

Form No: HCJD/C.

JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Case No: Writ Petition No.3517 of 2015

Imran Iqbal Panjwani
Vs.
Federation of Pakistan etc.

Petitioner by: **Mr. Asim Hafeez, Advocate.**
Respondent No.1 by: **Syed Hasnain Ibrahim Kazmi,**
Deputy Attorney-General.
Respondent No.2&3 by: **Mr. Azid Nafees & Ibrar Saeed,**
Mr. Shahzad Ali Rana, Advocates.

Date of Decision: **27.11.2015.**

AAMER FAROOQ, J.- Through the instant petition the petitioner has challenged show cause notice dated 13.10.2015 issued by respondent No.3 on behalf of respondent No.2.

2. The petitioner is an employee of respondent No.2 and joined as Executive Director, Securities Market Division in the year 2013. The petitioner was suspended with immediate effect vide office order dated 09.10.2015 and a fact finding inquiry was initiated against him and others for discerning involvement of the officers of respondent No.2 in extending help to the sponsors of KASB Bank Limited. The referred inquiry was initiated in pursuance of e-mail dated 14.08.2015 wherein it was alleged that the petitioner acted in an unprofessional and negligent manner pertaining to the affairs relating to KASB Bank Limited. The fact finding inquiry was delegated to one of the Commissioners of respondent No.2. The report of the fact finding inquiry was submitted before the Commissioner and in pursuance thereof a show cause notice was issued to the petitioner which has been assailed in the instant petition.

3. Learned counsel for the petitioner *inter alia* submitted that the show cause notice as well as proceedings in pursuance thereof and prior thereto are in violation of section 8(2) of Securities &

Exchange Commission of Pakistan Act, 1997 (the Act). It was further contended that only the Commission constituted under section 3 could competently issue show cause notice under clause 6.16 of Securities & Exchange Commission of Pakistan Human Resource Manual. Learned counsel further argued that the fact finding report dated 17.08.2015 submitted by one of the Commissioners namely Mr. Tahir Mehmood was in violation of clause 6.7 (i) of Securities & Exchange Commission of Pakistan, Human Resource Manual. It was also submitted that the proceedings instituted against the petitioner are in violation of the case titled *Muhammad Ashraf Tiwana and others v. Pakistan and others* (2013 SMR 1159). Learned counsel also pleaded that the Commission is not authorized to hear the show cause proceedings against the petitioner on account that the Chairman and Commissioners are biased against him inasmuch as the inquiry was initiated on the instructions of the Chairman Securities & Exchange Commission of Pakistan and the same was conducted by one of the Commissioners. In support of his contention learned counsel placed reliance on the case titled *Mitchell v. Georges* (2015 SCMR 1020), *New Jubilee Insurance Company Ltd. Karachi v. National Bank of Pakistan, Karachi* (PLD 1999 Supreme Court 1126), *M. Hanif Niazi v. The Director of Food and others* (1986 SCMR 1066), *Pir Imran Sajid and others v. Managing Director/General Manager (Manager Finance) Telephone Industries of Pakistan and others* (2015 SCMR 1257), *Asif Ali Zardari and another v. The State* (PLD 2001 Supreme Court 568), *Pakistan Defence Officers' Housing Authority and others v. Lt. Col. Syed Jawaaid Ahmed* (2013 SCMR 1707) and *the President v. Mr. Justice Shaukat Ali* (PLD 1971 Supreme Court 585).

4. Learned counsel for the respondents *inter alia* submitted that the instant petition is not maintainable inasmuch as only a show cause notice has been issued and all the pleas taken in the instant Constitutional petition can be agitated before the Commission. In support of his contention learned counsel placed reliance on the case titled *Khalid Mahmood Ch. And others v. Government of the Punjab through Secretary, Livestock and Diary Development* (2002 SCMR

805). It was further contended that that the relationship between the petitioner and respondent No.2 is that of master and servant and since there are no statutory Rules governing the relationship between the parties, therefore, the Constitutional petition is not maintainable. Learned counsel for SECP also submitted that under section 10 of the Act the Commission can delegate its authority to any Commissioner or Commissioners.

5. Admittedly, the Human Resource Manual of Securities & Exchange Commission of Pakistan is a non-statutory instrument, therefore, there are no statutory Rules governing the relationship between the petitioner and respondent No.2. It is also admitted position that the petitioner is an employee of respondent No.2. In such like cases where there are no statutory Rules of service between the employer and the employee, it is an established principle that the Constitutional petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 is not maintainable. The Hon'ble Supreme Court of Pakistan in case titled *Pakistan Defence Officers' Housing Authority and others v. Lt. Col. Syed Jawaid Ahmed* (2013 SCMR 1707) laid down the following principles with respect to the employees of various organization/authorities:

50. The principles of law which can be deduced from the foregoing survey of the precedent case-law can be summarized as under:--

(i) Violation of Service Rules or Regulations framed by the Statutory bodies under the powers derived from Statutes in absence of any adequate or efficacious remedy can be enforced through writ jurisdiction.

