

JUDGMENT SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

W.P. No. 1120/2019.

Fazal Dad

Versus

Federation of Pakistan through Secretary M/o Education Government of
Pakistan, Islamabad, etc.

Petitioner by: Sheikh Riaz ul Haq, Advocate.

Respondents by: Barrister Mumtaz Ali, AAG.
S. M. Rehan Naqvi, AD (Legal), FDE.

Date of Decision: 18.10.2019

MOHSIN AKHTAR KAYANI, J: Through this Writ Petition, the petitioner has prayed for issuance of direction to the respondents to issue orders of his permanent absorption in Federal Directorate of Education, Islamabad.

2. Learned counsel for the petitioner contends that petitioner was appointed as C.T. Teacher in the Education Department, Government of NWFP (now Khyber Pakhtoon Khuwa) on 13.04.1986, his wife was employed as Head Nurse in Federal Government Services Hospital, Islamabad whereby petitioner was transferred to Federal Directorate of Education (FDE), Pakistan as Trained Graduate Teacher on 09.01.1995 under wedlock policy; that petitioner is still serving with Federal Directorate of Education, Islamabad, however, he applied for his permanent absorption in the FDE, in response to his request FDE directed the petitioner to submit NOC and other documents for completion of process, whereupon he has produced NOC vide Notification dated 16.05.2000 issued by Government of KPK for permanent absorption of the petitioner in the FDE, however, he was asked to appear before departmental selection committee and an objection was raised upon his qualification as he was M.A B.Ed. with third division in intermediate vide letter dated 09.03.2009, where-after, petitioner again

appeared in the exam from Allama Iqbal Open University in March, 2015 and obtained first division; that other colleagues of petitioner on similar position were permanently absorbed on the interference of different Courts but petitioner has been discriminated and at this point of time petitioner is likely to be retired on 10.01.2020 due to superannuation but respondent department has repatriated the petitioner on 03.09.2019 during the pendency of instant writ petition with immediate effect and as such petitioner at verge of retirement claims his permanent absorption and pensionary rights at Islamabad.

3. Conversely, learned AAG along with Law Officer FDE contends that there is no provision in the Civil Servant Act to permanently absorb any person in civil service nor any deputationist has any vested right to remain on any position after expiry of deputation period; that Apex Court has passed the direction to repatriate all the individuals to their parent departments, therefore, order of repatriation of petitioner was issued.

4. Arguments heard, record perused.

5. Perusal of record reveals that petitioner is mainly claiming his right to be absorbed permanently with FDE as he is at the verge of retirement. The record further reveals that petitioner was initially appointed with Education Department Government of KPK on 13.04.1986 as C.T Teacher and was transferred to FDE on deputation basis and latter on he managed to stay here in Islamabad from last 24 years, however, he applied for his permanent absorption whereby FDE/respondent initiated his case and he was directed to produce NOC from Government of KPK, the same was produced by him vide letter dated 16.05.2000, issued by Section Officer Schools, however, petitioner's case was referred to departmental selection committee, whereby an objection was raised that he has obtained Grade 'D' in HSSC and he was directed to improve the said grade vide letter dated 28.07.2008, in response to said letter petitioner appeared

in HSSC exam and obtained second division (grade 'B') in February, 2016 and as such his absorption has not become permanent.

6. While considering the above position on record, I have gone through the Civil Servant Act, 1973 as well as Civil Servant (Appointment, Promotion and Transfer) Rules, 1973, both these statutory instruments are silent qua the absorption of civil servant. Even otherwise, deputationist cannot claim any right of permanent absorption as a vested right especially at the time of completion of deputation period. Reliance is placed upon 2013 PLC (C.S) 915 Islamabad (Mst. Robia Ayub Vs. Federation of Pakistan through Secretary, Ministry of Education).

7. Similarly, transfer or deputation from one department to another department does not by itself create a vested right in favour of transferred or deputed official to claim his absorption. Reliance is placed upon 2009 PLC (C.S) 234 (Azhar Rasheed Vs. Board of Revenue), 2014 SCMR 522 (Senate Secretariat through Chairman Vs. Miss Faiqa Abdul Hayee). However, detailed view has been given by the Apex Court in judgment reported as 2015 SCMR 456 (Ali Azhar Khan Baloch and others Vs. Province of Sindh and others), the same is as under:-

ABSORPTION

119. The learned Additional Advocate-General, as well as the counsel representing the petitioners had argued that the Competent Authority had the powers under Rule 9(1) of the Rules to absorb any person from within and/or outside the Province through appointment by transfer. We have already dealt with the scope of Rule 9(1) of the Rules, which permits appointment by transfer subject to the conditions prescribed therein. It does not permit absorption from one cadre to another cadre. The Competent Authority in the cases of the petitioners has ordered absorption by relaxing the rules, which is in deviation of the scheme of the Act framed pursuant to the dictates of Article 240, read with the qualifications incorporated in the Rules of 1974. We may observe that section 5 of the Act does not give any discretion to the Selection Authority to bypass the restriction by relaxing the Rules. If such discretion is allowed to prevail, it

would destroy the fabric of Civil Service, which is protected by the mandates of Articles 240 and 242 of the Constitution. It is also a misconception that Rule 9-A permits transfer of a non-Civil Servant to a Cadre, Service or Post meant for a Civil Servant, recruited in the Cadre or Service or Post after competitive process. Such an appointment by transfer in the nature of absorption would only be permissible, if the pre conditions laid under Rule 9-A of the Rules are met.

