pakistan through its Chairman / CEO, Karachi

... Appellant

VERSUS

Muhammad Aslam Chaudhry and others

... Respondents

For the Appellant:

Mr. Sanaullah Noor Ghouri, ASC
Mr. Arshad Ali Chaudhry, AOR

For Respondent (1):

In person

CIVIL APPEAL NO. 142-K/2009
(On appeal from the judgment dated 17.4.2009 passed by the High Court of Sindh, Karachi in C.P. No. D-1690/2007)

N.E.D. University of Engineering and Technology and others

... Appellants

VERSUS

Hafeezullah Khawaja

... Respondent

For the Appellants:

Mr. Nadeem Azhar Siddiqui, ASC
Mr. Khalid Javed, ASC

For the Respondent:

In person

CIVIL APPEAL NO. 177-K/2010
(On appeal from the judgment dated 3.6.2010 passed by the High Court of Sindh, Karachi in CPs D-2705/2009, D-1768/2006, D-1771/2006, D-1871/2006, D-1872/2006, D-1894/2006, D-1895-, D-1896/2006, D-1897/2006, D-2018/2006, D-2031/2006, D-1918/2006, D-405/2006, D-563/2007, D-574/2007, D-795/2007, D-871/2007, D-

1320/2007, D-1331/2007, D-1643/2007, D-1648/2007, D-1951/2007 & D-2464/2007)

M/s House Building Finance Corporation and another
... Appellants

VERSUS

Shahid Mehmood Usmani
... Respondent

For the Appellants: Mr. M.A. Rehman Qureshi, ASC

For the Respondent: N.R.

CIVIL APPEAL NO. 178-K/2010
(On appeal from the judgment dated 3.6.2010 passed by the High Court of Sindh, Karachi in CPs D-2705/2009, D-1768/2006, D-1771/2006, D-1871/2006, D-1872/2006, D-1894/2006, D-1895-, D-1896/2006, D-1897/2006, D-2018/2006, D-2031/2006, D-1918/2006, D-405/2006, D-563/2007, D-574/2007, D-795/2007, D-871/2007, D-1320/2007, D-1331/2007, D-1643/2007, D-1648/2007, D-1951/2007 & D-2464/2007)

Chairman Pakistan Steel Mills and others
... Appellants

VERSUS

Sirjauddin Ghori
... Respondent

For the Appellants: Mr. M.G. Dastagir, ASC

For the Respondent: N.R.

CIVIL APPEAL NO. 228-K/2010
(On appeal from the judgment dated 30.9.2010 passed by the High Court of Sindh, Karachi in Constitution Petition No. 1549/2010)

Pakistan International Airline and another
... Appellants

VERSUS

Hamayun Raja
... Respondent

For the Appellants: Mr. Munib Ahmed Khan, ASC
 Mr. Arshad Ali Chaudhry, AOR

For the Respondent: N.R.

CIVIL APPEAL NO. 57-K/2011

(On appeal from the judgment dated 8.1.2010 passed by the High Court of Sindh, Karachi in CP D-2122/2006)

Pakistan Steel Mill through its Chairman

... Appellant

VERSUS

Shakir Ali Khan and another

... Respondents

For the Appellant: Mr. Nadeem Azhar Siddiqui, ASC

For the Respondents: N.R.

CIVIL APPEAL NO. 63-K/2011

(On appeal from the judgment dated 28.11.2010 passed by the High Court of Sindh, Karachi in Constitution Petition No. D-1489/2007)

Pakistan Steel Mills Corporation (Pvt) Ltd

... Appellant

VERSUS

Muhammad Rafiq Memon and others

... Respondents

For the Appellant: Mr. Munir Ahmed Khan, ASC

For the Respondents: In person

CIVIL APPEAL NO. 65-K/2011

(On appeal from the judgment dated 20.12.2010 passed by the High Court of Sindh, Karachi in Constitution Petition No. D-1871/2006)

Pakistan Steel Mills Corporation (Pvt) Ltd

... Appellant

VERSUS

Noor Muhammad Awan and others

... Respondents

For the Appellant: Mr. Munib Ahmed Khan, ASC

For the Respondents: N.R.

CIVIL APPEAL NO. 66-K/2011

(On appeal from the judgment dated 20.12.2010 passed by the High Court of Sindh, Karachi in Constitution Petition No. D-1872/2006)

Pakistan Steel Mills Corporation (Pvt) Ltd

... Appellant

VERSUS

Noor Muhammad Awan and others

... Respondents

For the Appellant: Mr. Munib Ahmed Khan, ASC

For the Respondent (1): In person

CIVIL APPEAL NO. 83-K/2011

(On appeal from the judgment dated 5.3.2011 passed by the High Court of Sindh, Karachi in Constitution Petition No. D-574/2007)

Port Bin Qasim Authority through its Chairman and another

... Appellants

VERSUS

Irshad Ahmed and another

... Respondents

For the Appellants: Mr. M.G. Dastagir, ASC

For the Respondents: Mr. Muhammad Aqil Awan, Sr. ASC

CIVIL APPEAL NO. 91-K/2011

(On appeal from the judgment dated 8.10.2010 passed by the High Court of Sindh, Karachi in Constitution Petition No. 871/2007)

Pakistan Steel Mills Corporation (Pvt) Ltd

... Appellant

VERSUS

Muhammad Sadiq and another

... Respondents

For the Appellant: Mr. M.G. Dastagir, ASC

For the Respondent (1): In person

CIVIL APPEAL NO. 135-K/2011

(On appeal from the judgment dated 2.12.2010 passed by the High Court of Sindh, Karachi in Constitution Petition No. D-1771/2006)

Pakistan Steel Mills Corporation (Pvt) Ltd

... Appellant

VERSUS

Arshad Nadeem

... Respondent

For the Appellant: Mr. Shaukat Ali Sh, ASC

For the Respondent: Syed Amjad Hussain, ASC

CIVIL APPEAL NO. 136-K/2011

(On appeal from the judgment dated 31.3.2011 passed by the High Court of Sindh, Karachi in C.P. No. D-2498/2010)

Pakistan Steel Mills Corporation (Pvt) Ltd through its Chairman

... Appellant

VERSUS

Abid Hussain and another

... Respondents

For the Appellant: Mr. Muhammad Ikram Siddiqui, ASC

For the Respondents: N.R.

CIVIL APPEAL NO. 137-K/2011

(On appeal from the judgment dated 6.4.2011 passed by the High Court of Sindh, Karachi in C.P. No. D-1770/2006)

Pakistan Steel Mills Corporation (Pvt) Ltd

... Appellant

VERSUS

Qazi Ghulam Rehmani and another

... Respondents

For the Appellant: Mr. Muhammad Ikram Siddiqui, ASC

For the Respondents: Syed Amjad Hussain, ASC

CIVIL APPEAL NO. 188-K/2011

(On appeal from the judgment dated 10.5.2011 passed by the High Court of Sindh, Karachi in CP 3316/2010)

M/s Pakistan State Oil Company Ltd and others

... Appellants

VERSUS

Imran Hassan Khan and another

... Respondents

For the Appellants:

Mr. Muhammad Humayun, ASC

For the Respondents:

Mr. Muhammad Aqil Awan, Sr. ASC

CIVIL APPEAL NO. 232-K/2011
(On appeal from the judgment dated 16.5.2011 passed by the High Court of Sindh, Karachi in Constitution Petition No. D-1643/2007)

Pakistan Steel Mills Corporation (Pvt) Ltd

... Appellant

VERSUS

Mirza Hassan Ali

... Respondent

For the Appellant:

Mr. Shaukat Ali Sh, ASC

For the Respondent:

N.R.

CIVIL APPEAL NO. 75-K/2012
(On appeal from the judgment dated 19.7.2012 passed by the High Court of Sindh, Larkana in Constitution Petition No. D-381/2012)

S.M.E. Bank Ltd

... Appellant

VERSUS

Akbar Ali Abbasi and another

... Respondents

For the Appellant:

Mr. Agha Faqeer Muhammad, ASC

For the Respondent (1):

In person

CIVIL APPEAL NO. 82-K/2012
(On appeal from the judgment dated 18.4.2012 passed by the High Court of Sindh, Karachi in C.P. No. D-1667/2010)

Pakistan Steel Mills Corporation (Pvt) Ltd

... Appellant

VERSUS

Miss Shakeela Naz

... Respondent

For the Appellant:

Mr. Sanaullah Noor Ghori, ASC

For the Respondent:

N.R.

Date of Hearing:

02.05.2013

JUDGMENT

TASSADUQ HUSSAIN JILLANI, J.- This judgment shall dispose of the above titled appeals as the questions of law raised are common.

BRIEF FACTS IN APPEALS:

2. In Civil Appeal No. 39/2010 the respondent was serving as Vice Principal of Pakistan Defence Officers Housing Authority, Karachi. He was proceeded against departmentally *inter alia* on the ground that he violated service discipline by filing a constitution petition (bearing No. 1276 of 2008) seeking a direction that he may be ordered to be appointed as Principal. The enquiry culminated in the award of major penalty of termination of service. The High Court allowed the constitution petition on the ground that the order passed was not sustainable as the procedure prescribed in Removal from Service (Special Powers) Ordinance 2000 [hereinafter referred to as the 'Ordinance 2000'] had not been followed.

