

JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, **ISLAMABAD**

WRIT PETITION NO.2405 OF2016

Nargis Shazia Chaudhry
Vs.
Federal Public Service Commission.

Petitioner by : Mr. Abdul Rehman Khan, Advocate

Respondents by : Raja Saim ul Haq Satti, Advocate
Mr. Farrukh Shahzad Dall, AAG.
Syed Nazar Hussain Shah, AAG.
Ms. Aisha Bashir Wani, Joint Secretary, Mr. Jamil Akhtar, Deputy Secretary (Lit.), Mr. Nadeem Arshad, S.O and Mahmood Khan Lakho, S.O, Establishment Division.
Mr. Haroon Rashid, Deputy Director, FPSC.

Date of hearing : 01.12.2020.

LUBNA SALEEM PERVEZ, J. The petitioner through present writ petition has assailed the recommendations made by Federal Public Service Commission (hereinafter referred to as “FPSC”) vide No. FPSC U.O.No. F2/4/2009-CE dated 14th April 2016 to the Establishment Division, whereby it has been recommended that the petitioner’s allocation to PAS/DMG may be withdrawn and she may be reverted to Information Group. The petitioner has sought the following prayer:-

“Under the circumstances it is, therefore, respectfully prayed that this Hon’ble Court may very graciously be pleased to set aside the impugned recommendation of the FPSC being void, ab initio, coram non judice, illegal and without lawful authority with all consequential effects in favour of the petitioner and restraint the respondent No.1 to act on the aforesaid recommendations of FPSC.

Any other relief which this Hon’ble Court may deem just and proper may also be awarded.”.

2. Brief facts of the case are that the petitioner passed the CSS examination held for the year-2008 by securing 344th position in all Pakistan merit list, 222nd

position in Punjab merit list and 53rd position out of 90 qualified female candidates. Having lower position in merit list, she was not allocated any occupational group. She, therefore, filed representation before the FPSC, under section 7(3) of the FPSC Ordinance, 1977 (hereinafter referred to as the Ordinance, 1977), on 05.08.2009, to grant her allocation on the reserved 10% women quota. The representation was rejected by FPSC, vide order dated 04.11.2009 and thereafter the review filed under section 7(3)(b) of the Ordinance 1977 was also dismissed, vide FPSC's order dated 04.12.2009. Against the said order the petitioner filed FAO No. 01 of 2010 before the Hon'ble Lahore High Court, Rawalpindi Bench, Rawalpindi, which was allowed, vide judgment dated 17.03.2010 with the directions to the FPSC to appoint her against women quota. The FPSC assailed the judgment before the Hon'ble Supreme Court vide CPLA No. 941 of 2010, which failed, vide order dated 03.06.2010. The review filed by the FPSC was also dismissed by the Hon'ble Supreme Court, vide order dated 25.08.2010. The FPSC in compliance of judgment dated 17.03.2010 and orders of the Hon'ble Supreme Court dated 03.06.2010 & 25.08.2010, allocated Information Group to the petitioner which she duly accepted. However, being dissatisfied with the allocation in the Information Group, the petitioner later on filed another representation dated 11.11.2010 before the FPSC which was rejected, vide order dated 25.04.2016. The review application of the petitioner against the said order was also dismissed, vide order dated 01.06.2016. The petitioner assailed both the orders before this Court, vide FAO No. 15 of 2011 whereby, this Court, vide judgment dated 07.06.2012, set aside the orders passed in representation and in review petition passed by the FPSC, with the directions to place the petitioner as per para-4 of the order dated 03.06.2010, of the Hon'ble Supreme Court. Being aggrieved with the judgment dated 07.06.2012, the FPSC filed CPLA No. 1459 of 2012 before the

