

Form No: HCJD/C

JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Intra Court Appeal No.314 of 2016

Nasir Aziz Khan Niazi and another

Vs.

Federation of Pakistan and 196 others

Appellants by: Mr. Ali Nawaz Kharal,
Advocate.

Respondents by: Mr. Saqlain Haider Awan, AAG.
Liaqat Ali, DSP and Muhammad
Asad, Inspector Legal NH&MP.

Date of Hearing: 14.10.2019

AAMER FAROOQ, J.- This judgment shall dispose of the instant appeal as well as Intra Court Appeal No.315/2016 titled "*Mumraiz Khan v. Federation of Pakistan and 196 others*" as common questions of law and facts are involved. The appellants are in service of National Highways and Motorway Police (NH&MP). Respondents No.3 to 197 are also in employment of NH&MP. They were appointed on the post of Senior Patrol Officers (BPS-16) on 02.12.2000. The appellants challenged the appointments of respondents No.3 to 197 by filing writ petitions under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (the **Constitution**) in the nature of *quo warranto*. The referred

petitions were dismissed vide the impugned judgment, hence these appeals.

2. Learned counsel for appellants *inter alia* contended that appointments have not been made in accordance with the procedure provided in Civil Servants Act, 1973 (the **Act**) as well as Civil Servants (Appointment, Promotion and Transfer) Rules, 1973 (the **Rules**). It was submitted that the appointments should have been made by the Federal Public Service Commission (FPSC) which was not done, instead were made by the Board constituted by the then Chief Executive of the country. In this behalf, learned counsel took the Court through various provisions of law including Section 5 of the Act and Rule 10 of the Rules. The attention was also drawn towards Section 7 of the Federal Public Service Commission Ordinance, 1977 (the **Ordinance**). It was further contended that the then Chief Executive had no authority to make the appointments or sanction the procedure for appointments; that in case titled *Zafar Ali Shah v. Pervez Musharraf, Chief Executive of Pakistan* (PLD 2000 SC 868) various observations were made and the powers of Chief Executive to run the affairs of the country was in light of the observations made in the judgment. It was also contended that Article 270AA of the

Constitution does not validate the acts of Chief Executive and even otherwise if there is validation the matter is still open to judicial review in light of the decision of the Hon'ble Supreme Court of Pakistan reported as **Federation of Pakistan etc. v. Saeed Ahmed Khan** (PLD 1974 SC 151) and **Federation of Pakistan and another v. Malik Ghulam Mustafa Kar** (PLD 1989 SC 26). It was submitted that validation under Article 270AA of the Constitution does not take away jurisdiction of this Court from acts which have been done with *mala fide* or without lawful authority being *coram non judice*. Reliance was placed on the case titled **District Bar Association Rawalpindi etc. v. Federation of Pakistan etc.** (PLD 2015 SC 401), **Chief Justice of Pakistan, Iftikhar Muhammad Chaudhry v. President of Pakistan etc.** (PLD 2010 SC 61), **Wukala Mahaz Barai Tahafaz Dstoor and another v. Federation of Pakistan** (PLD 1998 SC 1263), **Sardar Farooq Ahmad Khan Leghari and others v. Federation of Pakistan etc.** (PLD 1999 SC 57), **Secretary Ministry of Religious Affairs and Ministries etc. v. Syed Abdul Majid** (1993 SCMR 1171), **Muhammad Azhar Siddique v. Govt. of Punjab** (PLD 2010 Lahore 138 [DB]). Reliance was also placed on the case titled **Qaid e Azam Mazar Management Board v. Province of Sindh etc.** (2015 SCMR 116) and **Sabur Rehman and another v.**

Government of Sindh and others (PLD 1996 SC 801). It was also submitted that harmonious interpretation of the provisions of the Constitution shows that Article 270AA of the Constitution does not synchronize with other provisions including its sub-Article (4). It was further contended that summary moved to the then Chief Executive was not in accordance with the Rules of Business, 1973 since there was no elected Prime Minister and the powers exercised were arbitrary and without transparency.