3. In Civil Appeal Nos. 177-K/2010, 178-K/2010, 65-K/2011, 66-K/2011, 83-K/2011, 91-K/2011, 135-K/2011 & 232-K/2011 the respondents are employees of various organizations which are admittedly under the control of Federal Government. Those organizations included House Building Finance Corporation, Port Qasim Authority, Pakistan Steel Mills Corporation (Pvt) Ltd, S.M.E. Bank and Pakistan International Airlines Corporation. Respondents were proceeded against under the Ordinance, 2000 and awarded major penalties. Some of them initially approached

the Federal Service Tribunal and their appeals before the Tribunal were held to have abated on account of judgment of this Court in Muhammad Mubeen-us-Salam Vs. Federation of Pakistan and others (PLD 2006 SC 602). They filed Constitution petitions and relying on a judgment of this Court in Civil Aviation Authority through its Director General Vs. Javed Ahmed and another (2009 SCMR 956), the High Court of Sindh held that if an employee is proceeded under the Ordinance, 2000, the High Court is competent to consider as to whether the action taken was in accordance with law or not. A Division Bench of the High Court having decided the question of jurisdiction directed the Constitution petitions to be listed before the appropriate benches.

4. In Civil Appeal No. 142-K/2009 the respondent was an employee of the NED University of Engineering & Technology, Karachi. He was proceeded against departmentally which culminated in the award of major penalty of termination from service. The court relied on Tanveer Hussain Vs. Divisional Superintendent, Pakistan Railways etc (PLJ 2006 SC 1092) & Federation of Pakistan through D.G. Military Lands and Cantonment Rawalpindi and others Vs. Syed Ibrahim Shah and others (2007 PLC (C.S) 1288) to hold that the Ordinance, 2000 being general law has overriding effect and the proceedings held under the University Statute of 1990 could not be sustained. The University, however, was given the option to proceed *de novo* against the respondent under the Ordinance 2000.

5. In Civil Appeal No. 1150/2010 respondent was Manager Accounts in Pakistan International Airlines Corporation.

He was awarded major penalty of compulsory retirement. He challenged the said order before the Service Tribunal which partly allowed the appeal and altered the major penalty to minor penalty of withholding of increment for three years without cumulative effect. However, on account of the judgment in **Mubeen ul Islam's case** (PLD 2006 SC 602), appeal before the Service Tribunal stands abated whereafter the respondent filed a constitution petition which was allowed by the High Court and respondent was directed to be reinstated but the Court observed that it would be open for the competent authority to reconsider the matter on the basis of the report of the Enquiry Committee after issuing respondent a show cause notice.

6. In Civil Appeal No. 228-K/2010 respondent was employed as Baggage Attendant / Loader in the Pakistan International Airlines, Karachi Airport. He was proceeded against under section 3 of the Ordinance 2000 and was awarded major penalty of dismissal from service. The High Court allowed the writ petition and directed his reinstatement as it was of the view that no eyewitness appeared during enquiry and the enquiry stood vitiated on account of the enquiry officer's bias.

7. In Civil Appeal No. 57-K/2011 respondent was an employee of the Pakistan Steel Mills. He was proceeded against on charges of misconduct, which culminated in the award of major penalty of removal from service. The learned High Court allowed the Constitution petition and converted the penalty of removal from service into compulsory retirement as it found that the

penalty awarded was not proportionate to the charge. He was also held entitled to the benefits of retirement.

8. In Civil Appeals Nos. 63-K/2011, 136-K/2011, 137-K/2011, and 82-K/2012, the respondents – writ petitioners were employees of the Pakistan Steel Mills Corporation. They were proceeded against departmentally and awarded various penalties. The Constitution petitions were disposed of *inter alia* holding that those Constitution petitions were maintainable as respondents had been removed under the Ordinance, 2000; that the charges levelled against them could not be proved and that the penalties awarded were not sustainable.

9. In Civil Appeal No. 188-K/2011 respondent was an employee in the Pakistan State Oil. He was proceeded against departmentally in terms of the Ordinance, 2000 and awarded major penalty of dismissal from service. However, the learned High Court allowed the Constitution petition *inter alia* on the ground that the charges had not been established during inquiry and he was directed to be reinstated with all the consequential back-benefits.

10. In Civil Appeal No. 1162/2012 respondent was an employee of the Pakistan Steel Mills. He was proceeded against on charges of misconduct. The Constitution petition was allowed mainly on the ground that it was a case of no evidence and the allegations levelled had not been established.

11. In Civil Appeal No. 75-K/2012, respondent was an employee of the S.M.E. Bank. He was proceeded against under the Ordinance 2000 and awarded major penalty of termination of his

service vide order dated 1.12.2000. The said order was however withdrawn by the competent authority; he was reinstated but later on fresh enquiry was held which culminated in the award of the same major penalty of dismissal from service vide order dated 12.12.2001. He challenged the order in appeal before the Service Tribunal which was allowed vide order dated 19.3.2010. However the said order was challenged before this Court which set aside the order of the Service Tribunal vide judgment dated 11.6.2010. Meanwhile, respondent filed a representation before the Secretary Finance who vide order dated 2.12.2011 allowed the said representation and finding that he had been condemned unheard, reinstated him and left the question of payment of back benefits to a Committee constituted by the President of the Bank. The said Committee, however, did not grant him back benefits whereafter he approached the High Court in constitution petition which was allowed *inter alia* on the ground that there was no evidence on record that he was gainfully employed and merely because he had invested some money in defense certificates does not disentitle him to back benefits.

Gist of the Arguments:

12. In support of Civil Appeal No. 39/2010 learned counsel for the appellants Mr. Khalid Javed, ASC submitted that the learned High Court of Sindh has failed to appreciate that the service of the respondent was neither regulated by any law nor statutory rules of service and the petition under Article 199 of the Constitution was not maintainable; that the learned High Court has failed to consider that the termination order dated 9.9.2008 of

the respondent was a 'termination simplicitor' and there being no stigma attached the petition for reinstatement was not maintainable; that the learned Court fell in error in not appreciating that the Ordinance, 2000, did not provide substantive rights to employees but only laid down procedure for taking action against them for any act or omission which may fall within the mischief of law and that the service of the respondent was being regulated by regulations which were non-statutory and therefore, the Constitution petition was not maintainable.

13. In support of the submissions made, learned counsel relied on Pakistan International Airline Corporation Vs. Tanweer-ur-Rehman (PLD 2010 SC 676 (relevant paras 19, 23 25), Pakistan Telecommunication Co. Ltd Vs. Iqbal Nasir (PLD 2011 SC 132), R.T.H. Janjua Vs. National Shipping Corporation (PLD 1974 SC 146), Secretary, East Pakistan Industrial Development Corporation Vs. Md. Serajul Haque (1970 SCMR 398), Pakistan International Airlines Corporation Vs. Shahabuddin and others (1993 PLC (CS) 1), Raziuddin Vs. PIA Corporation (PLD 1992 SC 531), Muhammad Yusuf Shah Vs. Pakistan International Airlines Corporation (PLD 1981 SC 224), Shafaullah Vs. Saif ur Rehman (PLD 1991 SC 1106), Pakistan Red Crescent Society Vs. Nazir Gillani (PLD 2005 SC 806).

14. Learned counsel for the appellants in all the remaining appeals adopted the arguments of learned counsel for the appellant in Civil Appeal No. 39/2010.

15. Learned counsel for the respondents in Civil Appeal Nos. 188-K/2011 and 83-K/2011 M/s Muhammad Humayun, ASC

and Muhammad Aqil Awan, Sr. ASC defended the impugned judgments of the learned High Court as according to them the Constitution petitions were maintainable because the Ordinance, 2000 had an overriding effect and any violation thereof was amenable to writ jurisdiction of the High Court. They added that after promulgation of Ordinance 2000, there was a statutory intervention and the respondents who were aggrieved of the violation of the said statute could invoke the jurisdiction of the High Court under Article 199 of the Constitution.

