

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

Writ Petition No. 2822 of 2019

Khushdil Khan Malik

Versus

Federation of Pakistan and two others

Date of Hearing : 08.02.2021

Petitioner by : In person.

Respondents by: Mr. Farrukh Shahzad Dall, Assistant Attorney-General.
Raja Saim ul Haq Satti, Deputy Legal Advisor, Establishment Division.
Ms. Ayesha Bashir Wani, Joint Secretary (Litigation).
Mr. Jameel Akhtar Khan, D.S. (Lit.).
Mr. Shamas ud Din, S.O. (E-7).
Mr. Mehmood Khan Lakho, S.O. (Lit.).

BABAR SATTAR, J.- Through this petition, the petitioner has challenged notifications dated 08.07.2019 and 09.07.2019. Through notification dated 08.07.2019, the petitioner, a BS-20 officer of Federal Government Educational Institutions (Cantonments/Garrisons) under Defense Division, Rawalpindi, who was posted at the time as Joint Secretary Textile Industry Division, was directed to report to the Establishment Division. The notification dated 09.07.2019 was issued by the Ministry of Commerce and Textile relieving the services of the petitioner pursuant to notification dated 08.07.2019.

2. The petitioner has a history of litigation and the background facts regarding his case have been summarized by a learned Divisional Bench of this Court in I.C.A. No.859 of 2013 which are as under:

"2. The facts, in brief, are that Mr. Khushdil Khan Malik (hereinafter referred to as the "respondent") was appointed against the post of Headmaster (BPS-18) on 24.12.1996 in the Federal Government Educational Institutions (Cants/Garrison) [hereinafter referred to as "parent Department"]. The latter falls under the administrative control of the Ministry of Defence. The respondent was posted as Deputy Secretary in the Federal Government on deputation basis with effect from 13-09-2004. The period of deputation was extended from time to time under section 10 of the Civil Servants Act 1973 (hereinafter referred to as the "Act of 1973"). It appears, from the record, that, due to alleged complaints relating to misconduct, the respondent was repatriated to the parent Department on 03-02-2010 vide office Memorandum, dated 20-01-2010. The respondent was granted financial benefits of BPS-20 with effect from 25-10-2004 under the Four Tier Structure Formula. The respondent was again transferred to the Federal Government under section 10 of the Act of 1973 vide Notification, dated 01-11-2011. The respondent filed a representation for his induction/absorption in the 'Secretariat Group'. However, his request was regretted by the Establishment Division on the ground that he was not eligible. The parent Department forwarded a summary to the Ministry of Defence for granting promotion to the respondent on the basis of meritorious service. The Ministry of Defence, vide office Memorandum dated 24-06-2015, sought the advice of the Establishment Division. The latter had observed in the said memorandum that the respondent was transferred vide Notification dated 29-07-2013 without seeking its concurrence or that of the parent Department. Moreover, it was also observed that the respondent had barely served in BPS-19 and 20 in his parent Department. In response the Establishment Division, vide office Memorandum dated 17-12-2015, informed that since the respondent had not rendered meritorious service in his parent cadre, therefore, he was not eligible for being promoted on meritorious basis. The respondent filed W.P. No. 828/2011 seeking a writ regarding his induction/absorption in the Secretariat Group besides challenging Notification dated 03-02-2010 whereby he was repatriated to his parent Department. While the constitutional petition was pending the respondent was transferred under section 10 of the Act of 1973 and, therefore, an amended petition

was filed and the same was allowed by the learned Single Judge in Chambers vide judgment dated 13-05-2013. The operative part of the judgment is as follows:

“In this view of the matter, instant petition is allowed and the respondents are directed to process his case for induction in the Federal Government (Secretariat Group) as per rules and regulations, applicable.”

The said judgment has been assailed by the Federal Government through ICA No. 859/2013. The Prime Minister of Pakistan issued a directive whereby the financial benefits under the 'Time Scale Formula' were granted to the Teaching Staff of the Federal Directorate of Education, Islamabad and, pursuant thereto, the Capital Administration and Development Division issued the Office Memorandum dated 15-09-2011. The Ministry of Defence forwarded a summary to the competent authority for extending the 'Time Scale Formula' to the Teaching Staff in BPS-16 and above employed and working in the parent Department. The said summary was endorsed by the Secretary Finance vide note dated 14-02-2014 and the approval, accorded by the Prime Minister, was duly communicated to the Defence Secretary on 16-10-2015. It appears from the record that the respondent's repatriation orders to his parent Department were issued through Notifications dated 18-10-2012 and 05-05-2016 but there is nothing on record to show as to why they were not implemented. Nonetheless, the respondent continued to serve outside his parent Department. The respondent filed W.P. No. 4118/2016, praying that an appropriate writ be issued for the grant of 'Time Scale Promotion in BPS-21 with effect from 01-01-2011 and thereafter forwarding his case for the grant of BPS-22 on the basis of meritorious service. The said constitutional petition was allowed by the learned Single Judge in Chambers vide the impugned judgment, dated 10-03-2017. The respondents in the said petition were directed to issue a notification in favor of the petitioner for the grant of Time Scale Promotion in BPS-21 with effect from 01-01-2011 and then to forward his case for promotion to BPS-22 on the basis of meritorious service. The Secretary Establishment Division has challenged the judgment, dated 10-03-2017, through ICA No. 123/2017, while the same has also been assailed by the parent Department through the Ministry of Defence by filing

ICA No. 117/2017. The respondent was transferred vide Notification, dated 12-01-2017, to the National Security Division and later directed to report to the Establishment Division. The said transfer was challenged by the respondent by filing Crl. OP No. 11/2017 in CP No. 23/2012 and the same was dismissed by the august Supreme Court vide order dated 30-01-2017. The respondent filed W.P. No. 427/2017 before this Court, which was disposed of vide order dated 06-02-2017. Another constitutional petition i.e. W.P. No. 1230/2017, filed by the respondent, was also disposed of by this Court vide order dated 10.04.2017. Pursuant to the aforesaid orders, dated 06-02-2017 and 10-04-2017, the Secretary Establishment Division passed order, dated 26-04-2017, and the relevant portion thereof is as follows:

“Now, therefore, the undersigned, in compliance with the orders of the honourable Islamabad High Court, has heard the petitioner and is of the view that an appropriate placement, that too in consultation with his parent department or repatriation of the officer to his parent department, would be decided in pursuance to any final order of the honourable Islamabad High Court (ICA No. 859/2013) for which an application for early hearing has already been filed. A seat of OSD for the officer will be created in the Establishment Division meanwhile, for pay purposes.”

3. Regarding the claim of the petitioner to be inducted in the Secretariat Group, this Court, in I.C.A. No.859 of 2013 held the following:

“In the instant case, the respondent is, admittedly, neither an officer belonging to one of the Occupational Groups/Services nor has he been recommended by the controlling Ministry of the parent Department. We are afraid that his case is also not covered under the other modes prescribed for induction as an officer in the Secretariat Group. There is no force in the argument that as other ineligible persons have been inducted, therefore, the same benefit may also be extended to the respondents. It is implicit in this argument that illegality may be allowed to be perpetuated. The respondent definitely does not meet the prescribed eligibility criteria and conditions for induction in the

Secretariat Group. The learned Single Judge in Chambers was indeed not properly assisted nor was his attention drawn to the mandatory conditions which have been discussed above. The respondent is not eligible nor otherwise entitled for induction in the Secretariat Group. No right has accrued in his favor and, therefore, the constitutional petition which was decided vide the impugned judgment, dated 13.05.2013, was without merits."

