

**IN THE SUPREME COURT OF PAKISTAN**

(Appellate Jurisdiction)

**Present:**

**Mr. Justice Qazi Faez Isa, C.J.**

**Mr. Justice Amin-ud-Din Khan**

**Mr. Justice Athar Minallah**

**Civil Petition No.6211 of 2021**

*(Against the judgment dated 12.10.2021 of the Peshawar High Court, Mingora Bench (Dar-ul-Qaza) Swat passed in Writ Petition No.562-M of 2020)*

Ahmad Ullah and others                      ...Petitioners

**Versus**

District Education Officer (Male),  
Buner and others                      ...Respondents

For the petitioners:                      Mr. Shamsul Hadi, ASC  
Syed Rifaqat Hussain Shah, AOR

For the respondents:                      Not represented.

Date of hearing:                      27.10.2023

**ORDER**

**Athar Minallah, J.-** The judgment dated 12.10.2021 of the High Court has been assailed by eleven petitioners, who have sought leave by invoking the jurisdiction of this Court under Article 185(3) of the Constitution of the Islamic Republic of Pakistan 1973 (**'the Constitution'**). The petitioners had invoked the extraordinary constitutional jurisdiction of the High Court under Article 199 of the Constitution. They had challenged the proceedings of the Departmental Promotion Committee (**'DPC'**) meeting held on 11.11.2019 to consider eligible candidates to fill the vacant posts of Senior Certified Teacher (**'SCT'**) in District Buner, Khyber Pakhtunkhwa. They had further prayed that the notification dated 25.02.2020, whereby the recommendations of the DPC were approved and eligible civil servants were promoted, be set aside.

2.        The petitioners were appointed as Certified Teachers (**'CT'**) in BPS-15 on *ad hoc*/contract basis in 2015. Their services were regularized on

07.03.2018 under the Khyber Pakhtunkhwa Employees of the Elementary and Secondary Education (Appointment & Regularization of Services) Act, 2017 (**'Act of 2017'**). Section 3 described the terms and conditions relating to the regularization and it, inter alia provided that the service promotions quota of all service cadres shall not be affected. Section 4 explicitly provided that employees whose services were regularized shall rank junior to all other employees belonging to the same cadre who were in service on regular basis and shall also rank junior to such other persons who, in pursuance to recommendations of the Public Service Commission, were appointed to the cadre regardless of their date of appointment. Moreover, the *inter se* seniority of the regularized employees within the cadre was required to be determined on the basis of their continuous service. After being regularized under the Act of 2017 the petitioners had attained the status as civil servants and grievances regarding their terms and conditions of service were amenable to the exclusive jurisdiction of the Khyber Pakhtunkhwa Service Tribunal (**'Tribunal'**).

3. In 2019 the concerned department had initiated the process to consider eligible candidates to fill twenty one vacant posts of Senior Certified Teachers (**'SCT'**) in BPS-16 in District Buner. The cases of the petitioners were not forwarded to the DPC because, according to the terms and conditions of regularization set out under the Act of 2017, their consideration for promotion had not matured by then. They had also not completed the required length of service. The petitioners who had invoked the jurisdiction of the High Court had not contested their seniority determined in accordance with the seniority set out under section 4 of the Act of 2017. They also did not exhaust the departmental remedies provided under the law. The High Court had entertained the petition but, without advertent to the question of maintainability, dismissed the petition on merits. The learned counsel for the

petitioner, at the very outset, was asked regarding maintainability of the petition filed by the sixteen petitioners who had invoked the extraordinary constitutional jurisdiction of the High Court, keeping in view the bar contained under Article 212 of the Constitution. He has argued that the petition was maintainable because no final order amenable to the jurisdiction of the Tribunal had been passed by the competent authority. Moreover, he has argued that fundamental rights of the petitioners were involved and, therefore, the only efficacious remedy was by way of invoking the jurisdiction of the High Court vested under Article 199 of the Constitution. The maintainability of the petition was also argued on the ground that, since the petitioners had been regularized, therefore, interpretation of the Act of 2017 was also required.