16. In support of the submissions made, learned counsel relied on I.G. HQ Frontier Corps and others Vs. Ghulam Hussain etc (2004 PLC (CS) 1187 at page 1199), Daud Shah and another Vs. Pakistan Water and Power Development Authority and others (2007 PLC (CS) 281 at page 284-F para), Federation of Pakistan Vs. Syed Ibrahim Shah and others (2007 PLC (CS) 1288 at 1290(b)), Tanveer Hussain Vs. Divisional Superintendent (PLJ 2006 SC 1092 at 1095-A para 5-6), Azizullah Memon Vs. Province of Sindh (2007 SCMR 229 at 231), Evacuee Trust Property Board Vs Muhammad Nawaz (1993 SCMR 1275 at 1277), Muhammad Zubair Ikram Vs. Aithison College, Lahore through its Principal (NLR 2000 Civil 519 at 530), Aitchison College Vs. Muhammad Zubair (PLD 2002 SC 326 at 341), Managing Director, Ittehad Chemical Vs. Musthaq Ahmed (NLR 1997 Service 119), Pakistan International Airlines Vs. Nasir Jamal Malik (2001 SCMR 934 at 943 and 944-F), Principal Cadet College, Kohat Vs. Muhammad Shoab (PLD 1984 SC 170 at 176-B), Muhammad Ashraf Vs. Director General, Multan Development Authority etc (2000 PLC (CS) 796 at 801-C),

Muhammd Dawood Vs. Federation of Pakistan and others (2007

PLC (CS) 1046), Civil Aviation Authority Vs. Javed Ahmed (2009

SCMR 956) and (2010 PLC (CS) 1360 at 1375).

17. Leave was granted by this Court (In Civil Appeal No. 1162 of 2012) against the judgment of the High Court in following terms:-

4. We have heard the learned Advocate Supreme Court for the petitioner and learned Deputy Attorney-General, the latter relied upon the judgment in the case of Civil Aviation Authority v. Javed Ahmad (2009 SCMR 956) and stated that in such like cases when a person has been dismissed under the Ordinance of 2000, he can invoke the jurisdiction of the High Court as he cannot be left without any remedy. He relied upon following paragraph from the judgment in the case of Javed Ahmed (supra):--

"8. Needless to mention here that FBR through Circular No.7 dated 19th July, 2008 clarified that scheme is applicable to all undisclosed assets/income which somehow or the other could not be disclosed and remained unexplained and that cases are pending in appeal or raised/detected by the department would be dealt under normal law and not under specific provisions of scheme. The second deviation took place when the FBR issued Circular No.8 of 2008 whereby the scheme was restricted so as to exclude pending cases before the department, appellate authority or any Court, thus, the state of law was changed. We are of the view that amendment brought through the referred circular is of substantive nature thereby restricting the scope of the original scheme and the state of law stood changed from the said date effecting the right and liabilities of those who have acted upon the scheme in good faith under its original scope. Therefore, Circular No.8 of 2008 cannot apply retrospectively and show-cause notices stand vacated.

5. It is pertinent to mention here that besides the above judgment, in another case i.e. *Hyderabad Electric Supply Company v. Mushtaq Ali Brohi* (2010 PSC 1392), this Court has held that as the services of the respondent were not governed by the statutory rules, therefore, the High Court had no jurisdiction to entertain the petition under Article 199 of the Constitution. It may not be out of context to note that in another case reported as *Executive Council Allama Iqbal Open University v. M. Tufail Hashmi* (2010 SCMR 1484), this Court in its paragraph No.9 observed as under:--

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."

6. As far as the jurisdiction of the Tribunal under Article 212 of the Constitution is concerned, it was opined that the Tribunal would have jurisdiction under Article 212 of the Constitution for redressal of grievance of those employees whose terms and conditions are governed under the statutory rules. Admittedly, terms and conditions of the respondent in the present case have not been settled under the Constitutional provision referred to hereinbefore, therefore, *inter alia*, the question for consideration would be as to whether, if a person being employee of a corporation like Steel Mills has been proceeded against under the provisions of Ordinance of 2000, would he have no remedy to challenge such order.

7. Leave to appeal is granted, *inter alia*, to examine the above questions and to resolve the divergent opinions in the judgments noted hereinabove. Office is directed to put up a note for the purpose of constituting larger Bench to set at naught these discrepancies in the judgments noted above."

18. Having considered the submissions made by learned counsel for the parties and having gone through the precedent case law cited at the bar as also the conflict of opinion reflected in the leave granting order, the questions which crop up for consideration broadly would be as follows:-

- (i) Whether the appellants are persons discharging functions in connection with affairs of Federation or a Province within the meaning of clause (5) of Article 199 of the Constitution and amenable to writ jurisdiction of the High Court? and
- (ii) Whether the respondent-employees being 'person in corporation service' within the meaning of section 2(c) of the Removal from Service (Special Powers) Ordinance, 2000 and having been deprived of their right to appeal by a judgment of this Court in *Mubeen us Islam's case* (PLD 2006 SC 602), could invoke Article 199 of the Constitution against the order of the departmental authority in view of the law laid down by this Court in Civil Aviation Authority through Director General v. Javed Ahmad and another (2009 SCMR 956) or their remedy is a claim of damages as held in Pakistan International Airline Corporation Vs. Tanweer-ur-Rehman (PLD 2010 SC 676), Executive Council, Allama Iqbal Open University, Islamabad through Chairman and another v. M. Tufail Hashmi (2010 SCMR 1484), Hyderabad Electric Supply Company v. Mushtaq Ali Brohi (2010 PSC 1392) and

Civil Aviation Authority through Director General v.

Javed Ahmad (2009 SCMR 956)?

Questions of Law and Opinion of the Court:

Question No.1:

Whether the appellants are persons discharging functions in connection with affairs of Federation or a Province within the meaning of clause (5) of Article 199 of the Constitution and amenable to writ jurisdiction of the High Court?

19. To better appreciate the question mooted above, it would be of relevance to give a brief overview of the law, structure and functions of the statutory bodies/corporations/authorities (appellants).

(i) Pakistan Steel Mills

Pakistan Steel Mills is admittedly a public sector project. It was established in July 1968 under the Companies Act, 1913 as a private limited company. It is not denied that the Federal Government makes appointments in the top management of the Mills and plays a pivotal role in its policy making. Though it is not a statutory body, but its employees are “persons in corporation service” within the scope of section 2(c) of the Ordinance, 2000. Admittedly, their disciplinary matters were being regulated by a statutory regime (the Ordinance 2000) and they had sought enforcement of the said regime/statutory intervention when the said regime was in the field by invoking Article 199(1)(a)(ii) of the Constitution as they had been deprived of their right to appeal.

(ii) **Port Qasim Authority:**

Port Qasim Authority is a statutory body created under the Ports Qasim Authority Act, 1973. A bare reading of various provisions of this Act would indicate that in its management and functions the Federal Government has effective control. The Government by notification in the Official Gazette defines the limits of the Port Qasim Authority (Section 3); the management of the Authority is carried out by the Board comprising of at least three and not more than seven members including the Chairman to be appointed by the Federal Government (Section 6); the Board is guided on policy matters by directions issued by the Federal Government from time to time [(Section 5(2)]; the remuneration and conditions of service of the Chairman and Members of the Board are determined by the Federal Government (section 7); all schemes under the Act are to be prepared in such manner and form as the Federal Government may specify (section 12); the Authority is mandated to frame scale of tolls, dues, rates and charges, annual or other, to be paid by the owners of vessels. Such scales are to be published in the Official Gazette after approval by the Federal Government [Section 12 (3) (4)]; the Federal Government has the power to exempt any goods or class of goods from operation of the charging section (Section 20(3); the Authority has the power to acquire land within the Board Area (Section 34); the Chairman, members, officers and servants of the Authority when acting under the Act are deemed to be public servants within the meaning of section 21 of the Pakistan Penal Code (Section 52).

Thus the composition and functions as given in various provisions of the Statute to which reference has been made above indicate that: first the Federal Government has an overriding role in the appointment of the Chairman and members of the Board, in policy making and even in charging provisions and with regard to powers of land acquisition. Second the functions and powers it exercise have some elements of public authority. The Authority therefore can be classified as a 'person' performing functions in connection with the affairs of the Federation within the meanings of Article 199(1)(a)(ii) read with Article 199(5) of the Constitution of Islamic Republic of Pakistan.

iii) **S.M.E. Bank:**

S.M.E. Bank is established under the Regional Development Finance Corporation and Small Business Finance Corporation (Amalgamation and Conversion) Ordinance, 2001 (Ordinance LVI of 2001). Its employees would come within the purview of the Ordinance 2000, section 2(c) of which defines 'person in corporation service' as *"every person in the employment of a corporation, corporate body, authority, statutory body or other organization or institutions set up, established, owned, managed or controlled by the Federal Government, or by or under any law for the time being in force or a body or organization in which the Federal Government has a controlling share or interest and includes the Chairman and the Managing Director, and the holder of any other office therein."* It was on account of the above mandate of law that

admittedly its respondent-employees were proceeded against this Ordinance.