120. At the time of hearing of Petitions No.71 of 2011 and others the learned Additional Advocate-General, as well as the petitioners appearing in these Petitions, attempted to justify absorption on the basis of legislative instruments, which were declared unconstitutional. In these review proceedings, the petitioners have changed their stance claiming their absorption on the basis of Rule 9(1) of the Rules. We have separately dealt with the scope of Rule 9(1) of the Rules. Under Rule 9(1), appointment by transfer would only mean an ordinary transfer from one post to another post, subject to the restrictions contained in the Rules of 1974. Neither a person can be absorbed under these Rules nor a Civil Servant or non-Civil Servant or a deputationist could be allowed to travel horizontally outside his cadre to penetrate into a different cadre, service or post through an appointment by transfer. Rule 9(1) cannot override the provisions of section 8 of the Act, which have been introduced by the Legislature for proper administration of Service law. For the aforesaid reasons, in addition to our findings recorded in the judgment under review, we are of the considered view that the petitioners have failed to make out any justifiable ground to seek review of the judgment.

8. Similarly, the other important question which has been dealt by the Apex Court is the question of jurisdiction of High Court in terms of Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 viz. a viz. the jurisdiction of Service Tribunal, whereby it was held that:-

246. We, after perusal of the aforesaid record in suits and H.C.A, are of the considered view that the issue raised by the parties relates to their terms and conditions of service and cannot be entertained by a High Court either in its Constitutional jurisdiction or in its Original Civil jurisdiction or in High Court Appeal, being barred under Article 212 of the Constitution. We, for the reasons already recorded by us separately on the scope of Article 212 of the Constitution, are of the considered view that the Suit

No. 1052 of 2014, filed by Mir Aijaz Hussain Talpur and the High Court Appeal No.288 of 2014, filed by Shahzar Shamoon, stand abated for want of jurisdiction of the High Court. However, it would be open for the aggrieved party to approach the concerned Service Tribunal or this Court in Review, if so advised.

247. Before parting with this judgment, we have noticed that a civil servant cannot approach the Service Tribunal unless he exhausts the remedy of departmental appeal/representation under section 22 of the Sindh Civil Servants Act, 1973. Section 4(i)(a) of the Sindh Service Tribunals Act, 1973, provides that a Civil Servant can approach the Tribunal, subject to his exhausting remedy under section 22 of the Sindh Civil Servants Act, after lapse of 90 days from the date on which such appeal/application was so preferred. In other words, a Civil Servant aggrieved by an order of the department has to file a representation or Appeal within 30 days of passing of such order and if the said authority does not decide his appeal/representation within 90 days, he can prefer an appeal before the Tribunal, after lapse of time as contained under section 4(a) of the Sindh Service Tribunals Act. These provisions of section 22 of the Sindh Civil Servants Act and section 4 of the Sindh Service Tribunals Act require to be re examined after insertion of Article 10A in the Constitution, as it restricts a Civil Servant from seeking expeditious remedy from the Tribunal which is constituted under the command of the Constitution.

248. We have also examined the service laws of other Provinces and the Federation and find that they have similar provisions in their service laws, as contained in Sindh Service laws. The provisions of section 22 of the Sindh Civil Servants Act and the section 4 of the Sindh Service Tribunals Act, restrict a Civil Servant to get efficacious and expeditious remedy against the order of the department till the expiry of almost 120 days. After the promulgation of Article 10-A, we find it imperative to re-examine the existing law which apparently bars the filing of appeal in the Service Tribunal before the passage of mandatory 90 days, but practically for 120 days. The law also needs to be looked afresh, because writ jurisdiction in the matters relating to terms and conditions of service against the executive by the aggrieved Civil Servant is barred under Article 212 of the Constitution.

9. While considering the above background, there is no denial to the fact that petitioner is likely to be retired in January, 2020 but at this stage when repatriation order has already been passed by the respondent department in the light of observation passed by the Apex Court, office order dated 03.09.2019 was issued, therefore, nothing is left to be dealt by this Court, although petitioner contends that repatriation at the verge of end of his service amounts to denial of his right to life in terms of Article 9 of the Constitution of Islamic Republic of Pakistan, 1973 and he has relied upon PLD 1994 SC 693 (Shehla Zia Vs. WAPDA).

10. I have gone through the said judgment as well as the law laid down by the Apex Court in the light of Civil Servant Act, 1973, the concept of absorption is defined in Section 11A of Civil Servant Act, 1973 the only exception to the general rules defined in the said section is that a civil servant can be absorbed if the department, division, office as a result of reorganization or abolition, civil servant become surplus, although such civil servant could be absorbed by observing other conditions as such the case of petitioner does not fall within the said provision, nor his previous department dissolved, neither he was declared surplus due to re-organization of his previous department, therefore, his repatriation order passed by the FDE at this stage is in accordance with law as well as in accordance with the judgment passed by the Apex Court, hence, instant writ petition is not maintainable and the same is hereby dismissed. Even otherwise, question of absorption falls within terms & condition of service which could not be agitated before this Court in terms of bar contained in Article 212 of the Constitution of Islamic Republic of Pakistan, 1973. However, after passing of repatriation order of petitioner by the FDE, whereby petitioner was repatriated to his parent department i.e. District Education Office, Schools & Literacy Department District Abbotabad, Khyber Pakhtun Khawa and said department is directed to accept his joining and prepare his service record as

well as pension file in accordance with the relevant rules and release his salary accordingly as held by the Apex Court in the judicial pronouncement.

(MOHSIN AKHTAR KAYANI)
JUDGE

Zahid