

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

Mr. Justice Mian Saqib Nisar, HCJ
Mr. Justice Sh. Azmat Saeed
Mr. Justice Umar Ata Bandial
Mr. Justice Ijaz ul Ahsan
Mr. Justice Sajjad Ali Shah

CIVIL APPEALS NO.521 OF 2015 & 2387, 2388, 2552-2553 OF 2016
&
CIVIL PETITIONS NO.3875 OF 2016 & 2418, 2879 OF 2017 &
CIVIL PETITIONS NO. 2937-2940 & 4287 OF 2017.

(On appeal from the judgment/order of Peshawar High Court, Peshawar dated 28.05.2001 passed in W.P. No.597-P/2013 & judgment dated 02.12.2015 passed in W.Ps. No.2256-P/2013, 604-P/2014 & judgment dated 09.06.2015 passed in W.P.1736-P & 3016-P of 2013 & judgment dated 01.11.2016 passed in W.P.2808 of 2010 & judgment dated 11.05.2017 passed in W.P.1512 of 2016 & judgment dated 13.06.2017 passed in W.P. 1666 of 2014 & judgment dated 21.03.2017 passed in W.P. No.1477-P, 1611-P/2016, 118-P/2017 & judgment dated 28.09.2017 passed in W.P.1746-P of 2016)

Commandant, Frontier Constabulary,
Khyber Pakhtoonkhwa, Peshawar & others

**... Appellant/
Petitioner**
(in all cases)

VERSUS

Gul Raqib Khan

...Respondent
(in CA.521 of 2015)

Javed Khan & others

...Respondents
(in CA.2387 of 2016)

Fayyaz & others

...Respondents
(in CA.2388 of 2016)

Ex-Havaldar Iza Gul

...Respondent
(in CA.2552 of 2016)

Niaz Meen Bad Shah

...Respondent
(in CA.2553 of 2016)

Sep. Irfan Ullah and others

...Respondents
(in CP.3875 of 2016)

Rehmatullah and others

...Respondents
(in CP.2418 of 2017)

Subedar Aslam Khan Afraidi

...Respondents
(in CP.2879 of 2017)

Sarad Khan & others	...Respondents (in CP.2937 of 2017)
Khaliq Rehman & another	...Respondents (in CP.2938 of 2017)
Nasir Shah & others	...Respondents (in CP.2939 of 2017)
Khalil Khan & others	...Respondents (in CP.2940 of 2017)
Dilawar Shah and another	...Respondents (in CP.4287 of 2017)

For the appellant(s)/ Petitioner(s) (in all cases)	Mian Shafaqat Jan, ASC. Mr. Tariq Aziz, AOR. (in CA.521/2015) Syed Rifaqat Hussain Shah, AOR, AOR. (in all other cases). Mr. Naveed Ahmed, Asstt. Dir. FC.
For the respondent (in CA.521 of 2015)	Malik Ghulam Mustafa Kandwal, ASC.
For the respondent (in CA.2387-2388/2016)	Mr. Shaukat Ali Yousafzai, ASC.
For the respondent (in CA.2552-2553/2016)	Mr. M. Ijaz Khan Sabi, ASC.
Respondent No.22 (in CA.3875 of 2016)	In-person.
Respondent (in CP.2418/2017)	Not represented.
For respondents (in CA.2879 of 2017)	Mr. Muhammad Asif, ASC.
For the respondents (in CP.2937& 2939 of 2017)	Mr.Dil Muhammad Khan Alizai, ASC.
For the respondents (in CP.2938 & 2940 of 2017)	Nemo.
Respondents (in CP.4287of 2017)	Not represented.
Date of hearing	29.01.2018.

ORDER

UMAR ATA BANDIAL, J. – We intend to decide these connected appeals and petitions by this judgment as a common question of law is involved therein.

2. **Civil Appeal No. 521 of 2015 & Civil Appeals No. 2387, 2388, 2552 & 2553 of 2016. –** Leave was granted in these appeals in order to consider whether the respondents being employees of the Frontier Constabulary (**“FC”**) were civil servants; and therefore, the Writ Petitions filed by them before the learned Peshawar High Court in relation to the terms and conditions of their service were not maintainable on account of the bar contained in Article 212 of the Constitution of Islamic Republic of Pakistan (**“Constitution”**).