iv) **Defence Housing Authority, Karachi:**

The Defence Housing Authority Karachi was established under the Pakistan Defence Officers Housing Authority Order, 1980 (promulgated on 9th of August 1980). The management and authority vests in the Governing Body which comprises of the Secretary-General, Ministry of Defence, Government of Pakistan, who would be its Chairman and the other members/officers include (a) Vice Chiefs of Staff of the three Services or one Principal Staff Officer from each of the three Services to be nominated by the respective Chiefs of Staff; (b) the President; (c) the Director, Military Lands and Cantonments; and (d) the Administrator [(Section 5 (1)]. For day to day working, an Executive Board of the Authority comprises of Corps Commander who would be its President and other members include: (a) a serving Naval Officer not below the rank of a Commodore posted at Karachi, to be nominated by the Chief of the Naval Staff; (b) a serving Air Force officer not below the rank of an Air Commodore posted at Karachi, to be nominated by the Chief of the Air Staff; (c) a serving Army Officer not below the rank of a Brigadier posted at Karachi, to be nominated by the Chief of the Army Staff; (d) the Administrator; and (e) co-opted members, to be appointed by the Executive Board for a period not exceeding two years at a time, provided that such co-opted members shall not have any right of vote. [(Section 5(2)]. The Executive Board of the Authority has the

power to acquire land under the law, undertake any work in pursuance of any scheme or project; no master plan, planning or development scheme can be prepared by any local body or agency for the specified area without prior consultation with, and approval of, the Executive Board (Section 9). The Authority through the Executive Board has the power to raise funds for the purpose of its working capital in a manner the Board may think proper, through loans or levy of any charges which may be prescribed by it under the Rules (Section 10). The Administrator functions in accordance with the policy laid down by the Governing Body (Section 11). All schemes/projects/works carried out by the Authority are deemed under the law to be schemes for public purposes (section 12). The employees of the Authority are deemed to be public servants within the meaning of section 21 of the Pakistan Penal Code (Section 16). The Governing Body has the power to make Rules by notification in the Official Gazette for carrying out the purposes of the Order/Statute. (Section 22). The Executive Board has the power to make Regulations not inconsistent with the provisions of the Order and the rules as it may consider necessary or expedient for the administration and management of the affairs of the Authority. (Section 23).

In Civil Appeal Nos. 1150 and 228-K of 2010, respondents were employees of Pakistan International Airlines Corporation. In Civil Appeal No. 117-K of 2010, respondents were employees of Housing Building Finance Corporation. In Civil Appeal No. 142-K of 2009, respondents were employees of N.E.D. University. In Civil Appeal No. 188-K of 2011, respondents were

employees of Pakistan State Oil. All these employees were proceeded against under the Ordinance, 2000 and were awarded various penalties. The learned High Court decided the question of jurisdiction holding that writ was maintainable as the appellants were "persons" within the meaning of Article 199(5) of the Constitution and further that respondent-employees had no alternate remedy as their right of appeal under section 10 of the Ordinance had been declared to be *ultra vires* of the Constitution.

20. While dilating on this question whether the appellants-organizations are "persons" within the meanings of Article 199(1)(a)(ii) read with Article 199(5) of the Constitution, the expanded functions of the Federation or a Province in contemporary age have to be kept in view. An important dimension of the modern welfare State is that the role of the State and its various institutions has increased manifold. The government is regulator and dispenser of special services. It has the power to create jobs, issue licenses, fix quotas, grant mining rights or lease of estate, sign contracts and provide variety of utility services to the people. Such entrepreneurial activities at times are carried out through companies created under the Statute or under the Companies Ordinance. The functions these companies / institutions perform have elements of public authority. A public authority is a body which has public or statutory duties to perform and which performs those duties and carries out its transactions for the benefit of the public and not for private gain or profit. Such an authority, however is not precluded from making a profit for the public benefit. The Courts have generally applied what has been

classified as a "function test" to consider whether a statutory body is a 'person' within the meaning of Article 199 of the Constitution. In Salahuddin v. Frontier Sugar Mills & Distillery Ltd (PLD 1975 SC 244), the Court laid down similar test to assess whether a body or authority is a person within the meaning of Article 199 of the Constitution and observed:-

"The primary test must always be whether the functions entrusted to the organization or person concerned are indeed functions of the State involving some exercise of sovereign or public power; whether the control of the organization vests in a substantial manner in the hands of Government; and whether the bulk of the funds is provided by the State. If these conditions are fulfilled, then the person, including a body politic or body corporate, may indeed be regarded as a person performing functions in connection with the affairs of the Federation or a Province; otherwise not."

21. The afore-referred view was further affirmed in Aitchison College, Lahore through Principal v. Muhammad Zubair (PLD 2002 SC 326), and while not interfering with the judgment of the Lahore High Court whereby the latter court had held that the said college was amenable to the jurisdiction of the High Court under Article 199 of the Constitution, this Court laid down as follows:-

"Applying the above test on the facts of instant cases, we feel no hesitation in drawing inference that the Board of Governors, Aitchison College, Lahore headed by the Governor of the Province as its President along with other officers i.e. Secretaries Education, Finance and General Officer Commanding as well as unofficial Members are involved in providing education which is one of the responsibility of the State and by taking over its management and control the Board, exercises sovereign powers as well as public powers being a statutory functionary of

Government who in order to provide it full legal/Constitutional protection had brought it into the folds of its Education Department by amending the Provincial Rules of Business as back as in 1994 and even if for sake of arguments if it is presumed that no financial aid is being provided to the College from the Provincial Public exchequer, even then, the College remains in dominating control of the Provincial Government through Board of Governors. Therefore, the above test stands fully satisfied and we are persuaded to hold that organization of the Aitchison College, Lahore falls within the definition of a person."

22. In Pakistan International Airlines v. Tanweer-ur-Rehman (PLD 2010 SC 676), reiterating the earlier view, the Court laid down a similar three pronged test:

- (i) *whether the functions entrusted to the organization or person concerned are indeed functions of the State involving some exercise of sovereign or public power;*
- (ii) *whether the control of the organization vests in a substantial manner in the hands of Government; and*
- (iii) *whether the bulk of funds is provided by the State.*

23. A comparative study of constitutional law on issues under consideration would be instructive. In Sukh Dev Singh and others v. Beghatram Sardar Singh Raghwamshi and another (AIR 1975 SC 1331), the questions mooted before the Court were *inter alia* whether action of a statutory corporation in derogation to its Rules could be annulled in writ jurisdiction and whether the Rules framed by the corporation under the Statute were statutory. The Court held as follows:-

"33.A regulation framed under a statute applies uniform treatment to every one or to all members of same group or class.. The' Oil and

Natural Gas Commission, the Life Insurance Corporation and Industrial Finance corporation are all required by the statute to frame regulations, inter alia, for the purpose of the duties and conduct and conditions of service of officers and other employees. These regulations impose obligation on the statutory authorities. The statutory authorities cannot deviate from the conditions of service. Any deviation will be enforced by legal sanction of declaration by Courts to invalidate actions in violation of rules and regulations under statute is to ensure regular conduct with a distinctive attitude to that conduct as a standard. The regulations in the cases under consideration give the employees a statutory status and impose restriction on the employer and the employee with no option to vary the conditions. An ordinary individual in a case of master and servant contractual relationship enforces breach of contractual terms. The remedy in such contractual relationship of master and servant is damages because personal service is not capable of enforcement. In cases of statutory bodies, there is no personal element whatsoever because of the impersonal character of statutory bodies. In the case of statutory bodies it has been said that the element of public employment or service and the support of statute require observance of rules and regulations. Failure to observe requirements by statutory bodies is enforced by Courts by declaring dismissal in violation of rules and regulations to be valid. This Court has repeatedly observed that whenever a man's rights are affected by decision taken under statutory powers, the Court would presume the existence of a duty to observe the rules of natural justice and compliance with rules and regulations imposed by statute. "

24. Somewhat similar view was taken by this Court in The Evacuee Trust Property Board and another v. Muhammad Nawaz (1983 SCMR 1275) and the judgment of this Court in C.P.S.L.A. No. 645/74 titled as Chairman Evacuee Trust Property Board Lahore, etc., v. Noor Elahi and C.P.L.S.A. No. 646/74, titled as Chairman Evacuee Trust Property Board Lahore, etc v.

Muhammad Ramzan, upholding the judgment of the High Court

was followed with approval. This Court held:-

"It appears from the order passed by the learned Chief Justice of the High Court on the two Constitution Petitions that the Board at its 6th Meeting held in May 1969, passed the following resolution :--

"Agreed. Central Government Rules would apply to the Board's employees for all intents and purposes."

Under paragraph 43 of the scheme the Board is authorized to make rules to carry out the purposes of the scheme framed under section 16-A(i) of the Displaced Persons (Compensation and Rehabilitation) Act 1958, and under section 14(2) of the Displaced Persons (Land Settlement) Act 1958. Paragraph 16 of the Scheme provides that no employee of the Board shall be dismissed or otherwise punished except in accordance with the rules framed by the Board and approved by the Central Government. In our opinion the aforesaid resolution amounted to making of the rules by the Board."

It was not disputed before the learned Chief Justice that till such time the Board framed its own rules, the employees were governed by the Efficiency and Discipline Rules 1960, framed by the Central Government.

Admittedly these rules were not followed in the cases of the two respondents and, therefore, no fault can be found with the impugned orders of the learned Chief Justice. Both the petitions are accordingly dismissed."

