

IN THE SUPREME COURT OF PAKISTAN
(ORIGINAL JURISDICTION)

PRESENT: MR. JUSTICE ANWAR ZEHEER JAMALI, CJ
MR. JUSTICE UMAR ATA BANDIAL
MR. JUSTICE KHILJI ARIF HUSSAIN

CONSTITUTION PETITION NO.97 of 2014.

Ishtiaq Ahmed.Petitioner

Versus

Hon'ble Competent Authority thr.
Its Registrar, Supreme Court of Pakistan ...Respondent

For the petitioner(s): Mr. Hamid Khan, ASC.
Mr. M .S.Khattak, AOR.

On Court's notice:

For the Federation: Mr. Sohail Mehmood, DAG
For the Balochistan: Mr. Ayaz Khan Swati, Addl. A.G.
For the KPK: Mr. Abdul Latif Yousafzai, A.G.
For the Punjab: Mr. Muddassar Khalid Abbasi, Asstt.AG
For the Sindh: Mr. Sheryar Qazi, Addl. A.G.

Date of hearing: 13.01.2016.

JUDGMENT

Khilji Arif Hussain, J. The petitioner served as Private Secretary in the Supreme Court of Pakistan. Through this Petition under Article 184(3) of the Constitution of Islamic Republic of Pakistan, 1973 he prayed that Rule 13 of the Supreme Court (Appointment of Officers and Servants and Terms and Conditions of Service) Rules 1982 (hereinafter referred to as *the Rules, 1982*) and Rule 17 of the Supreme Court Establishment Service Rules, 2015 (hereinafter referred to as *the Rules, 2015*) be declared ultra vires and the appeal of the petitioner (DSA No. 1 of 2011) may kindly be allowed to engage a counsel of his own choice.

2. Brief facts to decide this petition are that the petitioner while serving as Private Secretary of this Court at his own request was sent on deputation to the Office of the Federal Tax Ombudsman on 10.6.2005. His deputation period was extended from time

to time and was eventually expired on 9.6.2010. While he was posted in the Regional Office of Federal Tax Ombudsman at Lahore, he was temporarily attached with the Regional Office at Quetta vide order dated 13th January, 2010 and was relieved from Lahore on 16.1.2010 to join his new place of posting at Quetta. However, he did not report for duty rather submitted application for leave on the ground of his illness. On 10.6.2010 he submitted joining report to this Court but he was not allowed to join this Court and was directed by Memorandum dated 26.6.2010 to obtain relieving order from borrowing department (FTO). The Federal Tax Ombudsman by his report dated 13.7.2010 stated that the petitioner had remained absent from duty since 16.1.2010 and the medical certificates submitted by him for grant of leave were not valid and were not accepted by the Office necessitating disciplinary action against him by the parent department for misconduct, insubordination and obstruction of public work. It appears from the record that Hon'ble Chief Justice of Pakistan directed that as the alleged misconduct had been committed during the deputation period, therefore, the borrowing department shall initiate disciplinary action and shall report its findings to this Court. Accordingly the Inquiry was conducted against the petitioner by the borrowing authorities. He was found guilty of misconduct on the basis of said report, therefore, Show Cause Notice was issued and eventually the petitioner was dismissed from service with effect from 7.3.2011 vide order dated 8.3.2011. The petitioner filed departmental appeal which was heard and dismissed on 19.2.2014 by three senior most Judges of this Court.

3. Through this petition the petitioner questioned Rule 13 of the Supreme Court (Appointment of Officers and Servants and Terms and Conditions of Service) Rules 1982 and Rule 17 of the Supreme Court Establishment Service Rules, 2015 being violative of fair trial.

4. Mr. Hamid Khan, learned ASC for the petitioner contended that Rule 13 of the Rules, 1982 and Rule 17 of the Rules, 2015 are *ultra vires* to principle of fair trial and violative of Article 10-A of the Constitution of Islamic Republic of Pakistan and as such liable to be declared *ultra vires* and order passed by the Appellate Forum constituted under Rule 17 of the Rules, 2015 may be set-aside and petitioner may be allowed to appear

before the said forum through his counsel. In support of his contention, the learned counsel for the petitioner relied upon Aslam Ali Shah vs. Collector of Central Excise and Land Customs (1983 PLC [CS] 498), Collector Excise and Land Customs vs. Aslam Ali Shah (PLD 1985 SC 82), Muhammad Saeed Ahmed Khan vs. Secy. to Govt. of Pb., Housing & Planning Deptt. (PLD 1983 Lahore 206), Faisal vs. State (PLD 2007 Karachi 544), Baz Muhammad Kakar vs. Federation of Pakistan (PLD 2012 SC 923), Pett vs. Greyhound Racing Asscn., Ltd. (1968 [2] AER 545) and Board of Trustees, Port of Bombay vs. Dilipkumar (AIR 1983 SC 109).

