

IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:

MR. JUSTICE GULZAR AHMED, CJ

MR. JUSTICE IJAZ UL AHSAN

MR. JUSTICE SAYYED MAZAHAR ALI AKBAR NAQVI

CIVIL APPEAL NO. 827 OF 2020

(On appeal against the judgment dated 04.03.2020 passed by the Peshawar High Court, Peshawar in Writ Petition No. 5281-P/2019)

Government of KPK through Chief Secretary and others

...Appellant(s)

VERSUS

Syed Sadiq Shah and others

...Respondent(s)

For the Appellant(s):

Mr. Atif Ali Khan, Addl. A.G KP

Mr. Amanatullah Qureshi, Deputy
Secretary Finance, KPK

For Respondents (1-10):

Qazi Jawad Ehsanullah, ASC

For the Respondent (11):

Mr. Aftab Javed, Sr. Research Officer,
PHC

Date of Hearing:

04.03.2021

...

JUDGMENT

SAYYED MAZAHAR ALI AKBAR NAQVI, J.- Through this appeal by leave of the Court under Article 185(3) of the Constitution of Islamic Republic of Pakistan, 1973, the appellant has called in question the vires of the impugned judgment dated 04.03.2020 passed by the Peshawar High Court, Peshawar, whereby the Writ Petition filed by the respondents was allowed and they were held entitled to ad-hoc relief allowance at the rate of 5% of the running basic pay.

2. Briefly stated the facts of the matter are that for the fiscal year 2019-20, the Federal Government in the annual budget had granted 10% ad-hoc relief allowance to the employees of Federal Government from BPS 1 to BPS 16, while 5% ad-hoc relief allowance was granted to the employees of BPS 17 to BPS 20. These allowances were given on running basic pay. The Government of Khyber Pakhtunkhwa while drawing analogy from

the said grant announced increase in salaries vide notification dated 11.07.2019, however, it made a distinction that 5% ad-hoc relief allowance will be provided to employees of BPS 17 to BPS 19 but the same was not made available to those employees of the Provincial Government who were already drawing special allowances including Special Judicial Allowance, subject matter of issue in dispute. As the respondents being employees of BPS 17 to BPS 19 of Peshawar High Court were already drawing Special Judicial Allowance, therefore, they were denied the said 5% ad-hoc relief allowance. Being aggrieved by the notification, they challenged the impugned notification before the Peshawar High Court, Peshawar, by filing a Constitutional Petition on the ground that the notification in question is discriminatory in nature and is issued in defiance of Article 25 of the Constitution of Islamic Republic of Pakistan, 1973, hence, not sustainable in the eyes of law. During the proceedings before the High Court, it was hotly contested from both ends, however, the High Court accepted the Constitutional Petition vide impugned judgment dated 04.03.2020 mainly on the ground that the allowance in question has been extended to all similarly placed employees across the board, hence, refusal of the said allowance to the respondents cannot be said to have been made under reasonable classification based upon the principle of intelligible differentia, therefore, it is violative of Article 25 of the Constitution. The Government of KPK challenged the impugned judgment by filing Civil Petition wherein leave to appeal was granted by this Court vide order dated 22.09.2020. Hence, the instant appeal by leave of this Court.

3. *Learned Additional Advocate General, KPK, inter alia, contended that the respondents are already getting special judicial allowance, which is already disproportionate to the employees of BPS 1 to 16 and when it is calculated along with basic salary, it becomes hefty; that the very purpose of the impugned notification was to compensate the other employees similarly placed in BPS 1-16 to eliminate chances of disparity and as such there was reasonable classification based on intelligible differentia; that every Province has to grant financial benefits within their own financial resources, otherwise, if the impugned allowance is granted at random to each and every employee, it would create further*

discrimination resulting into financial burden upon the provincial government. He lastly contended that the impugned judgment is defective in law, hence, not sustainable in the eye of law and may be set at naught.