25. The Court further candidly held, *"Even otherwise it is well-settled that where statutory rules govern the service conditions of an employee, then the pleasure of the master stands surrendered to the extent the matter is covered by the relevant rules".*

26. Whether a company or authority is an instrumentality of the State has also been subject of debate in constitutional

jurisprudence of India. The Indian Supreme Court in Ramana v.

I.A. Authority of India (AIR 1979 SC 1628) adverting to the factors

which make a corporation or authority an instrumentality of the

State held:-

"It will thus be seen that there are several factors which may have to be considered in determining whether a corporation is an agency or instrumentality of Government. We have referred to some of these factors and they may be summarized as under: Whether there is any financial assistance given by the State, and if so, what is the magnitude of such assistance whether there is any other form of assistance, given by the State, and if so, whether it is of the usual kind or it is extraordinary, whether there is any control of the management and policies of the corporation by the State and what is the nature and extent of such control, whether the corporation enjoys State conferred or State protected monopoly status and whether the functions carried out by the corporation are public functions closely related to Governmental functions. This particularization relevant factors is, however, not exhaustive and by its very nature it cannot be because with increasing assumption of new tasks, growing complexities of management and administration and the necessity of continuing adjustment in relations between the corporation and Government calling for flexibility, adaptability and innovative skills, it is not possible to make an exhaustive enumeration of the tests which would invariably and in all cases provide an unfailing answer to the question whether a corporation is Government instrumentality or agency. Moreover, even amongst these factors which we have described, no one single factor will yield a satisfactory answer to the question and the Court will have to consider the cumulative effect of these various factors and arrive at its decision on the basis of a particularized inquiry into the facts and circumstances of each case. 'The dispositive question in any State action case', as pointed out by Douglas, J., in Jackson v. Metropolitan Edison Co. (1974) 419 US 345 (supra) is not whether any single fact or relationship presents a sufficient degree of State involvement, but rather whether the aggregate of all relevant factors compels a finding of State responsibility. It is not enough to

examine seiatim each of the factors upon which a corporation is claimed to be an instrumentality or agency of Government and to dismiss each individually as being insufficient to support a finding to that effect. It is the aggregate or cumulative effect of all the relevant factors that is controlling."

27. Keeping in view the Statutes which established and the functions of the appellants' authorities, and having considered in the light of "function test", we hold and declare that these are statutory bodies, performing some of the functions which are functions of the Federation/State and through the exercise of public power, these bodies create public employments. These bodies are therefore "persons" within the meanings of Article 199(1)(a)(ii) read with Article 199(5) of the Constitution. If their actions or orders passed are violative of the Statute creating those bodies or of Rules/Regulations framed under the Statute, the same could be interfered with by the High Court under Article 199 of the Constitution.

Question No.2:

Whether the respondent-employees being 'person in corporation service' within the meaning of section 2(c) of the Removal from Service (Special Powers) Ordinance, 2000 and having been deprived of their right to appeal by a judgment of this Court in Mubeen us Islam's case (PLD 2006 SC 602), could invoke Article 199 of the Constitution against the order of the departmental authority in view of the law laid down by this Court in Civil Aviation Authority through Director General v. Javed Ahmad and another (2009 SCMR 956) or their remedy is a claim of damages as held in Pakistan International Airline Corporation Vs. Tanweer-ur-Rehman (PLD 2010 SC 676), Executive Council, Allama Iqbal Open University, Islamabad through Chairman and another v. M. Tufail Hashmi (2010 SCMR 1484), Hyderabad Electric Supply Company v. Mushtaq

Ali Brohi (2010 PSC 1392) and Civil Aviation Authority through Director General v. Javed Ahmad (2009 SCMR 956)?

28. For a better appreciation of the question framed, it would be pertinent to comprehend the ambit and scope of the Ordinance 2000 and its various provisions. It has not been disputed before this Court that the appellants are statutory bodies within the meaning of section 2 of the Ordinance and that is why all the respondent-employees were proceeded against under the said law except those of NED University and regarding that the High Court of Sindh vide the impugned judgment had observed that those employees too ought to have been dealt with under the said Ordinance. To discern that the Ordinance 2000 has an overriding effect a reference to certain provisions at this stage would be in order. Section 1(4) of the Ordinance 2000 stipulates that *"it shall apply to persons in Government service and corporation service."* The expression "person in corporation service" has been defined in section 2(c) which reads as under:-

"2. Definitions.--- ----

(a)-----

(aa) -----

(b)-----

(c)'person in corporation service' means every person in the employment of a corporation, corporate body, authority, statutory body or other organization or institutions set up, established, owned, managed or controlled by the Federal Government, or by or under any law for the time being in force or a body or organization in which the Federal Government has a controlling share or interest and includes

the Chairman and the Managing Director,
and the holder of any other office therein.

(d) ----- "

29. The right of appeal given under section 10 of the Ordinance (before the Service Tribunal) was held to be *ultra vires* in view of the law laid down in *Mubeen-us-Salam's* case (PLD 2006 SC 602). To further buttress its overriding effect, Section 12 of the Ordinance 2000 provided:-

"Proceedings under this Ordinance. - All proceedings initiated on the commencement of this Ordinance in respect of matters and persons in service provided for in this Ordinance shall be governed by the provisions of this Ordinance and rules made thereunder.

Provided that the Federal Government may, by notification in the official Gazette, exempt any class or classes of employees of a Corporation, a corporate body, authority, statutory body or other organization or institution set up, established, owned, managed or controlling share or interest from the provisions of this Ordinance and such class or classes of employees shall, notwithstanding anything contained in this Ordinance, be proceeded against and dealt with under the laws and rules applicable to such employees before the commencement of this Ordinance."

30. This Ordinance was promulgated on 27th of May 2000 and remained in force till its repeal on 6th of March, 2010.

31. The expression 'person in corporation service' appearing in section 2(c) of the Ordinance 2000 is fairly comprehensive and indicates that the legislative intent was that every person in the service of a corporation, a corporate body, authority, statutory body or other organization or institution which is established, owned and managed or controlled by the Federal Government or under any law for the time being in force in which

the Federal Government has a controlling share shall be treated as a "person in corporation service". Section 12 mandates that proceedings in service matters against the employees of such statutory bodies/organizations shall be governed by the provisions of the Ordinance 2000. However, it carries a rider i.e. unless, *"the Federal Government may, by notification in the official Gazette, exempt any class or classes of employees of a Corporation, a corporate body, authority"* as defined in section 2(c) from the provisions of this Ordinance and the said notification further provides that those employees would, *"be proceeded against and dealt with under the laws and rules applicable to such employees before the commencement of this Ordinance"*. It has never been the case of the appellant-organizations before this Court that the Federal Government had in this regard issued any notification in the Official Gazette exempting the respondent-employees from the provisions of Ordinance 2000. Hence the matters of their service discipline had to be dealt with under the said Ordinance.

32. Before we proceed to discuss the issue raised, a brief reference to the precedent case law in writ jurisdiction with regard to the employees of statutory bodies generally would be relevant.

33. The actions of statutory bodies in service matters have been subject of judicial scrutiny in all jurisdictions. In some cases, Courts have interfered in exercise of the power of judicial review on a variety of grounds, while in others they have refrained invoking the principle of Master and Servant. There is need to discern the principles which have weighed with the Courts in varied situations. In Maloch Vs. Aberdeen Corporation (1971) 1 W.L.R. 1578 Lord

Wilberforce, in speaking about the anomaly created by judicial decision in the area of contractual and statutory employments narrowed down the parameters of 'pure master and servant cases' in observing:-

"A comparative list of situations in which persons have been held entitled or not entitled to a hearing or to observation of rules of natural justice, according to the master and servant test, looks illogical and even bizarre. A specialist surgeon was denied protection which is given to a hospital doctor; a University professor, as a servant has been denied the right to be heard, a dock labourer and an undergraduate have been granted it; examples can be multiplied. One may accept that if there are relationships in which all requirements of the observance of rules of natural justice are excluded (and I do not wish to assume that this is inevitably so), these must be confined to what have been called "pure master and servant cases", which I take to mean cases in which there is no element of public employment or service, no support by statute, nothing in the nature of an office or a status which is capable of protection. If any of these elements exist, then, in my opinion, whatever the terminology used, and even though in some inter parties aspects the relationship may be called that of master and servant, there may be essential procedural requirements to be observed, and failure to observe them may result in a dismissal being declared to be void. (Emphasis is supplied)

I think that employment under public corporation of the nature under consideration here is public employment and therefore the employee should have the protection which appertains to public employment."

34. In Viteralli v. Saton (359 US 535 Second Series 1012), the American Supreme Court speaking through Judge Frankfurter held that the authority is bound to follow the procedure prescribed in law:

"An executive agency must be rigorously held to the standards by which it professes its action to

be judged.....Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed.....This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with the sword."

