

IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE SARDAR TARIQ MASOOD
MR. JUSTICE AMIN-UD-DIN KHAN
MR. JUSTICE MUHAMMAD ALI MAZHAR

CIVIL PETITION NO.2021 OF 2019

(Against the judgment dated 05.04.2019
passed by the Federal Service Tribunal,
Islamabad, in MP.No.2047/2018 in Appeal
No.483 (P)CS/2013)

Abdul Qudoos

...Petitioner

VERSUS

Commandant Frontier Constabulary, Khyber Pakhtunkhwa,
Peshawar and another

...Respondents

For the Petitioner:

Mr. Muhammad Ramzan Khan, ASC
Mr. Muhammad Sharif Janjua, AOR

For the Respondents:

N.R.

On Court Call:

Ch. Amir Rehman, Addl. AGP

Date of Hearing:

04.10.2022

JUDGMENT

MUHAMMAD ALI MAZHAR, J. This Civil Petition for leave to appeal is directed against the Order dated 05.04.2019 passed by the Federal Service Tribunal, Islamabad ("**Tribunal**") in M.P.No.2047/2018, which was moved for resurrection of Appeal No.483(P)CS/2013, but the request was denied and the application was dismissed.

2. The sequence of events as recounted in the memo of the petition spell out that the petitioner was employed by the Frontier Constabulary on 09.04.1992. After qualifying the training process, the petitioner was designated as Kotlis Naik on 01.03.1994; subsequently, he was promoted to the rank of Pay Naik and thereafter to the rank of Pay Hawaldar on 29.09.1999. According to him, his seniority was not fixed rightfully, therefore he filed a representation to the competent authority on 03.02.2012 which remained pending without any decision, hence, the petitioner filed

the aforesaid service appeal, but in the meantime this Court, in the judgment reported as 2015 SCMR 1040, held that the jurisdiction of the learned Tribunal was barred and, as a consequence thereof, his appeal was abated vide order dated 14.03.2016 of the learned Tribunal. However, after the passage of some time, this Court, in its judgment reported as 2018 SCMR 903, held that employees of the Frontier Constabulary ("**F.C. Employees**") are civil servants. Subsequently the petitioner filed a Writ Petition No. 2181-P/2016 in the Peshawar High Court and, *vide* order dated 07.02.2018, the matter was sent to the learned Tribunal, but the learned Tribunal, instead of resurrecting or revitalizing the abated/disposed of service appeal, dismissed the application.

3. The learned counsel for the petitioner argued that the impugned order of the learned Tribunal is against the law settled by this Court in the case of Commandant Frontier Constabulary Khyber Pakhtunkhwa Peshawar & others Vs. Gul Raqib Khan, (2018 SCMR 903) wherein it was held that the Tribunal has the jurisdiction to decide the appeals of F.C. Employees being civil servants. He further argued that in a similar situation, another bench of the same Tribunal allowed the Misc. Petition No. 889 to 902/2018 on 12.3.2019 and the appeals were restored, but in the case of petitioner the bench seized of the matter, without considering the law and facts, dismissed the restoration application of the petitioner.

4. Heard the arguments. The scrutiny of the order passed by the Tribunal substantiates that, at the beginning, the Service Appeal No.483(P) CS/2013 of the petitioner was disposed of by the Tribunal with the observation that the parties may avail their remedy before the appropriate forum. However, after the Petitioner filed the Writ Petition No.2181-P/2016 in the High Court, the matter was remitted to the Tribunal in view of the dictum laid down by this Court in the judgment reported as PLD 1994 SC 539. On one hand, according to the astuteness of the Tribunal, it was obligatory for the petitioner to apply within thirty days for the resurrection of his appeal, which the petitioner allegedly failed to do, and so his application was considered to be barred by law, but on the other hand, the Tribunal held that appeal was never abated, rather it was disposed of on the question of jurisdiction. In our view, the findings noted down in the impugned order are mutually destructive. In contrast, the order of the learned

Peshawar High Court rendered on 07.02.2018 displays that the judgment of this Court rendered in the case of Gul Raqib Khan (supra) was taken into consideration wherein the F.C. Employees were declared Civil Servants, therefore the parties with their free will and consent requested the High Court to remit the petition to the Tribunal for decision on merits and the learned High Court, in view of the dictum laid down in the judgment reported as PLD 1994 SC 539 held that the petitioner has already filed the requisite departmental appeal before filing the instant writ petition, therefore, with the consent of learned counsel for the parties matter was sent to the Tribunal for further adjudication subject to all just and legal objections, including limitation.

