

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE UMAR ATA BANDIAL, CJ
MR. JUSTICE AMIN-UD-DIN KHAN
MR. JUSTICE MUHAMMAD ALI MAZHAR

CIVIL PETITIONS NO. 657 TO 662 OF 2020

(Against the judgment dated 11.12.2019 passed by the Federal Service Tribunal, Islamabad, in Appeals. No. 1096 (R) CS/2019, 1103 (R) CS/2019, 1106 (R) CS/2019, 1107 (R) CS/2019, 1108 (R) CS/2019 and 1109 (R) CS/2019)

- | | |
|-------------------------|------------------|
| 1. Asrar Ahmed | (In CP.657/2020) |
| 2. Muhammad Rafiq Anjum | (In CP.658/2020) |
| 3. Muhammad Riaz | (In CP.659/2020) |
| 4. Tahir Iqbal | (In CP.660/2020) |
| 5. Syed Qamar Abbas | (In CP.661/2020) |
| 6. Muhammad Mushtaq | (In CP.662/2020) |

...Petitioners

VERSUS

Chairman Pakistan Aeronautical Complex Board,
Kamra and others

...Respondents
(In all cases)

For the Petitioners: Mr. Muhammad Aftab Alam Rana, ASC

For Respondents: Mr. Ayaz Shaukat, DAG
Wing Commander, Muhammad Kamran
Haider Ali, Superintendent

Date of Hearing: 05.07.2022

JUDGMENT

MUHAMMAD ALI MAZHAR, J. These six Civil Petitions for leave to appeal are directed against the common Judgment dated 11.12.2019, passed by learned Federal Service Tribunal, Islamabad ("**Tribunal**") in Appeals No. 1096 (R) CS/2019, 1103 (R) CS/2019, 1106 (R) CS/2019, 1107 (R) CS/2019, 1108 (R) CS/2019 and 1109 (R) CS/2019, whereby the service appeals filed by the petitioners were dismissed.

2. The cursory statistics of the case are that the petitioners were employed by the Ministry of Defence, Production Division,

Government of Pakistan and posted in Mirage Rebuild Factory, Kamra. Their terms and conditions were governed under the Civil Servants Act, 1973. Afterwards, the Pakistan Aeronautical Complex Board, Kamra ("**PAC Board**") was established through the Pakistan Aeronautical Complex Board Ordinance, 2000 ("**PACB Ordinance**"), but the employees appointed prior to the PACB Ordinance were protected. Under the aforesaid Ordinance, the PAC Board Employees (Service) Rules, 2002 ("**PACB Rules**") were framed and the petitioners were directed to submit option whether they want to remain as civil servant or the employees of Board. According to the petitioners, they opted to continue as civil servant and also claimed that they are eligible for promotion to the next higher grade as civil servant. On the other hand, the respondents pleaded that the petitioners of their free will and consent appeared in the departmental examination and never opted the status of civil servant at the time when option was afforded to all such employees. The petitioners preferred departmental appeals which were rejected, thereafter, the petitioners approached the learned Federal Service Tribunal, Islamabad but their service appeals were also dismissed vide impugned judgment dated 11.12.2019.

3. The learned counsel for the petitioners argued that the learned Tribunal failed to consider Section 7 of the PACB Ordinance, as well as Rules 2(1) & 4 (g) of the PACB Rules wherein the terms and conditions of service of the employees appointed before promulgation of the PACB Ordinance were protected and, if they opted to remain civil servants within the time fixed by the Board, they would be considered as Civil Servants. It was further contended that the petitioners opted the status of civil servants but later on the departmental authorities directed them to appear in exams, failing which proceedings would be initiated against them. So, under the fear of losing their jobs, they appeared in the examinations, however they could not succeed. It was further contended that the learned Tribunal ignored the material fact that, being civil servants, the right of promotion had already accrued to the petitioners without appearing in the departmental examinations.

4. The learned Deputy Attorney General ("DAG") argued that the PAC Board is empowered to frame promotion & recruitment rules under the PACB Ordinance and the provisions mentioned in the Civil Servants (Appointment, Promotion & Transfer) Rules, 1973 ("**APT Rules**") are not applicable. It was further contended that the petitioners never submitted any option under Section 7 (a) of the PACB Ordinance, hence they are not civil servants but employees of the PAC Board. He further argued that the petitioners appeared in the departmental examinations but could not qualify on merit. They accepted PACB Rules and repeatedly appeared in the examinations with their free will and without any pressure of the PAC Board. It was further contended that the right of promotion was never infringed, rather an equal opportunity was always afforded to the petitioners in the departmental examinations. He further argued that the copy of option certificate produced by the petitioners in this Court is not available in the official record of the respondents and is a fictitious and misleading document.

