

THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

Present:

Justice Qazi Faez Isa, C.J.

Justice Amin-ud-Din Khan

Justice Athar Minallah

Civil Petition No.5795 of 2021 & Civil Petition No.2-Q of 2022

(Against the judgment dated 30.10.2021 of the High Court of Balochistan, Quetta passed in CP No.631 of 2021)

Mr. Muhammad Hassanullah (OMG/B-18),

Acting Additional Secretary,

Health Department,

Balochistan

...Petitioner in CP-5795/2021

Chief Secretary, Government of Balochistan,

Civil Secretariat Zarghoon Road, Quetta

and another

...Petitioner in CP-2-Q/2022

Versus

The Chief Secretary, Government of

Balochistan, Civil Secretariat, Quetta

and others

...Respondents in CP-5795/2021

Shujaat Ali Khosa BS-18 S&GAD,

Government of Balochistan,

Quetta and others

...Respondents in CP-2-Q/2022

For the petitioners:

Mr. Muhammad Shoaib Shaheen, ASC

Syed Rifaqat Hussain Shah, AOR

(in CP-5795/2021)

Mr. Ayaz Khan Swati, Additional Advocate General,
Balochistan

(in CP-2-Q/2022)

For the respondents:

Nemo.

Date of hearing:

13 December 2023

ORDER

Athar Minallah, J. Muhammad Hassanullah, (**petitioner no.1**) and the Government of Balochistan, (**'Government'**) (collectively they shall be referred to as the 'petitioners') have separately sought leave against the judgment of the High Court, dated 30.10.2021.

2. The extraordinary jurisdiction vested in the High Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (**'Constitution'**) was invoked by three petitioners; Shujaat Ali Khan (BPS-18), Haseebullah Kakar (BPS-16) and Mukhtar Ali (BPS-16) (**'respondents'**).

They had challenged the notification, dated 31 March 2021, whereby petitioner no.1 was posted as 'Acting' Additional Secretary, Health Department, Government of Balochistan, Quetta. The respondents belong to the Balochistan Secretariat Service. The respondents had explicitly stated in the memorandum of petition filed before the High Court that the matter relating to the posting of petitioner no. 1 was also challenged and the same was pending before the Balochistan Service Tribunal ('**Tribunal**'). They did not disclose in the memorandum of the petition whether any of their proprietary or personal right(s) had been invaded or denied and whether they had been wrongfully deprived of something to which they were entitled under the law. It was their case before the High Court that petitioner no.1 belonged to the service, Office Management Group ('**OMG**'), therefore, he could not have been transferred to a post reserved for the Balochistan Civil Service ('**BCS**'), Pakistan Administrative Service ('**PAS**') and Balochistan Secretariat Service ('**BSS**'). They had placed reliance on the notifications issued by the Government whereby the formula regarding cadre and ex cadre share of the aforementioned services had been prescribed. It appeared from the memorandum of the petition that the petitioners had challenged the transfer notification in a representative capacity was well. Nonetheless, the respondents were essentially asserting rights in relation to their terms and conditions of service, inter alia, under the Balochistan Civil Servants Act, 1974, Balochistan Secretariat (grade 16 and above) Service Rules, 2002 ('**Rules 2002**') and the notifications dated 6 October 2020, 14 October 2020 and 10 February 2014 issued by the Government. The Government had explicitly raised the objection against the maintainability of the petition in their written comments but this crucial objection appears to have escaped the attention of the High Court because it was not adverted to. The High Court had also not taken into consideration the fact that the respondents had expressly admitted in their memorandum of petition that the jurisdiction of the Tribunal regarding the same matter was invoked and that

the appeal was pending. The High Court, without adverting to the question of maintainability expressly raised by the Government, allowed the petition.

2. Notices were issued to the respondents in compliance with this Court's orders, dated 12-05-2022 and 07-11-2023 respectively, but they preferred not to pursue the matter and consequently they are proceeded against ex parte.

3. We have heard learned counsel for the petitioner no.1 and the learned Additional Advocate General, Balochistan. The latter has mainly argued that the High Court could not have exercised its jurisdiction under Article 199 because the respondents were civil servants and asserting rights regarding the terms and conditions of service. The matter was already pending before the Tribunal and this fact was expressly stated by the respondents in their memorandum of petition filed before the High Court. The constitutional command under Article 212 of the Constitution bars the jurisdiction of a High Court because exclusive jurisdiction vests in the Tribunal. Moreover, the respondents were, in essence, agitating the matter in a representative capacity and, therefore, the petition could not have been entertained in disregard to the procedure prescribed under Order 1 Rule 8 of the Civil Procedure Code.

4. Admittedly, the respondents enjoy the status of civil servants within the meaning of the said expression defined under the Baluchistan Civil Servant Act 1974 (**'Act of 1974'**). Pursuant to the constitutional command under Article 212, the Baluchistan Service Tribunal has been established under section 3 of the Baluchistan Service Tribunals Act 1974 (**'Tribunals Act'**). Section 4 sets out the conditions and limitation for filing an appeal. It expressly provides that where an appeal, review or representation to a departmental authority is provided under any law or any rules then, in such an eventuality, the appeal shall not be competent if the departmental remedies have not been availed by an aggrieved civil servant. The

respondents had invoked the jurisdiction of the High Court and had raised grievances which essentially related to their terms and conditions of service. There is nothing on record to show that the respondents had availed the departmental remedies provided under the law. The Advocate General appears to be justified in raising concerns regarding the consequences of the judgment because it has placed a clog on the jurisdiction of the executive to order transfers and postings of civil servants in accordance with the powers conferred under section 10 of the Act of 1974. It is not disputed that the same matter was also challenged and pending before the Tribunal. The High Court has declared that the postings/transfers can only be made in accordance with the distribution formula notified by the Government. The question before us is whether the High Court could have exercised its jurisdiction under Article 199 in the light of the bar contained in Article 212 of the Constitution.

