

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

CASE NO. : W.P. NO.4275-2018

Mehboob Hussain

Vs.

**Zarai Taraqati Bank Limited through its Company Secretary,
Islamabad etc.**

CASE NO. : W.P. NO.4777-2018

Mehboob Hussain

Vs.

**The Federation of Pakistan through Secretary, Ministry of
Finance, Islamabad etc.**

Petitioner by : Syed Nayyar Hussain Rizvi, Advocate
Respondents by : Mr. Muhammad Shoaib Shaheen, Advocate
Raja Saad Sultan, Assistant Attorney
General.
Date of decision : 29.01.2019

AAMER FAROOQ J. This judgment shall decide instant petition as well as W.P. No.4777-2018, as common questions of law and facts are involved.

2. The petitioner is an employee of Zarari Taraqati Bank Limited. He was appointed as Executive Vice President (EVP) in the Bank and was working as Chief Financial Officer, when he was transferred vide Office Memorandum dated 06.11.2018 and posted in HR Pool, HR Division, Head Office, Islamabad. The petitioner assailed the said Office Memorandum in W.P. No.4275-2018. Meanwhile, the petitioner was served with a notice on 20.11.2018 calling upon him to explain his position within 15-days regarding irregularities in his appointment as Executive Vice President. The referred letter was assailed by the petitioner in W.P. No.4777-2018.

3. Learned counsel for the petitioner, *inter alia*, contended that petitioner was working as Chief Financial Officer and is in Executive Pay Scale being Executive Vice President; that order for transfer as well as issuance of explanation regarding appointment has been issued by the Acting President of the Bank, who is not competent to

do so; that the petitioner is fully qualified and holds the requisite qualification, which at the time of his appointment, were duly verified by the employer. It was further contended that being the Chief Financial Officer, he could have been only transferred by the Board of the Bank in light of para 13(3) of Public Sector Companies (Corporate Governance) Rules, 2013; that there was neither any justification or basis for transfer of the petitioner nor issuance of letter dated 20.11.2018.

4. Learned counsel for the respondent Bank, *inter alia*, contended that petitioner was transferred in light of the policy of the Bank inasmuch as Board of Directors duly resolved that any person, who is EVP and Divisional Head, would be generally transferred after three years in light of the policy of State Bank of Pakistan and since the petitioner has been serving as Chief Financial Officer for the last three years therefore he was transferred. It was further contended that petitioner holds M.A. qualification in 3rd Division and in light of the policy of the Bank, any person who has 3rd Division, is not entitled to be appointed; that the instant petition is not maintainable in light of the decision of the Hon'ble Supreme Court of Pakistan reported as 2013 SCMR 642; the appointments, which were made under the original Act/Ordinance are protected being statutory and in the case of subsequent appointments, the principle of master and servant applies; that since the appointment of petitioner was made in 2014 therefore relationship is one of master and servant.

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

6. The petitioner has been transferred vide Office Memorandum dated 06.11.2018 and is posted in HR Pool, HR Division, Head Office, Islamabad of the respondent Bank.

7. In so far as the transfer of the petitioner is concerned, the thrust of the arguments by learned counsel for the petitioner is that Public Sector Companies (Corporate Governance) Rules, 2013 are applicable and the transfer of the Chief Financial Officer could have

only be done with the approval of the Board of the Bank. The referred rules are applicable to the Public Sector Companies and not to the Bank, which is a statutory organization falling under the regulations of State Bank of Pakistan.

8. The Board of Directors of Zarai Taraqati Bank has formed guidelines regarding competent authority for issuance of appropriate orders regarding appointment, transfer and posting. In this behalf, in light of 32nd meeting of Human Resource Management Committee, all Divisional Heads, who are working in the Scale of EVPs, would normally be transferred after three years and the competent authority to do so is the President.

9. Even-otherwise, the transfer and posting is the exigency of the service and cannot be questioned as long as the same is not tainted with malafide and suffers from any other violation of law. In the instant case, there is no malafide surfacing on the face of record.

