

JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
(JUDICIAL DEPARTMENT)

I.C.A No.314/2019.

Najaf Ali Zahid etc Vs Federation of Pakistan etc.

Appellants by: Mr. Ali Nawaz Kharal, Advocate.

Respondents by: Mr. Saqlain Haider Awan, AAG.

I.C.A No.317/2019.

Abdul Hannan and others Vs Federation of Pakistan etc.

Appellants by: Mr. Ali Nawaz Kharal, Advocate.

Respondents by: Mr. Saqlain Haider Awan, AAG.
Syed Hashmat Kamal, SSP, AIG (HRM),
Rana Liaqat Ali, DSP Motorway &
Muhammad Asad, Inspector.

Date of Decision: **12.02.2020.**

MOHSIN AKHTAR KAYANI, J:- Through this single judgment, we intend to decide above mentioned I.C.As as the same have been filed against one and the same order.

2. The appellants have assailed the order dated 11.07.2019, passed by learned Single Judge in Chambers, whereby writ petition Nos.2199/2019 and 2481/2019 have been dismissed. In the writ petitions, the appellants assailed the notification dated 28.05.2019 for their de-induction from National Highways & Motorway Police (NHMP) and initiated the process of their repatriation to their parent departments.

3. Learned counsel for the appellants contends that the appellants were inducted in National High Way & Motorway Police prior to National Highways & Motorway Police Ordinance, 2000; that National Highways & Motorway Police was established for the first time, therefore, services of trained police officers were required and different police officers/the appellants were posted in NH & MP on deputation basis from provinces of Punjab, KPK, Sindh and Balochistan; that later on the appellants were absorbed in NH & MP on

24.04.2003; that Apex Court passed the judgments reported as *2013 SCMR 1752 (Contempt Proceedings against Chief Secretary Sindh and others)* in criminal original No.89/2011 and *2015 SCMR 456 (Ali Azhar Khan vs. Province of Sindh)*, whereby the Apex Court settled the criteria of absorption; that the petitioners were given notice of de-induction after passing of the said judgments, which were assailed before this Court in writ petitions, which were dismissed vide judgment dated 04.04.2016 and the said judgment was assailed before Division Bench of this Court in ICAs, which were dismissed vide judgment dated 12.05.2016; that the Apex Court has held that absorption of deputationists without observing the codal formalities under the rules is illegal, whereas, the appellants were absorbed after observing all the codal formalities, even otherwise, such absorption was not challenged and as such, learned Single Judge in Chambers misinterpreted the judgments passed by this Hon'ble Court as well as by the apex Court and passed the impugned order, which is liable to be set-aside.

4. Conversely, learned AAG contends that question of absorption of the appellants has already been adjudicated in the earlier round by this Court and the matter was finalized; that the appellants are civil servant as such the bar contained in Article 212 of the Constitution comes into play and this Court has no jurisdiction to entertain the matter regarding terms and conditions of service of the employees; that impugned judgment passed by learned Single Judge in Chambers is in accordance with law and the appellants have to approach FST in order to get redressed their grievance, that too, after joining their parent departments as they are no more deputationists after passing of their de-induction orders.

5. We have heard the arguments and perused the record.

6. Perusal of the record reveals that the appellants are aggrieved with the notification 28.05.2019, issued by Inspector General of Police, National Highways and Motorway Police, Islamabad. Contents of the said notification are reproduced here under for convenience:-

"This notification is issued in compliance with the order/judgment dated 05-10-2018 passed by the Hon'ble Supreme Court of Pakistan in Criminal Review Petition No.207/2106 in Criminal Original Petition No.89/2011, its

connected cases and the order/judgment dated 05-10-2018 passed in the Criminal Original Petition 36/2017 in Criminal Original Petition 89/2011, Criminal Original Petition 22/2017 in Criminal Original Petition 89/2011 and order dated 16-05-2014, order dated 30-05-2014, order dated 25-02-2016 and order dated 17-06-2016 passed by the Honourable Sindh High Court, Karachi, in Constitution Petition No. D-331 of 2013, the following officers who were inducted in National Highways & Motorway Police (NHMP) above BPS-07, are hereby de-inducted. They shall stand as deputationists till the process of their repatriation to their parent departments is completed."

