

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE AMIN-UD-KHAN
MR. JUSTICE JAMAL KHAN MANDOKHAIL
MR. JUSTICE MUHAMMAD ALI MAZHAR

CIVIL PETITION NO.47-Q OF 2016

(Against Order dated 29.03.2016 passed by
the High Court of Balochistan, Quetta in
C.P.No.112/2014)

Dr. Abdul Nabi, Professor, Department of Chemistry,
University of Balochistan, Sariab Road, Quetta ...Petitioner

Versus

Executive Officer, Cantonment Board, Quetta ...Respondent

For the Petitioner: Mr. Gohar Yaqoob Yousafzai, AOR

For the Respondent: Mr. Adnan Basharat, ASC
(For Cantonment Board)
Mr. Abdul Zahir Kakar, AAG, Balochistan

Date of Hearing: 21.03.2023

JUDGMENT

MUHAMMAD ALI MAZHAR, J.-: This Civil Petition for leave to appeal is directed against the Order dated 29.03.2016 passed by the learned Balochistan High Court, Quetta in C.P.No.112/2014 whereby the Constitution Petition filed by the petitioner was dismissed.

2. The ephemeral statistics of the *lis* are that the petitioner is a Professor in the Basic Pay Scale 21, who is imparting education in the Department of Chemistry at the University of Balochistan, Quetta ("**University**") and he claimed to be a government servant within the meaning of Section 39 of the University of Balochistan Act, 1996 ("**UOB Act**"). According to him, he is the owner of the house bearing No.254/24-B, situated at Jinnah Town, Quetta, within the territorial limits of Cantonment Board Quetta. On 10.08.2010, the petitioner was called upon to pay a sum of Rs.57360/- on account of House Tax, Water Charges, Rent of Residential Building etc. He paid the dues on 11.08.2010 for a period commencing from 14.08.2005 to 30.06.2011 and was also allowed 60% rebate on the basis of being a provincial Government Servant. However, on 30.09.2012 the petitioner was sent a notice of demand for payment of Cantonment board dues and arrears amounting to Rs.124,550/-. Being

dissatisfied, the petitioner made some representations whereby the department asked him to produce confirmation from the University that he is an employee thereof, which was provided to the respondent. In unison, the respondent also sought verification from the Office of the Director, Military Lands and Cantonment Department, Ministry of Defence, Rawalpindi and *vide* their letter dated 10.07.2013, it was confirmed that the said exemption is available to regular employees (serving or retired) of the Federal Government, Provincial Government and Cantonment Board, but the respondent declined to recognize the status of the petitioner as a Government Servant (BPS-21) and refused to grant the 60% exemption and/or rebate in view of the S.R.O.156(I)/2004 dated 13.03.2004. The petitioner challenged the refusal of rebate in the High Court but his constitution petition was dismissed *vide* the impugned judgment dated 29.03.2016.

3. The learned counsel for the petitioner argued that the learned High Court failed to appreciate the jurisdiction vested in it under Article 199 of the Constitution of Islamic Republic of Pakistan 1973 ("**Constitution**") as there was no alternate remedy for seeking declaration as to the status of the petitioner as a "government servant" within the meaning of Section 39 of the UOB Act. It was further contended that there was no dispute regarding the Assessment of House Tax etc. under the Cantonments Act, 1924 ("**Cantonments Act**"), rather the prime question was the denial of 60% exemption as a government servant, therefore, Section 84 of the Cantonments Act was not applicable. He further averred that the petitioner, being an employee of the University, is in fact a government servant within the ambit of Section 39 of the UOB Act.

4. The learned counsel for the respondent argued that the petitioner was rightly non-suited by the learned High Court due to his failure to avail the alternate remedy provided under Section 84 of the Cantonments Act. He further added that after availing the right of appeal against the assessment, an aggrieved person may also file a revision application under Section 88 of the Cantonments Act before the relevant authority provided under the law. He further argued that the petitioner was not entitled to claim any exemption or rebate in view of the notification relied upon by the petitioner, hence this civil petition is liable to be dismissed.

