

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.No.551 of 2020

Qaiser Mahboob

Versus

Chief Accounts Officer, Ministry of Foreign Affairs etc.

Date of Hearing:	25.06.2020
Petitioner by:	Raja Ahsan Mehmood Satti, Advocate,
Respondents by:	Mr. Muhammad Nadeem Khan Khakwani, learned Assistant Attorney-General, Mr. Aitizaz Ahmed, Deputy Chief Accounts Officer, Syed Ahmed Farhan, Deputy, CAO, Mr. Riaz Ahmad Khalil, Advocate for respondent No.4.

MIANGUL HASSAN AURANGZEB, J:- Through the instant writ petition, the petitioner (Qaiser Mahboob), who is serving as Senior Auditor (BPS-16) in the Ministry of Foreign Affairs, impugns the selection of respondent No.4 (Imran Ahmed) who was also serving as Senior Auditor (BPS-16) in the said Ministry, for posting at Pakistan's Diplomatic Mission in Washington DC.

2. Learned counsel for the petitioner submitted that the petitioner is presently serving as Senior Auditor (BPS-16) and is due to retire on 02.11.2023 on attaining the age of superannuation; that the petitioner has not been posted abroad at any stage of his career; that as per the policy contained in the Establishment Division's Office Memorandum No.4/7/81-TIV, dated 28.12.1981, an officer who has already availed foreign posting is ineligible for foreign posting on a second occasion; that in 2016, respondent No.4 was considered for foreign posting but was not selected since he had already availed foreign posting in the past; that the Departmental Transfer Committee, in its meeting held on 11.12.2019, has selected respondent No.4 for foreign posting in violation of the above-mentioned policy; that the petitioner was one of the officers considered for posting abroad; that if respondent No.4's name is dropped, the petitioner is the next in line in the list to be selected for foreign posting; that the petitioner had agitated this matter in an appeal before the Federal Service Tribunal, but vide order dated 07.02.2020, the said appeal was dismissed as premature on the ground that the petitioner had not waited for 90 days after filing a

representation to the department before filing the appeal; and that since the petitioner has no alternative remedy, he has invoked the jurisdiction of this Court. Learned counsel for the petitioner prayed for the writ petition to be allowed in terms of the relief sought therein.

3. On the other hand, the learned Assistant Attorney-General submitted that in the past, respondent No.4 had not been posted abroad by the Ministry of Foreign Affairs; that respondent No.4 was senior to the petitioner since the former had been working as Senior Auditor since 31.07.1990 whereas the latter had been serving as Senior Auditor since 23.05.2000; that respondent No.4 had served as Senior Auditor for 29 years whereas the petitioner had served as Senior Auditor for 19 years; and that respondent No.4 is at serial No.10 in the seniority list whereas the petitioner is at serial No.31.

4. He further submitted that respondent No.4 had served in Pakistan International School of Damascus ("PISD") from 2005 to 2009; that respondent No.4's service in PISD was notified as "*foreign service*"; that since respondent No.4 had not been "*posted abroad*", the office order dated 01.04.2015 issued by the Ministry of Foreign Affairs was not applicable to respondent No.4's service in PISD; that during respondent No.4's service in Damascus, he had not been paid salary from government funds but by PISD; and that the decision to select respondent No.4 for abroad does not suffer from any legal infirmity. Learned Assistant Attorney-General prayed for the writ petition to be dismissed.

5. Learned counsel for respondent No.4 adopted the arguments advanced by the learned Assistant Attorney-General. Furthermore, he submitted that since the matter agitated by the petitioner in the instant petition pertains to the terms and conditions of his service, the instant petition is not maintainable.

6. I have heard the contentions of the learned counsel for the contesting parties as well as the learned Assistant Attorney-General, and have perused the record with their able assistance.

7. It is an admitted position that the petitioner had filed an appeal before the Federal Service Tribunal challenging the decision of the official respondent not to select him for posting abroad. The petitioner had challenged the selection of respondent No.4 for

posting abroad primarily on the ground that he had already been posted abroad in the past.

8. Vide order dated 07.02.2020, the said appeal was dismissed as premature. Perusal of the said order shows that it was observed therein that the petitioner would be at liberty to file a fresh appeal after a decision had been taken on his departmental appeal or after a period of 90 days of the submission of the departmental appeal.

9. It is not disputed that the petitioner had filed a departmental appeal against the decision not to select him for posting abroad and to select respondent No.4 for the said purpose. The said departmental appeal has been decided by the Ministry of Foreign Affairs on 28.02.2020.

10. It is well settled that the mere fact that a civil servant has to wait for a decision on his departmental appeal or wait for a period of 90 days after filing of the departmental appeal before filing an appeal before the Service Tribunal is not a valid ground for a writ petition to be entertained on a matter that concerns the petitioner's terms and conditions of service. The petitioner is admittedly a civil servant and in the petition he has agitated the matter pertaining to the terms and conditions of his service.

11. It is also well settled that the jurisdiction of this Court is ousted in matters which fall within the jurisdictional domain of the Service Tribunal. Even if this Court is to grant interim relief as a stopgap measure until the petitioner is in a position to agitate his grievance before the Federal Service Tribunal, it would amount to assuming jurisdiction over the *lis*. In doing so, this Court would be going against the mandate of Article 212(2) of the Constitution, which is reproduced herein below:-

“(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 establishment of the Administrative Court or Tribunal, other than an appeal pending before the Supreme Court, shall abate on such establishment:

Provided that the provisions 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 (Parliament) by law extends the provisions to such a Court or Tribunal.”