7. The impugned notification has been issued regarding 173 officials (including the appellants) of different police departments of Islamabad, KPK, Punjab and Sindh, which was assailed by the appellants in two writ petition Nos.2199 and 2484/2019 before learned single Judge in Chambers, which have been dismissed through impugned order dated 11.07.2019 with following observations:-

"15. The petitioners are admittedly civil servants and have the remedy of approaching the Federal Service Tribunal against the impugned notification dated 28.05.2019. The ground that the petitioners were not afforded an opportunity of hearing before the passing of their de-induction and repatriation orders may also be agitated before the Federal Service Tribunal.

16. Therefore, I am of the view that the instant petition is not maintainable due to the bar contained in Article 212(2) of the Constitution.

17. In the case of Ali Azhar Khan Baloch Vs. Province of Sindh (2015 SCMR 456), it was inter-alia held as follows:-

"149. Article 212 of the Constitution ousts the jurisdiction of High Courts and civil Courts in respect of the matters pertaining to terms and conditions of civil servants. In other words, the provisions of Article 212 do not confer a concurrent jurisdiction to civil Courts, High Courts and Tribunals. The ouster contemplated under the said Article is a Constitutional command, and, therefore, of necessity restricts the jurisdiction of civil courts and High Courts on the subject, which squarely falls within the exclusive domain of Tribunals."

18. Furthermore, it was held that the exercise of jurisdiction by way of suit and Constitution petition filed by a civil servant with regard to his terms and conditions of service is violative of Articles 175, 212 and 240 and the law on the subject. The Hon'ble Supreme Court also observed that the admission of such suits and petitions by the learned Judges concerned "obviously confront and defy Article 189, if not attract the provisions of Article 209 of the Constitution."

19. Furthermore, in the case of National Assembly Secretariat Vs. Manzoor Ahmed (2015 SCMR 253), it has been held as follows:-

“8. We have heard the learned counsel for the parties and have perused the record. Admittedly, respondent No.1 is a Civil Servant and, therefore, he could not have approached the High Court under Article 199 of the Constitution for redressal of his grievance, which pertained to the terms and conditions of his Service in view of the Bar created under Article 212(2) of the Constitution. The High Court, therefore, was not competent to adjudicate the issue raised in the Writ Petition. The High Court has fallen in error while proceeding on the erroneous assumption that respondent No.1 had raised the issue of violation of the statutory Rules, therefore, it was competent to decide the issues. This was an incorrect approach of the learned High Court to entertain a Constitution Petition of a Civil Servant on the ground of the statutory violation. Such grievances of a Civil Servant fall within the domain of the Federal Service Tribunal as mandated by the Constitution.”

Law to the said effect has also been laid down in the cases of Iqan Ahmad Khurram Vs. Government of Pakistan (PLD 1980 S.C. 153), Khalid Mahmood Wattoo Vs. Government of Punjab (1998 SCMR 2280), Government of the Punjab Vs. Muhammad Zafar Bhatti (PLD 2004 S.C. 317), Peer Muhammad Vs. Government of Balochistan (2007 SCMR 54) and Engineer Musharaf Shah Vs. Government of Khyber Pakhtunkhwa (2015 PLC (C.S.) 215).

20. In view of the above, the instant writ petitions are dismissed as not maintainable. The petitioners are at liberty to raise their grievances against their de-induction and repatriation orders before an appropriate forum.

21. I have refrained from touching the merits of the case, lest it may prejudice to the petitioners' case before the competent forum. There is catena of case law in support of the view that where a Court holds a petition not to be maintainable, it ought not to delve into or give findings or even observations on the merits of the case. Reference in this regard may be made to the judgments in the cases of S.M. Waseem Ashraf Vs. Federation of Pakistan through Secretary, Ministry of Housing & Works and others (2013 SCMR 338), Yousuf A. Haroon Vs. Custodian of the Karachi Hotel Project (2004 CLC 1967), and Messrs Voyage de Air, General Sales Agent, Shaheen Air International Vs. Shaheen Air International Pvt. Ltd. (2006 CLC 173). There shall be no order as to costs.”