Hon'ble Supreme Court, which was dismissed vide order dated 10.09.2012, against which the FPSC preferred Review Petition No. 238 of 2012. The FPSC during the pendency of review petition before the Apex Court allocated the petitioner the PAS/DMG in compliance of the order of the Hon'ble Supreme Court. The review petition filed by the FPSC was allowed, vide order dated 08.02.2016, by the Larger Bench of the Hon'ble Apex Court whereby, the Hon'ble Supreme Court was pleased to set aside its own order dated 10.09.2012 as well as judgment dated 07.06.2012 of the High Court and remanded the case of the petitioner back to the FPSC to decide the representation dated 11.11.2010 afresh, on merits. In consequence thereof, the FPSC withdrew the allocation of PAS/DMG to the petitioner in compliance of the Supreme Court's order and forwarded recommendation dated 14.04.2014, to the Establishment Division, impugned herein, to revert the petitioner to information group, impugned through the instant writ petition.

3. Learned Counsel for the petitioner mainly argued that the order dated 08.02.2016 passed by the Hon'ble Supreme Court is not binding for the reason that the Respondents' Counsel consciously distorted the facts and mala-fidely pleaded that the petitioner had exploited the observations contained in the order dated 03.06.2010, passed by the Hon'ble Supreme Court, as such, he submitted that the order dated 08.02.2016, of the Hon'ble Supreme Court, being in contravention of record is *per-incurium*. He, in this regard, relied on the judgment of Hon'ble Supreme Court re: ***Sh. Muhammad Rafique Goreja vs. Islamic Republic of Pakistan (2006 SCMR 1317)***, wherein it has been held that:-

“Decisions per incurium do not constitute binding precedent. Such decisions are those which are given in ignorance of the terms of the Constitution or of a statute or of a rule having the force of a statute. Also an order delivered without argument, without reference to the relevant provisions of the Constitution or the Act and without any citation of authority is per incurium. Similarly, decisions sub silentio have no precedential value. Such decisions

are those which are given on a point of law not perceived by the Court or present to its mind.”.

4. Learned counsel submitted that the petitioner has been working in the PAS/DMG since past 8-years, vide notification issued by Respondent No.1, therefore, a vested right has been accrued in her favour to retain the said occupational group; that on the principle of *locus poenitentiae*, respondent cannot recall its earlier order. In support he relied on the following observation of the Hon’ble Supreme Court made in case titled as ***Ferozuddin & others vs. Mazhar Hussain Shah (PLD 2009 Khi 397)***:-

“Ordinarily according to rule of locus poenitentiae, whereunder an authority passing an order can recall the same unless it is acted upon, is subject to three exceptions which are very common in its nature against such rule and i.e. the order’ must not be obtained by its beneficiary through fraud or misrepresentation, secondly it must not be passed by incompetent authority and thirdly it must not be passed in violation of specific provisions of the law”.

5. He further submitted that after joining the PAS/DMG, petitioner has satisfactorily completed her probation period, therefore, she cannot be withdrawn from said group in view of the observation of the Hon’ble Supreme Court made in the judgment reported as ***Qaiser Mehmood vs. Secretary Land & Parliamentary Affairs (2012 PLC (CS) 669)*** that:-

“In a situation where a Government servant is appointed against a clear vacancy, even on probation, after lapse of some specified period prescribed for this purpose, if not removed from service, he stands automatically confirmed”.

6. He contended that the petitioner has never demanded the DMG, however, the Hon’ble Supreme Court, vide order dated 03.06.2010, has directed the Respondents to allocate her DMG and now the said order has attained finality. He, in view of his argument, prayed for setting aside of the impugned recommendations dated 14.04.2016.

