

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P No.1719 of 2020

Faqeer Muhammad
Vs
Chief Election Commissioner of Pakistan, etc

Petitioner By: Mr. Rashid Ali Advocate.
Respondents By: Mr. Sanaullah Zahid, Advocate.
Mr. Amjad, Assistant Director (Law)
& Mohsin Ali Khan, Assistant Director
(Estb).
Date of Hearing: 28.07.2020

Ghulam Azam Qambrani, J: Through this petition, the petitioner has invoked the jurisdiction of this Court filed under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 with the following prayer:-

"In view of the above circumstances, it is most respectfully prayed;

- (i) *That the impugned notification of transfer of petitioner and charge sheet alongwith office order dated: 12.06.2020 issued by respondent No. 1 for conducting inquiry may very kindly be set aside/suspend and may kindly be declared as illegal, void and against the law and natural justice.*
- (ii) *Further the respondents may very graciously be directed to sanction the application of LPR of the petitioner dated 24.06.2020 which is pending before respondent No.1.*
- (iii) *That the respondents be directed to perform their functions in connection with the affairs of the Federation justly, fairly and legally. They are also refrained from doing anything that they are not permitted by law to do and be directed to act as they are required by law to do.*
- (iv) *That the respondents may kindly be restrained not to take any adverse action against the petitioner during the pendency of the writ and its final decision.*

Any identical relief pendent lite due to the petitioner ex-debito justitae be graciously granted."

2. Briefly stated facts of the petition are that the petitioner joined the Election Commission of Pakistan as Upper Division Clerk on 2nd December, 1984 and now a days performing his duties with full devotion honesty and having unblemished record for more than thirty five years of service. He also performed duty as Returning officer for KP-105 in Khyber District as District Election Commissioner, Lakki Marwat and conducted the election. He also performed his duties has head of team for printing of ballot papers for local government elections at PCP Press Islamabad for the whole province of KPK. The petitioner was serving as District Election Commissioner at Lakki Marwat, KPK. On 15.05.2020, the petitioner moved an application for grant of two days casual leave from 18th to 19th May, 2020 to the Regional Election Commissioner and he sanctioned the causal leave and that was communicated to the petitioner. On 15th June, 2020, the petitioner received a telephonic call from Director Election, KPK and he informed that he has been transferred from Lakki Marwat to Washuk District, Baluchistan with the direction to immediately relinquish the charge. The transfer notification was communicated to the petitioner through mobile whatsapp on same date. The petitioner left the charge at Lakki Marwat as a protest on 16th June, 2020 at afternoon and thereafter reached Quetta on 22.06.2020 and submitted charge assumption report on 23rd of June, 2020 at Washuk, Baluchistan. The petitioner visited the Provincial Election Commissioner Baluchistan on 22.06.2020 and was informed that he has been charge sheeted on the absence of two days i.e. 18th & 19th May, 2020 and a written charge sheet and allegations was received by the petitioner on 22.06.2020. After leaving charge at Lakki Marwat, the petitioner submitted an application for Leave Preparatory to retirement for 365 days through Provincial Election Commissioner, Khyber Pakhtunkhwa, Peshawar to the respondent No.1 on the ground that the petitioner is 57 years old and has recently lost his father and elder brother within a short span of time and further he has no male

child. After assumption of charge at Washuk, Baluchistan, another application for Leave Preparatory to retirement was submitted to respondent No.1 through District Election Commissioner, Washuk Baluchistan on 24th June, 2020 and the same was forwarded by Regional Election Commissioner, Kharan, Baluchistan, on same date, which is still pending, hence this writ petition.

3. Learned counsel for the petitioner has contended that the impugned notifications of transfer, charge sheet and inquiry dated 12.06.2020 is against the law and facts and is not sustainable in the eye of law; that the impugned transfer notification and charge sheet dated 12.06.2020 were issued mainly on the ground of two days absence and he was on leave duly sanctioned by the competent authority; that the petitioner never remained absent from duty; that the transfer notification was communicated immediately to the petitioner while the charge sheet and inquiry order were concealed and were communicated when the petitioner took over the charge at Washuk, Baluchistan on 22.06.2020. Next contended that the impugned order is a worst example of colourable exercise of powers by the authority and also against the principle of natural justice; that the valuable rights of the petitioner are involved. Further contended that if the impugned notification for transfer, charge sheet and inquiry order is not suspended/set aside, he would suffer irreparable loss. Lastly he prayed for setting aside of the impugned notifications.