10. In so far as the competency of the Acting President of the Bank is concerned, learned counsel for the respondent Bank drew the attention of the Court towards Procedural Regulations for Corporate/Commercial Banking and under clause (6) of the same, Chief Executive Officer is the one who is entrusted with the whole or substantial or part of management of the affairs of the Bank and the position of the Chief Executive Officer, includes President as well as Acting President. The current incumbent Syed Talat Mahmood, who is the Chief Executive Officer and the Acting President of the Bank has been granted the power of attorney by the Board of the Bank. Moreover, in the minutes of 19th meeting held on 13.10.2005 of the Board of Directors, the President of the Bank is empowered to take all actions including disciplinary proceedings in accordance with staff regulations.

11. In so far as the objection by learned counsel for the respondent Bank regarding maintainability of instant petition is concerned, the case law reported as 'Zarari Taraqati Bank Limited and others Vs. Said Rehman and others' (2013 SCMR 642) is instructive. In the referred case, the august Apex Court observed as follows:-

“5. *Agricultural Development Bank Ordinance, 1961 was gazetted on 11-2-1961 and the Regulations were drafted immediately thereafter when the Board had yet to be constituted. Those Regulations in absence of the Board were sent to the Government for approval and after Government's approval those were brought into force. It was on 3/4 May, 1961 that those were placed before the Board of Directors and approved. The approval by the Government did not make it statutory as requirement of approval by the Government stood dispensed with in terms of section 39 of the Ordinance, 1961; that the Agricultural Development Bank Ordinance 1961 (IV of 1961) was, however, amended through Act XII of 1973 and thereby eight Sections of the said Ordinance including section 39 were amended (relatable to regulations). A proviso was added to section 39(2) and the requirement of prior approval of the Federal Government for making regulations was reinserted. The said proviso reads as follows:--*

"Provided that no regulation made with respect to the matters mentioned in clauses (e) and (f) shall take effect until it has been approved by the Federal Government".

6. *The effect of the afore-mentioned amendment, according to learned counsel, would be prospective and all regulations framed after 1973 would be statutory as requirement of approval by the Federal Government was made a condition precedent. In support of this submission, he relied on a judgment of this Court in Anwar Hussain v. Agricultural Development Bank of Pakistan (1992 SCMR 1112).*

7. *Elaborating his submission, learned counsel added that the Agricultural Development Bank of Pakistan Officers Service (Efficiency and Discipline) Regulation, 1975 were statutory as those were duly approved by the Federal Government.*

But in the appeals in hand, he maintained, the issues raised are relatable to promotions whereas the Officers Service (Efficiency and Discipline) Staff Regulations 1975 which are statutory, cater to disciplinary matters. The regulations governing issues of promotion or the Agricultural Development Bank Staff Regulations, 1961 were neither approved by the Federal Government nor it was so required prior to the amendment by Act XII of 1973.

8. *The Agricultural Development Bank Ordinance, 1961 was however repealed with the promulgation of the Agricultural Development Bank of Pakistan (Reorganization and Conversion) Ordinance, 2002. The Bank was converted into a corporation, all the employees were transferred and became the employees of the company and it was provided under the Ordinance that these employees shall be governed and subject to same rules and regulations as were applicable to them before the effective date.*

9. *A close reading of section 6 of the Ordinance, 2002, according to learned counsel, would indicate that the legislative intent was that the employees of the Bank who stood transferred to the newly created/converted company were to be governed by the same rules as existed prior to promulgation of new Ordinance and that would mean that so far as the matters pertaining to efficiency and discipline are concerned, the employees would be governed by the Agricultural Development Bank Staff Regulations of 1975 which are statutory. However, the subject of promotions (contained in paragraph 17 of the Staff Regulations, 1961) has not been approved by the Federal Government after the Regulations, 1961 were made by the Board. Therefore, the subject of promotions continues to be non-statutory in nature. He added that after promulgation of the Agriculture Development Bank of Pakistan (Amendment) Act, 1973, no Regulations on the subject of promotions have been made except the Promotion Policy, 1999, which has never been approved by the Federal Government and, therefore, non-statutory.*