5. Heard the arguments. According to Section 3 of the PACB Ordinance, the Federal government by notification established the Pakistan Aeronautical Complex Board for carrying out the purposes of the PACB Ordinance. In order to thrash out the controversy involved in the case in hand, Section 7 is quite significant which is for ease of convenience reproduced as under:-

7. Investment of the Board with certain powers.--

Notwithstanding anything contained in any law, regulation, rule, order, notification, agreement or other instrument for the time being applicable to any factory, or any officer or other employee appointed or engaged in, or in connection with, any factory, the Board may, in relation to such factory, officer or employee, exercise the following powers of the Federal Government or of any officer authorized for the purpose by the Federal Government, namely:

(a) to determine the terms and conditions of service, recruitment, promotion, transfer, posting, dismissal, discharge, demotion and other disciplinary actions of all officers and other employees:

Provided that the terms and conditions of service of any officer or other employee appointed or engaged before the commencement of this Ordinance shall not be varied to his disadvantage and that he shall not be dismissed or removed from service or reduced in rank by any authority subordinate to that by which he was appointed:

Provided further that the officers or employees appointed before the commencement of this Ordinance shall be given an option, after the service rules for the officers and employees of the Board have been made, to opt for the new service rules or to continue to be governed by their existing service rules; but once the option has been exercised by an officer or employee within the time fixed by the Board, it shall be final, and an officer or employee who does not exercise the option within the prescribed time shall be considered to have opted for the new rules: (Emphasis supplied)

Provided also that the promotion, demotion or other disciplinary action against an officer or employee on deputation or secondment shall be governed by the service rules applicable to him;

(b) to appoint or engage such officers and other employees, advisers, consultants on contract as it considers necessary for the efficient discharge of its functions on such terms and conditions of service as it may determine;

(c) to carry out all technical and engineering projects or works, or to enter into contract or agreement pertaining to their execution;

(d) to make all purchases of plant, machinery and stores either in the country or abroad in such manner as it thinks fit and also to dispose of stores and equipment and write off the losses;

(e) to fix pay of the officers and other employees wherever necessary either initially or otherwise at any stage within the pay scales prescribed by the Federal Government;

(f) to utilize or incur expenditure in respect of lump sum grant allocated for the purpose in the budget;

(g) to utilize surplus capacity of factories to undertake commercial activities in markets within the country and abroad;

(h) to create and operate with the approval of the Federal Government non-lapsable revolving fund in foreign as well as local currency to meet objectives of indigenization and to promote export and R&D activities from sale proceeds of the factory products; and

(i) to make, subject to any direction issued in this behalf by the Federal Government, departmental, financial, and accounting rules and procedures based on sound commercial lines within six months of establishment."

6. It is quite obvious that before constituting the PAC Board to manage, organize or re-organize any factory, and to administer the affairs of factories on sound commercial lines within the existing financial resources so as to adequately meet the needs of the defence of the country during war and peace, the PAC Board has to

discharge its functions according to the policies involving national interest, including the directions that the Federal Government may pass on from time to time. By the same token, the aforesaid PACB Ordinance explained in simple terms that, in order to safeguard the services structure of the employees appointed or engaged before the commencement of the PACB Ordinance, their terms and conditions of service shall not be varied to their disadvantage, with a further rider that all such officers appointed before the commencement of the PACB Ordinance shall be given a preferential right to either opt for the new service rules, or to continue to be governed by their existing service rules; but with a further qualification that once the option is exercised within time, it shall be final and the officer or employee who did not submit an option within the prescribed time will be deemed to have opted for the new set up. According to Rule 2 of the PACB Rules, the said Rules are made applicable to all the employees in the whole time employment of the Board, working in PAC, other than (i) the employees appointed before the commencement of the PACB Ordinance and opted to continue to be governed by the Civil Servants Act, 1973; and (ii) the employees appointed on deputation, secondment or contract unless their terms of appointment or contract make these rules applicable. Whereas under Rule 4 (g) (definition clause), the term "civil servants" means all employees of the PAC Board appointed before the commencement of the PACB Ordinance and opted to continue to be governed by the Civil Servants Act, 1973. So far as the criteria for promotion is concerned, it is provided under Rule 16 which articulates that an employee, possessing such minimum qualifications and standards as may be specified by the Board from time to time, shall be eligible for promotion to a post reserved for departmental promotions under the Rules in the higher scale of the cadre to which he belongs, on the recommendation of the Departmental Promotion Committee.