5. Heard the arguments. The judgment of High Court unequivocally reflects that the petition remained pending since 2014 to decide the question of maintainability on account of availability of alternate remedy and finally, the learned High Court reached the conclusion that the petitioner had failed to avail an alternate and adequate remedy, therefore the petition was dismissed. What we have deciphered is that there is no discord in the midst of the parties in relation to the performance of duties by the petitioner as a professor in the Department of Chemistry at the University; instead the bone of contention was with regard to the claim of rebate or exemption being an employee of the Provincial Government. In order to advert to the line of reasoning upstretched by the parties *vice versa*, it is most expedient to analyze the relevant provisions of the UOB Act wherein, under Section 2, definition clause (k), an "Employee" means a person borne on pay roll of the University but shall not include (a) a person holding purely fixed tenure post, (b) a person appointed by the University on contract basis, or (c) a person on deputation with the University. Whereas Section 39 of the UOB Act expounds the status of employees of the University, which is for the ease of reference, reproduced as under:-

39. (1) Employees of the University and their retirement.-- All employees of the university including employees appointed on contract basis and/or on fixed tenure posts shall be deemed to be provincial public servants as defined by section 21 of Pakistan Penal Code: [emphasis supplied]

Provided that the sanction of their prosecution shall be granted by the respective competent authority in the University and not by any other authority in the University and not by any other authority prescribed by Federal or Provincial Government.

(2) An Officer, teacher or other employee of the University shall retire from service:

(i) On such date after he has completed 25 years of service qualifying for pension or other retirement benefits as the competent authority may, in the public interest direct, or

(ii) Where on direction is given under clause (i) on the completion of the sixty years of his age.

Explanation.--In this section "Competent Authority or a person duly authorized by the appointing authority in that behalf, not being a person lower in rank to the officer, teacher or other concerned employee.

6. According to Section 21 of the Pakistan Penal Code, 1860 ("**PPC**"), the expression "public servant" is defined as under:-

21 "Public servant" -The words "public servant" denote a person falling under any of the descriptions hereinafter following, namely:
First. [Omitted by Ord. XXVII of 1981]

Second. Every Commissioned Officer in the Military [Naval or Air] Forces of [Pakistan] while serving under the [Federal Government] or any Provincial Government;

Third. Every Judge;

Fourth. Every officer of a Court of Justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate, or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order in the Court; and every person specially authorized by a Court of Justice to perform any of such duties;

Fifth. Every juryman, assessor, or member of a panchayat assisting a Court of Justice or public servant;

Sixth. Every arbitrator or other person to whom any cause or matter has been referred for decision or report by any Court of Justice, or by any other competent public authority;

Seventh. Every person who holds any office by virtue of which he is empowered to place or keep any person in confinement;

Eighth. Every officer of [the Government] whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety, or convenience;

Ninth. Every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of [the Government], or to make any survey, assessment or contract on behalf of [the Government], or to execute any revenue-process, or to investigate, or to report, on any matter affecting the pecuniary interests of [the Government], or to make, authenticate or keep any document relating to the pecuniary interests of [the Government], or to prevent the infraction of any law for the protection of the pecuniary interests of [the Government], and every officer in the service or pay of [the Government] or remunerated by fees or commission for the performance of any public duty;

Tenth. Every officer whose duty it is, as such officer, to take, receive, keep or expend any property, to make any survey or assessment or to levy any rate of tax for any secular common purpose of any village, town or district, or to make, authenticate or keep any document for the ascertaining of the rights of the people of any village, town or district;

[*Eleventh.* Every person who holds any office in virtue of which he is empowered to prepare, publish, maintain or revise an electoral roll or to conduct an election or part of an election.]

7. In the case in hand, the employees of the University, in line with the provisions of the UOB Act are deemed to be public servants within the meaning of Section 21, PPC, which denotes that they shall be dealt with strictly during the course of duties as compared to other classes and genres of persons mentioned in the definition of public servants. According to **Black's Law Dictionary**, Ninth Edition, Pg. 477-478, the meaning of the word "**Deem**" is to treat (something) as if it were really something else, or it has qualities that it does not have. "'Deem' has been traditionally considered to be a useful word when it is necessary to establish a legal fiction either positively by 'deeming' something to be what it is not or negatively by 'deeming'