4. The appeals filed by the Federal Government against the petitioner thus succeeded and the learned Division Bench issued the following directions:

"For what has been discussed above, all the three appeals succeed and the impugned judgments, dated 13.05.2013, passed in W.P. No.828/2011 and dated 10.03.2017, passed in W.P. No. 4118/2016, are consequently set aside. It will be open to the Federal Government to proceed with the placement of the respondent in the light of paragraph 8 of the order, dated 26.04.2017, passed by the Secretary, Establishment Division."

5. The petitioner filed W.P. No.4278/2017 and Criminal Original No.379-W/2017, which were dismissed as withdrawn. During the pendency of I.C.A. No.859/2013, 117/2017 and 123/2017, he filed W.P. No.2425/2017 challenging transfer orders reproduced as part of the order of the I.C.A. above. This petition was dismissed in limine for being barred by Article 212(2) of the Constitution. The petitioner had also filed W.P. No.427/2017 against a transfer order of the Federal Government, which was also disposed of for being premature as his representation was pending before the competent authority and he had approached this Court without waiting for it to be decided.

6. The petitioner appeared in person and took the Court through his history of transfers and postings which has been reproduced above and also as part of the submissions of the

learned Assistant Attorney General later in this judgment. The petitioner has submitted that he has been a victim of malice and discrimination due to which he has been posted as an officer on special duty (“OSD”) as a prelude to be transferred back to his parent department. He asserted that an appropriate posting is a prerequisite for the transfer of a civil servant for purposes of section 10 of the Civil Servant Act, 1973 (“CSA”) and given that there is no post available for him in his parent department, he cannot be repatriated to his parent department. He further submitted that he has been a victim of discrimination and has been kept dysfunctional for the last eighteen months as OSD which is also something that has been depreciated by the apex Court. He has relied on Syed Mahmood Akhtar Naqvi vs. Federation of Pakistan (PLD 2013 SC 195), Suo Motu Case No. 24 of 2010 in the matter of (regarding Corruption in Hajj Arrangements in 2010) (2014 SCMR 484). He has further submitted that this Court is vested with authority to exercise judicial review over illegal administrative actions and relies on Suo Motu Case No. 18 of 2010 (PLD 2011 SC 927) and also relies on Abdul Hameed Anjum vs. Federation of Pakistan (2010 PLD SC 857) for the proposition that promises made by the government to a public functionary are to be fulfilled.

7. Learned Assistant Attorney General has appeared along with Joint Secretary Establishment Division and has submitted that following fact profile re postings and transfers of the petitioner:

- i. *Mr. Khushdil Khan Malik is a regular Principal (BS-20) of FGEI Cantonment/Garrison under Ministry of Defence who was posted on deputation as Director, Human Right on 23.08.2004 for three years;*

- ii. *Subsequently, he was posted as DS, Ministry of Human Rights under Section 10 on 04.02.2009 and subsequently posted as DS, SAFRON Division;*
- iii. *He was repatriated for the 1st time to his parent department on 03.02.2010 on the request of Ministry of Defence on account of complaint received against him and he assailed the said order by filling W.P. No.828/2011 in Islamabad High Court and also prayed for induction in Secretariat Group which vide judgment dated 12.06.2013 was allowed with the direction to process his case for induction in Secretariat Group as per rules and regulation but Establishment Division feeling aggrieved thereby filed Intra Court Appeal No.859/2013 which was allowed vide judgment dated 08.03.2018 wherein observation was made "that it will be open to the Federal Government to proceed with the placement of the officer in the light of para 8 of order dated 26.04.2017, passed by Secretary, Establishment Division".*
- iv. *On 20.10.2011 he was posted as Director General, National Counter Terrorism Authority (ACTA) but again repatriated 2nd time to his parent department on 18.10.2012 but he did not join;*
- v. *On 29.07.2013, he was posted as Director General NACTA on deputation but again he was repatriated 3rd time to his parent department but he did not join;*
- vi. *On 20.05.2016, he was posted in National Security Division. He was directed to report to Establishment Division 12.01.2007 but he filed a Cr. Org. Petition No.11/2017 in C.P. No.23/2012 (Anita Turab Case) for non-compliance of judgment regarding transfer before the completion of tenure but Supreme Court vide order dated 30.01.2017 dismissed the Cr. Org as withdrawn with direction to the petitioner to first approach the competent authority regarding his transfer/posting but he has not so approached;*
- vii. *Thereafter, he filed a representation to Secretary, Establishment Division and simultaneously filed W.P. No. 427/2017 before Islamabad High Court against notification dated 12.01.2017*

wherein he was directed to report to Establishment Division. Islamabad High Court vide order dated 06.02.2017 dismissed the petition being premature and directed the Secretary, Establishment Division to decide the officer's application within 30 days. Secretary, Establishment Division vide order dated 26.04.2017 decided the officer's appeal and observed that "the Officer's repatriation case would be decided in pursuance of final order of Islamabad High Court in ICA. No.859/2013 that too in consultation with Defense Division";

- viii. Ministry of Defence on 03.03.2017 requested Establishment Division to "repatriate the officer". But instead of obeying the lawful orders the petitioner filed another W.P. No.2425/2017 which was dismissed vide order dated 23.06.2017. The officer filed a Civil Petition. No.3042 of 2017 before Supreme Court and that court vide order dated 07.11.2017 disposed of the case on the statement of Deputy Attorney General that the officer has been made (Officer on Special Duty) OSD only for pay purpose and shall be given posting. SC further observed that respondents shall act in accordance with law and post the petitioner as early as possible;*
- ix. Establishment Division vide notification dated 29.11.2017 repatriated the officer for the 4th time. The officer filed Crl. Org. No.58/18 before Supreme Court and a W.P. No.45/2018 before IHC against repatriation orders. Establishment Division posted the officer as Joint Secretary, Textile Division subject to final outcome litigation. The august Supreme Court vide order dated 12.02.2019 disposed of the Crl. Org. No.58/18 and observed that "order dated 17.11.2017 has been complied with". Islamabad High Court vide order dated 23.01.2019 disposed of W.P. No.45/2018 on the same grounds";*
- x. Ministry of Defence vide D.O. letter dated 11.01.2019 requested Establishment Division to take disciplinary action against the officer on the ground of misconduct;*
- xi. Textile Division vide O.M dated 19.06.2019 surrendered the services of the officer to Establishment Division and*

Establishment Division vide notification dated 08.07.2019 directed the officer to report to Establishment Division. Both OM dated 19.06.2019 and notification dated 08.07.2019 are under challenge in the instant W.P.