5. Learned Deputy Attorney General, Additional Advocate General, KPK, Assistant Advocate General, Punjab and Additional Advocate General Sindh opposed the petition and contended that the Rule framed by this Court is not violative under Article 10A of the Constitution and Constitution Petition merits dismissal.

6. We have taken into consideration the arguments so raised by the parties and perused the record. From the perusal of the record it appears that the petitioner while serving as Private Secretary of this Court, at his own request, was sent on deputation to the Office of Federal Tax Ombudsman on 10.6.2005 which period was extended from time to time. On 13.1.2010 Federal Tax Ombudsman ordered his temporarily attachment with the Regional Office, Quetta. He was relieved from his office at Lahore on 16.1.2010 to join his new place of posting. However, he did not report for duty rather submitted applications for leave on the ground of illness. On 10.6.2010 eventually his deputation period expired and he submitted joining report to this Court. Petitioner was not allowed to join and was directed to obtain his relieving order from the borrowing department. Since the alleged misconduct had been committed during the deputation period, the Hon'ble Chief Justice of Pakistan directed that the borrowing department shall initiate disciplinary action and report his findings to this Court. The inquiry was directed against the petitioner by the borrowing authorities and found guilty of misconduct and report was submitted to this Court. After he joined this Court a final Show Cause Notice under Rule 4-5 of the Supreme Court (Appointment of Officers and Servants and Terms and Conditions of Service) Rules, 1982 was served upon the petitioner on 20.1.2011. He was required to explain his position

within 14 days from the date of issue of notice and to show cause why major penalty of dismissal from service under rule 4(1)(b)(d)(b)(iv) of the Rules, 1982 may not be imposed upon him. The petitioner submitted his reply to show cause notice and requested that the departmental proceeding initiated against him by the Federal Tax Ombudsman Secretariat may be dropped and show cause notice issued on the basis of the same may be withdrawn. On 7.3.2011 the competent authority after taking into consideration all aspects of the matter awarded major penalty under Rule 4(1)(b)(d)(b)(iv) of the Rules, 1982 and dismissed the petitioner from service as the charges of remaining absent from the duty were fully established. The petitioner being aggrieved by the order filed Appeal under Section 11 of the Rules, 1982 and prayed that the impugned order of dismissal from service of the petitioner may be set-aside and petitioner may be reinstated into service with all consequential benefits. It appears that the petitioner also filed an application that he may be allowed to represent through counsel.

7. The appeal filed by the petitioner came up for hearing before a Bench of three available senior most Judges of this Court in terms of Rule 11 of Rules, 1982. His request that permission to be represented through counsel was declined in view of bar contained under Rule 13 of the Rules, 1982. After hearing the petitioner and taking into consideration his submissions relating to his illness, his appeal was dismissed vide order dated 19.2.2014. The petitioner filed Review petition against the said Order. In order to appreciate contentions of learned counsel for the petitioner that Rule 13 of the Rules, 1982 and Rule 17 of the Rules, 2015 are *ultra vires* of the Constitution, we will like first to reproduce Rules 8, 11, 12 and 13 of the Rules, 1982 and Rules 13, 14 and 17 of the Rules, 2015:-

"Rule 8 of the Supreme Court (Appointment of Officers and Servants and Terms and Conditions of Service) Rules, 1982.- To impose penalty on the Registrar. The Chief Justice alone shall have power to impose a penalty on the Registrar of the Court and where an inquiry is held against him the Inquiry Officer shall submit his findings to the Chief Justice.

Rule 11. Appeal. Where any penalty is imposed by the Registrar, an appeal shall lie from his order to the Chief Justice, and where any penalty is imposed by the

Chief Justice, otherwise than on appeal from an order of the Registrar, an appeal shall lie from his order to a Bench of three available senior most Judges of the Court.

