

Form No: HCJD/C.

JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Case No: Writ Petition No. 1233 of 2015

Iftikhar Rashid and 3 others
Vs.
Federation of Pakistan and 5 others

Petitioners by: **Mr. Babar Sattar, Advocate.**
Respondents No.1to4 by: **Mr. Afnan Karim Kundi, Additional Attorney-General.**

Date of Decision: **29.05.2015.**

AAMER FAROOQ, J.- The petitioners, in the instant Constitutional petition, seek *inter alia* declaration and direction to the effect that the police officers and civil servants are required to exercise authority through application of mind in accordance with law and that disciplinary proceedings initiated against respondents No.5 & 6 are void *ab initio*.

2. The petitioners are retired Officers of Police Force. The present writ petition is in the nature of public interest litigation inasmuch as a declaration is sought that the civil servants in general and officers in police service in particular are required to perform their duties in accordance with law and are not to follow the illegal orders of the Superiors. The present writ petition has been filed in the wake of disciplinary proceedings initiated by respondents No.1 to 4 against respondents No.5 & 6 who allegedly failed to comply with the orders passed by the Superiors and take action against the protestors before the Parliament House.

3. Notices were issued to respondents No.1 to 4 by this Court and in response thereto learned Additional Attorney-General entered appearance. At the outset learned Additional Attorney-General raised preliminary objection regarding maintainability of the Constitutional petition in light of Article 212 of the Constitution of the Islamic Republic of Pakistan, 1973 as well as on the ground that the petitioners are not aggrieved persons within the meaning of

words as contained in Article 199 (1)(a) of the Constitution. Learned Additional Attorney-General in support of his objections *inter alia* submitted that it is an established principle that what is not permissible directly is also not permissible indirectly. In this behalf he contended that under Article 212, the Constitutional petition is barred and filing of the instant petition not by respondents No.5 & 6 but by the petitioners is indirectly seeking what is prohibited expressly. In support of his submissions learned Additional Attorney-General placed reliance on the case titled *Haji Muhammad Boota and others v. Member (Revenue), Board of Revenue, Punjab and others* (PLD 2003 SC 979 and *Ali Azhar Khan Baloch v. Province of Sindh and others* (2015 SCMR 456).

4. Learned counsel for the petitioners on the issue of maintainability of the instant petition *inter alia* submitted that the bar provided in sub Article (2) of Article 212 of the Constitution is not attracted in the instant case inasmuch as under section 4 of the Service Tribunal Act, 1973 only an aggrieved civil servant can file an appeal against the order of departmental authority, therefore, since the petitioners are not the aggrieved civil servants, they cannot agitate the matter before the Service Tribunal. In respect of the objection regarding the petitioners not being aggrieved party, the learned counsel submitted that the Courts have interpreted the concept as provided in Article 199 in a liberal manner and the same is not restricted to a person having direct interest in the issue. In support of his contention learned counsel placed reliance on the case titled *Ardeshir Cowasjee and 11 others v. Sindh Province and others* (2004 CLC 1353), *Mushtaq Ali v. Government of Sindh* (PLD 1998 Karachi 416), *Mian Fazal Din v. Lahore Improvement Trust, Lahore and another* (PLD 1969 SC 223) and *Muhammad Afzal and othes v. Government of Pakistan and others* (1987 SCMR 2078). Learned counsel further submitted that through the instant petition the petitioners seek enforcement of fundamental rights and for the referred purpose the objection pertaining to the maintainability as raised by learned Additional Attorney-General does not apply. In support of his contention learned counsel placed reliance on the case titled *Pakistan Petroleum Ltd. v. Director-General Mines and*

Minerals Mines and Manpower Building and 2 others (PLD 2011 Quetta 1), *Makik Changez Khan and 4 others v. Provincial Police Officer, Karachi and 7 others* (2011 YLR 868), *The State and others v. Director General FIA and others* (PLD 2010 Lahore 23) and *K.B. Threads (Pvt.) Limited through Chief Executive and others v. Zila Nazim, Lahore (Amir Mehmood) and others* (PLD 2004 Lahore 376). Learned counsel submitted next that the instant petition is in the nature of public interest litigation and hence is maintainable. In this behalf reliance was placed on the case of *Muhammad Yasin v. Federal of Pakistan* (PLD 2012 SC 132) and *Philips Electrical Industries v. Pakistan and others* (2000 YLR 2724). Learned counsel finally submitted that the august Supreme Court of Pakistan has laid down the parameters in various pronouncements regarding the manner in which the civil servants in general and police officers in particular are to perform their duties and in this behalf has held that illegal orders are not to be followed. Learned counsel placed reliance on the case titled *Ali Azhar Khan Baloch and others v. Province of Sindh and others* (2015 SCMR 456), *Syed Mahmood Akhtar Naqvi v. Federal of Pakistan* (PLD 2013 SC 195) and in the matter *Of Arrest Of Accused On Murder Of Her Daughter Waheeda* (2014 SCMR 83).

