P L D 2007 Supreme Court 498

Before Falak Sher and Raja Fayyaz Ahmad, JJ

FEDERATION OF PAKISTAN and others---Appellants

Versus

Raja MUHAMMAD ISHAQUE QAMAR and another---Respondents

Civil Appeals Nos. 1274 and 1275 of 2005, decided on 23rd January, 2007.

(On appeal from the judgment dated 40-5-2004 of the Lahore High Court, Rawalpindi Bench, Rawalpindi passed in Writ Petitions Nos.2632/2000 and 2808/2000).

Raja M. Irshad, D.A.G. with Ch. Akhtar Ali, Advocate-on-Record for Appellants (in both Appeals).

Ch. Afrasiab Khan, Advocate Supreme Court with Arshad Ali Ch., Advocate-on-Record for Respondents (in both Appeals).

Date of hearing: 23rd January, 2007.

JUDGMENT

RAJA FAYYAZ AHMAD, J.---Leave to appeal in these two matters arising out of Civil Petitions Nos. 1633 and 1634 of 2003 were granted by this Court vide order dated 14-10-2005 from a common judgment passed by the learned Single Judge in Chambers of the Lahore High Court, Rawalpindi Bench, Rawalpindi allowing their Writ Petitions Nos. 2632 and 2808 of 2000 on 10-5-2004.

2. As identical questions of law and facts are involved in these two appeals, therefore, the same are proposed to be decided through a single judgment.

3. The precise relevant facts of the case are that the respondents in both the appeals namely, Raja Muhammad Ishaque Qamar and Muhammad Ramzan respectively posted as Chief Technician (Pak)/467826 GRD SIG) and Senior Technician (Pak-471088 Trade G.S.O.E/W Rafique) in the Pakistan Air Force were accused of the offences under sections 420,468,469 and 471, P.P.C. in case crime No.9 of 1999 dated 13-1-1999 registered at Police Station Saddar, Talagang, District Chakwal. Both the said respondents were tried by a Magistrate Section-30/Civil Judge 1st Class, Talagang and were acquitted of the charges vide judgment dated 13-5-2000. It appears from scrutiny of the available documents that during pendency of the criminal trial, a compromise was effected between the respondents and complainant, which eventually resulted into their

acquittal, however, a Board of Inquiry was constituted by the competent Authority of the PAF concerned quarters into the matter and it was recommended by the Board of Inquiry on 15-2-2000 that as per Air Headquarters policy invoked and promulgated vide Air Hq.22661/8/DLS dated 13th December, 1992 C/T Ishaque Pak/467826 GSO and S/T Ramzan Pak/471088, the respondents be administratively discharged from service with all benefits for the services rendered by them.

On receipt of the report of the Board of Inquiry the respondents were removed from service without any benefit vide letter No.TAB/495, May, 2000, which was assailed by the said respondents through Writ Petitions before the learned High Court. They also submitted representations to appellant No.2 praying for their reinstatement/retention in service, which was declined vide order dated 8-9-2000.

4. The appellants filed written statements to the Writ Petitions before the learned High Court pleading ouster of jurisdiction of the learned High Court in the matter and in respect of the action taken against the said respondents as members of the Armed Forces in view of the bar as contained in Article 199(3) of the Constitution of the Islamic Republic of Pakistan, 1973. As regards the merits of the case, it was admitted that both the accused/respondents were acquitted by the learned Magistrate for having patched up their differences by entering into compromise with the complainant party, in which case the prosecution witnesses also turned hostile. It was alleged in the written statement that the respondents were involved in the offence of impersonation, fraud, and moral turpitude which brought disgrace to the PAF and that the accused-respondents were not honourably acquitted, therefore, their removal from service was made in accordance with section 20(1) of PAF Act, 1953 read with Rule 31-A of PAF Act Rules, 1957 by the competent PAF Authority, therefore, they had been validly and legally removed from service.