(ii) Where conditions of service of employees of a statutory body are not regulated by Rules/Regulations framed under the Statute but only Rules or Instructions issued for its internal use, any violation thereof cannot normally be enforced through writ jurisdiction and they would be governed by the principle of 'Master and Servant'.

(iii) In all the public employments created by the Statutory bodies and governed by the Statutory Rules/Regulations and unless those appointments are purely contractual, the principles of natural justice cannot be dispensed with in disciplinary proceedings.

(iv) Where the action of a statutory authority in a service matter is in disregard of the procedural requirements and is violative of the principles of natural justice, it can be interfered with in writ jurisdiction.

(v) That the Removal from Service (Special Powers) Ordinance, 2000 has an overriding effect and after its promulgation (27th of May, 2000), all the disciplinary proceedings which had been initiated under the said Ordinance and any order passed or action taken in disregard to the said law would be amenable to writ jurisdiction of the High Court under Article 199 of the Constitution.

6. The relevant principle for the present purposes is (iv) whereby the august Apex Court held that where action of a statutory authority in a service matter acted in disregard of a procedural requirement and is violative of the principle of natural justice it can be interfered with in writ jurisdiction. The main thrust of argument by the learned counsel for the petitioner is that the Commission is biased against the petitioner inasmuch as the fact finding inquiry was initiated on the instructions of Chairman, Securities & Exchange Commission of Pakistan and the same was done by one of the Commissioners, therefore, both have biased against the petitioner as they have already made up their mind, therefore, no impartial proceedings can be conducted by the Commission. In this behalf under section 3 of the Act, the Commission comprises of Chairman and the Commissioners. In case titled *Muhammad Ashraf Tiwana and others v. Pakistan and others* (2013 SMR 1159) the Hon'ble Apex Court held that the provisions of section 8 of the Act whereby it provides for termination of services of an employee can only be exercised by Securities & Exchange Commission of Pakistan alone and by none else. It was further observed that it is well settled in our jurisprudence that a discretionary authority conferred on person or a body by statute cannot be delegated. The august Apex Court in the referred case also observed as follows:

“Likewise is the case of firing/termination and disciplinary action as per section 8(2) of the Act. A Committee or functionary of SECP may be delegated the function of fact finding etc. or even to make a recommendation for dismissal of an employee, based on an inquiry, but section 8(2) ibid does not envision any person or authority (other than SECP) as a "competent authority" for

the purpose of terminating the employment of an employee of SECP.

That the framers of the Act chose to deal with this matter in a separate section of the statute makes it clear they intended to distinguish between, on the one hand, powers and functions of the SECP which are listed in section 20 and are, by virtue of section 10, delegable, subject to limitations and, on the other hand, the authorization to hire and fire employees (section 8) granted to the SECP which, as discussed above, constitutes the non-delegable discretionary authority of the SECP involving the individual input, consideration, evaluation and judgment of each Commissioner and Chairman. In other words, a holistic reading of the Act and section 10 shows that it does not provide cover for delegation of this core function of hiring and firing of employees; the SECP itself as a collegiate body must take decisions on it. In addition, the general principles applicable to construction of instruments and texts relating to delegation of authority can appropriately be applied to section 10 read with section 20 of the Act. Accordingly such texts are to be strictly construed and no delegation of authority is to be assumed or inferred if it is not expressly provided for or which may be required by necessary implication.

50. We can only conclude that, under the Act the hiring and firing of employees is a decision which the SECP alone can take and that too through a collective and deliberative exercise. There is a conclusive indicator of this in section 8(2) of the Act. The term "pleasure of the Commission" and its limitations have been discussed above. However, even if the term is taken to mean a literal, absolute and unconstrained ability to fire an employee, it will be evident that the "pleasure" has to be the pleasure of SECP. No delegate of SECP can possibly know what the "pleasure" of SECP (the collegiate body) is. The deliberative process itself envisions a consultation between at least five Commissioners and is essential for the purpose of expressing the will and pleasure of the Commission."

7. In light of the abovementioned judgement by the Apex Court the termination of services of any employee of respondent No.2 can only be undertaken by Securities & Exchange Commission of Pakistan. However, the fact finding inquiry or such like ancillary matters can be delegated to any officer including Commissioner but the final act of termination of services has to be undertaken by the collective body. The fact that a fact finding inquiry is conducted by one of the Commissioners or was initiated on the direction of the Chairman making the referred persons biased against the petitioner is not sustainable. In this behalf in case titled *the President v. Mr. Justice Shaukat Ali* (PLD 1971 Supreme Court 585) it was observed

as follows:

“In the absence of any pecuniary or proprietary interest in the subject-matter of the proceeding, it is essential that a real likelihood of bias must be shown. The mere fact that the Council had scrutinised the declaration of assets is not sufficient to establish such likelihood or bias, for, if it were so, then no judge, issues a rule in a motion or issues a notice to show cause in any other proceeding or frame a charge in a trial, can ever heal that matter or conduct that trial. The reason is that a preliminary inquiry intended to determine whether a prima facie case has been made out or not is a safeguard against the commencement of wholly unwarranted final proceedings against a person. To say that a charge should be framed against a person amounts to saying nothing more than that the person should be tried in respect of it. Anybody who knows the difference between a prima facie case and its final trial would reject the objection as misconceived. We accordingly reject them as misconceived.