- xii. Meanwhile, Establishment Division vide notification dated 20.08.2019 repatriated the officer 5th time to Defence Division by quoting order dated 06.08.2019. Court vide order dated 12.09.2019 raised objection that there was no direction given by the court to repatriate the officer and suspended the operation of impugned notification dated 20.08.2019.*

The learned Assistant Attorney General submitted that the petition is not maintainable as the question of transfer and posting falls within the terms and conditions of service in relation to which bar under Article 212 applies; that no civil servant has a right to stay on a certain post and the Federal Government has the requisite power under section 10 of the Civil Servant Act to repatriate a civil servant to his parent department; that the petitioner has served outside his parent department beyond the period prescribed under the Civil Servants (Appointment, Promotion and Transfer) Rules, 1973 ("**APT Rules**"); that it is the prerogative of the Federal Government to transfer him back to his parent department and the parent department also seeks his repatriation; that there is one post of BS-20 available as per information received from the Ministry of Defence and the argument of the petitioner that there is no post presently available in his parent department is without force; that the petitioner has been seeking time scale promotion but that he cannot be considered for such promotion until he is repatriated to his parent department and it is therefore in his interest to return to his parent department; that even if the petitioner is aggrieved by the transfer order he has an adequate remedy before the Federal Service Tribunal and he is in fact availing such remedy and the order impugned before this Court has also been challenged before

the Federal Service Tribunal; that the Federal Government has had to block one post due to the instant litigation and it would be in the interest of justice if the petition is dismissed and the Federal Government is allowed to repatriate the petitioner to the Defence Division.

8. In view of the arguments made, three questions arise for purposes of adjudication of this petition:

(1) Does a civil servant have a right to object to a posting or transfer order and can he/she claim to remain on a certain post or on deputation for a particular period of his/her choice?

(2) Is an order under section 10 of the Civil Servant Act for posting and transfer of a civil servant distinguishable from the order to post a civil servant on deputation and whether a posting order of a deputationist is also to be issued under section 10 of the Civil Servant Act?

(3) Does an order under section 10 to transfer a civil servant fall within the scope of terms and conditions of service of the civil servant, consequently attracting the bar imposed by Article 212 of the Constitution ousting the jurisdiction of this Court?

9. In relation to first question and third question a copious amount of case law has been produced by superior courts. The simple answer to the question of whether a civil servant has a right to seek a certain post or object to a transfer order or remain on deputation for a period of his/her own choice, is an emphatic no. And a posting order falls within the domain of terms and conditions of service attracting the bar to jurisdiction of the High Court imposed by Article 212 of the Constitution as has been discussed at length later in this judgment. The rulings of superior courts on the first question are reproduced below:

- (1) 1991 SCMR 477 (Syed Afzal Ahmad Hydari Vs. Secretary Ministry of Defence Production Division)

“Section 10 of the Civil Servants Act, 1973, in clear and unambiguous term says that every Civil Servant shall be liable to serve anywhere within or outside Pakistan on any position under the Federal Government or the Provincial Government or a local authority. We are therefore of the view that the petitioner could be transferred to work in any post under the Federal Government, without his consent”

- (2) 2007 SCMR 54 (Peer Mohammad Vs. Government of Balochistan)

“No legal right of the petitioner has been infringed. A desire simpliciter cannot be equated to that of a legal right...

It is well-settled by now that the question of posting of a Government servant squarely falls within the jurisdictional domain of the Competent Authority subject to law and rules made thereunder. The question of posting/transfer relates to terms and conditions of a Government servant and Service Tribunal would have exclusive jurisdiction to dilate upon and decide such matters and Constitutional jurisdiction cannot be invoked to get such controversies resolved.”

- (3) Dr. Shafi ur Rehman Afridi Vs. C.D.A through Chairman and others (2010 PLC CS 367).

7. We may mention here that the deputationist by no stretch of imagination and in absence of any specific provision of law can ask to serve the total period of deputation and he can be repatriated being a deputationist by the Competent Authority in the interest of exigency of service as and when so desired and such order of the competent authority cannot be questioned. The Civil Servants Act, 1973 and rules made thereunder as well as Estacode are silent about the fact that a deputationist must serve his entire period of deputation and this omission seems deliberate enabling the Competent Authority to utilize the service of an employee in the manner as it may deem fit and

proper. The period of deputation can at the best be equated to that of an expression of maximum period which can be curtailed or extended by the Competent Authority and no legal or vested rights whatsoever are available to a deputationist to serve his entire period of deputation in the borrowing Department. In this regard we are fortified by the dictum laid down in the following authorities:-

Zain Yar Khan v. Chief Engineer 1998 SCMR 2419, Aslam Warraich v. Secretary, Planning and Development Division 1991 SCMR 2330, Pakistan v. Fazal-ur-Rehman PLD 1959 SC (Pak.) 82, Sheikh Abdul Rahim's case PLD 1964 Lah. 376, Abdul Khaliq Anjum's case 1998 PLC (C.S.) 839, Government of Pakistan v. Prof. M.A. Saeed C.P.No.427-L of 1991, Prof. M. Ashraf Khan Niazi v. Chairman Board of Governors, Allama Iqbal Medical College 2003 PLC (C.S.) 243.

8. We have also examined the controversy from another angle that as to whether the Constitutional petition was maintainable or otherwise? As mentioned hereinabove it is well-settled by now that a civil servant has no vested right to complete the deputation period and matter relating to the terms and conditions of service, the Constitutional jurisdiction as conferred upon High Court under Article 199 of the Constitution of Islamic Republic of Pakistan cannot be invoked. In this regard reference can be made to the dictum laid down in the following cases:

Pakistan v. Moazzam Hussain Khan and another PLD 1959 SC 13, PLD 1964 (W.P.) Lah. 376, Abdul Qayyum v. Nasrullah Khan Draishak and others 1975 SCMR 320, Ala-ud-Din Akhtar v. Government of Punjab and another 1982 CLC 515, Ch. Muhammad Bakhsh v. Government of Punjab PLD 1989 Lah. 175, Ayyaz Anjum v. Government of Punjab and others 1997 PLC (C.S.) 123, 1997 SCMR 169, Rafique Ahmad Chaudhry v. Ahmad Nawaz Malik and others 1997 PLC (C.S.) 124, 1997 SCMR 170 and Abdul Khaliq Anjum v. Secretary Education 1998 PLC (C.S.) 839.

12. On the touchstone of the criterion as discussed hereinabove the case of petitioner has been examined and we are of the considered opinion that petitioner has no legal right whatsoever and therefore, the question of its recognition or enforcement does not arise. We have no hesitation in our mind to hold that deputation can be defined as an administrative arrangement between borrowing and lending Authorities for utilizing the services of an employee in the public interest and exigency of services against a particular post and the deputationist cannot remain on deputation for an indefinite period or stipulated period in accordance with his own whims and wishes.

- (4) 2014 PLC (CS) 82 Contempt proceedings against Chief Secretary, Sindh and others.

The procedure provided under the ESTACODE requires that a person who is transferred and appointed on deputation must be a government servant and such transfer should be made through the process of selection. The borrowing Government has to establish the exigency in the first place and then the person who is being transferred/placed on deputation in Government must have matching qualifications, expertise in the field with required experience. In absence of these conditions, the Government cannot appoint anyone by transfer on deputation.

- (5) 2014 SCMR 799 (S. Masood Abbas Rizvi Vs. Federation of Pakistan)

It is a settled principle that a deputationist does not have any vested right to remain on the post as deputationist forever or for a stipulated period, he could be ordered to be repatriated to the parent department at any time without assigning any reason.