5. Article 212 starts with a non obstante clause and provides that the appropriate legislature may, by the Act, provide for establishment of one or more administrative courts or tribunals, inter alia, to exercise jurisdiction in respect of matters 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 also begins with a non obstante clause and expressly provides that no court other than an administrative court or tribunal shall grant an injunction, make any order or entertain any proceedings in respect of any matter of which the jurisdiction of such administrative court or tribunal extends. The Constitution has, therefore, expressly declared that the administrative court or tribunal established pursuant to the command under Article 212 shall exercise exclusive jurisdiction in relation to the matters within its jurisdiction. The non obstante clause in Article 212 gives it an overriding effect and thus bars the jurisdiction of a High Court vested under Article 199 of the Constitution.

The ouster curtails the jurisdiction of a High Court in respect of matters which fall within the ambit of the exclusive jurisdiction of an administrative court or tribunal. It is noted that in order to make a matter exclusively within the domain of the service tribunal under the Tribunals Act, and thus create a bar contemplated under Article 212, it must be shown that the grievance has been agitated by a civil servant and relates to the terms and conditions of service and does not attract the exceptions set out in clause (b) of section 4 of the Tribunals Act. The Act of 1974 and the Tribunals Act provide for a comprehensive mechanism for agitating a grievance by a civil servant and specific forums have been provided for seeking remedies. The exclusive jurisdiction of the service tribunal and the bar contained under Article 212 are of such a nature that that they are attracted even if the grievance arises from an order which may involve questions of mala fide, coram non judice or having been passed without jurisdiction.¹ In I.A Sherwani's case², a larger Bench of this Court has held and observed that a civil servant cannot bypass the jurisdiction of the service tribunal by adding a ground of violation of fundamental right(s). The service tribunal will have exclusive jurisdiction in a case founded on the terms and conditions of service even if it involves the question of violation of fundamental rights. It has been further held that the service tribunal will be vested with jurisdiction even where the case involves the vires of a statutory rule or notification. It was held that if a statutory rule or notification adversely affects the terms and conditions of a civil servant the same will be treated as a final order for the purposes of the jurisdiction of a service tribunal. The questions and grievances relating to transfer and postings of a civil servant fall within the ambit of the terms and conditions of service of a civil servant

¹ Syed Arshad Ali and others v. Pakistan Telecommunication Company Ltd. and others (2008 SCMR 314), Peer Muhammad v. Government of Balochistan through Chief Secretary and others (2007 SCMR 54) Khalid Mahmood Wattoo v. Government of Punjab and others (1998 SCMR 2280) Asadullah Rashid v. Haji Muhammad Munir and others (1998 PLC (CS) 1371) Noor Badshahd Khattak v. Government of NWFP and others (2004 PLC (CS) 1084)

² I.A Sherwani and others v. Government of Pakistan through Secretary Finance and others (1991 SCMR 1041)

and thus are within the exclusive domain of an administrative tribunal established under the command of Article 212.³ The bar under Article 212 is complete in respect of the cases in which the Tribunal has jurisdiction under the Tribunals Act.

6. In the case before us, the respondents were asserting a right which fell within their terms and conditions of service. They were admittedly civil servants within the meaning of the said expression as defined under the Act of 1974. It was mandatory for them to have agitated the grievance in the manner prescribed under the scheme of law applicable to a civil servant under the Act of 1974 and the Tribunals Act. Moreover, they had explicitly stated in the memorandum of the petition that the same matter was challenged and it was pending before the Tribunal. The objection regarding maintainability of the petition and its adjudication under Article 199 of the Constitution was raised by the Government but it was not adverted to by the High Court. The respondents were attempting to achieve an object which was not justiciable before the High Court while exercising jurisdiction under Article 199 of the Constitution. The bar under Article 212 had ousted the jurisdiction of the High Court. The declaration made by the High Court was, therefore, not sustainable. The matter was already pending before the Tribunal and thus the latter had the exclusive jurisdiction to adjudicate upon it.

7. In the light of the aforementioned reasons, these petitions are converted into appeals and allowed. The impugned judgment is consequently set aside. However, allowing the appeals will not entitle petitioner no.1 to be restored to the position pursuant to the notification which was impugned before the High Court. The Government will be competent to order posting or transfer in accordance with the applicable

³ Ayyaz Anjum v. Government of Punjab, Housing and Physical Planning Department and others (1997 SCMR 169), Peer Muhammad v. Government of Balochistan through Chief Secretary and others (2007 SCMR 54)

law. This judgment shall not prejudice any proceedings that may be pending before or order(s) which may have been passed by the Tribunal in the same matter.

Chief Justice

Judge

Judge

Announced in open Court on _____
at Islamabad

Judge.

'NOT APPROVED FOR REPORTING'
*Aamir Sh. /Rameen Moin LC**