There is furthermore, in this case, another exception which should not be lost sight of, namely, that "the rule of disqualification must yield to the demands of necessity, and a Judge or an officer exercising judicial functions may act in a proceeding wherein he is disqualified even by interest, relationship or the like, if his jurisdiction is exclusive and there is no legal provision for calling in a substitute, so that his refusal to act would destroy the only tribunal in which relief could be had and thus prevent a termination of the proceeding" (vide American Jurisprudence, Vol, 30, page 770). The Supreme Judicial Council is the only body which can hold an inquiry into the capacity of conduct of a Judge and if this entire body is itself disqualified, there will be no other forum before which the inquiry can be conducted. The procedure of co-option under clause (3) of Article 128 would not resolve the difficulty, if this objection is allowed to prevail, for after three Judges of the Supreme Court are disqualified, there will be only 3 left to constitute the Council which has to consist of 5 persons under Article 128. There is no provision for a quorum therein. The quorum was fixed at 3 only by the amendment of the 6th May 1971. The preliminary objections are, therefore, overruled as being misconceived.”

8. In light of the above judgement there is nothing on record to substantiate the apprehension of the petitioner that the Chairman and one of the Commissioners is biased against him. The mere apprehension of being biased is not sufficient for disqualifying any member of the Commission. There is no cavil with the principle laid down by the august Hon’ble Supreme Court of Pakistan in case titled *Asif Ali Zardari and another v. The State* (PLD 2001 Supreme Court 568) or *Muhammad Mohsin Siddiqi v.*

Government of West Pakistan (PLD 1964 Supreme Court 64). However, they are not applicable in the instant case. Similarly, the principle laid down by the Hon'ble Supreme Court of Pakistan in case titled *Pir Imran Sajid and others v. Managing Director/General Manager (Manager Finance) Telephone Industries of Pakistan and others* (2015 SCMR 1257) is that every public functionary is supposed to function in good faith, honestly and within the precincts of its power so that person concerned should be treated in accordance with law as guaranteed by Article 4 of the Constitution. It would include principles of natural justice, procedural fairness and procedural propriety. The action which is mala fide or colourable is not regarded as action in accordance with law. The referred principle is not attracted in the circumstances inasmuch as there is nothing on record which reflects that the inquiry initiated against the petitioner was tainted with mala fide or is a colourable exercise of power by respondent No.2. The fact that Chairman authorized/instructed the initiation of inquiry and one of the Commissioners conducted the same does not *per se* make them bias. It was a preliminary action on part of respondent No.2 on the basis of which show cause notice has been issued and reply is sought from the petitioner. In case the reply of the petitioner is satisfactory the matter might end however, in case it is not, then further action would be taken and the same has to be taken by respondent No.2 i.e. Securities & Exchange Commission of Pakistan and no one else. In light of judgement of the Hon'ble Supreme Court of Pakistan PLD 1971 SC 585 *ibid* where any action is to be taken by any authority under the law and there can be no replacement of it then the principle of natural justice has to make the way for necessity.

9. Even otherwise, it is an established principle that show cause notice is mere initiation of proceedings and not the proceedings in itself and no Constitutional petition is

maintainable against it unless the same is without jurisdiction or suffers from patent legal defective. In this behalf the case law cited by the learned counsel for respondent No.2 is instructive; in the case titled *Khalid Mahmood Ch. And others v. Government of the Punjab through Secretary, Livestock and Diary Development* (2002 SCMR 805) the Hon'ble Supreme Court of Pakistan held that where disputed show cause notice was still a preliminary stage as after considering the replies if the competent authority comes to the conclusion that it was a case of taking further proceedings only then the proceedings shall commence, therefore, Constitutional petition was pre-mature and ought to be dismissed. Learned counsel for the petitioner submitted that show cause notice has been issued by the Chairman whereas it should have been signed by respondent No.2 as a Commission. In this behalf learned counsel for respondent No.2 has drawn attention of this Court towards resolution/authority given to the Chairman to initiate the show cause proceedings in light of the same it cannot be said that show cause notice is without authority.

10. For the foregoing reasons, the instant petition is without merit and is accordingly dismissed.

(AAMER FAROOQ)
JUDGE

M.Naveed