3. It was also submitted that in the petitions, which are in the nature of *quo warranto*, laches is not a ground for dismissal and the motive of the appellants/petitioners is also inconsequential.

4. Learned counsel for respondents *inter alia* contended that the impugned judgment does not suffer from any illegality or jurisdictional defect; that the petitions filed by the appellants were barred by laches inasmuch as they were filed after a delay of almost eleven years. Reliance was placed on the case titled **Pakistan Post Office v. Settlement Commissioner and others (1987 SCMR 1119)**. It was contended that the issue of seniority of appellants *qua* the referred respondents is also pending before the Federal Service Tribunal and in this

behalf the Hon'ble Supreme Court of Pakistan in C.P. No.709 to 717/2016 vide order dated 16.01.2017 has settled the issue of seniority. It was also submitted that this Court in W.P. No.920/2019 titled Shah Asad Khan and 5 others v. Accountant General of Pakistan Revenue and 3 others has held that the dispute *qua* terms and conditions of service of employees of NH&MP falls within the jurisdiction of Federal Service Tribunal and the bar under Article 212 of the Constitution attracted. It was also submitted that since there were no Rules governing the appointments of service of respondents No.3 to 197, hence summary was placed before the Chief Executive which after seeking comments from various Ministries decided the matter. It was also contended that FPSC had excused from undertaking the process of appointments as there were no Rules in this behalf.

5. Arguments advanced by learned counsel for the parties have been heard and the documents placed on record perused with their able assistance.

6. The facts in the instant case are not disputed and have been mentioned with brevity in the impugned judgment. In this behalf, for ease of convenience paragraph 3 of the impugned judgment narrating the facts, is reproduced below:

“The facts, in brief, are that the Ministry of Communications forwarded a summary to the Prime Minister of Pakistan for raising a Motorway Police and the same was approved on 23.04.1997. As a consequence the Motorway Police was established. In July, 1998 the Motorway Police was renamed as ‘National Highway & Motorway Police (hereinafter referred to as the “Motorway Police”). Initially Inspectors/ Senior Patrolling Officers were recruited through the Federal Public Service Commission (hereinafter referred to as the “Commission”). It appears from the record that in May 1999 the Commission informed the Federal Government that no further appointments could be made against the posts of Inspectors /Senior Patrolling Officers in BS-16 in the absence of recruitment rules. In the meanwhile there was a change of Government and the Chief Executive took the control pursuant to the Provincial Constitutional Order No.1 of 1999. The Motorway Police, therefore, forwarded a summary dated 10.06.2000 to the then Chief Executive of Pakistan, which was later revised and resubmitted on 29.08.2000. It was proposed that appointments up to BS-16 be made by a Board headed by the Inspector General of Motorway Police. The revised summary was approved by the Chief Executive on 04.09.2000. On 05.09.2000, the national Highway Safety Ordinance, 2000 was promulgated. Pursuant to the approval dated 04.09.2000, the recruitment process was initiated by inviting applications from eligible candidates. After completion of the process respondents No.3

to 197 were appointed in January, 2002. The Recruitment Rules were framed on 15.03.2007. it is pertinent to note that dispute relating to seniority had arisen between the respondents and the already inducted Inspectors / Senior Patrolling Officers. The appeals are stated to be pending before the learned Federal Service Tribunal after being remanded by the august Supreme Court vide judgment dated 15.05.2013."