something not to be what it is...". In order to interpret the statute, the Court is obligated to give effect to the deeming provisions while taking into consideration the object of such legal fiction and also dredge up the rationales of statutory fiction to its cogent finale *vis-à-vis* the intention of legislature so it should not cause any injustice. Legal fictions give rise to explicit objectives restricted to the purposes which should be construed contextually but should not be elongated further than the legislative wisdom for which it has been created. In the case of All Pakistan Newspapers Society vs. Federation of Pakistan (PLD 2012 SC 1), this Court, while referring to the case of Mubeen-us-Salam v. Federation of Pakistan (PLD 2006, SC 602), held that the purpose of importing a deeming clause is to place an artificial construction upon a word/phrase that would not otherwise prevail and sometimes it is to make the construction certain. It was further held that a deeming clause is a fiction, which cannot be extended beyond the language of the section by which it is created or by importing another fiction. In the case of Anwar Aziz Chaudhry vs. The State (1991 SCMR 994), this Court held that in an enactment specific officers or persons holding specific offices in an organization may be particularized as persons falling within the definition of 'public servant', or those who normally would not fall within that category may be treated as falling within that definition, or all persons working in that organization may be deemed as falling within that definition. The absence of definition section in an enactment does not mean that the persons concerned who are covered by the enactment are not to be treated at all as public servants. What it means is that Section 21 of the PPC would come into play, which will determine which of such persons, can be treated as falling in the category of public servants. In the case of Mehreen Zaibun Nisa vs. Land Commissioner, Multan and others (PLD 1975 SC 397), it was held that when a statute contemplates that a state of affairs should be deemed to have existed, it clearly proceeds on the assumption that in fact it did not exist at the relevant time but by a legal fiction we are to assume as if it did exist. The classic statement as to the effect of a deeming clause is to be found in the observations of Lord Asquith in East End Dwelling Company Ltd. v. Finsbury Borough Council that "where the statute says that you must imagine the state of affairs, it does not say that having done so you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs". In the case of Central Bureau of Investigation,

Bank Securities and Fraud Cell and Ors. V. Ramesh Gelli and Ors. ((2016) 3 SCC 788), the Court dilated upon the situation when the Rajasthan Municipalities Act, 1959 deemed every member to be a public servant within the meaning of Section 21 of the Penal Code, 1860 and the Court observed that when the legislature creates a legal fiction, the court has to ascertain for what purpose the fiction is created and after ascertaining this, to assume all those facts and consequences which are incidental or inevitable corollaries for giving effect to the fiction and finally held that there is no escape from the conclusion that the Appellant is a public servant within the meaning of Section 21 of the Penal Code. Whereas in the case of G.A. Monterio v The State of Ajmer (AIR 1957 SC 13), the Court held that the true test to determine whether a person is an officer of the government, is: (1) Whether he is in the service or pay of the Government, and (2) whether he is entrusted with the performance of any public duty and if both these requirements are satisfied it matters not the least what is the nature of his office, whether the duties he is performing are of an exalted character or very humble indeed.

8. The petitioner had claimed the exemption/rebate taking into account the S.R.O.156(I)/2004 dated 13.3.2004, issued by Ministry of Defence pursuant to the powers conferred by Section 99A of the Cantonments Act whereby the Federal Government granted certain exemptions in the payment of house or property tax imposed under Section 60 of the aforesaid Act, on the lands and buildings situated within the cantonment limits in Pakistan. The relevant Statutory Regulatory Order (SRO) is reproduced as under:-

"THE GAZETTE OF PAKISTAN

Statutory Notifications (S.R.O)
GOVERNMENT OF PAKISTAN

MINISTRY OF DEFENCE
NOTIFICATIONS

Rawalpindi, the 13th March, 2004

S.R.O. 156 (I)/2004.-In exercise of the powers conferred by section 99A of the Cantonments Act, 1924 (II of 1924), and in supersession of its Notification No. S.R.O.1207(I)/79, dated the 22nd December, 1979, the Federal Government is pleased to grant the following exemptions in payment of house or property tax imposed under section 60 of the aforesaid Act, on the lands and buildings situated within the cantonment limits in Pakistan, namely:-

(a) 10% of the annual tax, on account of cost of repairs and other expenditure incurred to maintain the building in a condition in which it may fetch the gross annual rent;

(b) 5% of the annual tax, in a case in which the tax in respect of a financial year is paid in lump sum before the 30th day of September in that year;

(c) 60% of the annual tax payable in respect of one house in any cantonment in Pakistan owned by a person or the spouse of such person whether self-occupied or rented out either wholly or in part, who is Federal Government or a Provincial Government or a Cantonment Board servant, exemption will be permissible to these serving employees who are regularly employed by a Competent Authority of the aforesaid authorities. A Cantonment Board servant would mean a servant of a Board holding a substantive whole time appointment under the Board paid from the Cantonment Fund. Persons appointed on contract under rule 9 of the Pakistan Cantonments Servants Rules, 1954 or those employed on adhoc or purely temporary basis will not be entitled to this exemption;

(d) 100% of the annual tax payable in respect of one house in any cantonment in Pakistan owned by a retired Federal Government or a Provincial Government of a Cantonment Board servant or his/her spouse whether self-occupied or rented out either wholly or in part. Exemption will be permissible to those retired servants who have retired after superannuation or after completing qualifying pensionable service. Those retired compulsorily, removed from service, prematurely retired due to fault or discipline or dismissed from service will not be entitled for the exemption". [emphasis supplied]