12. The argument of the learned counsel for the petitioner that until the petitioner is in a position to approach the Service Tribunal, he is without a remedy, has been adequately answered by the Superior Courts in the following judgments:-

- (i) In the case of Abdul Wahab Khan Vs. Government of the Punjab (PLD 1989 SC 508), the petitioner had assailed the appointment of an authorized officer in a writ petition before the Hon'ble Lahore High Court. The said petition was dismissed as not maintainable due to the bar contained in Article 212 of the Constitution. The Hon'ble Supreme Court held that if an order passed against the civil servant was not appealable to the Service Tribunal, the civil servant would have to wait till such order was passed against him which was appealable before the Service Tribunal.
- (ii) In the case of Dr. Ghazanfar Ullah Vs. Secretary Health, Government of Punjab (2010 PLC (C.S.) 51), the Hon'ble Lahore High Court held as follows:-

"8. Arguments heard. Article 199 is "Subject to the Constitution", while Article 212 being a non obstante Article prevails over Article 199. Article 212 clearly states that "no 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". Therefore, this Court has no jurisdiction to entertain a matter that stands barred under Article 212 of the Constitution. The arguments of the counsel that he has been left remediless after filing his representation under section 4 of the Punjab Service Tribunals Act, 1974 is without any force. The filing of the representation before a departmental authority is itself initiation of the remedy under section 4(1)(a) of the Service Tribunals Act, 1974. The pendency of the representation for a maximum period of 90 days is a part of the procedure/remedy prescribed for a civil servant which then culminates into right to file an appeal. In fact the pendency of the representation before the departmental authority cannot be taken to mean that the petitioners have been left remediless. In fact the petitioners have invoked the remedy and the remedial process has been set in motion. For the sake of arguments even if a writ is issued during this period of 90 days it will make a mockery of the statutory process provided under section 4(1)(a) rendering the final right to appeal in 90 days totally meaningless. Constitutional jurisdiction cannot be put to use to frustrate statutory remedial process as in the present case. In any case

this argument is totally fallacious. Once this Court has no jurisdiction under Article 212, the same cannot be conferred on it just because after filing the representation under section 4 of Punjab Service Tribunals Act, 1974 the petitioner has been rendered "remediless" it is not the question of alternate remedy but of bar of jurisdiction. In fact Article 199 cannot be set in motion due to the jurisdictional bar, therefore the question of alternate remedy or mala fide or political consideration or the nature of grievance does not even begin to arise. This distinction between bar of jurisdiction and exercise of judicial power must be clearly understood."

The Hon'ble Judge who authored the said judgment rose to grace the Hon'ble Supreme Court. Therefore, the said judgment deserves respect and reverence.

13. The jurisdiction of the High Court is barred under Article 212(2) of the Constitution even if an order assailed before the High Court or the proceedings which a civil servant is aggrieved by or are alleged to be *malafide*, *coram non judice*, without jurisdiction or are assailed on the ground of violation of the civil servant's fundamental rights. Reference in this regard may be made to the following case law:-

- (i) In the case of Muhammad Amin Butt Vs. Secretary Education, Government of the Punjab (2003 PLC (C.S.) 926), a show cause notice was issued to the petitioner on the basis of a preliminary inquiry. The petitioner's case was that he had earlier been exonerated by the Anti-Corruption Agency and that the allegation against him could only be established in a regular inquiry. The Hon'ble Supreme Court held that the issue raised by the petitioner, was a civil servant, was germane to the terms and conditions of his service and since no final order had been passed, the bar of jurisdiction contemplated by Article 212 of the Constitution was attracted.
- (ii) In the case of Akhtar Ali Vs. Province of Punjab (PLD 1992 Lahore 127), the petitioner had challenged the appointment of the inquiry committee and the framing of the charge against him. The Hon'ble Lahore High Court, after making reference to Article 212 of the Constitution

as well as to the provisions of the Punjab Service Tribunal Act, 1974, held as follows:-

“The aforementioned provisions place it beyond doubt that the Service Tribunal has been given exclusive jurisdiction in the matters relating to the terms and conditions of the service of the civil servants including disciplinary matters and the jurisdiction of all other Courts in respect of matters falling within the competence of the Service Tribunal stands ousted. Needless to observe that non obstante clause in Article 212(2) gives it overriding effect with the result that the jurisdiction of this Court under Article 199 of the Constitution to entertain any proceedings in respect of matters falling within the ambit of Service Tribunal is completely excluded.”

14. Law to the said effect has also been laid down in the cases of Syed Arshad Ali and others Vs. Pakistan Telecommunication Company Ltd and others (2008 SCMR 314), Peer Muhammad Vs. Government of Baluchistan through Chief Secretary and others (2007 SCMR 54), Noor Badshah Khattak Vs. Government of N.W.F.P. and others (2004 PLC (C.S.) 1084 and Khalid Mehmood Wattoo versus Government of Punjab and others (1998 SCMR 2280).

15. The Federal Service Tribunal had not dismissed the petitioner's appeal on merits. Now the petitioner's departmental appeal has been decided by the Ministry of Foreign Affairs, he is at liberty to file an appeal against the decision dated 28.02.2020 before the Federal Service Tribunal, subject to the law.

16. In view of the above, I hold that the instant petition is not maintainable. Consequently, the same is dismissed as not maintainable. I have refrained from expressing my views on the merits of the case.

**(MIANGUL HASSAN AURANGZEB)
JUDGE**

ANNOUNCED IN AN OPEN COURT ON 29-06-2020

(JUDGE)