7. The appellants are aggrieved of appointments of respondents No.3 to 197. The actual dispute between the appellants and the said respondents is regarding seniority. In this behalf, the matter between appellants and respondents No.3 to 197 is reported to be pending adjudication before the Federal Service Tribunal. The writ petitions filed by appellants and the instant appeals are collateral assault on respondents No.3 to 197 to gain advantage or walkover in the main dispute pending before the referred forum. Under Article 199 of the Constitution petition for *quo warranto* can be filed by any person; the word any person depicts a person who necessarily is not aggrieved or has *locus standi*, however, the law in this regard is settled to the effect that where a petition in the nature of *quo warranto* is filed with the motive or where the petitioners have some personal grievance, the same is not maintainable. Reliance is placed on the case titled

Ghulam Shabbir v. Muhammad Munir Abbasi and others**(PLD 2011 Supreme Court 516).**

8. A petition under Article 199 of the Constitution seeking an order in the nature of *quo warranto* is with respect to a person who holds or purports to hold a public office to show under what authority of law he claims to hold that office. The concept of holding of public office was elaborated by the Hon'ble Supreme Court of Pakistan in case titled **Salahuddin and 2 others v. Frontier Sugar Mills & Distillery Ltd. Tokht Bhai and 10 others** (PLD 1975 Supreme Court 244) wherein it was observed as follows:

"The term 'public office' is defined in Article 290 of the Interim Constitution as including any office in the Service of Pakistan and membership) of an Assembly. The phrase 'Service of Pakistan' is defined, in the same) Article, as meaning any service, post or office in connection with the affair of the Federation or of a Province and includes an All-Pakistan Service, any defence service and any other service declared to be a Service of Pakistan by or under Act of the Federal Legislature or of a Provincial Legislature but does not include service as a Speaker, Deputy Speaker or other member of an Assembly. Reading the two definitions together, it becomes clear that the term 'public office', as used in the Interim Constitution, is much wider than the phrase 'Service of Pakistan', and although it includes any office it, the Service of Pakistan, it could not really refer to the large number of posts or appointments held by State functionaries at various levels in the hierarchy of Government. As early as 1846, the House of Lords in Henry Farran

Darley v. Reg. ((1846) 8 E R 520), expressed the view that "a proceeding by information in the nature of quo warranto will lie for usurping any office, whether created by Charter of the Crown alone, or by the Crown with the consent of Parliament, provided the office be of a public nature and a substantive office, and not merely the function or employment of a deputy or servant held at the will and pleasure of others". Their Lordships held the office of Treasurer of the public money of the county of the city of Dublin to be an office for which an information in the nature of a quo warranto would lie. In other words, their Lordships excluded, from the purview of the term 'public office', the large number of servant of the Crown who were not holding any statutory, representative or elective office.

This view seems to have held the ground throughout. As summed up Ferris (Extraordinary Legal Remedies, 1925 Edition, p. 145), "a public office is the right, authority and duty created and conferred by law, by which an individual is vested with some portion of the sovereign functions of the Government to be exercised by him for the benefit of the public, for the term and by the tenure prescribed by law. It implies a delegation of a portion of the sovereign power. It is a trust conferred by public authority for a public purpose, embracing the ideas of tenure, duration emolument and duties. A public officer is thus to be distinguished from a mere employment or agency resting on contract, to which such powers and functions are not attached The determining factor, the test, is whether the office involves a delegation of some of the sovereign functions of Government, either executive, legislative or judicial, to be exercised by the holder for the public benefit. Unless his powers are of this nature, he is not a public officer."

9. The bare perusal of the dictum of Hon'ble Supreme Court of Pakistan in the afore-noted judgment shows that a public office is one where office holder exercises the powers of Government in discharge of duties of the sovereign function and the true test is whether or not the public office holder has been delegated with the assignment or discharge of duties as a sovereign function of the Government. Undoubtedly, the function of the police is an integral obligation of the day and is sovereign function; however, the appointment in the nature of Senior Patrol Officer of NH&MP cannot be regarded as a public office inasmuch as the referred officers though are discharging the public duty in the nature of maintenance of law and order on the National Highways but the Senior Patrol Officer is not really controlling the helm of affairs in order to qualify as discharge sovereign function; however, the post comprising of Inspector General of NH&MP or any such post would be regarded as public office for the purpose of Article 199 of the Constitution.