35. In Sukhdev Singh, Oil & Natural Gas Commission, Life Insurance Corporation, Industrial Finance Corporation Employees Associations Vs. Bhagat Ram, Association of Clause II Officers, Shyam Lal, Industrial Finance Corporation (AIR 1975 SC 1331), the questions before the Indian Supreme Court were whether an order for removal from service contrary to regulations framed under the Oil and Natural Gas Commission Act, 1959; the Industrial Finance Corporation Act, 1948; and the Life Insurance Corporation Act, 1956 would enable the employees to a declaration against the statutory corporation of continuance in service or would only give rise to a claim for damages. Second whether an employee of a statutory corporation is entitled to claim protection of Articles 14 and 16 against the Corporation. The Court by majority held as follows:-

"60. The Oil and Natural Gas Commission is owned by the Government. It is a statutory body and not a company. The Commission has the exclusive privilege of extracting petroleum. The management is by the Government. It can be dissolved only by the Government.

.....

67. For the foregoing reasons, we hold that rules and regulations framed by the Oil and Natural Gas Commission, Life Insurance Corporation and the Industrial Finance Corporation have the force of law. The employees

of these statutory bodies have a statutory status and they are entitled to declaration of being in employment when their dismissal or removal is in contravention of statutory provisions. By way of abundant caution we state that these employees are not servants of the Union or the State. These statutory bodies are "authorities" within the meaning of Article 12 of the Constitution."

36. In Lt. Col. Shujaddin Ahmad v. Oil & Gas Development Corporation (1971 SCMR 566), the question mooted was whether the Oil & Gas Development Corporation was a government department and, if so, whether its employees could challenge the order of departmental authority before the High Court under Article 199 of the Constitution. The Court while reiterating that relationship between the Corporation and its employees in the said case was that of master and servant dismissed the petition and held as follows:-

"The consistent view of this Court therefore has been that the employees of such statutory Corporations do not acquire the status of Government servants nor are the guarantees given by the Constitution applicable in their case. The High Court was, therefore, in our view, right in vacating the order of interim injunction, for according to the law of Master and Servant, a contract of service cannot be specifically enforced. It follows, therefore, that no temporary injunction can either be granted in such case. This petition is, accordingly dismissed."

This view was further affirmed in Raziuddin v. Chairman, Pakistan International Airlines Corporation (PLD 1992 SC 531), and while dismissing the appeal of the employees whose services had been terminated by the respondent, this Court held as follows:-

"Even if we are to agree with Mr. Niaz Ahmad Khan's above submission, we cannot hold that

section 10(2) of the Act is violative of any fundamental rights guaranteed by the Constitution, keeping in view the factum that to the absence of statutory provisions for regulating the relationship of a statutory Corporation and its employees, the relationship is that of Master and Servant. We may also observe that subsections (2), (3) and (4) of section 10 of the Act have been omitted by the Pakistan International Airlines Corporation (Amendment) Act, 1989 (Act No.V11 of 1989), gazetted on 2-11-1989, and therefore, the above subsection (2) of section 10 is no longer on the statute."

37. The above rule of master and servant, it may however, be noted, was departed in situations where relationship between a corporation and its employees was regulated by statutory provisions and violation of such provisions was complained of. Thus in Evacuee Trust Property Board v. Muhammad Nawaz (1983 SCMR 1275), the Court upheld the judgment of the High Court by holding that, "Where statutory rules governed the service conditions of an employee, then the pleasure of the master stands surrendered to the extent the matter was covered by the relevant rules."

38. The afore-referred view was followed in Anwar Hussain v. Agricultural Development Bank of Pakistan (PLD 1984 SC 194) wherein this Court laid down as follows:-

"The test of the employer/employee relation is the right of the employer to exercise control of the details and method of performing the work. It follows that if the relationship is the result of a contract freely entered into by the contracting parties then the principle of Master and Servant will apply. The principle, however, will not apply if some law or statutory rule intervenes and places fetters upon the freedom of the parties in the matter of the terms of the contract. It is on this principle that a civil servant for whom there are constitutional safeguards, is not governed by the principle of Master and Servant; for he is possessed of a legal character for the

enforcement of which he can bring an action. Even where the employee is not a civil servant but there are statutory safeguards governing his relationship with the employer and placing restrictions on the freedom of the parties to act, the general law of Master and Servant will not apply. In such cases the employer would be bound to follow the procedure provided for in the statute or the statutory rules before terminating the service of the employee and in the absence of conformity to such procedure, the termination of service would not be clothed with validity and the employee will be entitled to an action for his reinstatement:" (Emphasis is supplied)

39. In Principal, Cadet College, Kohat and another v. Mohammad Shoab Qureshi (PLD 1984 SC 170), this Court reiterated the above principle and held as follows:

"It is, therefore, evident that where the conditions of service of an employee of a statutory body are governed by statutory rules, any action prejudicial taken against him in derogation or in violation of the said rules can be set aside by a writ petition. However, where his terms and conditions are not governed by statutory rules but only by regulations, instructions or directions, which the institution or body, in which he is employed, has issued for its internal use, any violation thereof will not, normally, be enforced through a writ petition." .

40. The above principle was reiterated in following cases:-

- (1) Nisar Ahmad v. The Director, Chiltan Ghee Mills 1987 SCMR 1836.
- (2) National Bank of Pakistan v. Manzoorul Hasan 1989 SCMR 832.
- (3) Sindh Road Transport Corporation through , its Chairman v. Muhammad Ali G. Khokhar 1990 SCMR 1404.
- (4) Karachi Development Authority and another v Wali Ahmad Khan and others 1991 SCMR 2434.

41. In Karachi Development Authority v. Wali Ahmed Khan (1991 SCMR 2434), this Court did not interfere in the judgment of the High Court under Article 199 of the Constitution whereby the petitions were allowed because the action of the authority was tainted with malice notwithstanding the non-statutory nature of Regulations under which the employee was being governed.

42. In Mrs. Anisa Rehman v. PIAC and another (1994 SCMR 2232), the scope of judicial review was further enlarged despite Regulations being non-statutory and violation of principles of natural justice was held to be a valid ground to invoke writ jurisdiction under Article 199 of the Constitution. In the said case, the employee was aggrieved of an order of demotion passed without hearing him and the said right of hearing was not being claimed by him through statutory provision. This Court nevertheless held that the principles of natural justice were part of law and the order of the authority was struck down.

43. In Walayat Ali Mir v. Pakistan Intl. Airlines Corporation through its Chairman (1995 SCMR 650), the Court held that the Corporation was bound by its Regulations though those may be non-statutory and struck down the order of the authority which was violative of those Regulations. It also laid down parameters of exercise of this discretionary jurisdiction.

44. In Housing Building Finance Corporation through Managing Director, Karachi and another v. Inayatullah Shaikh (1999 SCMR 311), this Court while reiterating the earlier view that the Corporation may terminate the service of an employee under

Regulation 11 *simplicitor* qualified it with a proviso; provided it acts in good faith and in the interest of Corporation. Though the principle of 'Master and Servant', was reaffirmed, yet the Court did not interfere with the judgment of the High Court whereby the writ petition had been allowed and the employee of the House Building Finance Corporation was reinstated since the order of the competent authority terminating the service of the employee had not been placed before the High Court.

45. In Pakistan International Airlines Corporation (PIAC) v. Nasir Jamal Malik (2001 SCMR 934), the PIA had challenged the judgment of the Service Tribunal wherein it had allowed respondents-employees' appeal and directed their reinstatement as their services had been terminated without assigning any reason but it was left to the organization to proceed against them in accordance with law. This Court upheld the judgment of the Service Tribunal and reiterated the law laid down in Mrs. Anisa Rehman v. PIAC (1994 SCMR 2232) to the effect that the employees of PIAC were governed by the principle of "Master and Servant" but put a rider that *"the employer who itself has framed Rules as well as the Regulations for its domestic purposes is bound to strictly follow/adhere them because deviation therefrom is bound to violate settled principles of justice including the one enshrined in the maxim Audi alteram partem i.e. no one is to be condemned unheard."*

46. The violation of principles of natural justice in disciplinary proceedings has been found to be valid ground for

judicial review in U.K. as well. In a very instructive Article¹ titled 'Judicial Review of Dismissal from Employment: Coherence or Confusion?' by Bernadette A. Walsh, with reference to plethora of case law, the author stated that:-

"In the context of dismissal from employment, the major significance of the grounds of judicial review is that they enable a dismissed employee to challenge his dismissal on the grounds that the decision to dismiss him was taken in disregard of procedural requirements, including the rules of natural justice, or that it was so unreasonable that no reasonable body could have taken it². By contrast, in an ordinary action for wrongful dismissal, the traditional view was that the employee was confined to arguing that there had been a breach of the terms of his contract pertaining to notice³. Ridge v. Baldwin⁴ established that an office-holder was entitled to challenge his dismissal on the additional ground that there had been a breach of the rules of natural justice. Ridge itself concerned an action begun by writ, but there was no argument in the case as to the appropriate procedure for seeking relief."

47. In Azizullah Memon v. Province of Sindh (2007 SCMR 229), this Court annulled the order of the departmental authority because notwithstanding the overriding effect of the Removal from Service (Special Powers) Ordinance (Sindh Ordinance IX) of 2004, the said civil servant had not been dealt with under the said Ordinance. The Court observed as follows:-

"In the presence of express and specific language employed in the Ordinance neither the departmental authorities nor the Tribunal

¹ Appeared in Public Law (1989) 131.