4. *On the other hand, learned counsel for the respondent Nos. 1 – 10 defended the impugned judgment. The crux of arguments advanced was that pursuant to the impugned notification, the Government of KPK has divided the employees of one category into sub-categories, which is against the intent of law. He added that this disparity by dividing the employees of the same department into sub-classes is violative of the law laid down by this Court in I.A. Sherwani Vs. Government of Pakistan (1991 SCMR 1041) and Government of Punjab Vs. Mubarik Ali Khan (PLD 1993 SC 375).*

5. *We have heard learned counsel for the parties and have perused the record.*

6. *The questions involved in this appeal are three fold, (i) whether the classification in question was based on intelligible differentia and contrary to Article 25 of the Constitution of Islamic Republic of Pakistan, (ii) whether the executive authority can classify and sub-classify the employees only to the extent to grant certain extra benefits, (iii) whether the High Court while exercising the power of judicial review has the authority to interfere in policy matters of government.*

7. *Firstly, we will discuss first two questions as these two are interrelated and conjoined in a manner that these cannot be separated from each other. The crux of the issues also lies in understanding the term 'intelligible differentia', therefore, it would be in order to discuss as to what does the term "intelligible differentia" mean. The dictionary meaning of "intelligible" is well articulated or enunciated and loud enough to be heard, can be understood, whereas the word "differentia" means an attribute that distinguishes one entity from other, especially an attribute that distinguishes one species from others of the same genus. According to the book 'Legal Terms & Phrases, 2013 Edition', the word "intelligible differentia" means an attribute by which a species is distinguished from all other species of the same genus, or, a distinguishing mark. In literal words, the expression "intelligible*

differentia" means difference capable of being understood, a factor that distinguishes a class from another which is capable of being understood. In the case of Dr. Mobashir Hassan Vs. Federation of Pakistan (PLD 2010 SC 265), this Court defined "intelligible differentia" in the following terms:-

"As far as 'intelligible differentia' is concerned, it distinguishes persons or things from the other persons or things, who have been left out. The Indian Supreme Court, while relying upon the statement of Professor Willis in Charanjit Lal v. Union of India (AIR 1951 SC 41), observed that "any classification which is arbitrary and which is made without any basis is no classification and a proper classification must always rest upon some difference and must bear a reasonable and just relation to the things in respect of which it is proposed".

Same principle has been highlighted in Shazia Batool v. Government of Balochistan (2007 SCMR 410).

59. Thus, keeping in view the above principles and the definition of classification "intelligible differentia" means, in the case of the law differentiating between two sets of the people or objects, all such differentiations should be easily understood as logical and lucid and it should not be artificial or contrived."

8. Undeniably equality is one of the magnificent cornerstones of a society, which has been followed in each and every system to run the state, however, a special emphasis has been laid down in a democratic state. Article 25 of the Constitution of Islamic Republic of Pakistan, 1973, guarantees to every person the right to equality before the law and the equal protection of the laws. The expression "equal before law" is a declaration of equality of all persons irrespective of gender, race, religion, colour, caste, creed, status and language etc, implying thereby the absence of any privilege in favour of any individual. The guiding principle of this Article is that all persons and things similarly circumstanced shall be treated alike both in respect of privileges conferred and liabilities imposed. Equality before law means that amongst equals should be equal and equally administered and that like should be treated alike. Hence what it forbids is discrimination between persons who are substantially in similar circumstances or conditions. However, this Article does not forbid different treatment of un-equals. The rule is rather that alike should be treated equally and that unlike should

