

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

CASE NO. : W.P. NO.4402-2018

Aneela Asif

Vs.

Federation of Pakistan through Secretary, Ministry of Defence,
Rawalpindi etc.

CASE NO. : W.P. NO.4403-2018

Maqbool Hussain

Vs.

Federation of Pakistan through Secretary, Ministry of Defence,
Rawalpindi etc.

Petitioners by : Mr. Waheed Akhtar, Advocate

Respondents by : Raja Khalid Mahmood Khan, Deputy Attorney
General with Commander Imtiaz Hussain,
Deputy JAG, Pakistan Navy.

Date of decision : 23.09.2020

AAMER FAROOQ J. This judgment shall decide instant petition as well as W.P. No.4403-2018, as common questions of law and facts are involved.

2. The petitioners, in both the petitions, are employees of Pakistan Navy; disciplinary proceedings were initiated against them which eventually culminated in Summary General Court Martial and same led to dismissal/discharge of petitioners from service; appeals were filed by the petitioners which were also dismissed; hence the petitions.

3. Learned counsel for the petitioners, *inter alia*, contended that in case of petitioner in W.P. No.4402-2018, she tendered resignation/request for discharge, however, without taking into account said fact, disciplinary proceedings were initiated and eventually, petitioner was discharged from service. It was further contended that charges, leveled against the petitioners, were not cognizable by the Summary General Court Martial

inasmuch as same were indecent behavior and other violations of Code of Conduct and Rules of Pakistan Navy.

4. Learned Deputy Attorney General, *inter alia*, contended that this Court does not have the jurisdiction in the matter inasmuch as entire episode took place at Karachi. It was further contended that even otherwise, instant petitions are not maintainable, as the petitioners have the remedy of review. It was also contended that before Summary General Court Martial, trial was exhaustively conducted and evidence was recorded and petitioners had ample opportunity to present their case and even appeals filed, were decided on merit.

5. In rebuttal, learned counsel for the petitioners contended that petitioners do not have the remedy of review, as appeals have been decided. It was further contended that this Court has concurrent jurisdiction along with Hon'ble Sindh High Court at Karachi.

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

7. In case of petitioner in W.P. No.4402-2018, she tendered a request for discharge on 02.03.2016, which was returned on 14.03.2016, as the same was not routed through proper channel. Meanwhile, on 05.08.2016, the competent authority made a request to the Commanding Officer of the petitioners to initiate disciplinary proceedings. On 10.08.2016, the petitioner in W.P. No.4402-2018 again made a request. Summary Court Martial proceedings were initiated against the petitioners pursuant to the directions of the Headquarters. The specific charges were leveled against the petitioners, which involved Hadd and indecent behavior along with other violations. In the trial, evidence was duly recorded, where-after, they both were

awarded penalty of dismissal/discharge from service; appeals were filed which were also dismissed.

8. It is the case of respondents that petitioners have the remedy of review. In almost similar circumstances, the Division Bench of this Court, vide order dated 21.10.2019 passed in case titled 'Maj. (R) Saeed Ahmad Khan Vs. Federation of Pakistan and Another' (W.P Nos.2954-2018 etc.), observed that where there is remedy of review, a writ petition is not maintainable, as an alternate and efficacious remedy is available. For ease of convenience, relevant paragraphs of the referred order are reproduced below:-

"6. Under section 136 of Pakistan Navy Ordinance, 1961, any Officer, who has been punished under the court-martial proceedings, may file review before the Federal Government or the Chief of Naval Staff against the conviction or sentence or both. For the ease of convenience, relevant provision is reproduced below: -

"136. Remedy of aggrieved persons, on being convicted by a court-martial. - Without prejudice to the provisions of the foregoing section, a person convicted under this Ordinance by a court-martial may at any time present a petition against the finding or the sentence or both to the Federal Government or the Chief of the Naval Staff who may thereupon review the finding or the sentence or both".