15. *Historically statutory rules and orders were the means by which delegated legislation used to be made in United Kingdom. "The Rules Publication Act 1893 in England defines "rule making authority" to include every authority authorized to make any statutory rules. Statutory rules are defined as rules, regulations or by-laws under any Act of Parliament, in England. Orders are excluded from the statutory definition of statutory rules as being administrative. In England regulation is the term most popularly understood and the one favoured by the Committee on Ministers' Powers, who suggested that regulations should be used for substantive law and rules for procedural law, while orders should be reserved to describe the exercise of executive power or the taking of a judicial or quasi judicial decision (See Craies on Statute Law, 7th Ed. At p. 303). The validity of*

statutory instruments is generally a question of vires, i.e., whether or not the enabling power has been exceeded or otherwise wrongfully exercised¹."

16. *The "rules" and "regulations" framed under any Act are meant to regulate and limit the statutory authority. All statutory authorities or bodies derive their powers from statutes which create them and from the rules or regulations framed thereunder. Any order passed or action taken which is in derogation or in excess of their powers can be assailed as ultra vires. Rules and regulations being forms of subordinate legislation do not have substantial difference as power to frame them is rooted in the statute. Statutory bodies are invariably authorized under the Act to make or adopt rules and regulations not inconsistent with the Act, with respect to such matters which fall within their lawful domain to carry out the purposes of the Act. This rule making power of such bodies, called 'delegated legislation' has assumed importance in the contemporary age. "The justification for delegated legislation is threefold. First, there is pressure on parliamentary time. Second, the technicality of subject matter necessitates prior consultation and expert advice on interests concerned. Third, the need for flexibility is established because it is not possible to foresee every administrative difficulty that may arise to make adjustment that may be called for after the statute has begun to operate. Delegated legislation fills those needs²."*

17. *Broadly the salient characteristics of statutory rules are threefold:--*

- (i) Rules or Regulations are framed by statutory or public body;*
- (ii) Those are framed under the authority or powers conferred in the statute;*
- (iii) Those have statutory Governmental approval or statutory sanction.*

18. *The question as to which rules or regulations are statutory and how they affect the rights of the employees has been a subject of comment in several judgments. In Principal, Cadet College, Kohat v. Muhammad Shoab (PLD 1984 SC 170), this Court considered this issue with reference to sections 17 and 18 of the West Pakistan Government Educational and Training Institutions Ordinance, 1960. Section 17(1) of the said Ordinance provided that the Government may make rules for carrying out the purposes of the said Ordinance and section 18 provided that the Board of Governors may subject to the approval of the Government, frame regulations "not inconsistent with the provisions of this Ordinance and the rules made thereunder, to carry out the purposes of this Ordinance." Since the "rules" framed by the Board of Governors, governing the appointment, promotion, retirement, termination of service and dismissal of staff employed by the Board had not been made by the Government, those 'rules', the Court held "could not be regarded as "rules" under section 17, nor having been approved by the Government, be treated as Regulations under section 18 thereof. These "rules" therefore could only be regarded to be in the nature of mere instructions issued for the guidance of the Board of Governors and the Principal of the Cadet College, Kohat." This view was reiterated in Zia Ghafoor Piracha v. Chairman, Board of Intermediate and Secondary Education (2004 SCMR 35) wherein in para 7, it was held as follows:--*

"7. The Service Regulations of the Employees of the Board were framed by the Board. However, as has been determined by the learned Single Judge of the Lahore High Court, the Government, as required by the Act, has not given its formal approval to these Regulations. In these circumstances, these Regulations may be termed as internal instructions or domestic rules having no status of statutory rules. Reference in this regard is made to the case of "The Principal Cadet College, Kohat and another v. Muhammad Shoab Qureshi (PLD 1984 SC 170). In that case, the Government under the West Pakistan Government Educational and Training Institution Ordinance, 1960 was empowered to make Rules for carrying out the purposes of the Ordinance under section 17 thereof. Similarly, under section 18, the Board was also empowered to make Regulations subject to approval of the Government. There was identical situation in the aforesaid case as is now prevailing in the present case because the Regulations though made by the Board but the approval of the Government had not been secured. Similarly, the Government too had not made any Rules as mandated by section 17 ibid."