The parent department of the deputationist is not obliged in law, to assign reasons for his repatriation.

- (6) 2015 PLC (CS) 666 (National Assembly Secretariat Vs. Manzoor Ahmad):

This was an incorrect approach of the learned High Court to entertain a constitutional petition of a Civil Servant on

the ground of the statutory violation. Such grievance of a civil servant falls within the domain of Federal Service Tribunal as mandated by the Constitution.

The learned High Court has failed to notice that the transfer under section 10 of the Civil Servants Act is itself of a temporary nature and neither confers a right on the transferee to get himself absorbed nor the borrowing department, in law, could be compelled to retain the services of such an employee on permanent basis by absorption. There is no concept of absorption of a Civil Servant in another department either in the Civil Servant Act or the Rules framed thereunder. Section 10 of the Civil Servant Act empowers the Competent Authority to order an employee from one post to another, which is never permanent in nature.

(7) *Fida Hussain Shah vs Government of Sindh (2017 PLC (C.S.) 1229*

From the above, the following inference can be drawn:

i. It is within the competence of the authorities to transfer a civil servant from one place or post to another to meet the exigencies of service or administration; provided his terms and conditions of service are not adversely affected;

ii. A civil servant has no vested rights to claim posting or transfer to any particular place of his choice, nor has he any right to continue to hold a particular post at a particular place;

iii. His transfer and posting is limited to the given tenure, or at the pleasure of the competent authorities;

iv. Normally, he is not required to acquire any specialized skill or professional training in order to serve at the new post or place;

v. His seniority and progression of career in terms of promotion and other benefits of the service are not affected by the transfer and he remains pegged to his batch or group to which he was initially appointed after completing the required common and specialized trainings and after passing the required departmental examinations conducted by the FPSC;

vi. He is posted and transferred routinely in the same grade or scale that he possesses in his service or group; unless the rule requires so or allows so.

10. The definition of deputation and the conditions that apply to the selection and posting of a civil servant on deputation was elucidated by this Court in W.P. No.194/2020 titled “Nusrat Rasheed vs. Federation of Pakistan, etc.” as follows:

“Section 1(2) of the Civil Servants Act, 1973 provides that the said Act shall apply to all civil servants wherever they may be. Under Section 2(b)(i) of the said Act, a person who is on deputation to the Federation from any Province or other Authority has been excluded from the definition of the term “civil servant.” The term “deputation” has neither been defined in the Civil Servants Act, 1973 nor in any of the rules made thereunder. In the cases of Islamic Republic of Pakistan Vs. Israr ul Haq (PLD 1981 S.C. 531), Muhammad Arshad Sultan, Section Officer, Cabinet Division Vs. Prime Minister of Pakistan, Islamabad (PLD 1996 SC 771) and Province of Punjab Vs. Ikram-ul-Haq (1986 SCMR 1994), the Hon'ble Supreme Court referred to and endorsed the meaning given to the term “deputation” in Chapter IX of the Establishment Manual, Volume I (O&M), and Serial No.29 of the Establishment Code (1989 Edition) which is reproduced herein below:-

“Hitherto, the term “deputation” has not been formally defined. However, according to the practice in vogue a Government Servant begins to be regarded as a “deputationist” when he is appointed or transferred, through the process of selection, to a post in a department or service altogether different from the one to which he permanently belongs. He continues to be placed in this category so long as he holds the new post in an officiating or a temporary capacity but ceases to be regarded as such

either on confirmation in the new post or on reversion to his substantive post.” (Emphasis added)

This is the definition of the term “deputation” accepted by the Superior Courts. In the case of Province of Punjab Vs. Ikram-ul Haq (supra), it was held inter alia that the said interpretation of the term “deputation” has the effect of a statutory rule. It was also held that the Hon'ble Supreme Court had accepted the said definition of the term “deputation” in the case of Islamic Republic of Pakistan Vs. Israr ul Haq (supra).”

It was held that an appointment on deputation basis would be void if not made through a selection process:

“Given the said definition of the term “deputation” accepted by the Superior Courts since the past few decades, it is safe to hold that a person cannot be appointed on deputation unless he or she has been subjected to a process of selection. An appointment of an officer on deputation basis would be void if such appointment is not preceded by a process of selection of the officer in question.”

This Court further elaborated how the selection process was to be run in a legal and transparent manner:

“In exercise of the powers conferred by section 10 of the Federal Public Service Commission Ordinance, 1977, the Federal Government made the Federal Public Service Commission (Functions) Rules, 1978. Rule 3(1) of the said Rules provides that the F.P.S.C. shall conduct tests and examinations for recruitment to all posts in connection with the affairs of the Federation in BPS-16 and above or equivalent. In the said notification dated 15.03.2019, there is no quota reserved for appointment by transfer to any of the posts in BPS-16 and above. Appointment to civil posts in BPS-16 and above fall within the purview of the Federal Public Service Commission (“F.P.S.C.”). Appointment by transfer to posts in BPS16 and above in the F.D.E. can be

made only if either the department/F.D.E. certifies that there is no person eligible for promotion or the departmental promotion committee, after considering the persons eligible for promotion, does not find them fit for promotion (where the post is to be filled by promotion), and if the competitive process for initial appointment initiated by the Federal Public Service Commission does not result in the appointment of a suitable candidate (where the post is to be filled by initial appointment). An appointment by transfer made to a post in BPS-16 and above without the departmental promotion committee considering candidates for promotion or without the F.P.S.C. carrying out a competitive process for initial appointment, as the case may be, would be in violation of the method of appointment set out in the said notification, and therefore unlawful."

After summarizing case law on the lack of legal right of a deputationist to serve out his initial deputation period or beyond the maximum prescribed period of deputation, the Court ruled as follows:

"Rule 20A was inserted in the APT Rules through Establishment Division's notification SRO 365(I)/2007 dated 03.05.2007. The maximum period for which a deputationist can be appointed is regulated by Rule 20A of the A.P.T. Rules. Rule 20A(1) of the A.P.T. Rules, titled "Appointment on deputation" provides that "a person in the service of a Provincial Government or an autonomous, semi-autonomous body or corporation or any other organization set-up, established, owned, managed, or controlled by the Federal Government who possesses the minimum educational qualifications, experience or comparable length of service prescribed for a post shall be eligible for appointment to the said post on deputation for a period not exceeding three years which may be extended for another period of two years on such terms and conditions as may be sanctioned by Federal Government in consultation with the lending Organization."