4. Conversely, learned counsel for respondents has opposed the contentions of the petitioner and has contended that writ petition is not maintainable; that the petitioner often remained absent from duty; on 16.06.2020, he has relinquished the charge and on 23.06.2020, assumed the charge and since 26.06.2020, he is not performing his duty; that on 15th July, 2020, PEC Balochistan has submitted the detailed report regarding the absence of the petitioner stating therein that on 24th June, 2020 the petitioner submitted the application for grant of Leave Preparatory to Retirement w.e.f 10th July, 2020 and the petitioner was informed that the same is not tenable in light of serial No. 42.1 (3) of the Esta Code. Further

contended that the petitioner submitted the application for grant of casual leave on medical grounds from 29th June to 3rd July, 2020 and he left the station without approval of the leave. Lastly prayed that the facts presented by the petitioner require recording of evidence which this Court cannot do in exercise of powers under Article 199 of the Constitution of Islamic Republic of Pakistan and has prayed for dismissal of the writ petition.

5. I have heard the arguments of learned counsel for the parties and have perused the material available on record.

6. I propose first to deal with the contention of the learned counsel for the respondent that the petitioner being in the employment of Election Commission of Pakistan falls within the definition of Civil Servant and could approach the Service Tribunal, hence the petition under Article 199 of the Constitution is not maintainable under Article 212 of the Constitution. The Hon'ble Supreme Court of Pakistan in case titled as "Muhammad Azam Davi & others Vs Speaker Balochistan Provincial Assembly & others" [2010 SCMR 1886] has held that:-

More recently a similar question arose in the case of an employee of another Constitutional Body, the Election Commission of Pakistan, in the case of Chief Election Commissioner of Pakistan v. Miss Nasreen Pervez (2009 SCMR 329). Refuting the arguments on behalf of the Chief Election Commissioner that the respondent, who was granted relief by the Federal Service Tribunal; was not a civil servant, it was held that "obviously the respondent whose terms and conditions were determinable by the Federal Legislature under Article 221 of the Constitution and was governed by statutory Rules are to be considered civil servants". While so holding, the Court distinguished the cases of Mubarik Ali Khan, and Qazi Wali Muhammad (ibid) on the ground that the Parliament had not been giving any role in regulating the terms and conditions of service of the Courts' employees under Article 208 of the Constitution. That, thus, the principle laid down in the said judgments were held not applicable to the case before the Court because Article 221 of the Constitution, like Article 240 expressly enables the Parliament to regulate the terms and conditions of the employees of the Election Commission of Pakistan.

From a detailed examination of the case-law mentioned in the leave granting orders and that of the case of Chief Election Commissioner of Pakistan v. Miss Nasreen Pervez (ibid), decided recently in the year 2009, we do not find inconsistency in the case-law. The principle emerging from these judgments is that the status of the employees of the Constitutional bodies as to whether or not they are civil servants for the purpose of being amenable to the jurisdiction of the Service Tribunal depends upon whether or not the Parliament has been conferred power to regulate the terms and conditions of service of such employees. In case the Parliament has been bestowed with such a power, either specifically, like in Articles 87 and 221, or generally as in Article 240, whether or not exercised, the employees of such a body would be civil servants. Applying this principle to the cases before us, Article 87 read with Article 127 of the Constitution expressly enables the Parliament and the Provincial Assemblies, as the case may be, to make laws for regulation of the terms and conditions of service of the employees of the respective Establishments. The employees of such bodies are, therefore, civil servants."

7. Perusal of the record reveals that the petitioner is serving under the Election Commission of Pakistan and was posted as District Election Commission at Lakki Marwat, KPK and on 15.05.2020, he moved an application for grant of two days casual leave from 18th to 19th May, 2020 to the Regional Election Commission, Bannu Division, which was sanctioned in his favour and approval whereof was communicated to him. It is also the case of petitioner that on 15.06.2020 he received a telephonic call that he has been transferred from Lakki Marwat to District Washuk, Baluchistan and the transfer notification was also communicated to him. Further reveals that on 22.06.2020, it came to his knowledge that a charge sheet has also been issued against him on the sole ground of two days absence i.e. 18th & 19th May, 2020. It is also the contention of petitioner that after assuming the charge at District Washuk, Baluchistan, he submitted an application for Leave Preparatory to retirement to the respondents.