3. The facts of each case differ and so does the nature of the service grievance of each respondent. However, their common feature is that the respondent in each case had ultimately approached the Peshawar High Court in its Constitutional jurisdiction for the redressal of his grievance.

4. The learned counsel for the parties agree that the pivotal judgment of this Court on the subject of the competent remedy available to employees of the FC in relation to their service grievances is reported as **Commandant, Khyber Pakhtunkhwa Constabulary vs. Muhammad Nasir** (2015 SCMR 1040). In that judgment, this Court has held as follows:

"8. We have heard the learned counsel for the parties at length and have perused the record. The appellants are not Civil Servants as their terms and conditions of service are regulated by the provisions of the North West Frontier Constabulary Rules of 1958. The case-law cited by the learned Counsel for the appellant is not relevant after the judgment of this court in the case of Muhammad Mubeen-us-Salam and others vs. Federation of Pakistan (PLD 2006 SC 602), where this Court has held that the status of a Civil Servant cannot be conferred on an employee of the organization by a deeming clause which has its own statutory service Rules. The terms and conditions of service of the respondents are regulated by the Act of 1915 which authorizes the appellants to frame Rules. The Rules were framed in 1958 and are duly notified which regulates the terms and conditions of service of the respondents. The plea of the appellants that the Respondents are Civil Servants is without force in view of the judgment in the case of Muhammad Mubeen-us-Salam and others (*supra*). **[emphasis supplied]**.

5. The learned counsel for the appellants have urged that the *ratio decidendi* of the judgment pronounced by a larger Bench of this Court comprising nine learned Judges in Muhammad Mubeen-us-Salam and others vs. Federation of Pakistan (PLD 2006 SC 602) lays down certain tests to ascertain whether an employee of the Federation is a civil servant. These have been misapplied in the quoted passage to hold that the persons in the employment of the FC are not civil servants. Reference has been made to parts of the judgment in Muhammad Mubeen-us-Salam's case *ibid* wherein the jurisdiction of the Federal Service Tribunal is determined on the touchstone of three crucial provisions of the Constitution. These are Article 212(1)(a), Article 240(a) and Article 260 of the Constitution.

The definition of the term 'civil servant' in Section 2(b) of the Civil Servants Act, 1973 ("**Act**") has accordingly been interpreted pursuant to the said Constitutional provisions. The said Articles of the Constitution and the definition given in the Act are reproduced hereinbelow:

Article 212(1)(a) of the Constitution:

212.(1) Notwithstanding anything hereinbefore contained the appropriate Legislature may by Act provide for the establishment of one or more Administrative Courts or Tribunals to exercise exclusive jurisdiction in respect of:

(a) matters relating to the terms and conditions of persons 2 [who are or have been] in the service of Pakistan, including disciplinary matters;

Article 240(a) of the Constitution:

240. Subject to the Constitution, the appointments to and the conditions of service of persons in the service of Pakistan shall be determined –

(a) in the case of the services of the Federation, posts in connection with the affairs of the Federation and All Pakistan Services, by or under Act of Majlis-e-Shoora (Parliament); and

(b) ...

Article 260 of the Constitution:

260.(1) In the Constitution, unless the context otherwise requires, the following expressions have the meaning hereby respectively assigned to them, that is to say, –

...

"service of Pakistan" means any service, post or office in connection with the affairs of the Federation or of a Province, and includes an All-Pakistan Service, service in the Armed Forces and any other service declared to be a service of Pakistan by or under Act of Majlis-e-Shoora (Parliament) or of a Provincial Assembly, but does not include service as Speaker, Deputy Speaker, Chairman, Deputy Chairman, Prime Minister, Federal Minister, Minister of State, Chief Minister, Provincial Minister, Attorney-General, Advocate-General, Parliamentary Secretary or Chairman or

member of a Law Commission, Chairman or member of the Council of Islamic Ideology, Special Assistant to the Prime Minister, Adviser to the Prime Minister, Special Assistant to a Chief Minister, Adviser to a Chief Minister or member of a House or a Provincial Assembly;"

Section 2(1)(b) of the Civil Servant Act, 1973:

"2. Definitions.- (1) In this Act, unless there is anything repugnant in the subject or context,--

(a) ...