5. The petition is in the nature of public interest litigation and the petitioners are retired police officers. The issues raised in the instant petition are both general and particular. In so far as the general relief is concerned, the petitioners are seeking a declaration to the effect that civil servants/police officers are bound to perform their duties in accordance with law and are not to follow the illegal orders of the Superiors. In so far as this aspect of the case is concerned, there is no cavil to the proposition that the civil servants/police officers are required to perform their duties in accordance with law and no declaration vis-à-vis the same is required, as such, inasmuch as the Hon'ble Supreme Court of Pakistan in recently reported case titled *Ali Azhar Khan Baloch v. Province of Sindh* (2015 SCMR 456) has observed that public functionaries had to reinforce good governance by observing rules strictly and adhere to the same in public service. It was further

observed that the public functionaries were not obliged to follow illegal orders of higher authorities.

6. The second limb of relief sought in the instant petition is with respect to the disciplinary proceedings initiated against respondents No.5 & 6 and also direction to respondents to initiate proceedings against the persons who usurped the authority of the civil servants. Admittedly, respondents No.5 & 6 are civil servants and disciplinary action has been initiated against them by respondents No.1 to 4. Under Article 212 of the Constitution bar is provided whereby with respect to issues pertaining to the terms and conditions of service of any civil servant no Court shall have jurisdiction in the matter except the Courts/Tribunals established under the said Article. In this behalf Article 212 is reproduced below for the sake of brevity and is as follows:

“212. Administrative Courts and Tribunals. (1) Notwithstanding anything hereinbefore contained, the appropriate Legislature may by Act provide for the establishment of one or more Administrative Courts or Tribunals to exercise exclusive jurisdiction in respect of-

- (a) matters relating to the terms and conditions of persons who are or have been] in the service of Pakistan, including disciplinary matters;*
- (b) matters relating to claims arising from tortious acts of Government, or any person in the service of Pakistan, or of any local or other authority empowered by law to levy any tax or cess and any servant of such authority acting in the discharge of his duties as such servant; or*
- (c) matters relating to the acquisition, administration and disposal of any property which is deemed to be enemy property under any law.*

(2) Notwithstanding anything hereinbefore contained, where any Administrative Court or Tribunal is established under clause (1), no other court shall grant an injunction, make any order or entertain any proceedings in respect of any matter to which the jurisdiction of such Administrative Court or Tribunal extends and all proceedings in respect of any such matter which may be pending before such other court immediately before the establishment of the Administrative Court or Tribunal [other than an appeal pending before the Supreme Court,] shall abate on such establishment];

Provided that the provisions of this clause shall not apply to an Administrative Court or Tribunal established under an Act of a Provincial Assembly unless, at the request of that Assembly made in the form of a resolution, Majlis-e-

Shoora (Parliament) by law extends the provisions to such a Court or Tribunal.

(3) An appeal to the Supreme Court from a judgment, decree, order or sentence of an Administrative Court or Tribunal shall lie only if the Supreme Court, being satisfied that the case involves a substantial question of law of public importance, grants leave to appeal"

7. The plain reading of the referred Article shows that disciplinary matters are included in the terms and conditions of persons who are or have been in the service of Pakistan. Moreover, under sub Article (2) of Article 212 a bar is provided from entertaining any petition with respect to *lis* which falls under the jurisdiction of Administrative Court or Tribunal established under the said provision of the Constitution. The Hon'ble Supreme Court of Pakistan in 2015 SCMR 456 *supra* has clinched the law on the subject and reaffirmed the bar provided in the aforementioned Article and observed that the High Court should not entertain a suit or petition filed by a civil servant relating to his/her terms and conditions of service in view of the bar contained under Article 212 of the Constitution. Under Service Tribunal Act, 1973 the remedy of appeal is provided to a civil servant who is aggrieved of any order passed by the departmental authority. Learned counsel for the petitioners has argued that since the petitioners are not civil servants, therefore, bar provided under sub Article (2) of Article 212 as well as the right of initiation of appeal as provided in section 4 of Service Tribunal Act, 1973 is not applicable to them, hence the petition is maintainable. The referred argument by the learned counsel is not tenable inasmuch as it is an established principle of law that what is not permissible directly is also not permissible indirectly. In this behalf reliance is placed on the judgment of the Hon'ble Supreme Court of Pakistan in the case titled *Hazji Muhammad Buta and others v. Member (Revenue), Board of Revenue, Punjab and others* (PLD 2003 SC 979). If the argument of the learned counsel for the petitioners was to be accepted then that would tantamount to circumventing the bar provided by Article 212 inasmuch as any person could assail the proceedings initiated against him/her through another person in the garb of public interest

litigation.