5. In order to resolve the bone of contention, the reconciliation and bringing together of the two judgments of this Court is indispensable. First and foremost is the judgment delivered by this Court in the case of Commandant, Khyber Pakhtunkhwa Constabulary, Headquarters Peshawar and another Vs Muhammad Nasir and others (2015 SCMR 1040), (Three member bench) which had in fact examined the exactitudes of the Khyber Pakhtunkhwa Constabulary Rules, 1958 and to end with, reached the conclusion that F.C. Employees are not Civil Servants. The relevant paragraph of the judgment is reproduced as under:-

8. We have heard the learned counsel for the parties at length and have perused the record. The appellants are not Civil Servants as their terms and conditions of service are regulated by the provisions of the North West Frontier Constabulary Rules of 1958. The case-law cited by the learned Counsel for the appellants is not relevant after the judgment of this Court in the case of Muhammad Mubeen-us-Salam and others v. Federation of Pakistan (PLD 2006 SC 602), where this Court has held that the status of a Civil Servant cannot be conferred on an employee of the organization by a deeming clause which has its own statutory service Rules. The terms and conditions of service of the respondents are regulated by the Act of 1915 which authorizes the appellants to frame Rules. The Rules were framed in 1958 and are duly notified which regulates the terms and conditions of service of the respondents. The plea of the appellants that the Respondents are Civil Servants is without force in view of the judgment in the case of Muhammad Mubeen-us-Salam and others (supra).

6. Whilst in the case of Commandant, Frontier Constabulary, Khyber Pakhtunkhwa, Peshawar and others Vs Gul Raqib Khan and others (2018 SCMR 903), (Five member bench) of this Court, posteriorly, while referring the dicta laid down in the case of Federation of

Pakistan through Secretary, Ministry of Interior (Interior Division), Islamabad and 2 others Vs. RO-177 Ex-DSR Muhammad Nazir (1998 SCMR 1081), it was held in paragraph 11 of the judgment as under:-

"11. It follows from the dicta laid down above that the protection of the border areas is a sovereign function belonging to and performed by the Federation. The same duty is performed equally in the present case by the FC not only on the frontiers of KPK Province but also by maintaining order in other parts of Pakistan. For discharging such functions, the services rendered by the FC have direct nexus with the affairs of the Federation. Therefore, the reasons given in the Muhammad Nazir case (supra) fully apply here as well and we hold that the employees of FC are civil servants. Insofar as the question of competent remedy in respect of service disputes of FC men is concerned, we hold that in a matter relating to the terms and conditions of service of the respondent-employees of the FC, an appeal before the Federal Service Tribunal is available to them as the exclusive remedy under the law. Accordingly, this remedy may be availed by them within the statutory period of limitation commencing from the date of issuance of certified copy of this judgment. All these appeals filed by the appellant-Commandant, FC are accordingly allowed in above terms". **[emphasis supplied]**

7. It is frankly resonating from the judgment in the case of Gul Raqib Khan (supra), that the controversy with regard to the employment status of the Frontier Constabulary force has been expounded and settled without any ambiguity in clear terms, i.e. that F.C. Employees are civil servants and, in a matter relating to the terms and conditions of service, they can approach the Tribunal and file an appeal in accordance with law. The learned Peshawar High Court disposed of the Writ Petition No. 2181-P/2016 filed by the petitioner on 7.2.2018 in the following terms:

"When the case was taken up for hearing, learned counsel for the parties at the very outset stated at the bar that Hon'ble Apex Court vide its order/judgment dated 29.01.2018, rendered in Civil Appeal No. 521-P/2015 titled Commandant FC versus Gul Raqeeb and others, has declared all the employees of Frontier Constabulary as "Civil Servants"; therefore, petition in hand may be remitted to "Federal Service Tribunal."

In view of judgment PLD 1994 SC 539 as the petitioner has already filed the requisite departmental appeal before filing the instant writ petition; therefore, with the consent of learned counsel for the parties matter is sent to Federal Service Tribunal for further adjudication subject to all just and legal objections including limitation. With these observations, petition in hand is hereby disposed of". **[emphasis supplied]**

8. The order of the learned High Court is indicating that the matter was remanded to the Tribunal in view of the dictum laid down in the case of Muhammad Anis and others Vs Abdul Haseeb and others (PLD 1994 SC 539), wherein this Court elaborately discussed the fine distinction between eligibility and fitness and went on to hold that eligibility relates primarily to the terms and conditions of service and their applicability to the civil servant concerned and, therefore, the Tribunal has jurisdiction; whereas the question of fitness is a subjective evaluation on the basis of objective criteria where substitution for an opinion of the competent authority is not possible by that of a Tribunal or of a Court and therefore, the Tribunal has no jurisdiction on the question of fitness. However, the findings recorded in paragraph 6, 15 and 16 have direct nexus to the case in point which are recapitulated as under:-