8. The petitioner in the instant petition has assailed (i) notification of transfer, (ii) for setting aside of conduct of inquiry, (iii) direction for approval of LPR. So far as transfer of the petitioner is concerned, the petitioner has alternate remedy of filing a representation before the

competent authority and without availing the said remedy, the petitioner has approached this Court. The inquiry proceedings against the petitioner are pending before the respondents under Government Servants (Efficiency & Discipline Rules, 1973). The disciplinary matters pertains to the terms and conditions of a Civil Servant and in such like cases the jurisdiction vests with Service Tribunal, constituted under the Service Tribunal Act, 1973 to adjudicate upon the matters as provided under Section 4 of the Service Tribunal Act. Under Article 212 of the Constitution, a bar is provided whereby the jurisdiction of this Court under Article 199 is ousted and all the matters pertaining to the terms and conditions of the service of persons, who are in service of Pakistan, fall within the jurisdiction of Court established for the said purpose i.e. Service Tribunal. In this behalf, for the sake of gravity, Article 212 is reproduced:-

212. Administrative Courts & Tribunals..--- (1) Notwithstanding anything hereinbefore contained, the appropriate Legislature may be 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 Supreme Court, shall abate on such establishment.

Provided that the provision 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 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."

9. Bare reading of the above Article of the Constitution shows that the disciplinary matters are included in the matters related to terms and conditions of service of Civil Servants. In such like cases, where the inquiry proceedings are challenged under the Constitutional jurisdiction of this Court, it has been consistently held by the Hon'ble Supreme Court that the same is not maintainable in the light of bar provided in Article 212 of the Constitution. In the case titled "Tahir Jamil Butt Vs Mian Jahangir Pervez & another" [1999 SCMR 2779], it was held that "Where before a High Court, the proceedings before the Inquiry Officer were challenged. The High Court dismissed the petition and the said order was maintained by the Hon'ble Supreme Court of Pakistan with the following observations:-

We have heard the learned counsel at length and we are of the view that it was rightly held by the learned Judge of the Lahore High Court that it was beyond his jurisdiction to interfere in the matter on account of bar of jurisdiction contained in Article 212 of the Constitution because the matter related to the enforcement of the terms and conditions of service. The learned Judge also rightly opined that an appeal was maintainable before the Subordinate Judiciary Services Tribunal, and therefore, these points could be urged in appeal. The learned Judge also correctly placed reliance upon a Full Bench judgment of the Lahore High Court in Writ Petition No.3963 of 1992 whereby the High Court had declined to interfere with the interim order passed by the Inquiry Officer in inquiry proceedings."

10. The Hon'ble Supreme Court of Pakistan in case titled as "IA Sharwani & others Vs Government of Pakistan through Secretary Finance Division, Islamabad & others" [1991 SCMR 1041] observed

that " The Civil Servant cannot bypass Service Tribunal by adding the ground of violating of fundamental rights. It was also observed that the Service Tribunal will have the jurisdiction in a case which is founded on the terms and conditions of service even if it involves the question of violation of fundamental rights."

11. With regard to the inquiry proceedings against the petitioner, it is the prerogative of the respondents, whereas this Court cannot interfere in the inquiry proceedings as factual controversies are involved in the matter, which cannot be thrashed out by this Court in exercise of its constitutional jurisdiction. So far the case of the petitioner that direction be issued to the respondents for approval of LPR is concerned; this Court while exercising its constitutional jurisdiction cannot direct the respondents to approve the case of LPR of the petitioner. The petitioner has a remedy of appeal or representation in this regard before the competent authority.

12. In view of the facts and circumstances of the case, since the matter relates to the terms and conditions of service of the petitioner, therefore, due to bar provided in Article 212, this Court has no jurisdiction in the matter.

13. For the foregoing reasons, the instant petition, having no force, is hereby dismissed.

Ghulam Azam Qambrani
Judge

Announced in open Court on this 04th day of August, 2020.

Judge

S.Akhtar