There was no scope under Rule 20A of the A.P.T. Rules for the deputation period of a deputationist to be extended beyond five years. Unlike the Establishment Division's said O.M. dated 18.02.1987, Rule 20A of the A.P.T. Rules does not provide for an extension of the deputation period beyond five years for "compelling reasons." Therefore, upon completion of the maximum permissible deputation period of five years, it is obligatory upon the borrowing department to repatriate a deputationist to his/her parent department. Failure on the part of the borrowing department to repatriate a deputationist who completes the maximum permissible deputation period of five years would be an actionable wrong. Payment of salary to a deputationist beyond the maximum deputation period of five years is an unnecessary and unjustified burden on the exchequer and ought to be made good from the personal coffers of the public functionaries in the borrowing department who are derelict in their duty in not relieving a deputationist upon completion of the said period. In cases where a deputationist is not relieved by the borrowing department, a deputationist should nevertheless resume his/her duties in her parent department on completion of the five years, failing which a deputationist would be liable to be proceeded against for misconduct by the parent department. At this stage, it is apposite to refer to Establishment Division's O.M. No.1/28/75-D.II(CV) dated 04.11.1980 (Serial No.28 of the Esta Code), paragraphs (ii) and (iii) whereof are reproduced herein below:-

"(ii) If a person is on deputation to a Government organization, and has completed the maximum tenure of five years, he must revert or be reverted by the borrowing office to his parent/lending Organization of the expiry of that period, otherwise, the Audit Offices concerned shall not make payment of salary and allowances to him beyond the date of expiry of five years, unless specifically

authorized by the Establishment Division. (iii) If a person is on deputation to an autonomous organization/ corporation etc., and has completed the maximum tenure of five years, it will be obligatory for that person to report back to his parent/lending Organization on the expiry of that period irrespective of his being relieved by the borrowing Corporation/ Body etc. Failure to report back unless specifically authorized otherwise by the Establishment Division will be construed as "Misconduct" and make him liable to disciplinary action under the Government Servants (Efficiency and Discipline) Rules, 1973."

The only exception to the said rule is that where the posting of a deputationist is on the basis of the wedlock policy."

11. The expression "deputation" appears in the Civil Servants Act, 1973 ("CSA") only once. Section 2(b) of CSA defines "civil servant" as "a person who is a member of an All-Pakistan Service or of a civil service of the Federation, or who holds a civil post in connection with the affairs of the Federation, including any such post connected with defence, but does include (i) a person who is on deputation to the Federation from any Province or other authority;..." A deputationist is thus excluded from the definition of a civil servant and merely by virtue of serving against a post ordinarily held by a civil servant, the employment status of a deputationist doesn't change to that of a civil servant. Rule 20A of Civil Servants (Appointment, Promotion and Transfer) Rules, 1973 ("APT Rules") regulates appointments on deputation basis, the scheme of which has been analyzed later in this judgment.

12. Serial No. 8.7 of ESTA Code explains that deputation is a not a regular method of appointment in the following terms:

Reference Establishment Division's O.M.No.1/28/75-D.2/R.3/R.I, dated 18th February, 1987, wherein the normal

period of deputation for all categories of government servants had been fixed as three years, extendable by another two years with the prior approval of the competent authority. Under the said instructions Secretaries of the Ministries/Divisions concerned were authorized to grant extension in deputation period beyond the initial period of three years in respect of government servants holding posts in BPS-17 to BPS-19. 2. It has been observed, however, that there is a growing tendency to resort to postings through deputationists despite the fact that deputation is not a normal prescribed method of appointment as, under the Civil Servants (Appointment, Promotion and Transfer) Rules, 1973, three methods of appointments are required to be made either by promotion or by initial appointment or by transfer. The method of appointment to posts is also prescribed in the recruitment rules. Filling up the posts through deputation, if not provided so in the recruitment rules, leads to following adverse implications:- (i) In case of promotion posts, the promotions of departmental personnel are delayed/stopped. (ii) In case the post is required to be filled through initial appointment, quota of a particular province is affected. 3. In order to bring the deputation policy in conformity with the present policy of postings and transfers circulated vide Establishment Division's O.M.No.10/10/94-R.2, dated 22nd March, 1994, and also to discourage the increasing tendency of postings through deputation, it has been decided that, in future, the deputation period will be limited to three years only. A maximum two years extension in the deputation period will be considered only in exceptional cases, in the public interest, and with the prior approval of the Establishment Division in all cases of government servants in BPS-17 and above. The extension cases shall be forwarded to the Establishment Division at least six months before the expiry of the three-year deputation period and with proper justification for the proposal. However, no deputation proposals will be entertained which will adversely affect the method of appointment to the post as laid down in the

recruitment rules. Accordingly, all such proposals must invariably be accompanied by a formal assurance signed by at least the Joint Secretary (Admn) to that effect. 4. Ministries/Divisions are requested to also bring these instructions to the notice of their Attached Departments, Subordinate Offices, Corporations, Autonomous Bodies, etc, under their administrative control, for guidance/strict compliance. It may please be noted that arrangements have been made in consultation with the Auditor General's Office whereby payment of emoluments etc. to those on deputation will be stopped forthwith, immediately following the completion of the three-year deputation period, unless the Establishment Division's prior approval has been obtained and conveyed to the concerned Audit Circle. 5. The existing instructions on this subject issued vide Establishment Division's O.M.No.1/28/75-D.2/R.3/R.I, dated 18th February, 1987 stand modified to the above extent. [Authority.- Estt. Division's O.M. No.1/28/75-R.I, dated 14-3-1995.

13. In view of the definition and scope of an appointment on deputation basis, the question to be considered is whether an order under section 10 of CSA for posting and transfer of a civil servant distinguishable from an order to post a deputationist, and whether a posting order of a deputationist can be issued under section 10 of the Civil Servant Act. Section 10 of CSA is reproduced below:

10. Posting and transfer.- Every civil servant shall be liable to serve anywhere within or outside Pakistan, in any equivalent or higher post under the Federal Government, or any Provincial Government, or local authority, or a corporation or body set up or established by any such Government;

Provided that nothing contained in this section shall apply to a civil servant recruited specifically to serve in a particular area or region:

Provided further that, where a civil servant is required to serve in a post outside his service or cadre, his terms and conditions of service as to his pay shall not be less favorable than those to which

he would have been entitled if he had not been so required to serve”.

14. Section 10 comprises machinery powers and neither confers any substantive right on a civil servant nor vests unstructured discretion in the Federal Government to post a civil servant in disregard of procedural requirements applicable for appointment to the post in question and the required criteria and qualifications for such job. The scope of Section 10 was considered by the learned Lahore High Court in Barrister Sardar Mohammad Ali Vs. Federation of Pakistan (PLD 2013 Lahore 343-378) and the following was held:

“Section 10 falls under Chapter-II of CSA titled "Terms and Conditions of Service of a Civil Servant" and deals with one of the terms and conditions of service namely: Posting and Transfer. The section simply provides that a civil servant is liable to serve anywhere in or outside Pakistan and can be posted anywhere under the Federal Government or a corporation or a body set up by the Government. First, PTA is not an organization established by the executive order of the Government but has established by the legislature. Second, section 10 only casts an obligation on a civil servant that he can be transferred to any post, it does not entitle the Federal Government or the civil servant to appoint or to be appointed, as the case may be, to any post through transfer without qualifying the requirements of the said post under the law. This is also evident from the reading of Rules 7 and 8 of the Civil Servants (Appointment, Promotion and Transfer) Rules, 1973. These Rules provide that promotions and transfers to posts in BS-2 to 18 and BS-19 to 21 and equivalent shall be made on the recommendations of the appropriate Departmental Promotion Committee or Selection Boards, respectively. Hence, section 10 is subject to the requirement of the post in question. Similarly, the post of Member and Chairman, PTA could not be filled through a mere transfer order without following an open and transparent procedure of appointment as

discussed above. Invoking section 10 of CSA for the appointment of respondent No.5 to the post of Member and Chairman, PTA appears to be a colourable exercise of power. It is also unclear how respondent No.5 was handpicked from the pool of civil bureaucracy without a proper broad-based search on the basis of an objective criteria. This pre-ordained selection of respondent No.5, besides being illegal, carries a ring of favouritism."