8. The above referred view rendered by learned Single Judge in Chambers is based upon basic concept that all the appellants are civil servant, therefore, they have to approach Federal Service Tribunal against the impugned notification. View of learned Single Judge in Chambers has to be seen in the light of Article 212 of the Constitution, whereby Administrative Courts or Tribunals have

exclusive jurisdiction to deal with the matters relating to terms and conditions of the persons in service of Pakistan and the said view was considered by the Apex Court in *PLD 1980 SC 153 (Iqan Ahmad Khurram Vs. Govt. of Pakistan), 1998 SCMR 2280 (Khalid Mahmood Wattoo Vs. Government of Punjab), PLD 2004 SC 317 (Government of the Punjab Vs. Muhammad Zafar Bhatti), 2007 SCMR 54 (Peer Muhammad Vs. Government of Balochistan through Chief Secretary and others), 2015 SCMR 253 (National Assembly Secretariat Vs. Manzoor Ahmed) & 2015 SCMR 456 (Ali Azhar Khan Baloch Vs. Province of Sindh)*, therefore, no exception can be taken against the said view, however, when the said proposition has been confronted to learned counsel for the appellants, he contends that the appellants were initially transferred to National Highways & Motorway Police in the year 1987 on deputation basis from police of KPK, Islamabad, Sindh, Punjab and Balochistan to raise new force for protection of highways and motorways, however, National Highways & Motorway Ordinance, 2000 was promulgated later on and fresh inductions were made, which gave rise to disputed situation amongst two batches i.e. present appellants, who were absorbed in NH & MP on 24.04.2003 and the fresh inductees, who were appointed under the Ordinance, 2000 in the year 2001. The said matter of seniority was concluded by the Apex Court and considered in judgment dated 05.10.2018 in criminal review No.207 alongwith other cases in the following manner:-

“3. The case of the petitioner in Criminal Original Petitions No.62/2016 & 69/2017 is that they were directly appointed employees of NH&MP; that most of the officials were hired from different departments and the petitioners are deprived of their legitimate right of seniority and that most of the deputationists lacked the requisite qualification and experience. According to them this Court in the above said judgment has cancelled all absorptions/appointments by transfer and deputations but the department has partially implemented the said judgment. Hence, they pray that contempt of court proceedings be initiated against the respondent Authority.

4. So far as the case of the petitioners in Criminal Review Petition No.207/2016 is concerned, we have perused the judgment under review. The respondent Department on the recommendation of the Departmental Committee has repatriated the petitioners on the ground that their induction was without the recommendations of the Departmental Induction Committee,

which to our mind is unexceptionable. No ground for review is made out. Criminal Review Petition No.207/2016 is accordingly dismissed.

5. So far as the case of the petitioners in Criminal Original Petition Nos.62/2016 & 69/2017 that they are regular employees of NH& MP and the process of absorption of several employees is illegal and has affected the seniority of regular employees is concerned, it would be appropriate to refer to our order dated 16.01.2017 passed in Civil Appeal Nos.709 to 717 of 2016 etc in which an almost a similar question was raised. Appellants of those appeals, who were working in different Police organizations, were initially appointed on deputation basis in NH&MP and were subsequently absorbed. However, a dispute arose with regard to their seniority which came up to this Court. With consent of the parties, it was held as under:-

3. We have called the A.I.G. (HRM), NH&M, and after hearing him and with the consent of the learned Counsel for the parties as well as the learned Additional Attorney General for Pakistan, intend to dispose of the Appeals in the following terms:-

"The seniority of the Police Officials, in the NH&MP shall be re-fixed. The deputationists (Police Officials) who were inducted in NH&MP by extending the benefit of one step higher than their substantive rank in the parent department, shall be assigned seniority from the date they were permanently absorbed in the department by the notification issued by the competent authority and their seniority shall be placed at the bottom. The one step promotion cannot be equated as out of turn promotion in terms of judgments of this Court reported as Contempt Proceedings against Chief Secretary Sindh (2013 SCMR 1752) and Ali Azhar Khan Baloch Vs. Province of Sindh (2015 SCMR 456). In fact the principles which this Court has enunciated in the cases of Ch. Muhammad Akram Vs. The Registrar, Islamabad High Court, Islamabad (PLD 2016 SC 961), would be attracted in the case in hand where the issue of the nature was dealt with by this Court. The seniority of all the Police Officials shall be finalized in the above terms from the date when they were permanently absorbed in the department, placing them at the bottom of seniority as concluded hereinabove."

6. The above order is very much clear regarding inasmuch as the seniority of all deputationists who are subsequently absorbed and have not been repatriated shall be placed at the bottom. In view of the above order, Criminal Original Petition Nos.62/2016 & 69/2017 are dismissed being misconceived."