² In C.S.S.U. v. Minister for the Civil Service [1985] A.C. 374, Lord Diplock described the latter ground as "irrationality". However, in R. v. Devon County Council, ex parte G. [1988] 3 W.L.R. 49, Lord Donaldson M.R. stated that he preferred the term "unreasonable" to that of "irrational", because the latter term is widely interpreted as casting doubt on mental capacity.

³ See, e.g. the discussion in Smith and Wood, Industrial Law (1986, 3rd ed.), 199-218.

⁴ [1964] A.C. 40.

bothered to notice that after the date of promulgation of the Ordinance all disciplinary proceedings should have been initiated under Ordinance rather than the old Rules enforced in 1973. This Court has already ruled in a number of judgments that this Ordinance has the overriding effect over all other laws on the subject except in case of proceedings, which were already pending before promulgation of the Ordinance. Since the impugned action was initiated and taken to its logical conclusion under a misconception of law and under a wrong law, it has vitiated the entire proceedings including the final order, which cannot be sustained under the law. The proceedings as well as final order is, therefore, liable to be set aside."

48. In Muhammad Dawood and others v. Federation of Pakistan and others (2007 PLC (C.S.)1046), the High Court of Sindh was seized of the cases of employees of statutory/corporate bodies (including the Civil Aviation Authority, etc.) who had been proceeded against under the Ordinance, 2000 and their appeals before the Service Tribunal were abated which obliged them to challenge the order of the departmental authority in writ jurisdiction. The Court allowed those petitions and speaking through its Chief Justice, Mr. Justice Sabihuddin Ahmed held as follows:-

"From the above somewhat detailed discussion, we have arrived at the following conclusions:-

- (i) Irrespective of an employee of a State controlled corporation not being a civil servant the corporation themselves continue to remain amenable to the jurisdiction of this Court under Article 199 of the Constitution.*
- (ii) The rule of master and servant is inapplicable to cases where there is violation of statutory provisions or of any other law.*

The expression "violation of law" would not be confined merely to violation of any specific provision of a statute but the expression "law", as observed by Hamoodur Rehman, J., (as his Lordship then was) in Government of West Pakistan v. Begum Agha Abdul Karim Sorish Kashmiri PLD 1969 SC 14 at page 31 and ought to be considered in its generic sense as connoting all that is treated as law in this country including even the judicial principles laid down from time to time by the superior Courts. It means according to the accepted norms of legal process and postulates a strict performance of all the functions and duties laid down by law. It may, for instance, include the principles of natural justice, the public duty to act fairly and honestly and absence of mala fides in fact and law. In all such cases the Court would be competent to grant relief of reinstatement."

49. While affirming the afore-mentioned judgment of the High Court of Sindh, this Court considered the effect of the Ordinance 2000 qua the jurisdiction of the High Court under Article 199 of the Constitution for the first time in Civil Aviation Authority through Director General v. Javed Ahmad (2009 SCMR 956). The Court observed as under:-

"The learned High Court was fully empowered to consider whether the action complained of is in accordance with the Removal from Service (Special Powers) Ordinance, 2000. Therefore, the violation of law falls within the parameters of the constitutional jurisdiction and the petition was properly entertainable regarding punishment of compulsory retirement to Javed Ahmed. The right of individual by change of law cannot be closed as past transaction and the constitutional petition remains alive to agitate the rights guaranteed under the Constitution. The departmental action on the statement of allegations contained 23 allegations which include additional allegations, was passed on malice and pre-determined desire to get rid of Javed

Ahmed. After abatement of his service appeal, there was no remedy available under the law in view of Mubeen-us-Salam's case and the petition before the High Court was maintainable"

50. The principles of law which can be deduced from the foregoing survey of the precedent case law can be summarized as under:-

- (i) Violation of Service Rules or Regulations framed by the Statutory bodies under the powers derived from Statutes in absence of any adequate or efficacious remedy can be enforced through writ jurisdiction.
- (ii) 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'.
- (iii) In all the public employments created by the Statutory bodies and governed by the Statutory Rules/Regulations and unless those appointments are purely contractual, the principles of natural justice cannot be dispensed with in disciplinary proceedings.

- (iv) Where the action of a statutory authority in a service matter is in disregard of the procedural requirements and is violative of the principles of natural justice, it can be interfered with in writ jurisdiction.
- (v) That the Removal from Service (Special Powers) Ordinance, 2000 has an overriding effect and after its promulgation (27th of May, 2000), all the disciplinary proceedings which had been initiated under the said Ordinance and any order passed or action taken in disregard to the said law would be amenable to writ jurisdiction of the High Court under Article 199 of the Constitution.

51. This brings us to the precedent case law of this Court which reflects the conflict of opinion with regard to remedies available to an employee of a statutory body. As we examine the law, it may be kept in view that prior to *Mubeen-us-Salam's case* (PLD 2006 SC 602), there were two remedies available to the employees of the statutory corporations: (i) section 2A of the Service Tribunals Act; and (ii) under section 10 of the Ordinance, 2000. Section 2A of the Service Tribunals Act, was declared *ultra vires* of the Constitution and the appeals pending before the Tribunal abated. The effect of section 10 of the Ordinance 2000, however, was not considered by the Court in the said judgment. As discussed in para 49 above, the effect of deprivation of right to

appeal granted under section 10 of the Ordinance, 2000 with reference to remedy under Article 199 of the Constitution was considered for the first time in *Civil Aviation Authority v. Javed Ahmad supra*. In the said case, the facts were that an employee of Civil Aviation Authority was proceeded against under the Ordinance 2000 and awarded major penalty of compulsory retirement. He filed appeal before the Service Tribunal which was directed to have abated by order of the Service Tribunal on account of the judgment of this Court in *Mubeen-us-Salam's* case (PLD 2006 SC 602). He along with several employees similarly placed challenged the order of departmental authorities before the High Court of Sindh. The petitions were allowed only on question of jurisdiction by a Full Bench of which one of us (Sarmad Jalal Osmany, J.) was a member and it was held that those petitions under Article 199 of the Constitution were competent and were directed to be listed before appropriate Benches of High Court of Sindh for hearing on merit [*Muhammad Dawood and others Supra* (2007 PLC (C.S.)1046)]. The Court allowed those petitions in terms as referred to in para 48 above. The said judgment was upheld in *Civil Aviation Authority supra* (2009 SCMR 956).

52. In Executive Council, Allama Iqbal Open University, Islamabad through Chairman and another v. M. Tufail Hashmi (2010 SCMR 1484) wherein a *contra* opinion was rendered, this Court was seized of several appeals filed by the employees of statutory bodies against the judgment of the Federal Service Tribunal. The question mooted in those appeals *inter alia* was whether the Service Tribunal had jurisdiction to entertain and

decide appeals in view of the law laid down in Muhammad Mubeen-us-Salam v. Federation of Pakistan (PLD 2006 SC 62) and Muhammad Idrees v. Agricultural Development Bank of Pakistan (PLD 2007 SC 681). The question of jurisdiction of the High Court under Article 199 of the Constitution was not considered. The Court relying on these two judgments and Pakistan Telecommunication Company Ltd. V. Muhammad Zahid (2010 SCMR 253) held as under:-

"10. Now coming towards the definition of a person in 'corporation service' or a person in 'government service', as defined in section 2(c) and (d) of the RSO, 2000. Such persons can be subjected to the RSO, 2000 but keeping in view the definition of the 'civil servant' under the Civil Servant Act, 1973 as well as the dictum laid down in Muhammad Mubeen-us-Salam's case (ibid), only those employees can approach the Service Tribunal, who fall within the definition of civil servant', holding posts in connection with the affairs of the Federation. As far as the remaining categories of employees, including the contractual ones; are concerned, if they are aggrieved of any adverse action, the Service Tribunal is not the appropriate forum for redressal of their grievance, in view of above conclusion, because it is a forum constituted under Article 212 of the Constitution for the redressal of grievance of those employees, whose terms and conditions are settled under Article 212(1)(a) of the Constitution. Similarly, any action taken against such persons shall not be questionable before the Service Tribunal as it is not meant to provide a forum to the employees, whose services are governed by non-statutory rules or who do not fall within the definition of a person in 'government service' as defined in section 2(d) of the RSO, 2000. Admittedly, in the present case the employees of AIOU, SME Bank and Pakistan Steel Mill, who approached the Service Tribunal for redressal of their grievance, were

not enjoying the protection of statutory rules, therefore, the Service Tribunal had no jurisdiction to adjudicate upon such matters and they will be governed by the principle of Master and Servant."