4. It is not disputed that the petitioners were regularized under the Act of 2017 and consequently they had attained the status of civil servants. The determination of the seniority quota of other employees who were in service on commencement of the Act of 2017 was explicitly dealt with under section 4 *ibid*. The cases of the petitioners were not forwarded to the DPC because their consideration for promotion had not matured by then. The competent authority, thus, did not consider them eligible. They also did not exhaust the departmental remedies individually. The District Education Officer (Male), District Buner, through a letter dated 23.12.2019, informed the Director, Elementary & Secondary Education, Khyber Pakhtunkhwa that the petitioners were not eligible and the grounds were stated therein. The petitioners preferred to invoke the extraordinary jurisdiction of the High Court under Article 199 of the Constitution. It is noted that the question of fitness was not determined since the petitioners were not considered for promotion nor were they assessed by the DPC. As noted above, after regularization, the petitioners enjoyed the status of civil servants. The

conditions of regularization set out under the Act of 2017 governed the terms and conditions of their service as civil servants. Their grievance before the High Court was in relation to the question of eligibility to be considered for promotion.

5. The constitutional command under Article 212 of the Constitution starts with a *non obstante* clause and provides that the appropriate legislature may, through an Act, provide for a Tribunal, *inter alia*, to exercise exclusive jurisdiction in respect of the matter relating to the terms and conditions of persons who are or have been in the service of Pakistan, including disciplinary matters. Sub Article 2 of Article 212, which also starts with a *non obstante* clause, further provides that where a Tribunal has been established under clause 1 then 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 Tribunal extends. Clause 3 provides that an appeal shall lie to this Court from a judgment, decree, order or sentence of a Tribunal if it is satisfied that a case involves a substantial question of law of public importance and leave has been granted accordingly. Pursuant to the aforementioned constitutional command, the legislature of Khyber Pakhtunkhwa has enacted the Service Tribunals Act 1974 (**'Act of 1974'**). It has been established to exercise jurisdiction in respect of matters relating to the terms and conditions of service of the civil servants. Section 3(2) of the Act of 1974 unambiguously provides that the Tribunal shall have exclusive jurisdiction in respect of the matters relating to the terms and conditions of civil servants, including disciplinary matters. Section 4 of the Act of 1974 provides that any civil servant aggrieved by any final order, whether original or appellate, made by a departmental authority, in respect of any of the terms and conditions of the latter's service may, within thirty days of the communication of such order, prefer an appeal to the Tribunal. Where an

appeal, review or representation has been provided under the Khyber Pakhtunkhwa Civil Servants Act 1973 ('**Act of 1973**') or any rules against any such order then an appeal shall lie before the Tribunal if the aggrieved civil servant has preferred a departmental appeal, application or review or representation to such authority and a period of ninety days has lapsed from the date on which such appeal, application or representation was preferred. Section 4(b) of the Act of 1974 excludes from the jurisdiction of the Tribunal an order or decision of the departmental authority determining the fitness or otherwise of a person to be appointed to or hold a particular post or to be promoted to a higher post or grade. In the case before us, the petitioners were declared ineligible to be considered for promotion and, therefore, their grievance was amenable to the exclusive jurisdiction of the Tribunal. Section 9 of the Act of 1973 confers a right of a civil servant to be considered for promotion to a higher post provided the latter is eligible i.e. possesses such minimum qualification as may be prescribed in this regard. As a corollary, only an eligible civil servant can be considered for promotion in accordance with clauses (a) and (b), as the case may be, of sub Section 2 and Section 9 of the Act of 1973. In case of non-selection posts, the promotion is made on the basis of seniority-cum-fitness. The question of fitness becomes relevant only when a civil servant is eligible to be considered along with other similarly placed civil servants.