9. Besides the above referred order, the Apex Court separately considered group of NH & MP officers in Crl. Org. Petition No.36/2017 vide judgment dated 05.10.2018 in the following manner:-

"2. This Court in Criminal Review Petition Nos. 131 & 133 of 2016 has specifically held "all those employees who are in BPS-1 to BPS-7 will not be repatriated to their parent departments...." Hence, only those employees who were

originally inducted in NH&MP from BPS-1 to BPS-7 are not be repatriated, the rest have to be. The respondent Department is directed to strictly follow this principle. So far as the issue that judgment of this Court passed in Criminal Original Petition No. 89/2011 was only meant for civil servants in Sindh is concerned, suffice it is to state that in the said judgment, this Court has settled the fate of all employees who were sent on deputation, therefore, it is to be uniformly applied to the rest of the provinces as well."

10. The above referred two orders have minutely been perused by us and it has been observed that absorption of the employees of BPS-1 to BPS-7 have been given protection by mentioning **"from BPS-1 to BPS-7 are not be repatriated"**, whereas by mentioning **"the rest have to be"**, this aspect leaves nothing in favour of the appellants for our interpretation, however, Apex Court passed another order in Criminal Original Petition No.18/2015 dated 13.02.2019 and disposed of the same while dealing with different petitions in the same order in the following manner:-

"We have heard the learned counsel for the petitioners in these cases and are of the view that the petitioners are, in fact, seeking implementation of the judgments of this Court reported as Ali Azhar Khan Baloch v. Province of Sindh (2015 SCMR 456) and Contempt Proceedings against Chief Secretary, Sindh and others (2013 SCMR 1752). Some of the petitioners are saying that on the basis of misinterpretation of the said judgments their services have been affected in that orders for repatriation have been issued, despite the fact that neither they were deputationists nor were they absorbed from such positions rather they were employed through notifications duly issued by the Sindh Government with the status of Civil Servants. Whether such a status could be enjoyed by the petitioners or not, the same has to be looked into individually in each and every case and also the policy of the Sindh Government and the relevant law governing the matter of employment and induction in the Civil Service of Government of Sindh and obviously this Court in the present circumstances cannot take such exercise. More appropriate mode by which all these disputes can be resolved is that the employees alleged to have been effected by the judgments of this Court referred to above should avail the remedy under the law, particularly, under Article 187(2) of the Constitution of the Islamic Republic of Pakistan, 1973 which gives powers to the High Court to examine the judgment of this Court and also to enforce it in accordance with law.

2. *Having said this, the learned counsel for the parties agree to this mode of disposal of the above cases in that the affected employees will be free to agitate their matters in the manner as noted above. Accordingly, all the listed petitions alongwith CMAs are disposed of. The Courts before whom the matters are instituted by the affected employees may deal and decide the same expeditiously preferably within a period of six months."*

11. While taking benefit of above referred view of Apex Court, this Court has to deal with proposition as to whether the cases of those employees, who have been absorbed in any department, who were later on de-inducted like present appellants can be considered in terms of 187(2) of the Constitution, especially when their cases of absorption have already been dealt by the High Court in terms of Article 199 of the Constitution in earlier round of the proceedings, this aspect has been discussed by learned Single Judge in Chambers in Paras 9, 10 & 11 of the impugned order, which are reproduced as under:-

“9. The repatriated officers aggrieved by the judgment dated 04.04.2016, passed by this Court preferred intra Court appeals before the Division Bench of this Court which were dismissed, vide judgment dated 12.05.2016. In the said judgment, it was explicitly held that the appellants were civil servants and the remedy of approaching the Federal Service Tribunal was available to them. Furthermore, it was held that the appeals were not competent and were barred under Article 212 of the Constitution. The said judgment passed by the Division Bench of this Court was not assailed any further.

10. It is well settled that judgment of the Division Bench of the High Court was binding on the Single Bench of the same High Court. Reference in this regard may be made to the law laid down in the cases of Maqbool Cooperative Housing Society Vs. Karachi Building Control Authority (2004 CLC 1567), Naeem Ahmed Vs. Chief Administrator Auqaf 2004 CLC 599), Mst. Seema and others Vs. M/s Millennium Developers (2003 CLC 632) and M/s Habib Insurance Vs. Pakistan National Shipping Corporation (1999 CLC 1727).

11. Since the said judgment dated 12.05.2016, passed by the Division Bench of this Court has till date not been overridden, overruled or reversed by the Hon'ble Supreme Court, I am bound by the said judgment bearing in mind the principles of maintaining judicial decorum.”