8. It is *sine qua non* for initiation of proceedings under Article 199 that the petitioner (s) should have a *locus standi* to institute the proceedings or in other words the petitioner (s) should be an aggrieved party. Seminal judgement of the apex Court on this issue is *Mian Fazal Din v. Lahore Improvement Trust, Lahore* (PLD 1969 SC 223) wherein reliance was placed on a judgment of the Lahore High Court titled *Montgomery Flour and General Mills Ltd. v. Director, Food Purchases* (PLD 1957 Lahore 914) wherein it was observed that for a person to have *locus standi* to initiate a petition for issuance of writ, he must have some right in the matter and he need not have a right in that strict sense of the term which is provided in article 170 of the Constitution. Similar view was taken by the august Supreme Court of Pakistan in 1987 SCMR 2078 wherein PLD 1969 SC 223 *supra* was followed and it was observed that it is enough if the applicant discloses that he had a personal interest in the performance of legal duty which if not performed or performed in a manner not permitted by law could result in loss of some personal benefit or advantage, curtailment of privilege or liberty of franchise. In the case titled *Dr. Imran Khattak and another v. Ms. Sofia Waqar Khattak, PSO To Chief Justice and others* (2014 SCMR 122) the Hon'ble Supreme Court of Pakistan held as follows:

"It would exercise such jurisdiction under Article 199(1)(a)(i), (ii) and (c) on the application of an aggrieved person while under 199(1)(b)(i) & (ii) on the application of any person whether aggrieved or not, and not on an information or on its own knowledge. In the case of "Tariq Transport Company, Lahore v. Sargodha Bhera Bus Service and others" (PLD 1958 SC (Pak) 437), this Court held that a High Court was not competent merely on an information or on its own knowledge to commence certiorari proceedings or other proceedings of a similar nature under Article 170 of the Constitution of Islamic Republic of Pakistan, 1956. In the case of "Fazl-e-Haq, Accountant General, West Pakistan v. The State" (PLD 1960 SC (Pak) 295), this Court reiterated the view by holding that the extraordinary jurisdiction relating to a writ could only be exercised by the High Court when moved by a party whose legal rights have been denied"

In *Hafiz Hamadullah v. Saifullah Khan and others* (PLD 2007 SC 52) the apex Court held as follows:

“With regard to the first objection it may be noted that under Article 199(1)(a) of the Constitutional jurisdiction of the High Court can be invoked by an aggrieved person which denotes a person who has suffered a legal grievance, against whom a decision has been pronounced which has wrongfully deprived him or wrongfully refused him something which he was legally entitled to. It is also the requirement that the person invoking the constitutional jurisdiction under Article 199 of the Constitution has to establish that any of his legal or fundamental right guaranteed under the Constitution has been violated resulting in legal loss”

In *N.W.F.P. Public Service Commission and others v. Muhammad Arif and others* (2011 SCMR 848) it was observed as follows:

“The right which is the foundation of an application under Article 199 of the Constitution is a personal and individual right. The legal right may be a statutory right or a right recognized by the law. A person can be said to be aggrieved only when a person is denied a legal right by someone who has a legal duty to perform relating to the right. There must not only be a right but a justiciable' right in existence, to give jurisdiction to the High Court in the matter. Unless whatever right personal or otherwise, on which the application is based is established, no order can be issued under Art.199.”

The petitioners are retired police officers who have no *locus standi* in respect of seeking a declaration to the effect that disciplinary proceedings initiated against respondents No.5 & 6 are *ultra vires* the Constitution. The referred declaration by the petitioners is being sought on the basis of enforcement of fundamental rights and on the touchstone that the action taken by respondents No.1 to 4 is based on *mala fide* and is *coram non judice*. The Hon'ble Supreme Court of Pakistan in a series of judgements has held that even if an order pertaining to the terms and conditions of service is based on *mala fide* or is without jurisdiction even then a petition under Article 199 of the Constitution is not maintainable. In this behalf reliance is placed on *Pir Muhammad v. Government of Baluchistan* (2007 SCMR 54) and *Muhammad Khan Ranjha and another v. Secretary, Government of Punjab, Irrigation Department Lahore and 5 others* (2014 PLC (CS) 244. All factual and legal defences are available to respondents No.5 & 6 in the proceedings before the competent authority or the Service Tribunal. Similarly the petitioners have no *locus standi* to seek direction, on the basis of aforementioned

judgements of the apex Court for initiation of action against public office holders as they do not have a legal right to ask for such a relief.

9. For the foregoing reasons, the instant petition is not maintainable and is hereby dismissed.

(AAMER FAROOQ)
JUDGE

M.Naveed

Approved for Reporting