53. In *Pakistan International Airlines Corporation PLD 2010 SC 676 supra*, (taking a *contra* view) the Court distinguished the case of Anisa Rehman v. PIAC (1994 SCMR 2232) by relying on the case of Justice Khurshid Anwar Bhinder (*Supra*). In the latter case, the petitioners who were Judges of the High Court had filed review applications against the judgment of this Court in Sindh High Court Bar Association v. Federation of Pakistan (PLD 2009 SC 879) wherein the appointment of the then Chief Justice of Pakistan and the entire consultative process leading to their appointments had been found to be unconstitutional and *non est*. The grievance of the review petitioners was that they had been condemned unheard. The Court while dismissing their review applications came to the conclusion that there can be exceptions to the principle of natural justice that no one should be condemned unheard. The Court observed as follows:

"42.....Principle of audi alteram partem, at the same time, could not be treated to be of universal nature because before invoking/applying the said principle one had to specify that the person against whom action was contemplated to be taken prima facie had a vested right to defend the action and in those cases where the claimant had no basis or entitlement in his favour he would not be entitled to protection of the principles of natural justice. "(Nazir Ahmad Panhwar v. Government of Sindh through Chief Secretary Sindh 2009 PLC (C.S.) 161, Abdul Haque Indhar and others v. Province of Sindh through Secretary Forest, Fisheries and Livestock Department, Karachi and 3 others 2000 SCMR 907 and Abdul

Waheed and another v. Secretary, Ministry of Culture, Sports, Tourism and Youth Affairs, Islamabad and another 2002 SCMR 769). It has been elucidated in the detailed reasoning of the judgment of 31.7.2009 how the order passed by a seven Member Bench of this Court has been flagrantly violated. Besides that the applicants had no vested right to be heard and furthermore they have acted illegally and in violation of the order of seven Member Bench for obtaining illegal gains and benefits which cannot be ignored while examining the principle of 'audi alteram Partem'.

54. The afore-referred justification for dispensing with the principle of natural justice was understandable as there was already in the field a conclusive finding by this Court (*Sindh High Court Bar Association's case* PLD 2009 SC 879 *supra*) qua the nature of the consultative process which culminated in the appointment of those Judges. But in the instant cases, there was no prior conclusive finding by this Court qua the merits of respondents' cases in disciplinary proceedings and also with regard to the effect of statutory intervention of the Ordinance, 2000. In Hyderabad Electric Supply Co. v. Mushtaq Ali Brohi (2010 PSC 1392), an employee of Hyderabad Electric Supply Co., had challenged the award of major penalty of dismissal from service under the Ordinance, 2000 in writ jurisdiction which was allowed. This Court set aside the said judgment holding that since the service regulations were non-statutory, writ was not competent. In this case as well, it was not appreciated that though the Rules/Regulations may be non-statutory but there was statutory intervention in the shape of the Ordinance and the employees had to be dealt with under the said law.

55. In an attempt to resolve a conflict of judicial opinion, this Court must keep in mind: first the purpose of law the Court is called upon to interpret; second that law is a living organism which adapts to societal change and sometimes change in law precedes the former; third the ambit of court's jurisdiction and its limitations as defined in the Constitution; fourth the Court must be consistent i.e. in similar situations/cases, the judicial opinion will be similar; fifth though the Supreme Court is not bound by the principle of *stare decisis*, but the departure from the precedent should be well reasoned, proper and in accordance with the established principles of law. A Judge's role is to interpret the law and to correct its mistakes. The twin role of a developer in law and an earnest interpreter of legislation, though challenging, is in accord with the role the Supreme Court has in the constitutional scheme as also consistent with society's perceptions of the role of judiciary in a liberal democracy. In the context of the case in hand, the mandate of two constitutional provisions should be kept in mind i.e. Article 4 and Article 10A which read as follows:-

"4. (1) to enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen wherever he may be, and of every other person for the time being within Pakistan.

(2) In particular---

(a) no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.

(b) No person shall be prevented from or be hindered in doing that which is not prohibited by law; and

(c) *No person shall be compelled to do that which the law does not require him to do.*

10A. *For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process."*

56. The legislative intent in the promulgation of Ordinance 2000, *inter alia*, was that "persons in corporation service" in their service matters should be dealt with in accordance with the provisions of the said law and to ensure a fair deal/trial it was *inter alia* provided in the Ordinance that unless specifically so exempted by a reasoned order, the competent authority shall hold a regular enquiry against an employee accused of misconduct and that he shall have a right of appeal (Section 10 of the Ordinance).

57. The right of appeal is a substantive right. The respondents were deprived of the said right not by any legislative amendment but by a judicial opinion and that too on the analogy of the law laid down in *Mubeen us Islam's case* (PLD 2006 SC 602) and *Muhammad Idrees's case* (PLD 2007 SC 68). In both these cases, the effect of the Ordinance 2000 and that it was a statutory intervention was not a moot point. It is well established that an appeal is continuation of trial. Would it be a fair trial if an accused is shorn off his right of appeal? Would the deprivation of right of appeal not amount to judicial sanctification of all the orders passed by the departmental authorities awarding various penalties to the employees and would it not be violative of the fundamental right to a "fair trial and due process" as ordained in Article 10A of the Constitution? Could the respondent-employees not invoke

Article 199 of the Constitution to seek due compliance of the Ordinance 2000 for ensuring fair trial and due process? If the constitutional scheme and the purpose of law are kept in view, the answer to all these queries has to be in the affirmative and the constitutional petitions filed by the respondents seeking enforcement of their said right would be maintainable.

58. The High Court in the exercise of its jurisdiction under Article 199 of the Constitution can pass an appropriate order *"declaring that any act done or proceeding taken within the territorial jurisdiction of the Court by a person performing functions in connection with the affairs of the Federation, a Province or a local authority has been done or taken without lawful authority and is of no legal effect."* [(Article 199(1)(a)(ii)] The grievance of the respondent-employees in most of the cases was that the order of the departmental authority was violative of the Ordinance, 2000 and of no legal effect (as they were proceeded against under the said law) while in other cases it was that they had not been dealt with under the said law despite its overriding effect, the High Court had jurisdiction to interfere and allow the petitions.

59. For what has been discussed above, the cases of this Court reported as (Pakistan International Airlines Corporation PLD 2010 SC 676, *Executive Council Allama Iqbal Open University 2010 SCMR 1484* and *Hyderabad Electric Supply Co. 2010 PSC 1392 Supra*), we observe with respect, did not declare or enunciate any principle of law but were rendered in their own peculiar facts and circumstances and may not be treated as precedent on the issue we are seized of, because:-

- (i) The issue before this Court in *Executive Council Allama Iqbal Open University supra* was only whether the Service Tribunal had jurisdiction to hear the appeal in view of the law laid down in Mubeen-us-Salam's case *supra* and whether the writ jurisdiction under Article 199 of the Constitution could be invoked in the event of violation of Ordinance, 2000.
- (ii) In all the above cases, the point that irrespective of the Rules/Regulations being non-statutory the promulgation of Ordinance 2000 was a statutory intervention and any violation thereof would be amenable to writ jurisdiction was not considered. In *Hyderabad Electric Supply Co. 2010 PSC 1392 Supra*, there was no allegation that there was any violation of any provision of the Ordinance 2000 and enforcement of Service Rules was sought which were found to be non-statutory.
- (iii) Neither the mandate of Articles 4 and 10A of the Constitution nor the law laid down in Civil Aviation Authority through Director General v. Javed Ahmad (2009 SCMR 956) and Azizullah Memon v. Province of Sindh (2007 SCMR 229) was considered in those cases.

60. It was not disputed before this Court by appellants' learned counsel that the respondent-employees were "persons in corporation service" within the meaning of section 2(c) of the Ordinance 2000 and except in the case of N.E.D. University, they were proceeded against under the said law. This was a statutory intervention and the employees had to be dealt with under the said law. Their disciplinary matters were being regulated by something higher than statutory rules i.e. the law i.e. Ordinance, 2000. Their right of appeal (under section 10) had been held to be *ultra vires* of the Constitution by this Court as they did not fall within the ambit of the Civil Servants Act, 1973, [(in *Mubeen us Islam's case* (PLD 2006 SC 602) and *Muhammad Idrees's case* (PLD 2007 SC 68)]. They could in these circumstances invoke constitutional jurisdiction under Article 199 of the Constitution to seek enforcement of their right guaranteed under Article 4 of the Constitution which *inter alia* mandates that every citizen shall be dealt with in accordance with law. The judgment of this Court in *Civil Aviation Authority* (2009 SCMR 956) *supra* is more in consonance with the law laid down by this Court and the principles deduced therefrom as given in Para 50 above.

61. These are the detailed reasons for our short order dated 2.5.2013 which is reproduced hereinbelow:-

"For the reasons to be recorded later in the detailed judgment we are of the view that Removal from Service (Special Powers) Ordinance, 2000 had overriding effect and any violation or non-compliance of the said statute was amenable to writ jurisdiction. The impugned judgments

rendered by the High Court on that score are not open to exception. In the afore-referred circumstances all these appeals are dismissed."

JUDGE

JUDGE

JUDGE

JUDGE

JUDGE

Islamabad, the
2nd of May, 2013
APPROVED FOR REPORTING
Khurram Anees/-