Rule 12. Limitation. *An appeal under rule 11 shall be filed within thirty days from the date of the order complained of.*

Rule 13. Advocates Bar to appear. *At no stage of the proceedings under these Rules, the person concerned shall be represented by an Advocate."*

AND

Rule 13 of the Supreme Court Establishment Service Rules, 2015.- Imposition of penalty on the Registrar.- *The Chief Justice alone shall have power to impose a penalty on the Registrar of the Court and where an inquiry is held against him, the Inquiry officer shall submit his findings to the Chief Justice.*

Rule 14 Appeal.- *Where any penalty is imposed by the Registrar, an appeal shall lie from his order to the Chief Justice, and where any penalty is imposed by the Chief Justice, otherwise than on appeal from an order of the Registrar, an appeal shall lie from his order to a Bench of three available senior most Judges of the Court.*

Rule 17. Bar against appearance of counsel. *At no stage of the proceedings under these Rules, the person concerned shall be represented by an Advocate".*

8. The above noted rules are in line with Rule 10A of the Government Servant (Efficiency and Discipline) Rules, 1973 and Rule 18 of Punjab Employees Efficiency, Discipline and Accountability Rules, 2006 which, for ease of reference, are reproduced as under:

"Rule 10A of the Government Servants E&D Rules, 1973. Appearance of Counsel.- *No party to any proceedings under these rules before the authority, the authorized officer, and Inquiry Officer or an Inquiry Committee shall be represented by an advocate.*

Rule 18. The Punjab Employees Efficiency, Discipline and Accountability Act, 2006. Appearance of Counsel.- *The accused, at no stage of the proceedings under this Act, except proceedings under section 19, shall be represented by an advocate".*

9. It is, by now, well settled that in domestic inquiries employees of the respective organizations are not allowed to be represented through their counsel except where the Inquiry Officer appointed by the competent authority is a legally trained person

as held in the case of Board of Trustees, Port of Bombay vs. Dilipkumar (AIR 1983 SC 109).

The question which needs to address, because in domestic inquiries petitioner has been denied to represent through counsel amount to denial of fair trial.

10. In the year 1993, an employee of the Supreme Court was removed from service by the then Hon'ble Chief Justice of Pakistan by order dated 1.9.1993 as a result of disciplinary proceedings initiated against him under Rule 4 of the Supreme Court Rules, 1982. He filed a review petition against the order dated 1.9.1993 before the Hon'ble Chief Justice of Pakistan, under Rule 11 of the Rules but the same was rejected on 9.11.1993. He thereafter preferred a service appeal before Federal Service Tribunal, Islamabad, under section 4 of the Service Tribunals Act, 1973 which was allowed on merits after overruling the preliminary objection raised in the appeal to the jurisdiction of the Tribunal to entertain appeal in respect of the employees of the Supreme Court of Pakistan, by order dated 10.7.1994. Leave was granted in the above appeal to consider the question, whether the view taken by the Federal Service Tribunal that persons serving in the Supreme Court of Pakistan are 'Civil Servants' and thus a dispute relating to the terms and conditions of service of such persons is amenable to the jurisdiction of Service Tribunal, is in consonance with law. The Court ultimately held as under:-

"In the case before us, it is not disputed that the Supreme Court of Pakistan has framed the Rules under Article 208 of the Constitution which governed the terms and conditions of appointment of officers and servants of the Supreme Court of Pakistan. It is also not disputed that the respondent in the case was appointed as Research and Reference Officer in the Supreme Court of Pakistan under these Rules. Since the service of the respondent was not governed under any Act of Majlis-e-Shoora passed under Article 240 of the Constitution and terms and conditions of his service were regulated under the Rules directly framed in pursuance of Article 208 of the Constitution, he could not fall in the category of a civil servant as defined in the Civil Servants Act, 1973 in view of the rule laid down in the case of Government of Punjab v. Mubarak Ali Khan supra. Consequently, the appeal of respondent which related to the terms and conditions of his service was not cognizable by the Federal Service Tribunal. The appeal is, accordingly, accepted and