15. Deputation is an arrangement between the Federal Government on the one hand and a borrowing or lending organization or provincial government on the other, affording Federal Government the flexibility to employ required human resource from outside when unavailable within its realm or to deploy its human resource within other organizations and/or governments to meet "exigencies of service". Thus, law requires an agreement between the Federal Government and the lending or borrowing organization, as the case may be. In the event that the civil servant employed by the Federal Government is being sent on deputation to a borrowing organization or government i.e. outside the Federal Government, the civil servant is mandated to serve as required by Section 10 of CSA and his consent for such appointment is not required. If, however, it is a case of Federal Government procuring the services of a deputationist from a lending organization/provincial government, whether or not the consent of the person being appointed on deputation basis is required is to be determined by the lending organization/government, in view of the terms and conditions of the service of the person in question, as Section 10 of CSA creates no obligation for such deputationist to abide by the Federal Government's command to serve as directed. Such deputationist serves on the basis of the arrangement agreed upon between the Federal Government and lending organization/government. Either way, Section 10 of CSA vests no right in a deputationist. His only right is to continue to serve on conditions regarding his pay that are not

less than favourable than those of his original service, in view of the second proviso to section 10 of CSA.

16. Thus, posting and transfer is to be ordered under section 10 of CSA when it involves a civil servant being posted by the Federal Government as a regular transfer case or on a deputation-basis outside the Federal Government. The posting and transfer of an employee of a lending organization/government on deputation-basis or his repatriation back to such lending organization/government would not fall within the scope of Section 10, even though a misconceived reference to Section 10 in such posting or transfer order would have no legal consequences. The appointment of a civil servant who is an employee of the Federal Government on deputation-basis in a borrowing organization/government must not be confused with the appointment of an employee of a lending organization/government on deputation-basis within the Federal Government. These two species of deputation involve civil servants employed by the Federal Government on the one hand and employees of organizations/provincial governments on the other hand and are subject to distinguishable schemes provided for under Rule 20A(1) and 20A(2) of the APT Rules, respectively.

17. Let us now consider the scope and process of making an appointment on deputation-basis within the Federal Government. Rule 3 of APT Rules provides three methods of appointment of civil servants i.e. by promotion, by transfer or by initial appointment. Rule 7 identifies the Departmental Promotion Committee or the Central Selection Board as the competent authority to run the process of appointment by transfer, depending on the basic pay scale of the post in question. Rule 8 mandates that the civil servant to be appointed by transfer must “possess the qualification and meet the conditions laid down” for

purpose of transfer and such criteria shall be applied by the Departmental Promotion Committee or the Central Selection Board, as the case may be. Rules 8-B provides for appointment to a post on an active-charge basis in the event that the most senior civil servant in the cadre or service does not possess the specified length of service. Rule 9 mandates that appointment by transfer can only be made from amongst persons holding an appointment in the same basic pay scale on a regular post. Rule 14 requires that vacancies in all posts in BPS-16 and above are to be filled on an All-Pakistan basis.

18. Rule 20-A deals with appointment on deputation and is reproduced below:

20A. Appointment on deputation. – (1) A person in the service of a Provincial Government or an autonomous, semiautonomous body or corporation or any other organization set-up, established owned, managed or controlled by the Federal Government who possesses the minimum educational qualifications, experience or comparable length of service prescribed for a post shall be eligible for appointment to the said post on deputation for a period not exceeding three years which may be extended for another period of two years on such terms and conditions as may be sanctioned by Federal Government in consultation with the lending Organization.

(2) Subject to any rule or orders on the subject issued by the Federal Government, a civil servant who fulfills the conditions and is considered suitable may be sent on deputation to an autonomous, semi-autonomous body or corporation established by law or to the Provincial Government on such terms and conditions as may be decided by the lending and borrowing organizations.

(3) In case of appointment under sub-rule (1) or sub-rule (2) pension contribution shall invariably be made by the borrowing organizations.

19. A plain textual reading of the rules projects that to be eligible to be appointed to a post on deputation in the Federal Government, such person must be in the service one of the following: (i) a Provincial Government; (ii) an autonomous body; (iii) a semi-autonomous body; (iv) a corporation; or (v) an organization set-up, established, owned, managed or controlled by the Federal Government. Rule 20-A(1) thus provides an exhaustive list of employers whose employees are eligible for appointment to a post on deputation. The Federal Government itself is conspicuously missing from this list for purposes of an appointment to a post on deputation within the Federal Government.

20. A person in the service of the Federal Government (i.e., a Division, attached Department or subordinate Office) cannot be transferred to another post within the Federal Government on deputation basis. The reasons for this include the following:

(1) The terms “Government”, “Division”, “Attached Department” and “Subordinate Office” are defined in rule 2 of the Rules of Business, 1973. Autonomous and Semi-Autonomous bodies, corporations and organizations and agencies set-up or controlled by the Federal Government are not the Federal Government themselves or part of it. They are one step removed from the Federal Government, even when owned, managed or controlled by the Federal Government. They have a separate legal identity and existence. Rule 4(5) of the Rules of Business provides that, “the business of government, other than the business done in the Federal Secretariat or the attached departments, shall

be conducted through such agencies and offices as the Prime Minister may determine from time to time”.

(2) It has been provided in rule 20A(2) that any “civil servant” subject to fulfillment of relevant conditions, can be sent on deputation “to an autonomous, semi-autonomous body or corporation established by law or to a Provincial Government....” The draftsman would have used the broader term “civil servant” in Rule 20A(1) if the pool of employees eligible to be appointed as deputationists within the Federal Government was to include those serving within Divisions, Attached Departments and Subordinate offices comprising the Federal Government. The Rules being sub-statutory legislation, the principles of statutory interpretation require us to accord meanings to the terms used, especially when different terms and expressions have been used in the sub-cluses of the same Rule. It must be assumed that the choice of words in 20A(1) that excludes the term “civil servant” for purpose of determining eligibility of persons to be appointed on deputation within the Federal Government is deliberate.

(3) It is settled law that a government or public authority may only do what it is expressly authorized by law to do, for purposes of Article 4 of the Constitution, as opposed to an ordinary citizen who may do anything he is not prohibited from doing by law, as has held in *Gadoon Textiles* 1997 SCMR 641 and *[PML-N vs. Federation]* PLD 2007 SC 642. In the event that civil servants employed within one department of the Federal Government were also eligible to be employed on deputation basis within another department of the Federal Government, the Federal Government could have provided for the same in Rule 20A(1) just as it did in Rule 20A(2).