“6. Since we are inclined to hold that the above writ petition was not competent in view of Article 212 of the Constitution and as we are inclined to remand the case to the Tribunal, we have refrained ourselves from making any observation on the merits of the case including on the above quoted portions of notifications/letters about the up-gradation of posts and the appointment of the private respondents, though the learned counsel for the parties had touched upon the above aspect in their arguments and had referred some case law in support of their submissions.

15. We are, therefore, inclined to hold that the controversy before the High Court was, whether private respondents were eligible for consideration for promotion to Grade 18 as Assistant Collectors along with the private appellants. The above question could not have been decided without reference to the terms on which the private respondents were given higher grade, namely, Grade 17 upon the upgradation of the posts of Appraiser and the Principal Appraisers pursuant to the above order of the late President, Muhammad Ziaul Haq, which in turn will involve consideration of the above various notifications, rules relating to the appointment or promotion as Assistant Collectors of Customs and the interpretation of section 23 of the Civil Servants Act etc. The above matters preeminently fall within the exclusive jurisdiction of the Tribunal and, therefore, the High Court had wrongly assumed jurisdiction in the present case, which did not vest in it. The judgment of the learned Single Judge of the Sindh High Court and of the Lahore High Court relied upon by Mr. Ali Ahmed Fazeel, learned Sr. ASC, do not correctly enunciate the legal position.

16. We would, therefore, allow the above appeals and set aside the judgment under appeal with no order as to costs. However, we would remand the case to the Tribunal with the direction that the above writ petition filed by the private respondents before the High Court shall be treated as a service appeal pending before it, which will be decided after notices to the parties concerned in accordance with law”.
[emphasis supplied]

9. The pith and substance and/or *ratio decidendi* of the aforesaid dictum of this Court in the aforesaid judgment lucidly translates that the matter was remanded to the Tribunal with the direction that the writ petition filed before the High Court shall be treated as a service appeal pending before it, which will be decided after issuing notices to the parties concerned in accordance with law. The order passed by the Peshawar High Court on 07.02.2018 in the Writ Petition No. 2181-P/2016 put on view that the learned counsel for the parties by consent agreed that the pending writ petition may be remitted to the learned Tribunal for decision and finally, the learned High Court in view of the dictum laid down in the case of Muhammad Anis (*supra*), observed that the petitioner had already filed the departmental appeal before filing the writ petition, therefore, with the consent of learned counsel for the parties, the matter was sent to the Tribunal for further adjudication subject to all just and legal objections, including limitation.

10. The tone and tenor of the judgment in the case of Muhammad Anis (*supra*) enlightens us that, while holding that the High Court was not authorized to take cognizance in the matter barred by Article 212 of the Constitution, but in unison this Court, in order to do complete and substantial justice, remitted the matter to the Tribunal for decision on merits with the direction that the writ petition be treated as a service appeal. At this point in time, the reference of the judgment rendered by this Court in the case of Justice Khurshid Anwar Bhinder and others v. Federation of Pakistan and another (PLD 2010 SC 483) is somewhat suitable in which it was concluded that where the Supreme Court deliberately and with the intention of settling the law, pronounces upon a question of law, such pronouncement is the law declared by the Supreme Court within the meaning of Article 189 and is binding on all the Courts of Pakistan. It cannot be treated as mere *obiter dictum*. It was further held that even *obiter dictum* enjoy a highly respected position as if "it contains a definite expression of the court's view on a legal principle, or the meaning of law". In view of the directions of the High Court rendered on the basis of this Court's judgment in the Muhammad Anis case (*supra*) which was binding upon the Tribunal, neither the petitioner was required to file any miscellaneous application for resurrection of the earlier disposed of appeal on the ground of

jurisdiction, nor the Tribunal could dismiss the application on the ground of limitation. As a matter of fact, only the memo of writ petition filed in the High Court was to be transmitted to the Tribunal for decision on merits, but the learned Tribunal without proper application of mind not only entertained the restoration application, but also dismissed it rather than asking for a copy of the writ petition from the petitioner or requisitioning the Registrar, Peshawar High Court for a copy of the writ petition for further proceedings.