the order passed by the Service Tribunal is set aside. Before parting with the case, we would however, like to mention here that Rule 11 of the Rules bars any appeal against the penalty which may be imposed by the Hon'ble Chief Justice of Pakistan on the employees of the Supreme Court. This rule, in our view, does not conform to the law laid down by the Shariat Appellate Bench of this Court in the case of Federation of Pakistan v Public at Large (PLD 1988 SC 202) and Pakistan through Secretary, Ministry of Defence v. The General Public (PLD 1989 SC 6) wherein it was declared that under the Islamic dispensation of justice at least one right of appeal must be provided to an aggrieved person and that the law barring such right to an aggrieved person is repugnant to the injunctions of Islam. We would accordingly, recommend that the provisions of Rule 11 of the Rules may be amended suitably to bring it in accordance with the aforesaid decision. The appeal stands disposed of with those observations."

11. In the light of the directions/observations made in the said case, the Rule 11 was amended to the following effect:-

"11. Where any penalty is imposed by the Registrar, an appeal shall lie from his order to the Chief Justice, and where any penalty is imposed by the Chief Justice, otherwise than on appeal from an order of the Registrar, an appeal shall lie from his order to the Bench of three available senior most judges of the Court."

12. Access to justice has been defined as an equal right to participate in every institution where law is debated, created, found, organized, administered interpreted and applied. Broadly it has been described as "an integral part of the rule of law in constitutional democracies and is a hallmark of civilized society". There can be no analytical, all comprehensive or exhaustive definition in seemingly infinite variety of actual situations with the ultimate object in mind viz. whether something that was done or said deprived the quality of fairness to a decree where a miscarriage of justice has resulted. In the instant Constitution Petition the petitioner has failed to address our intention that how a prejudice has been caused by the Appellate Forum constituting of three senior most available Judges of this Court merely because he has been denied the right of representation through a counsel. The issue before the forum was whether there was any

justification available for his long absence from the duty against the documents produced by the parties and after taking into consideration the order of the dismissal passed by the Hon'ble Chief Justice of Pakistan imposing major penalty, the petitioner has not alleged any basis, prejudicial or partisan against any member of the Bench who heard the appeal.

13. The order passed by a three Member bench of this Court, while exercising power under rule 11 of the Supreme Court (Appointment of Officers and Servants and Terms and Conditions of Service) Rules, 1982 and rule 17 of the Supreme Court Establishment Service Rules, 2015 as domestic Tribunal, is not and cannot be equated to an order passed by this Court under Article 184 of the Constitution of Pakistan and an aggrieved person, if so advice, can question the same before the competent forum.

14. In this view of the matter this Constitution Petition has no merits and is accordingly dismissed.

Sd/-
Chief Justice

I respectfully concur with the conclusion arrived by my learned brother Khilji Arif Hussain, J., in terms of my additional note.

Sd/-
Judge

Sd/-
Judge

Announced in open Court at Islamabad,
On 14.03.2016.

NOT APPROVED FOR REPORTING.
Saeed Aslam

Umar Ata Bandial, J. – I have had the privilege of reading the opinion rendered by my learned brother Khilji Arif Hussain, J. which cogently sets out the grounds for declining the relief prayed by the petitioner. In this behalf, I may respectfully record my agreement with the conclusion arrived by my learned brother. Notwithstanding that, it may be useful to briefly consider the limitations imposed, upon disciplinary proceedings initiated under statutory rules and procedure, by the constitutional rights of an accused to be given due process and fair trial conferred by Article 10A of the Constitution of Islamic Republic of Pakistan, 1973 (**"the Constitution"**) and his right of access to justice emanating from Article 9 of the Constitution. These rights are invoked by the petitioner as a basis to challenge the bar contained in the Supreme Court (Appointment of Officers and Servants and Terms and Conditions of Service) Rules, 1982 (**"the SC Rules, 1982"**) preventing his representation through counsel before the appellate forum adjudicating his appeal against the order of his dismissal from service passed on 08.03.2011 by the competent authority under the said rules.

