

Form No: HCJD/C-121.

JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

ICA No. 15 of 2019

Mst. Humaira Khushnood
Vs
Federation of Pakistan, etc.

DATE OF HEARING: 27-06-2019.

APPELLANT BY: Mr Muhammad Asif Gujjar Advocate.

RESPONDENTS BY: Raja Saif ur Rehman and Ms Sanum
Deedar Advocates, for respondent no
Syed Muhammad Tayyab, DAG.

ATHAR MINALLAH, CJ.- This appeal is directed
against judgment, dated 22-11-2018, passed in W.P. No.
811/2017, by the learned Single Judge.

2. The facts, in brief, are that respondent no. 6,
invoked the constitutional jurisdiction of this Court under
Article 199 of the Constitution of the Islamic Republic of

Pakistan, 1973 (hereinafter referred to as the "**Constitution**") challenging the decision of the Departmental Selection Board (hereinafter referred to as the "**Board**") in its meeting held on 05-01-2017, whereby the appellant was recommended for promotion to the next higher grade against the post of Chief Nursing Superintendent (BS-19) in the Pakistan Institute of Medical Sciences (hereinafter referred to as the "**Institute**"). The appellant was at serial no. 1 of the seniority list. Respondent no. 6, on the other hand, was at the bottom i.e. serial no. 5. The Board after considering the eligible candidates, recommended the appellant for promotion to the only vacant post. Respondent no. 6 was not considered for want of vacancies. The latter was, therefore, not competing with the appellant for the only vacant post. It is obvious from the decision of the Board that respondent no. 6 was not considered and, therefore, the question of determination of the fitness did not arise. Perusal of the memorandum of the petition filed by respondent no. 6, under Article 199 of the Constitution shows that he had not challenged the decision taken by the Board in its meeting held on 05-01-2017, to his extent but rather had assailed the recommendations made in favour of the appellant. The prayer sought in the constitutional petition filed by respondent no. 6 was essentially in the nature of seeking a writ of quo warranto. Moreover, the appellant as well as respondent no. 6, enjoy

the status of civil servants and, therefore, their grievances relating to terms and conditions of service are amenable to the jurisdiction of the learned Federal Service Tribunal.

3. The learned counsel for the appellant has argued that; the constitutional petition was not competent for several reasons i.e. respondent no. 6 could not have been treated as an aggrieved person; a writ in the nature of quo warranto was not competent because the post of Chief Nursing Superintendent (BS-19) was not a 'public office' in the context of the said expression used in Article 199 (1)(b)(ii) of the Constitution and lastly respondent no. 6 had raised grievances relating to the terms and conditions of service which were amenable to the jurisdiction of the learned Federal Service Tribunal.

4. When confronted with the above, the learned counsel for respondent no. 6, despite his able assistance, could not persuade us that the constitutional petition filed by respondent no. 6 was competent. He conceded that a writ in the nature of quo warranto was not sought and instead notification, dated 17-01-2017 and the decision taken by the Board in its meeting held on 05-01-2017, were challenged.

5. The learned counsels have been heard and the record perused with their able assistance.

6. Respondent no. 6 had challenged notification, dated 17-01-2017 and the decision taken by the Board in its meeting held on 05-01-2017, whereby the appellant had been recommended for promotion and pursuant to approval given by the competent authority was promoted to the post of Chief Nursing Superintendent (BS-19). Admittedly, the appellant was senior to respondent no. 6. The latter was not considered for want of vacancies because the appellant was considered and promoted against the only available vacant post. Respondent no. 6 had not challenged the decision of the Board taken in its meeting held on 05-01-2017 to his extent. Respondent no. 6, therefore, could not have been treated as an aggrieved person in the context of Article 199 of the Constitution. Moreover, the prayer in the petition was in the nature of seeking a writ in the nature of certiorari for which being aggrieved is a pre-requisite. The post of Chief Nursing Superintendent (BS-19) does not fall within the ambit of a public office for the purposes of Article 199 (1)(b)(ii) of the Constitution. A writ of quo warranto was, therefore, not competent.

7. The august Supreme Court in the case of '*Salahuddin and 2 others v. Frontier Sugar Mills & Distillery Ltd., Tokht Bai and 10 others*' [PLD 1975 SC 244] has quoted with approval the test laid down regarding a public office by Ferris (Extraordinary Legal Remedies, 1926 Edition, p. 145) and the same is as follows.-

"A public office is the right, authority and duty created and conferred by law, by which an individual is vested with some portion of the sovereign functions of the Government to be exercised by him for the benefit of the public, for the term and by the tenure prescribed by law. It implies a delegation of a portion of the sovereign power. It is a trust conferred by a public authority for a public purpose, embracing the ideas of tenure, duration, emolument and duties. A public officer is thus to be distinguished from a mere employment or agency resting on contract, to which such powers and functions are not attracted. The determining factor, the test, is whether the office involves a delegation of some of the sovereign functions of Government, executive, legislative or juridical, to be exercised by the holder of the public benefit. Unless his powers are of this nature, he is not a public officer."

8. For the above reasons, the instant appeal is **allowed** and consequently the impugned judgment, dated 22-11-2017, passed in W.P. No. 811/2017, is **set aside**.

(CHIEF JUSTICE)

(MOHSIN AKHTAR KAYANI)
JUDGE

Tanveer Ahmed.