12. In view of above position, the question of absorption of each appellant requires consideration on the touchstone of case i.e. W.P. No.4351/2019 (Hamid Nasraullah Raniha. vs. Chief Commissioner, Islamabad), which has not yet

been published), wherein term deputation has been discussed in the light of

Estacode and different parameters:-

8. *It has also been settled by the ESTA Code that the normal period of deputation is three years and the concerned official has to report back after completion of his three years period, unless it has been extended to further two years and the maximum period is five years in terms of Serial No.27 (iv) of the ESTA Code, whereby both the borrowing and lending organization should ensure immediate repatriation of the deputationist. Furthermore, it is also clearly mentioned in the ESTA Code that period of deputation has to be defined specifically and after the expiry of the said period, the official should automatically be relieved from his office duties, unless his period has been extended. The other pre-conditions of deputation are as under:*

- (i.) *Where a post proposed to be filled is reserved under the rules for departmental promotion, appointment on deputation may be made only if the department certifies that no eligible person is available for promotion or the eligible person is found unfit for promotion by the appropriate DPC/Selection Board. In such cases, deputation may be approved till such time a suitable person becomes available for promotion.*
- (ii.) *In case of posts reserved for initial recruitment, appointment on deputation may be made only as temporary arrangement, pending joining of the nominee of the FPSC, and subject to the condition that such appointment shall be made only after a requisition has been placed with the FPSC.*
- (iii) *In cases where a post is tenable through appointment by deputation, the normal period of deputation should be three years and no extension beyond three years may be allowed without prior approval of the Establishment Division.*
- (iv) *No officer should be sent on deputation unless he has completed three years' service in his parent department after return from an earlier deputation.*
(the underlining & emphasizing is mine)

9. *Similarly, any deputationist can be absorbed in terms of Serial No.28 of Chapter 3 of the ESTA Code in the following manner:-*

- (4) *In case a deputationist is proposed to be absorbed permanently in the borrowing office (either a government organization or a corporation etc), such*

a proposal shall be initiated by the borrowing office at least six months before the expiry of the deputation period of the deputationist concerned. Such a proposal, with the written consent or request of the deputationist, shall be made by the borrowing office to the lending office (or parent office of the deputationist) which shall convey its decision (if necessary, in consultation with the Establishment Division) to the borrowing office as well as the deputationist, by the expiry of the term of his deputation. In the event of non-acceptance of the proposal, the individual shall revert back to his parent office as indicated at (2) and (3) above.
(underlining and emphasizing is mine)

13. The above referred provisions of the Estacode clearly demonstrates that only a civil servant can be sent on deputation and absorbed thereafter, but in order to justify the absorption, the borrowing Department has to prove that there is no other suitable candidate with such matching qualifications and the appointment of a person so desired has been required on the term “exigency of services” and if such nominated person has not been absorbed, the normal day to day working of the Department of the Government of Pakistan will be affected and the appointment is indispensable, even the Government of Pakistan and the relevant Department will be benefited from the services of such transferee /deputationist.

14. The question of absorption has also been discussed and considered at the touchstone of 2013 SCMR 1752 (Contempt Proceedings against Chief Secretary Sindh), 2015 SCMR 456 (Ali Azhar Khan Baloch Vs. Province of Sindh) and PLD 2016 SC 961 (Ch. Muhammad Akram Vs. The Registrar, Islamabad High Court, Islamabad) as all the appellants were placed in NH&MP by way of deputation when NH &MP was in dire need of their services in terms of emergent situation and they have served the department for more than 20 years after proper absorption through notification but all these aspects cannot be considered in proper manner by this Court in constitutional jurisdiction.

15. The impugned de-induction notification was issued by Inspector General of Police, National Highways & Motorway Police, Islamabad as per his own interpretation but this Court strongly believes that each of the appellant has to be given separate opportunity of hearing before de-induction or repatriation to his

parent department, even orders of the authority require detailed appreciation of these facts, in which the appellants were absorbed in NH & MP on 24.03.2003 but this Court cannot go beyond the mandate of Article 212 of the Constitution, whereby all these questions exclusively fall within purview of Federal Service Tribunal and learned Single Judge in Chambers has rightly observed that the appellants have to approach competent forum to raise their grievance against their de-induction and repatriation as such no illegality has been observed in the impugned order and the same has been passed in accordance with law.

16. In view of above discussion, both the captioned appeals do not bear any merits, therefore, the same are **dismissed**.

(LUBNA SALEEM PERVEZ)
JUDGE

(MOHSIN AKHTAR KAYANI)
JUDGE

R.Anjam