2. The SC Rules, 1982 have recently been repealed and replaced by the Supreme Court Establishment Rules, 2015 (**"the SC Rules, 2015"**). Both sets of Rules, however, make identical provision with regard to the remedy of appeal against an order imposing a disciplinary penalty; and also for imposing an embargo on an accused officer or staff member from being represented by counsel at any stage of the proceedings under the respective Rules. The relevant provisions of the SC Rules, 1982 which are germane to the facts of the petitioner's case are reproduced herein below for facility of reference:

"Rule 11. Appeal. Where any penalty is imposed by the Registrar, an appeal shall lie from his order to the Chief Justice, and where any penalty is imposed by the Chief Justice, otherwise than on appeal from an order of the Registrar, an appeal shall lie from his order to a Bench of three available senior most Judges of the Court.

Rule 13. Advocate Bar to appear. At no stage of the proceedings under these Rules, the person concerned shall be represented by an Advocate."

The remedy of appeal against an order of dismissal from service provided under the SC Rules, 1982 to an officer of the Supreme Court lies before a forum comprising three senior Judges of the Court. Appellate *fora* that are constituted by disciplinary rules are often described as 'domestic' tribunals. The civil servants working in the Federal Government and the Provincial Governments are by their corresponding disciplinary laws also provided a remedy of appeal against imposition of penalty before domestic appellate *fora*. This is plain from the provisions of Rule 10 of the Government Servants (Efficiency & Discipline) Rules, 1973 ("**E&D Rules**") and also from Section 16 of the Punjab Employees Efficiency, Discipline and Accountability Act, 2006 ("**PEEDA**") which shows consistency of the SC Rules, 1982 with corresponding laws providing the disciplinary legal framework for civil servants.

3. Another common feature of the proceedings under the SC Rules, 1982, the E&D Rules and PEEDA is that each of these laws bars an accused officer from being represented by an advocate at any stage of the proceedings taken under the aforementioned laws. Thus the aforesaid bar contained in Rule 13 of the SC Rules, 1982, is also mirrored in Rule 10A of the E&D Rules and Section 18 of the PEEDA. It may also be noted that the domestic appellate proceedings under the said laws are not governed by the procedural laws that relate to the proceedings of Courts of law in the holding of trials or for the exercise of their jurisdictions. In this sense, the proceedings of a domestic forum of appeal are intended to be less formal, flexible and quicker. Nevertheless, the mode and manner of proceedings of these *fora* are not entirely discretionary but are regulated, in the first instance, by the rules laid down in or referred by the enabling law. It is settled generally that such rules must conform the substantive and procedural safeguards mandated by the constitutional rights of due process, fair trial and access to justice. These rights stand incorporated into the applicable rules by constitutional command and through judicial decree specifying the requirements prescribed for the enforcement of these rights of a citizen who is facing allegations about his service record before fact finding or resolutive *fora* governed by disciplinary rules. It remains to be seen whether the above said regulatory legal framework for disciplinary proceedings also entitles an accused officer

to be represented through a counsel, *inter alia*, before a domestic appellate forum established by the applicable enabling law.

4. The right of due process is not new to our jurisprudence and finds expression in the provisions of Article 4 of the Constitution. This right has been interpreted by this Court in several pronouncements. The case of **New Jubilee Insurance Company vs. National Bank of Pakistan** (PLD 1999 SC 1126) summarizes the features of that right very aptly. It is held that the right of due process requires that a person shall have notice of proceedings which affect his rights; such person must be given a reasonable opportunity to defend himself; the adjudicatory tribunal or forum must be so constituted as to convey a reasonable assurance of its impartiality and that such tribunal or forum must possess competent jurisdiction. Insofar as the right of fair trial under Article 10A of the Constitution is concerned, in **Suo Moto Case No.4 of 2010** (PLD 2012 SC 553) that right has been interpreted to ensure the grant of a proper hearing to an accused person by an unbiased competent forum; that justice should not only be done but be seen to be done. The above noted features of this right share attributes associated with the fundamental right of access to justice enunciated by this Court in **Benazir Bhutto vs. Federation of Pakistan** (PLD 1988 SC 416 at page-489), **Al-Jehad Trust vs. Federation of Pakistan** (PLD 1996 SC 324) and reiterated in **Liaquat Hussain vs. Federation of Pakistan** (PLD 1999 SC 405 at page-562). This right casts on an adjudicatory tribunal or forum a duty to treat a person in accordance with law, to grant him a fair hearing and for itself to be an impartial and a fair tribunal. Upon comparison, the said constitutional conditions requirements expand the principles of natural justice which according to our jurisprudence are treated as inherent rights that underlie the elements of fairness, both in terms of hearing as well as impartiality of the forum.