be treated differently. As a matter of fact all persons are not alike or equal in all respects. Application of the same laws or yardstick uniformly to all of them will, therefore, be inconsistent with the principal of equality. To avoid that situation laws must distinguish between those who are equals and to whom they must apply and those who are different and to whom they should not apply. In fact identical treatment in unequal circumstances would amount to inequality. So a reasonable classification or sub-classification is only not permitted but is necessary if society is to progress. It must always rest upon some real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved by the authority. It is now well established law that persons may be classified or further sub-classified into entities and such entities may be treated differently if there is a reasonable basis for such difference. Article 25 forbids class legislation but it does not forbid classification or differentiation which rests upon reasonable grounds of distinction. The classification however must not be arbitrary, artificial or evasive but must be based on some real and substantial bearing, a just and reasonable relation to the object sought to be achieved by the legislation. The principle of equality does not mean that every law, policy matter, notification, administrative or executive order etc must have universal application to all the persons who by nature, attainment or circumstances are not in the same position. The varying needs of different classes of persons require different treatment. In order to pass the test for permissible classification two conditions must be fulfilled i.e. (i) the classification must be founded on an intelligible differentia which distinguishes persons or things those are grouped together from others left out of the group, (ii) the intelligible differentia must have a rational nexus with the object sought to be achieved. However it must disclose that there must be a substantial basis for making the classification and there should be a nexus between the basis of classification and the object of action under consideration based upon justiciable reasonings. Through the impugned notification, the relief of 5% was denied to those employees of BPS-17 to BPS-19, who are already drawing special allowances in the name of Health Professional Allowance, Special Judicial Allowance, Scheduled Post Allowance, Technical Allowance, Prisons Allowance and Prosecution Allowance.

The reason of this classification as furnished by the appellant was due to financial impediment as the employees from BPS-17 and above being officers are in receipt of more salary than those of the employees from BPS 1 to BPS 16, which in common parlance is called disproportionality in the salary of the employees. As narrated above, in order to pass the test for permissible classification two conditions must be fulfilled i.e. (i) the classification must be founded on an intelligible differentia, and (ii) the intelligible differentia must have a rational nexus with the object sought to be achieved. Articles 29 to 40 in Chapter 2 of the Constitution of Islamic Republic of Pakistan are the "Principles of Policy". These principles of policy are the directive principles to achieve the cherished goal of a welfare state. Article 38(e) makes it mandatory for the Government that it shall "reduce disparity in the income and earnings of individuals, including persons in the various classes of the service of Pakistan;" In a way, it is the duty of the Government to remove the disproportionality in the salaries of various classes of employees who are in service of Pakistan. The impugned notification was impliedly in consonance with the spirit of the Constitution, therefore, the learned High Court ought to have refrained from interfering in it. To further strengthen what has been stated above, it would be in order to refer to the recent judgment of this Court in the case of House Building Finance Company Ltd. Vs. Muhammad Irfan Khan (2020 SCMR 98). In this case, the House Building Finance Company had granted financial relief to one group of employees while denied the relief to the other group of employees. The respondents in this case, who were deprived of the financial relief, went to High Court and succeeded in getting the relief. However, this Court while allowing the appeal of the department has held as under:-

"To arrive at the conclusion as noted in para-12 as reproduced above, no rational basis has been identified as to how the 'Officers and Executive' cadre which does not enjoy a statutory protection of collective bargaining could be equated with the workmen cadre in service of HBFCL. We have also noted that Government of Pakistan in a recent fiscal year, 2019-2020 increased the salary from Grade-01 to Grade-16 employees and revision was ordered to the extent of 10% whereas for the Gazetted Officers of Grade-17 to Grade-20 the increase was only ordered to the extent of 05% and salary of BPS-21 and above was not increased. Even we have noted that no increase was considered in respect of the armed personnel on account of the financial crunch faced by the State of Pakistan. As such, financial

exigency as has been expressed above, do empower the employer to consider different yardstick for revision in the salary of different categories of its employees. All employees cannot claim to be treated alike irrespective of their grades, domain and class. There is a clear distinction between the employees covered by the labour laws and other statutory dispensation vis-a-vis employees in 'Executive and Officers' cadre. This principle was so held in Sail Ex-Employees Association case (Supra). In a case reported Muhammad Shabbir Ahmed Nasir v. Secretary, Finance Division, Islamabad (1997 SCMR 1026) and Farman Ali v. State (1997 SCMR 1026 = 1997 PLC (C.S.) 903) it was held by this Court that grouping for good governance by the employer of its employees serving in BPS-01 to BPS-16 into one category and those serving in BPS-17 to BPS-22 to another category for the purpose of granting greater monetary benefit, cannot be challenged on ground of arbitrariness or unreasonable classification and as violative of Article 25 of the Constitution."