(4) There is wisdom in the scheme of Rule 20A. In view of the provisions of Rule 3 through 14 discussed above, an employee of the Federal Government can be appointed to a post within the Federal Government on transfer basis, subject to the approval of the Departmental Promotion Committee (“DPC”) or Central Selection Board (“**Board**”), as the case may be, and fulfillment of the qualification criteria. Such appointment by transfer is of a permanent nature, subject to satisfactory completion of the probation period. It is only when the Federal Government can neither find an employee to fill a post on promotion-basis nor one from across the Federal Government on transfer-basis, that it goes head-hunting for someone serving a provincial government or an organizations outside the Federal Government to find an appropriate employee possessing the relevant qualifications and satisfying the applicable criteria for the post to be filled on a temporary basis due to the exigency or immediate need to fill such post. This is where deputationists feature, who serve in the Federal Government on a temporary basis to be returned to their cadre or service or department or organization or government, as the case maybe, where they have a lien on their post and retain their seniority.

(5) Pursuant to Civil Service Regulation 77 read together with office memoranda issued by the Finance Division, deputationists are eligible to be paid an additional allowance while serving on deputation. It would be both discriminatory and a fraud on the public exchequer if an employee of the Federal Government were to be appointed to another temporary post within the Federal Government and be paid extra compensation for such service in the form of deputation allowance. If an employee is available within

the Federal Government and eligible to serve against a post to be filled, even if such post were outside his cadre or service or department, he would be considered to appointed on transfer-basis under the APT Rules and such transfer, subject to satisfaction of the rules applicable to the post and satisfactory completion of probation, would be an appointment of a permanent nature and not one rendering the appointee eligible for deputation allowance.

21. A person to be appointed to a post on deputation basis must meet the relevant criteria, including minimum education qualifications, experience and length of service. Such criteria are to be applied by the relevant Departmental Promotion Committee or Central Selection Board, as the case may be. Within the schemes of the Rules the process would work as follows:

(1) The DPC or Board would consider filling a post by promotion or transfer or initial appointment, in view of the rules applicable to the post in question. Unable to fill the post through these methods of permanent appointment prescribed in the APT Rules or an active-charge basis and having come to the conclusion that the post needs to be filled on a temporary-basis due to an exigency involved, the selection authority would inform the appointing authority of such need. The Federal Government, then, on behalf of the appointing authority, would solicit the services of a deputationist from the eligible pool of employees prescribed by Rule 20A(1).

(2) Once an appropriate employee has been identified, through a transparent process, his/her credentials would be scrutinized by the relevant selection authorities (DPC or Board etc. as the case may be), to ensure compliance with the criteria for appointment to the post in question.

(3) Once the selection authorities make a recommendation to the competent authority, the Federal Government, acting for the competent authority, would enter into an arrangement with the lending organization, pursuant to which such person would be posted as deputationist against a post within the Federal Government.

22. Under Rule 20A of APT Rules, a deputationist can be appointed for a period of three years, extendable by two years, which is the ceiling or maximum permissible period for such appointment. There is however, no floor or minimum prescribed period under Rule 20A(1). It is now settled, as already discussed in detail above, that the person serving on deputation has no right to insist on serving out the initially determined or extended deputation period. He/she can be repatriated to the lending organization (or provincial government, as the case may be) at any time by the Federal Government in its own discretion or on the request of the lending organization.

23. The appointment on deputation basis is not an appointment by transfer for purposes of Rule 3 of the APT Rules. Rule 9 provides that, "appointments by transfer shall be made from amongst the persons holding appointment on a regular basis in posts in the same basic pay scale or equivalent to or identical with the posts to be filled". This refers to persons serving within the Federal Government and excludes deputations for purposes of Rule 20A(1). Appointment on deputation basis is thus a distinct category of appointment under Rule 20A, and is thus provided for in Part-IV of the Rules that regulate ad hoc and temporary appointments. Being temporary appointments, they do not create a right for deputationists to be confirmed against posts on which they serve on deputation-basis.

24. Appointments on a deputation basis, within the Federal Government, for purposes of Rule 20A(1) cannot be ordered in exercise of powers under section 10 of Civil Servants Act. The powers of the Federal Government under section 10 of CSA can naturally not be exercised to post and transfer employees who serve provincial governments or autonomous or semi-autonomous bodies or other organizations etc. that comprise the pool for deputationists for purposes of Rule 20A(1). The transfer and posting of a civil servant as a deputationist outside the Federal Government for purposes of Rule 20A(2) can be ordered under section 10 of CSA. But rule 20A(2) has a completely differently scheme and need not be discussed here as it does not relate to the subject matter of the instant petition.

25. The order for appointment on deputation basis under Rule 20A(1) is made by the Federal Government in consultation with the lending organization, which can be a provincial government or an autonomous body regulated by its own statute. And is, therefore, not a posting and transfer order for purposes of section 10 of CSA, as Section 10 does not bind employees or such lending organizations or governments to serve as directed by the Federal Government. However, nothing turns on whether an appointment by transfer is made and subsequent posting ordered under section 10 of CSA or appointment by deputation made under Rule 20A(1) and posting ordered by the Federal Government subject to the arrangement with the lending organization. Even a misconceived reference to Section 10 of CSA in such posting order does not affect the rights and entitlements of deputations, the Federal Government or the lending organization, as section 10 of CSA is a machinery provision that merely vests power in the Federal Government to transfer and post its own employees subject to all applicable rules attracted to an appointment to the post in question. The only relevant

corollary of this scheme is that a deputationist once appointed to a certain post in the Federal Government, in the manner described above, cannot be further transferred to any other post in the Federal Government in exercise of powers under section 10 of CSA. Any subsequent posting or transfer of a deputationist would constitute a fresh appointment as a deputationist under Rule 20A(1) and the entire process for determining need or exigency, running a transparent selection, consulting with the lending organization/government and then making the appointment etc. would need to be followed de novo.

26. The third question (i.e. whether an order under section 10 to transfer of a civil servant falls within the scope of terms and conditions of service of the civil servant and subject to the bar under Article 212 of the Constitution) has already been answered above. But let us look at relevant case law to understand the nature of this ouster.

- (1) Islamic Republic of Pakistan v. Safdar Mehmood (PLD 1983 SC 100)

Thus under the new dispensation, the Service Tribunal was made the sole arbitrator of all disputes relevant to the terms and conditions of the civil servants and the jurisdiction of ordinary courts was altogether excluded in these matters.

- (2) I.A. Sharwani and others v. Government of Pakistan (1991 SCMR 1041)

Civil servant cannot by-pass Service Tribunal by adding a ground of violation of the Fundamental Rights. Service Tribunal will have jurisdiction in a case which is founded on the terms and conditions of the service even if it involves the question of violation of the Fundamental Rights.

- (3) Ahmad Salman Waris v. Nadeem Akhtar (PLD 1997 SC 382)

In order to make a matter exclusively cognizable by a tribunal under the Act, and to create an ouster of jurisdiction of all other Courts and Tribunals under article 212, it must be shown that the matter is agitated by a civil servant as defined under the Act, it has arisen from a final order of a departmental authority whether, original or appellate, it concerns the terms and conditions of the aggrieved civil servant and that it is not covered by the exceptions mentioned in proviso (b) (i) and (ii) of section 4 of the Act. If any of the conditions mentioned above are non-existent in a case then, the bar contained in Article 212 of the Constitution will not be operative.

- (4) Asadullah Rashid v. Haji Muhammad Muneer (1998 PLC (CS)1371)

Constitutional petition under Article 199 of the Constitution is not maintainable by a civil servant in relation to any matter connected with the terms and conditions of service in respect whereof the Service Tribunal has jurisdiction, in view of Art. 212 of the Constitution.