6. It is obvious from a cumulative reading of the Act of 1973 that eligibility and fitness are distinct and their criteria is altogether different. The question of determination of eligibility in the context of being considered for promotion precedes the stage when fitness is assessed and determined by a competent designated authority which, in these cases, was the DPC. The determination of eligibility is made in the light of the prescribed conditions and criteria. If a civil servant is determined to be eligible i.e. possesses such

minimum qualification as may have been prescribed only then is the latter's case placed before the designated authority for making an assessment of fitness for the purposes of promotion. Fitness to hold a higher post relates to comparative suitability, keeping in view the quantification of performance assessed on the basis of subjective decision based on objective criteria.<sup>1</sup> In other words, fitness is the subjective evaluation made by a designated authority/forum on the basis of objective criteria.<sup>2</sup> It is essentially an assessment of the competence and performance of a civil servant who becomes eligible to be considered for promotion. The subjective evaluation on the basis of an objective criteria made by the designated authority/forum cannot be substituted by a court or tribunal. It is also settled law that there is no vested right to be promoted to a higher post. The right under the Act of 1973 is conferred to the extent of being considered i.e. assessed and evaluated subjectively on the basis of an objective criteria if the bar of eligibility has been crossed. The eligibility purely relates to the terms and conditions of service, for example the prescribed length of service, quantification of the marks relating to performance evaluation reports (PERs), completion of training programs etc. The only factor which is excluded from the exclusive jurisdiction and domain of the Tribunal is the decision of a designated authority/forum regarding 'fitness', while eligibility and all other matters relating to the terms and conditions of service are exclusively within the domain of the Tribunal. The exclusive jurisdiction conferred upon the Tribunal, pursuant to the clear constitutional command under Article 212, ousts the jurisdiction of a High Court while exercising jurisdiction under Article 199 of the Constitution to decide, entertain or adjudicate upon any matter relating to the terms and conditions of service. The bar under Article

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<sup>1</sup> Tasleem Jan v. Muhammad Zaman(2005 SCMR 695)

<sup>2</sup> Muhammad Anis v. Abdul Haseeb (PLD 1994 Supreme Court 539)  
Muhammad Zahir Raja v. Federation of Pakistan (2012 SCMR 971)

212 extends even when an order passed by the departmental authority is without jurisdiction, *mala fide*, *coram non judice*, or in breach of the fundamental rights guaranteed under the Constitution.<sup>3</sup> Article 199 explicitly declares the jurisdiction of the High Court to be subject to the Constitution and, therefore, the bar under Article 212 of the Constitution, besides being a constitutional command, is absolute to the extent of all those matters that fall within the exclusive domain and jurisdiction of a Tribunal established under the Act of 1974. This Court has consistently observed that before taking any decision regarding admission of a constitutional petition brought by a civil servant, the High Court is expected to first decide the question of jurisdiction, having regard to the bar contained under Article 212 of the Constitution. It is further noted that a plea taken by an aggrieved civil servant regarding violation of fundamental rights guaranteed under the Constitution also does not confer jurisdiction on a High Court under Article 199 of the Constitution.<sup>4</sup>

7. In the case before us, the grievance of the petitioners was essentially regarding their terms and conditions of service as civil servants. The question of eligibility was within the exclusive jurisdiction of the Tribunal and, therefore, the petition was not maintainable under Article 199 of the Constitution and thus the jurisdiction of the High Court under Article 199 was ousted in the light of the express bar contained under Article 212 of the Constitution. The petition under Article 199 was not competent and the grievance raised before the High Court was not justiciable. The petition was, therefore, deemed to have been dismissed on the ground of maintainability and not on merits. The findings and determinations made by the High Court in the impugned judgment regarding the merits are *per incuriam* and shall not

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<sup>3</sup> *Superintending Engineer v. Muhammad Khurshid* (2003 SCMR 1241)

*Peer Muhammad v. Government of Balochistan* (2007 SCMR 54)

*Asadullah Rashid v. Muhammad Muneer* (1998 SCMR 2129)

<sup>4</sup> *I. A. Sharwani v. Government of Pakistan* (1991 SCMR 1041)

prejudice any proceedings that the petitioners may have initiated before a competent forum to agitate their grievance.

8. The above are the reasons for our short order dated 27.10.2023 whereby leave was refused and the petition was dismissed.

Chief Justice

Judge

Judge

Islamabad the

27<sup>th</sup> October 2023

'APPROVED FOR REPORTING'

*M. Azhar Malik/Rameen Moin*