7. Conversely, the Learned AAG and learned Counsel for the Respondents along with departmental Representatives have vehemently opposed the arguments

made on behalf of Petitioner. Learned AAG submitted that 1st offer of appointment for the post in Information Group dated 03.12.2010, was accepted by petitioner, vide her consent letter dated 08.12.2010, in pursuance whereof she was appointed on probation under Ministry of Information and Broadcasting, vide notification dated 09.04.2011 and posted to Civil Services Academy for training program; that in compliance of judgments of this Court and orders of the Hon'ble Supreme Court, she was relieved from Ministry of Information and Broadcasting and re-allocated to DMG with effect from 02.05.2013; that the Petitioner violated para 2(v) of her terms of appointment by filing representation for change of group according to which "*No representation will be entertained against decision of the Government in regard to your allocation to a particular Group/Service*"; that term 2(viii) of the appointment provided that "*Change of occupational Group/Service will not be allowed in any case*", therefore, hit by principle of approbate and reprobate as initially she accepted the Information Group and subsequently refused the same in sheer violation of terms of offer of appointment. He relied on observation made by the Hon'ble Supreme Court, vide judgment passed in the case titled *Secretary Economic Affairs Division, Islamabad & others vs. Anwar ul Haq Ahmed & others (2013 SCMR 1687)* that:-

"It is to be noted that the doctrine of 'estoppel' means a disability whereby a party is precluded from alleging or proving in legal proceedings that a fact is otherwise than it has been made to appear by the matter giving rise, to that disability. Even as a rule of evidence or pleading a party should not be allowed to approbate and reprobate."

8. He submitted that after willingly accepting terms & conditions of service in Information Group, the petitioner is legally prohibited to back off; that case of the petitioner is also hit by principle of constructive *rejudicata* as she has agitated the issue in FAO No. 71/2016 which is pending adjudication. He in this regard placed reliance on *Ghulam Akbar Lang versus Dewan Ashiq Hussain*

Bukhari (2012 SCMR 366); that the FPSC in view of the judgment of the Hon'ble Supreme Court dated 08.02.2016, recommended the Establishment Division, which being the competent authority, for implementation of the judgment; that the petitioner has failed to point out any illegality or irregularity in the recommendation dated 14.04.2016, therefore, the petition is liable to be dismissed.

9. Arguments heard. Record perused.

10. The case of the petitioner is that she cannot be reallocated to Information Group despite setting aside of judgment of this Court dated 07.06.2012 and order of Hon'ble Supreme Court dated 10.09.2012, as the order of Hon'ble Supreme Court dated 03.06.2010 still holds the field, whereby directions for reallocation of DMG group to the petitioner in women quota was given. To examine the contention of the petitioner, I have carefully perused order dated 03.06.2010, passed by the Hon'ble Supreme Court, vehemently relied upon by the learned counsel for the petitioner and it transpires that para-4 of the order only contains the reason for upholding the judgment of Hon'ble Lahore High Court dated 17.03.2010, in consequence whereof she was accommodated in women quota by allocating a seat in Information Group, vide recommendation of FPSC dated 03.09.2018, which she willingly accepted and consented to join Information Group, in pursuance of offer of appointment dated 03.12.2010. Yet, she filed representation dated 11.11.2010, for reallocation to DMG. This view of the petitioner in my opinion is based on misinterpretation of the order of the Hon'ble Supreme Court dated 03.06.2010. Nevertheless the petitioner was reallocated DMG in compliance of judgment dated 07.06.2012, passed by the High Court in FAO No. 15/2012 and upheld, by Hon'ble Supreme Court, vide order dated 10.09.2012. Both these decisions were set aside by a larger Bench of the

Hon'ble Supreme Court, vide judgment dated 08.02.2016 in Review Petition No. 238/2012 in the following terms:-

“9. For the reasons discussed above, we allow this petition, set aside the order dated 10.09.2012 of this Court, convert the petition into appeal, allow it, set aside the impugned judgment of the High Court and send the case back to the to the Federal Public Service Commission for decision afresh in accordance with law within a period of two months.