(b) "civil servant" means a person who is a member of an All-Pakistan Service or of a civil service of the Federation, or who holds a civil post in connection with the affairs of the Federation, including any such post connected with defence, but does include:

(i) a person who is on deputation to the Federation from any Province or other authority;

(ii) a person who is employed on contract, or on work-charged basis or who is paid from contingencies; or

(iii) a person who is "worker" or "workman" as defined in the Factories Act, (XXV of 1934), or the Workman's Compensation Act, 1923 (VIII of 1923):

6. Three broad tests for establishing the status and character of a civil servant emerge from the Constitutional mandate of the afore-going Articles. Firstly, under Article 240(a) of the Constitution, appointments to and the terms and conditions of service of the persons in the "service of Pakistan" are to be determined *by or under* Act of Parliament. Secondly, by virtue of Article 260 of the Constitution, 'service of Pakistan' means any service, post or office in connection with the affairs of the Federation. Thirdly, under Article 212(1)(a) of the Constitution, the exclusive jurisdiction to adjudicate disputes relating to the terms and conditions of persons, who are in the service of Pakistan vests in an Administrative

Tribunal, namely, the Federal Service Tribunal. These tests are mentioned in the **Muhammad Mubeen-us-Salam** case *ibid* (at pp.686-689 of the law report). The definition of the term 'civil servant' in the Act adopts the Constitutional criteria given in Article 260 noted above to reiterate that a person who, *inter alia*, holds a civil post "in connection with the affairs of the Federation" including any such post connected with defence, to be a civil servant. The larger Bench has in this respect taken the logical step to incorporate the requirements under Articles 240(a) and 260 of the Constitution as the definitional criteria of the term "civil servant" (at p.682 of the law report).

7. Having noticed the qualifying criteria of a civil servant under the law, it is appropriate now to examine the factual matrix of the present controversy. The FC was established by the NWFP Constabulary Act, (Act-XIII) of 1915 ("**Constabulary Act**"). Section 3 of the Constabulary Act empowers the Federal Government to maintain the FC as a force "for the better protection and administration of the external frontiers of Pakistan within the limits of or adjoining North-West Frontier or any part thereof." Section 3-A of the Constabulary Act authorises the Federal Government to employ the FC outside the limits of or adjoining the North-West Frontier Province in other parts of Pakistan for the better protection and administration of those parts. Section 5(1) of the Act *ibid* vests the Federal Government with power to appoint the Commandant and other persons including the District Constabulary Officers or

Assistant Constabulary Officers of the force in one or more districts. Section 6 delegates to the Commandant and District Constabulary Officer the power to appoint subordinate officers in the manner prescribed by Rules made under the Act. The Federal Government exercised its power conferred by Section 21 of the Constabulary Act, to frame the NWFP Constabulary Rules, 1958 (**“Constabulary Rules”**), in order to provide the terms and conditions of service of the officers and men in the FC.

8. It will be observed that the matter of terms and conditions of service of the respondent-employees of the FC, are in the first place regulated by the Constabulary Act and elaborated pursuant thereto by the FC Rules. The provisions made by the Constabulary Rules are in furtherance of and in exercise of the power conferred by the Constabulary Act. Therefore, the terms and conditions of service of the employees of the FC are prescribed in the Act and the Rules. The test laid down in Article 240(a) of the Constitution requires that the appointment to and the terms and conditions of service of posts in connection with the affairs of the Federation and of a service of Pakistan shall be determined **“by or under** an Act of” Parliament. The expression *“by or under”* in Article 240(a) of the Constitution authorizes the terms and conditions of service of a civil servant to be provided both by statute or by statutory rules. The provision made in the Constabulary Act and the Constabulary Rules, therefore, satisfy the Article 240(a) test. The

judgment in the **Muhammad Mubeen-us-Salam** case *ibid* endorses this point of view:

"86. ...The terms and conditions of service of those employees, however, are required to be specified under Article 240 of the Constitution by or under Act of the Parliament. Thus, the conclusion would be that only those persons, who are in the service of Pakistan, as discussed hereinabove, and if their terms and conditions are governed either by a statute or statutory rules, in terms of Article 240 of the Constitution, can seek remedy before the Service Tribunals. ..."