7. Under section 137 of the Ordinance, the reviewing authority has various options regarding conviction and sentence. Section 137 reads as follows: -

"137. Power to quash or alter findings. - (1) On review of a finding of a court-martial, the Federal Government or the Chief of the Naval Staff may-

- a) in any case, quash the findings;*
- b) where some other finding of guilty could lawfully have been made by the court before which the trial took place, and it appears to the Federal Government or the Chief of the Naval Staff that court must have been satisfied of facts necessary to justify that other findings, substitute that other finding.*
- (2) Where a finding is quashed under subsection (1), then-*
 - a) if the sentence passed in respect of that finding relates to that finding only, the sentence shall be quashed;*
 - b) if the sentence relates to that and any other finding or findings, the Federal Government or the Chief of the Naval Staff may substitute such sentence as is authorized by this Ordinance in respect of the other finding or findings.*

- (3) *Where a finding is substituted under subsection (1) the sentence may be substituted by any other sentence provided by this Ordinance in respect of the substituted finding.*
- (4) *The punishment awarded by a sentence substituted under subsection (2) or subsection (3) shall not be higher in the scale of punishments than, or in excess of the punishment awarded by the sentence for which the new sentence is substituted.*
- (5) *Any finding or sentence substituted under the preceding subsection shall for all purposes be deemed to be the finding or sentence of the court before which the trial took place”.*

The perusal of above two provisions shows that any person, convicted or sentenced under court-martial proceedings, may agitate the matter by way of review. Since there is an alternate and adequate remedy available to the petitioner, it is just and proper that same be availed”.

Similar view was expressed by this Court vide order dated 24.12.2019 passed in case titled ‘Zaheer Ahmad Qureshi Vs. Federation of Pakistan etc.’ (W.P. No.2871-2019) and it was observed as follows: –

“8. In order to resolve the controversy, it is necessary to reproduce the Sections 136 and 138 (a) of the Pakistan Navy Ordinance, 1961:-

<p>136. Remedy of aggrieved persons, on being convicted by a court-martial. Without prejudice to the provisions of the foregoing section, a person convicted under this Ordinance by a court-martial may at any time present a petition against the finding or the sentence or both to the 2[Federal Government] or the 3[Chief of the Naval Staff] who may thereupon review the finding or the sentence or both.</p>	<p>138 (a) Power to remit or alter sentences.—(1) On the review of a sentence awarded by a court-martial, the 1[Federal Government] or the 2[Chief of the Naval Staff] may, subject to the provisions of this section,— (a) annul the sentence ;</p>
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9. The above referred provisions provide separate remedy and mechanism, wherein the order in terms of Section 138(a) of the Pakistan Navy Ordinance, 1961 has been passed by Naval Authorities on 29.07.2019, which is part of instant writ petition, whereas no order of review has been passed till date due to non-filing of any application by the petitioner with the authority referred in Section 136 of the Pakistan Navy Ordinance, 1961.

10. In view of above position, at this stage if this Court passes any order without considering the remedies available to the petitioner whether exhausted or otherwise, amounts to denial of fundamental rights of the petitioner of due process of law, whereby the Courts are the guardians of the rights of individuals including the right to be dealt in accordance with law and a fair trial under the Constitutional mandate”.

9. In light of above case law and sections 136 & 137 of Pakistan Navy Ordinance, 1961, the petitioners have the remedy of review before the Federal Government or the Chief of Naval Staff. Even-otherwise, a petition under Article 199 of the Constitution, is barred against disciplinary proceedings conducted by the Armed Forces, however, by now, it is an established principle that where the order impugned, is *coram non judice* or suffers from lack of jurisdiction, a petition under Article 199 of the Constitution, is maintainable. Reliance is placed on case reported as 'Brig. (R) F.B. Ali and Another Vs. The State' (PLD 1975 SC 506).

10. The Summary General Court Martial proceedings can be initiated, where allegations levelled, are with respect to Hadd or indecent behavior in light of provisions of Pakistan Navy Ordinance, 1961. Likewise, if there are violations of various provisions of Pakistan Navy Ordinance, 1961 or other relevant rules or instructions of Pakistan Navy, Court Martial Proceedings can be initiated. There is nothing on record to show that proceedings were either based on malafide or without jurisdiction and *coram non judice*.

11. For the above reasons, instant petitions are without merit and are accordingly dismissed.

(AAMER FAROOQ)
JUDGE

Zawar