5. None of the above said constitutional rights or inherent rights that predicate every proceeding that may conclude in a penalty being imposed on an accused person, lay down any requirement that an affected accused officer before any domestic *fora* in disciplinary proceedings must be represented by counsel. In the present context the term

'domestic *fora*' is used to depict the domestic appellate forum or for that matter any other proceedings under the enabling disciplinary law. On the other hand, it may be pointed out that where the Constitution so intends, it has in Article 10(1) specifically commanded representation of an accused through counsel in the following situation:

"10. (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds of such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice."

Clearly, the constitutional right of consultation with and defence by a counsel under Article 10(1) *ibid*, in other words the right of representation which is presently desired by the petitioner for himself, is limited to cases involving arrest, detention and confinement under the law of the land whether it is criminal law, a detention law or any other law imposing penalty of confinement upon an offending person. None of the penalties that can be imposed under the SC Rules, 1982 inflict the personal restraints on the liberty of an accused person that are envisaged by Article 10(1) of the Constitution. It is therefore clear that the express exclusion of the right of representation of an accused by counsel under rule 13 of the SC Rules, 1982 (now Rule 17 of the SC Rules, 2015) does not violate any of his rights conferred by the Constitution or the law. Equally, the fact that procedural statutes which regulate the Court proceedings and grant the right of representation to an accused or a defendant, do not apply to the proceedings of a domestic appellate forum in disciplinary proceedings also becomes plausible. These statutes are the Code of Criminal Procedure, 1898 and the Code of Civil Procedure, 1908. Their exclusion does not offend or violate any higher right conferred on an accused person in disciplinary proceedings by the law or the Constitution.

6. The difference between the proceedings of a disciplinary Tribunal from the proceedings of a Court of law extends beyond the absence of checks imposed by the procedural statutes governing the Court proceedings. It is a well settled proposition of law that the result of disciplinary proceedings is not bound by or dependent upon the outcome of criminal proceedings initiated for the same wrongful act against the same accused

officer. Reference may be made to **Nawaz Khan vs. Federal Government** (1996 SCMR 315), **Arif Ghafoor vs. Managing Director, HMC** (PLD 2002 SC 13). The rationale for this rule is founded upon the subjective element present in disciplinary proceedings that concerns the suitability and the fitness of an accused officer to remain in government service when he has not been acquitted on the merits of the charge alleged against him. The distinction between disciplinary *fora* and Courts of law is highlighted again by the rule of law that the burden of proof in disciplinary proceedings is lighter than it is in criminal proceedings for the same wrong and against the same accused.

7. There is a significant difference between the substantive nature of trial by a Court of law as against the proceedings in a domestic disciplinary forum. Consequently, the entitlement of representation of an accused by counsel before a trial Court cannot by analogy be imported for the proceedings of a domestic appellate disciplinary forum constituted by Rule 11 of the SC Rules, 1982. The relief claimed by the petitioner is neither apt nor appropriate for the *fora* established under disciplinary laws governing the service rights of officers and staff that are governed by rules having the force of law. It may also be kept in mind that the rights assured to such officers and staff under the applicable statutory rules, constitutional principles and inherent legal rights are available as an exception to the rule of master and servant. This is because an employment governed by statutory instrument assures rights conferred by law as opposed to contract. This Court has held that the violation of such rights of an accused officer to be justiciable in the constitutional jurisdiction of the superior Courts of the country. Reference is made to **Pakistan Defence Officers' Housing Authority vs. Jawaaid Ahmed** (2013 SCMR 1707). The SC Rules, 1982 (now the SC Rules, 2015) that govern the discipline of officers and staff of the Supreme Court, including in the present case the petitioner, rest on the secure foundation of Article 208 of the Constitution. Such legal backing makes an accused officer eligible for relief by a competent Court of law to be granted in accordance with settled legal parameters governing exercise of its jurisdiction in relation to substantive rights appurtenant to disciplinary proceedings conducted under rules that have the force of law.

8. The foregoing points are intended to merely supplement the grounds for the conclusion given by my learned brother Khilji Arif Hussain, J., which I endorse fully to dismiss the petition.

Sd/-

Umar Ata Bandial, J.