10. Since we have set aside the impugned judgment and the judgment dated 10.09.2012 of this Court, the Civil Petitions No. 3212 to 3227 and 3246 of 2015 having become infructuous are dismissed. However, the respondents in these petitions shall have a right to voice their grievance before the FPSC which shall be considered together with the case of respondent No.1 as was also directed in the impugned judgment. The above are the detailed reasons of our short orders of even date.”.

11. Thus, after setting aside the findings contained in judgment of this Court dated 07.06.2012 and Hon'ble Supreme Court's order dated 10.09.2012, in pursuance whereof the petitioner was accommodated in DMG, have lost their existence and are no longer in the field and as a result thereof the entire superstructure built on the judgment dated 07.06.2012 of this Court bound to fall on the ground. In the light of the established principle that “*when the basic order is without lawful authority then superstructure built on it would fall on the ground automatically*”. Guidance has been sought from the judgments of the Hon'ble Supreme Court re: ***Rehmatullah and others Versus Saleh Khan (2007 SCMR 729)***, ***Muhammad Sabir Khan Versus Rahim Bakhsh (PLD 2002 SC 303)*** and ***Moulana Atta-Ur-Rehman Versus Al-Hajj Sardar Umar Farooq (PLD 2008 SC 663)***.

12. The learned counsel for the petitioner in addition to the above also argued that judgment dated 08.02.2016, passed by the Hon'ble Supreme Court is *per incuriam* on the ground that the same has been passed on irrelevant facts presented by the respondents during hearing of the case. The argument of the learned counsel for the petitioner are without any substance as the judgments/orders of the Supreme Court, unless held by the same Court to be *per*

incuriam, can neither be considered nor can be treated as *per incuriam* by the High Courts or other subordinate courts. In this regard Article 189 of the Constitution of Islamic Republic of Pakistan, 1973 in clear terms provides that the judgments and decisions of the Hon'ble Supreme Court are binding on all courts subordinate to it. Reliance in this regard can safely be placed on the judgment of the Hon'ble Supreme Court passed in the case titled as ***H.R.C. No.40927-S of 2012 (Application by Abdul RehmanFarooqPirzada) (P L D 2013 Supreme Court 829)*** wherein the august Supreme Court has held that:-

“Therefore, if any law which has been invalidly pronounced and declared by this Court, which in particular is based upon ignorance of any provisions of the Constitution, and/or is founded on gross and grave misinterpretation thereof; the provisions of the relevant law have been ignored, misread and misapplied; the law already enunciated and settled by this Court on a specific subject, has not been taken into account, all this, inter alia, shall constitute a given judgment(s) as per incuriam; and inconsistent/conflicting decision of this Court shall also fall in that category.”.

Reliance can further be placed on the case law reported as ***Sindh High Court Bar Association through its Secretary and another versus Federation of Pakistan through Secretary, M/o Law and Justice and others (P L D 2009 Supreme Court 879)and Syed ShabbarRazaRizvi and others versus Federation of Pakistan, Ministry of Law And Justice Division through Secretary, Islamabad and others (2018 S C M R 514)***. Moreover, in the present case, from the bare perusal of the judgment dated 08.02.2016, it has been observed that the judgment dated 08.02.2016, has been passed by examining all the previous orders/judgments of the case and it was established through record that no such direction was given in order dated 03.06.2010 to accommodate the petitioner in DMG, as admittedly it was never been an issue, the Hon'ble Supreme Court then set aside its own order dated 10.09.2012, vide order dated 08.02.2016 and after considering the facts of the case directions were given to the FPSC to re-decide the petitioner's representation dated 11.11.2010, afresh. In consequence

of setting aside of the judgment of this Court dated 07.06.2012, the impugned recommendations dated 14.04.2016 for reallocating her in the Information Group were validly issued by FPSC.

13. In view of the above discussion, the present petition, being devoid of any merit, is hereby dismissed, accordingly.

(LUBNA SALEEM PERVEZ)
JUDGE

Announced in the open Court on _____.

JUDGE

M. JUNAID USMAN