7. The Factory Routine Orders disseminated by the Managing Director, Mirage Rebuild Factory, Pakistan Aeronautical Complex, Kamra on 07.09.2010 is also relevant in which Order No.7 is interconnected with the Discipline and Extending the Option to

Civilian Employees, as provided under Section 7 (a) of the PACB Ordinance. The relevant Order is reproduced as under:-

"16. An option under Section 7 (a) of PAC Board ordinance is required immediately for the civilian officers and employees of MRF who are employed before the commencement of said Ordinance to opt for the new service rules i.e. PAC Board Employees (Service) Rules, 2000 or to be governed by their existing service rules i.e. Civil Servants Act-1973."

8. The chronicles of the petitioners' case expounds that they intermittently appeared in the departmental examinations starting from the year 2012 to 2018, but nobody could qualify the examination which was a precondition for awarding promotion. On one hand, the petitioners are asserting that they submitted the option but on the other hand, their never-ending and non-stop attempts in the departmental examination unambiguously corroborated that they never submitted any option in keeping with the requirements laid down in the PACB Ordinance. On the contrary, right through, the demeanor of petitioners signifies they assented and acquiesced to be governed by the PACB Ordinance and the PACB Rules, rather than being governed under the Civil Servants Act 1973 and the APT Rules. The plea of the petitioners is also hit by the doctrine of approbate and reprobate; the maxim *qui approbat non reprobat* (one who approbates cannot reprobate) is akin to the doctrine of benefits and burdens which at its most basic level provides that a person taking advantage under an instrument, which both grants a benefit and imposes a burden, cannot take the former without complying with the latter. A person cannot approbate and reprobate or accept and reject the same instrument. For all intents and purposes, the doctrine is somewhat nip in the bud to a contradictory demeanor which activates in circumstances where a person has to pick and choose between two rights and he cannot pick out both. If he opted one between the two, then he cannot later on ask for the other.

9. It is also beyond any logical comprehension that according to the petitioners they were forced to sit in the examination, but they never put forward any objection or reservation, nor anything was

brought on record to show that they appeared in the examinations without prejudice to their right to challenge. It is clear from the conduct of the petitioners that, after failure in the departmental examinations, a fall back stand was set in motion that the promotion cases of the petitioners should be processed in accordance with the APT Rules, being civil servants, and not as the employees of the PAC Board without submitting their option at the relevant time when they were afforded an opportunity to segregate themselves from the purview of the PACB Rules, but they failed to do so despite receiving an evenhanded and fair opportunity. According to the respondents, nothing is available on their record to indicate that any option was ever tendered by the petitioners. The first right of refusal was extended in terms of Ordinance to opt the new service rules and service structure of the Board according to the scheme of restructuring and reorganization, which cannot be construed the violation or infringement of any fundamental rights of the petitioner but it was founded on consensual act of every individual employee without any compulsion or pressure and the particular portion or provision of law inviting options from the employees was never challenged by the petitioners if in actual fact considered to be ultra vires the Constitution or the law.

10. In the same way, earlier one Nazar-ul-Islam, an employee of the PAC Board, approached the Federal Service Tribunal by means of Service Appeal No.1647(R)CS/2016, which was allowed by the learned Tribunal with the findings that the said appellant was appointed prior to the promulgation of the PACB Ordinance and submitted his option to continue as a civil servant under the Civil Servants Act, 1973, but the said judgment of the Tribunal was challenged in this Court and the lis was decided vide judgment reported as **2019 SCMR 1933** (Pakistan Aeronautical Complex through Chairman and others Vs. Nazar-ul-Islam), wherein after taking into consideration the sticking point, this Court held that the Nazar-ul-Islam participated in the departmental promotion examinations and when he failed to obtain the highest marks as required for promotion, he started raising grievance and cannot be allowed to blow hot and cold in the same breath as it was found to be apparent from the record that there was no option given by him

to be governed by the Civil Servants Act, 1973 and APT Rules, and he himself opted to appear in the departmental promotion examination but the Tribunal failed to consider this aspect and ultimately the judgment of the learned Tribunal in the case of Nazar-ul-Islam (supra) was set aside by this Court.

11. In the wake of the above discussion, we do not find any irregularity or perversity in the impugned judgment passed by the learned Tribunal. The petitions are therefore dismissed and leave is refused.

Chief Justice

Judge

Judge

Islamabad the
5th July, 2022
Khalid
Approved for reporting.