11. It is the foremost duty of the Court and Tribunal to do complete justice. A patent and obvious error or oversight on the part of Court in any order or decision may be reviewed sanguine to the renowned legal maxim "*actus curiae neminem gravabit*", which is a well-settled enunciation and articulation of law expressing that no man should suffer because of the fault of the Court or an act of the Court shall prejudice no one and this principle also denotes the extensive pathway for the safe administration of justice. It is interrelated and intertwined with the state of affairs where the Court is under an obligation to reverse the wrong done to a party by the act of Court which is an elementary doctrine and tenet to the system of administration of justice beyond doubt that no person should suffer because of a delay in procedure or the fault of the Court. This is a *de rigueur* sense of duty in the administration of justice that the Court and Tribunal should become conscious and cognizant that as a consequence of their mistake, nobody should become a victim of injustice and, in the event of any injustice or harm suffered by mistake of the Court, it should be remedied by making necessary correction forthwith. If the Court is satisfied that it has committed a mistake, then such person should be restored to the position which he would have acquired if the mistake did not happen. This expression is established on the astuteness and clear-sightedness that a wrong order should not be perpetuated by preserving it full of life or stand in the way under the guiding principle of justice and good conscience. So in all fairness, it is an inescapable and inevitable duty that if any such patent error on the face of it committed as in this case, the same must be undone without shifting blame to the parties and without further ado being solemn duty of the Court to rectify the mistake. Ref: Homoeo Dr. Asma Noreen Syed Vs.

Government of the Punjab through its Secretary Health, Department & others (2022 SCMR 1546 = 2022 PLC (C.S) 1390)

12. It is also quite significant to note that before the learned High Court, the parties agreed by consent that the matter be remitted to the Tribunal. According to the Corpus Juris Secundum, Volume LXXVI (at Page 905), the word "*Remit*" is defined as meaning to send back; to forward, transmit, or send, while in Black's Law Dictionary, Sixth Edition (page 1294), "*Remit*" means to send or transmit or refer a case back to a lower court for further consideration. The doctrine of *Ex debito justitiae* refers to the remedies to which a person is entitled as a matter of right as opposed to a remedy which is discretionary. Every court has the power to rectify *ex debito justitiae* its judgment and order to prevent abuse of process and severe and patent oversights and mistakes. This Court in the case of Government of the Punjab, through Secretary, Schools Education Department, Lahore etc. vs. Abdur Rehman & others (2022 SCMR 25), held that the lexicons of law provide the definition of the legal maxim "*Ex Debito Justitiae*" (Latin) "as a matter of right or what a person is entitled to as of right". This maxim applies to the remedies that the court is bound to give when they are claimed as distinct from those that it has discretion to grant and no doubt the power of a court to act *ex debito justitiae* is an inherent power of courts to fix the procedural errors if arising from courts own omission or oversight which resulted violation of the principle of natural justice or due process.

13. Mindful of such a situation, the High Court in its writ jurisdiction may exercise its discretionary powers to avoid grave injustice and in order to get out of the rigors of technicalities remit the case to the Service Tribunal in a *prima facie* case, provided all requisite formalities including the filing of departmental appeal were complied with according to law and rules. In the present set of circumstances, the learned Peshawar High Court rightly remitted the matter to the Tribunal to advance the cause of justice being mindful of the doctrine of *ex debito justitiae*, however, we are sanguine that such discretionary powers may only be exercised in exceptional cases where exigency so demands in the interest of justice, rather than adopting it as a routine or everyday practice to extend an advantage

or recourse to civil servants to approach the High Court despite the bar contained under Article 212 of the Constitution.

14. The learned Additional Attorney General for Pakistan concedes that after the judgment of this Court, the F.C. Employees may approach the Tribunal. He further argued that the learned Peshawar High Court rightly remitted the matter to the learned Tribunal and after the resurrection of the appeal it should have been decided on merits in accordance with law by the learned Tribunal.

15. As a result of the above discussion, this Civil Petition is converted into a Civil Appeal and allowed, and the impugned order of the Tribunal is set aside. The Registrar, Peshawar High Court shall transmit a certified copy of the Writ Petition No.2181-P/2016 along with its annexures to the learned Tribunal within 10 days which will be treated as a Service Appeal or, alternatively, the petitioner may submit a complete certified true copy of the aforesaid Writ Petition in the Tribunal. After receiving a copy of the aforesaid Writ Petition the learned Tribunal shall decide the Appeal in accordance with law and applicable rules after notice and opportunity of hearing to the parties.

Judge

Judge

Judge

Islamabad the
4th October, 2022
Khalid
Approved for reporting.