10. The governing law for the employees of NH&MP is National Highway Safety Ordinance, 2000. The referred force was created as it was felt that to maintain law and order and discipline on the National Highways a separate police force is required. The employees of NH&MP though are now regarded as civil servants and civil service

laws are applicable but at the relevant time there were no Rules governing the terms and conditions of service of the employees. In the referred backdrop since there was no law, the FPSC refused to discharge the function of appointments of respondents No.3 to 197 and likewise the Ministry concerned i.e. Ministry of Communication referred the matter to the Chief Executive who had come in power in terms of Provisional Constitution Order No.1 of 1999 dated 12.10.1999 (PCO). In terms of the said PCO the Chief Executive had all the powers to run the state of affairs as closely to the Constitution of Pakistan as possible. The said PCO though was held to be invalid under Article 270AA of the Constitution but the protection was afforded to the actions undertaken by the then Chief Executive or persons exercising powers under him under Article 270AA (2) of the same. Likewise, protection was afforded under sub Article 4 of Article 270AA of the Constitution to all the orders made, proceedings taken, appointments made, including secondments and deputations, and acts done by any authority, or by any person, which were made, taken or done, or purported to have been made, taken or done, between 12.10.1999 to 31.12.2003 pursuant to exercise of powers under the laws created as mentioned in sub Article 2 of Article 270AA of the Constitution. It was argued on behalf of the appellants

that the actions taken under Article 270AA do not enjoy the absolute protection and those actions which are passed with *mala fide* or without lawful authority can be struck down by the superior Courts in exercise of their powers under Article 199 or 184 of the Constitution as the case may be. Learned counsel for the appellants failed to point out any *mala fide* on part of respondents No.1 & 2 while making the appointments. The appointments made cannot be termed as in violation of the civil service laws and hence without lawful authority inasmuch as, as noted above, at the relevant time there were no rules of service or rules otherwise spelling out the mode and terms of appointments of NH&MP's employees and in the said background the FPSC refused to undertake the job of appointments. There is no cavil with the principles laid down by the Hon'ble Supreme Court of Pakistan regarding the powers and jurisdiction of this Court to undertake judicial review of any action taken during the Martial Law proclaimed on 12.10.1999; however, the key phrase in the principle as laid down in the said judgment is 'without lawful authority'. The action of appointments of respondents No.3 to 197 cannot be termed as without lawful authority inasmuch as under the Ordinance it is not provided that the appointments are to be made through

FPSC or that the appointments shall be made pursuant to the Act or Rules framed thereunder.

11. The controversy between the appellants and respondents No.3 to 197 is subject matter of litigation pending before the forum of competent jurisdiction. In somewhat similar controversy, the Hon'ble Supreme Court of Pakistan in C.P. No.709 to 717/2016 titled "*Moin ud Din and others v. Ghulam Qadir and others*" vide order dated 16.01.2017 observed in paragraph 3 of the order as follows:

"We have called the A.I.G. (HRM), NH&MP, 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 case 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 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 the seniority as concluded hereinabove.”

12. The seniority *qua* the employees of NH&MP can be always re-fixed and realigned.

13. Though there is ample case law that in case of *quo warranto* the principle of laches do not apply as the wrong is continuing; however, as noted above, the instant petitions cannot be regarded as one for *quo warranto* but in the nature of *certiorari* seeking setting aside appointments of respondents No.3 to 197, hence laches is applicable. Since a right has been created in favour of respondents No.3 to 197 it cannot be taken away after lapse of almost 11 years. Reliance is placed on the case titled *Pakistan Post Office v. Settlement Commissioner and others* (1987 SCMR 1119). The judgment impugned in the instant appeals does not call for interference.

14. In view of above, the instant appeals are without merit and are accordingly dismissed.

(MOHSIN AKHTAR KAYANI)
JUDGE

(AAMER FAROOQ)
JUDGE

Announced in open Court on the 13th day of January 2020

JUDGE

JUDGE