Orders even if malafide, ultra vires or coram non judice, fell within the ambit of Service Tribunal and jurisdiction of Civil Court including high Court is ipso facto ousted as result of barring provision of Art 212 of the constitution.

High Court before taking any decision regarding admission of a Constitutional petition and/or passing order granting interim relief will first decide the question of its jurisdiction in view of Art 212 of the Constitution and in the light of the judgments of Supreme Court.

- (5) Khalid Mahmood Wattoo v. Government of Punjab (1998 SCMR 2280)

The ouster contemplated under Article 212 is of the constitutional nature and, therefore, of necessity curtails jurisdiction of the High Court totally in respect of the subject matter committed to the Service Tribunals.

- (6) *Superintending Engineer, Highways Circle, Multan v. Muhammad Khurhsid* (2003 SCMR 1241)

Constitutional jurisdiction of High Court, would be declined where the petitioner has not exhausted all remedies available to him before filing of constitutional petition. Even otherwise where a particular statute provides a self-contained machinery for the determination of questions arising under the Act as where law provides a remedy by appeal or revision to another Tribunal fully competent to give any relief, any indulgence to the contrary by the High Court is bound to produce a sense of distrust in statutory Tribunal.

Where, therefore, a petitioner without exhausting his remedy provided by the statute under which he complained had filed a writ petition, the petition in the circumstances would not lie.

- (7) *Tasleem Jan and others v. Muhammad Zaman and Others* (2005 SCMR 695)

Any right denied on basis of eligibility or otherwise could be challenged before Service Tribunal.

Petitioner in Constitutional petition had asserted point of eligibility, which matter never related to fitness of an officer to hold a higher post. Only Service Tribunal had jurisdiction in such matter and not High Court.

- (8) *Peer Muhammad v. Government of Balochistan* (2007 SCMR 54)

...the provisions as contained in Article 212 of the Constitution of Islamic Republic of Pakistan ousts

jurisdiction of all other Courts and orders of the departmental authority even though without jurisdiction or mala fide can be challenged only before the Service Tribunal and jurisdiction of Civil Court including High Court is specifically ousted. The plea of mala fide does not confer upon High Court jurisdiction to act in the matter in view of the Constitutional ouster as contained in Article 212 of the Constitution of Islamic Republic of Pakistan and learned Service Tribunal has full jurisdiction to interfere in such-like matters. In this regard we are fortified by the dictum laid down in case Kh. Abdul Wahid v. Chairman, WAPDA 1986 SCMR 1534.

(9) Syed Arshad Ali v Pakistan Telecommunication Company Ltd. (2008 SCMR 314)

If right had been conferred by a statute and complete mechanism was provided for enforcement thereof in that Statute there could be no occasion to invoke applicability of fundamental rights. Jurisdiction of High Court was barred under Article 212 of the Constitution, as specific forum was provided for redressal of grievance of petitioners, even if order proposed to be challenged might have been passed in whatsoever circumstances viz. mala fide, coram non judice or without jurisdiction. Constitutional jurisdiction could not be exercised by High Court where equally efficacious remedy was available.

27. The foundational principles that guide the jurisprudence re ouster of jurisdiction of courts are (i) access to justice, (ii) separation of powers, and (iii) lack of authority of parliament to oust jurisdiction of courts through a statutory instrument where such jurisdiction is vested by the Constitution itself. Our Constitution guarantees fundamental rights of citizens and has established the judicature as the machinery to enforce these rights. Where an ouster clause has the effect of taking away the

adjudication of a grievance involving fundamental rights of citizens from the judiciary or depriving a citizen of the right of having a grievance adjudicated altogether, constitutional courts have read down such ouster clauses and held that they would exercise constitutional jurisdiction on grounds of *corum non judice*, jurisdictional defect, *mala fide* and breach of fundamental rights (see for example the enunciation of this principle in The State v. Zia-ur-Rehman [PLD 1973 S.C 49]) This is however not the case in relation to Article 212, which is a constitutional ouster clause. It bars the High Court from adjudicating disputes involving terms and conditions of persons in the service of Pakistan, but provides another legal forum for adjudication of such disputes, in the form of the Federal Services Tribunal (“FST”), the orders of which can be appealed before the august Supreme Court under Article 212. The concerns regarding access to justice and separation of powers and ouster of constitutional jurisdiction of the High Court through a statutory instrument are thus not attracted in relation to the constitutional ouster provided by Article 212.

28. In view of Peer Mohammad and Syed Arshad Ali, the High Court has no jurisdiction to adjudicate the grievance of a civil servant on grounds of *mala fide*, *corum judice*, lack of jurisdiction or breach of fundamental rights. Even if a civil servant is aggrieved by an order passed in relation to terms and conditions of service for being in breach of his fundamental rights, the remedy would lie before FST in view of Article 212 read together with Section 4 of the Federal Service Tribunal Act, 1973 (“FST Act”) and Rule 6(2) of The Services Tribunal (Procedure) Rules, 1974. The only exception to the ouster of High Court’s jurisdiction is the grievance of a person in the service of Pakistan that (i) doesn’t relate to his terms and conditions of service and/or disciplinary matters, or (ii) where the grievance relates to determination of fitness of a civil servant for appointment or

promotion in relation to which jurisdiction of FST is ousted by Rule 4(1)(b) the FST Act, and consequently the aggrieved civil servant has no other adequate remedy.

29. Having analyzed the relevant provisions and principles of law, let us apply them to the facts of the instant case. The petitioner is a civil servant employed by Federal Government Educational Institutions (Cantonments/Garrisons), which is an attached department of the Defense Division as per Rules of Business, 1973 and consequently a part of the Federal Government itself. As a civil servant employed by the Federal Government, he is mandated to serve as directed by the Federal Government in exercise of powers under Section 10 of CSA. However, as he does not fall within the scope of Rule 20A(1), being an employee of the Federal Government itself, he could never have been appointed on deputation-basis against another post within the Federal Government. If he were to be appointed against another post within the Federal Government, it could only be done on a permanent basis through one of the three modes prescribed under the APT Rules, subject to compliance with the selection process and qualification criteria applicable to the such post, as discussed in detail earlier in this judgment. Consequently, all posting and transfer orders issued in relation to the petitioner appointing him within other Divisions and/or Attached Departments of the Federal Government on deputation-basis or in exercise of powers under Section 10 of CSA were illegal for being in breach with provisions of the CSA read together with APT Rules.

30. In view of the principles enunciated above on the basis of judgments of the august Supreme Court, the instant petition is devoid of merit and is therefore **dismissed**. The subject-matter of the instant petition relates to the terms and conditions of service of the petitioner who is a civil servant. The petitioner could

therefore also not agitate his grievance through the instant petition before this Court in view of the bar in Article 212 of Constitution and the law settled in relation to its scope and effect. Given the litany of complaints brought by the petitioner before this Court in relation to terms and conditions of his service, this petition is being dismissed subject to the cost of Rs. 50,000/- payable by him to respondent No. 1 under Section 35 of the Civil Procedure Code.

(BABAR SATTAR)
JUDGE

Announced in the open Court on **03.03.2021**.

JUDGE