19. *An identical issue was considered by this Court in Asad Bashir v. Chairman Board of Intermediate and Secondary Education, Lahore and others (2006 PLC (C.S.) 110) and relying on the afore-referred precedent case-law, the Court upheld the judgment of the learned Lahore High Court and held that since the rules/regulations governing the service of the appellants were non-statutory, the Constitution petitions were not maintainable.*

20. *In Muhammad Mubeen-us-Salam v. Federation of Pakistan (PLD 2006 SC 602), the question inter alia of the remedies available to employees who are governed by statutory rules was a moot point and this Court observed in para 50 as under:--*

"Prima facie, this provision of law, i.e. section 2-A of the STA, 1973 has not advanced the cause of employees of Corporations, etc. by providing them remedy before the Service Tribunal because initially in the case of a Corporation/body, etc. if it has statutory backing, and rules are framed thereunder, its employees other than the workers, used to invoke the jurisdiction of the High Court under Article 199 of the Constitution i.e. a remedy which is always considered to be speedy, expeditious and inexpensive; whereas the employees governed by the relationship of master and servant rule used to approach the Civil Court for the redressal of their grievance while workers and the workmen were eligible to seek remedy before the local Labour Courts, functioning under the new dispensation of Industrial Relation Ordinance, 2002, at the Divisional level with a right of appeal before the respective High Courts and appeal under Article 185(2) or a petition for leave to appeal under Article 185(3) of the Constitution before this Court, under which this Court enjoys vast jurisdiction, as compared to limited jurisdiction under Article 212(3) of the Constitution."

21. *Similarly in Executive Council Allama Iqbal Open University v. Muhammad Tufail Hashmi (2010 SCMR 1484), this Court held as follows:--*

"9. The principle perceived from the above judgments is that the employees of those organizations, which are discharging functions in connection with the affairs of Federation, can approach the learned High Court under Article 199 of the Constitution but subject to the condition if their services are protected under the statutory rules."

22. *Statutory rules create certain rights for employees and impose obligations on the statutory authorities. The statutory authorities and functionaries cannot deviate or act in derogation to those rules or regulations. Any order passed or action taken by a public authority which is in conflict with those statutory rules can be challenged under Article 199 of the Constitution"*

In light of the above judgment, after 2002, status of respondent Bank underwent the change, as it became a statutory corporation. In this behalf, Agriculture Development Bank (Staff Service) Regulations, 1961 framed under repealed Ordinance namely Agricultural Development Bank Ordinance, 1961 were declared to be statutory by the august Apex Court, however subsequent to the transfer, employees were given protection under Agricultural Development Bank of Pakistan (Re-Organization and Conversion) Ordinance, 2002. Appointments made after 2002 were not governed through the statutory regulations and the relationship between employer and the employee is one of master and servant. It is trite law that where

rules of service are non-statutory, a petition under Article 199 of the Constitution is not maintainable unless there is violation of law.

12. As noted above, Acting President of Zarai Taraqati Bank Limited was duly competent to order transfer of the petitioner and even initiate disciplinary proceedings. In this behalf, as pointed by learned counsel for respondent Bank that the petitioner had 3rd Division in MA Degree and hence had incorrectly submitted his qualification while making application to the Bank; since this aspect of the case pertains to the merits of the disciplinary proceedings against the petitioner hence it is not appropriate to render any finding on the same at this stage. The decision to transfer as well as initiation of disciplinary proceedings is within the authority of the respondent Bank hence warrants no interference.

13. For the above reasons, petitions are without merits hence dismissed.

(AAMER FAROOQ)
JUDGE

Zawar