9. According to Section 99A of the Cantonments Act, the general power of exemption vests in the Federal Government to issue a notification in the official Gazette for exemption, either wholly or in part, for the payment of any tax imposed under the Act, for any person or class of persons or any property or goods or class of property or goods. While relying on the aforesaid S.R.O., the petitioner invited our attention for consideration to a letter dated 19.12.2013, communicated by the Director Human Resource, Directorate of Human Resource, University of Balochistan, Quetta stating that all the employees of the University, including employees appointed on contract basis and/or fixed tenure, are provincial public servants as defined by Section 21 of the PPC and also referred to Section 39 of the UOB Act. The petitioner also placed on record another letter dated 10.7.2013 sent by the Assistant Director General (Finance & Budget), Military Lands & Cantonments Department to the Director, Military Lands & Cantonments, Quetta Region, Quetta Cantt. for providing the exemption of House Tax to the petitioner and it is clearly mentioned in the letter that the exemption as per rule is available to regular employees (serving/retired) of the Federal Government, Provincial Government and Cantonment Boards and, in the end, a request was made to ask the CEO, Cantt. Board, Quetta to take further necessary action. Despite all this interdepartmental correspondence, the grievance of the petitioner was not redressed, hence he approached the High Court for the enforcement of the

notification allowing the exemption, but the petition was dismissed on the question of maintainability.

10. The extraordinary jurisdiction under Article 199 of the Constitution is envisioned predominantly for affording an express remedy where the unlawfulness and impropriety of the action of an executive or other governmental authority could be substantiated without any convoluted inquiry. The expression "adequate remedy" signifies an effectual, accessible, advantageous and expeditious remedy which should also be *remedium juris* i.e. more convenient, beneficial and effective. To effectively bar the jurisdiction of the High Court under Article 199 of the Constitution, the remedy available under the law must be able to accomplish the same purpose which is sought to be achieved through a writ petition. This extraordinary jurisdiction is provided as remedy to cure an illegality which can be established without any elaborate enquiry into disputed facts. In the case of Dr. Sher Afgan Khan Niazi Vs. Ali S. Habib & others (2011 SCMR 1813), this Court held that the question of adequate or alternate remedy has been discussed time and again by this Court and it is well settled by now that the words "adequate remedy" connote an efficacious, convenient, beneficial, effective and speedy remedy and also articulated the guiding principles to be considered by the High Courts in order to determine the adequacy of the alternate remedy that if the relief available through the alternative remedy in its nature or extent is not what is necessary to give the requisite relief within the meaning of Article 199 and the law has prescribed any remedy that can redress that category of grievance in that way and to the required extent.

11. In fact, the impugned judgment is structured on the sole issue of non-availing the right of appeal provided under Section 84 of the Cantonments Act, hence the petition was dismissed but there was no dispute as to whether the petitioner was a public servant and entitled to the rebate or not but he was called upon to avail the right of appeal rather than approaching High Court in writ jurisdiction. It is clear beyond any shadow of doubt that the right of appeal in the aforesaid Section is provided against the assessment or levy of or against the refusal to refund any tax under the Cantonments Act. There is a conspicuous distinctiveness struck between a claim of exemption under the notification issued under Section 99A of the Cantonments Act and challenge to an assessment of house tax etc.

made by the competent authority under the provisions of Cantonments Act. The framework and skeleton of the writ petition moved by the petitioner in the High Court was in relation to the enforcement of S.R.O.156(I)/2004, dated 13.3.2004, issued by Ministry of Defence pursuant to the powers conferred by Section 99A of the Cantonments Act and did not challenge any assessment order of tax, therefore in all fairness, he was wrongly non-suited on the ground of non-availing the alternate remedy of appeal which was not applicable in the present case but, on the contrary, his claim of exemption or rebate could be easily decided in writ jurisdiction in view of the terms and conditions of the aforesaid SRO wherein no factual controversy or disputed question of facts were involved to determine the petitioner's entitlement in view of the available documents and correspondence. After considering the pros and cons, we reached the finale that the petitioner is entitled to claim the exemption/rebate under the letter of law. The learned counsel for the respondent neither offered any lawful justification nor could give any good reason which may suffice to disentitle the petitioner from the benefit of exemption/rebate, nor did he controvert that the petitioner does not fall within the category or status of provincial public servant.

12. In the wake of the above discussion, this Civil Petition is converted into an appeal and allowed. As a consequence thereof, the impugned judgment of the High Court is set aside and the petitioner is held to be entitled to the benefit of S.R.O.156(I)/2004, dated 13.3.2004, issued by Ministry of Defence pursuant to the powers conferred by Section 99A of the Cantonments Act, 1924.

Judge

Judge

Judge

Quetta, the
21st March, 2023
Khalid
Approved for reporting.