(Underlined to lay emphasis)

9. In Muhammad Shabbir Ahmed Nasir Vs. Secretary, Finance Division (1997 SCMR 1026), a five Member Bench of this Court has candidly held that classification on the basis of low paid or high paid employees placed in different grades, irrespective of functional similarity, is a reasonable classification and BPS 1-16 and BPS 17-22 can be grouped into two different classes. It would be advantageous to reproduce the relevant portion of the judgment, which reads as under:-

"12. In the light of the rationale laid down by this Court in I.A. Sherwani's case (supra) the grouping by the Government of its employees serving in BPS 1 to 16 into one category, distinct from the category of those serving in BPS 17 to 22 for the purposes of granting greater monetary benefit to the former category could not be challenged on the grounds of arbitrariness or unreasonable classification. A glance on the old pay scales of employees serving in BPS 1 to 22 will show that there was substantial difference between the minimum and maximum amount of pay drawn by the employees serving in BPS 1 to 16 as compared to those serving in BPS 17 to 22. Therefore, if the Government, decided, while revising upward the pay scales of its employees in BPS 1 to 22, to extend more monetary benefit to the low-paid employees by putting them in a separate category, the classification did not suffer from any infirmity. In our view the categorization of the employees on the basis of low-paid and high-paid employees was a reasonable classification and did not suffer from any arbitrariness."

10. With the passage of time, the scope of interpretation of statutes has been broadened especially with reference to interpretation of certain expressions of law while keeping in view the

attributes of modern society in juxta position. Intelligible differentia is an exception to the basic principle of equality based upon the principle of natural justice in more refined manner to provide equality amongst the subjects of the society and while introducing certain legal expressions with an intent to bring the society close to equality eliminating the chances to face the atrocities of economical pressure which has squarely affected the society at large around the globe. Our country is not an exception rather is facing more financial constraints, therefore, the applicability of the said legal term seems to be in the interest of safe dispensation of justice. The said object has been achieved by the Government of KPK through impugned notification. Hence, the intelligible differentia existed between the two sets of employees and such differentia was logical and lucid and cannot be termed as artificial or arbitrary.

11. *Now, we will advert to the third question i.e. whether the High Court under the garb of judicial review has the power to interfere in policy matters of government. The process of judicial scrutiny of the legislative acts on the touchstone of the Constitution is called "Judicial Review". The doctrine of judicial review is the enforcement of the rights assured and guaranteed under the Constitution through Constitutional remedies. It is one of the great assets of federalism, and is the protector of the fundamental rights. The fundamental object of judicial review is to exert a great moral force upon the legislature to keep it within the limits of the Constitution and the law and to save the people from the unreasonable executive actions. This Court in a number of cases has held that the Constitutional courts being guardian of the Constitution have the power to judicially review the executive actions and the conduct of the public authorities but the same should be on the touchstone of fairness, reasonableness and proportionality. It is a matter of fact that our constitution is based upon principle of trichotomy of powers. However, the power of judicial review is an added attribute of the judiciary. The Courts while exercising power of judicial review must not violate the right of any other organ of the state and remain within the prescribed limits as disclosed in the Constitution of Islamic Republic of Pakistan, 1973. Though the Constitution is based upon federal system of government but the Provinces are autonomous in many respects rather after 18th*

Amendment, the horizon of autonomy of the Provinces has been widened especially with reference to financial matters by way of abolishing the concurrent list to some extent. As each Province has its limited quota under the National Finance Commission Award and the Provinces are supposed to run its affairs within the prescribed financial limits, hence, the impugned notification can be safely termed as subject of the policy to compensate the employees getting disproportionate salary as compared to the respondents. In view of the facts and circumstances narrated above, we are of the considered view that the learned High Court has passed the judgment in disregard of the powers and the law, hence, the impugned notification is declared to be legal and rightly issued in accordance with law.

12. *For what has been discussed above, this appeal is allowed and the impugned judgment of the Peshawar High Court, Peshawar, dated 04.03.2020 is set aside.*

CHIEF JUSTICE

JUDGE

JUDGE

Islamabad, the
4th of March, 2021
Approved For Reporting
Khurram