9. The second crucial test of the rule laid down in the **Mubeen-us-Salam** case *ibid* for a person to qualify as the member of a service of Pakistan and therefore as a civil servant, is that the civil post he holds must bear connection with the affairs of the Federation, including any such post connected with the Defence. The respondents were appointed in service pursuant to the provisions of the Constabulary Act of 1915 and the Constabulary Rules, 1958 framed thereunder. Under Section 3 and Section 3A of the Constabulary Act, the respondents, *inter alia*, perform functions for the better **protection and administration** of the frontiers of Pakistan. The performance of such duties and functions is clearly in connection with the affairs of the Federation of Pakistan because these are rendered to protect the solidarity, integrity and law and order in Pakistan.

10. A helpful discourse on this aspect of the matter is rendered by a judgment reported as **Federation of Pakistan vs.**

Muhammad Nazir (1998 SCMR 1081). In that case, the question in issue was whether the employees of Pakistan Rangers fell within the definition of “civil servant” and whether the Federal Service Tribunal had jurisdiction to entertain appeals from orders passed by the Pakistan Rangers Authorities. It was observed by the Court that:

“7. ... Perusal of these rules clearly shows that they are all embracing, and therefore, under the amendment of section 1 of the Pakistan Rangers Ordinance, these rules would prevail over the Rules of 1973. The Pakistan Rangers Ordinance was promulgated to constitute a force called the Pakistan Rangers for the protection of and maintenance of order in the border areas. Since with regard to the status of the members of the force the Pakistan Rangers Ordinance is silent, therefore, it can be safely said that the employees of the Pakistan Rangers will be deemed to be civil servants as they are performing duties in connection with affairs of the Federation and hence under the Service Tribunals Act, 1973, an appeal by a member of the Pakistan Rangers regarding a matter relating to terms and conditions of his service is competent before the Federal Service Tribunal. ...”

[emphasis supplied]

11. It follows from the *dicta* laid down above that the protection of the border areas is a sovereign function belonging to and performed by the Federation. The same duty is performed equally in the present case by the FC not only on the frontiers of KPK Province but also by maintaining order in other parts of Pakistan. For discharging such functions, the services rendered by the FC have direct nexus with the affairs of the Federation. Therefore, the reasons given in the **Muhammad Nazir** case (*supra*)

fully apply here as well and we hold that the employees of FC are civil servants. Insofar as the question of competent remedy in respect of service disputes of FC men is concerned, we hold that in a matter relating to the terms and conditions of service of the respondent-employees of the FC, an appeal before the Federal Service Tribunal is available to them as the exclusive remedy under the law. Accordingly, this remedy may be availed by them within the statutory period of limitation commencing from the date of issuance of certified copy of this judgment. All these appeals filed by the appellant-Commandant, FC are accordingly allowed in above terms.

12. **CIVIL PETITIONS NO.3875 OF 2016 & 2418, 2879**

OF 2017 & CIVIL PETITIONS NO.2937 & 4287 OF 2017.- Since

all these petitions involve the same question of law as discussed above, therefore, the same are converted into appeals and allowed in above terms.

13. **CIVIL PETITIONS NO.2938-2940 OF 2017. -** These

three petitions are barred by 58 days. As the substantial question of law raised in these petitions is the same as the one raised in the above noted appeals which have been allowed; therefore, following the dictum laid down by this Court in **Mehreen Zaibun Nisa vs. Land Commissioner, Multan** (PLD 1975 SC 397), we condone the delay occasioned in the filing of these petitions. Consequently, we

also convert these petitions into appeals and allow the same in the terms noted in para-11 above.

CHIEF JUSTICE

JUDGE

JUDGE

JUDGE

JUDGE

Islamabad,
29.01.2018.
*Irshad Hussain /**

APPROVED FOR REPORTING.