5. The learned D.A.-G. for the appellants and Ch. Afrasiab Khan for the respondents have been heard. The impugned judgment and the documents available on record have been gone through carefully and minutely with their assistance. The case-law cited on behalf of the parties by their learned counsel has also been perused and considered besides the provisions of Article 199(3) of the Constitution.

6. It has mainly been contended by the learned D.A.-G. that the impugned action taken against the respondents in these two appeals was neither mala fide nor corum non judice or without jurisdiction, therefore, constitutional jurisdiction of the learned High Court could not have been invoked by the respondents in these two appeals on account of the bar of the jurisdiction of the learned High Court as contained in Article 199(3) of the Constitution. The learned D.A.-G. in view of the law laid down by this Court in the case of Ex.Lt.Col. Anwar Aziz (PA-7122) v. Federation of Pakistan through Secretary, Ministry of Defence, Rawalpindi and 2 others PLD 2001 SC 549 submitted that if an action is found to be mala fide; corum non judice or without jurisdiction though; being subject to PAF Act, an aggrieved person could competently invoke the constitutional jurisdiction of the High Court notwithstanding the provisions of Article 199(3) of the Constitution but in the instant case according to the learned D.A.-G. none of the given conditions were attracted. The learned D.A.-G. when confronted to the relevant

circular/Notification dated 13-12-1992 copy available on the paper book issued on behalf of the Air Headquarters, Chaklala, Rawalpindi on query by this Court submitted that same is in vogue since its issuance which has been followed, acted upon and never offended in the matters as the case may be. Further, the learned D.A.-G. Contended that the respondents could have against the impugned judgment preferred appeal being an efficacious and alternate remedy before invoking the jurisdiction of learned High Court through the Writ Petitions, which thus were incompetently filed. To supplement his contentions, the learned D.A.-G. has also placed the reliance on the judgments of this Court in the case of Sheikh Maqbool Elahi and others v. Khan Abdul Rehman Khan and others PLD 1960 SC (Pak) 266 and Mrs. Shahida Zahir Abbasi and 4 others v. President of Pakistan as Supreme Commander of the Armed Forces, Islamabad and others PLD 1996 SC 632.

7. The learned counsel for the respondents in these two appeals contended that the action taken in the matter by the competent Authority removing the respondents from service by ignoring the findings and recommendations of the Board of Inquiry and being in violation of the circular/Notification dated 13-12-1992 issued on behalf of the Air Headquarters was patently mala fide, hence; appropriately, the respondents approached to the learned High Court, as such; the bar as contained in Article 199(3) of the Constitution on jurisdiction of the learned. High Court was not attracted. According to the learned counsel, no appeal against the order impugned in the Writ Petitions has been provided under the statute and Rules made thereunder, hence; competently the respondents had filed the Writ Petitions before the learned High Court to which no exception could be taken. He further submitted that the impugned judgment is not open to any interference by this Court, in view of the peculiar facts and circumstances of the case. Reliance has been placed by the learned Advocate Supreme Court on the reported judgments i.e. Brig. (Retd.) F.B., Ali and another v. The State PLD 1975 SC 506; Federation of Pakistan and another v. Malik Ghulam Mustafa Khar PLD 1989 SC 26 and Ex.Lt.Col. Anwar Aziz (PA-7122) v. Federation of Pakistan through Secretary, Ministry of Defence, Rawalpindi and 2 others PLD 2001 SC 549.

8. The ratio of the above referred judgments, as has been held is that presumption against provisions regarding ouster of jurisdiction to be strictly construed and the ouster of the jurisdiction of Superior Courts and any law which has the effect of denying access to them to be narrowly construed for the reasons that these are the fora created by the people for obtaining relief from oppression and redress for the infringement of their rights. But then where the ouster clause is clear and unequivocal, admitting of no other interpretation, the Courts unhesitatedly given effect to it. Seized of the matter in Civil Appeal No.384 of 1987 Federation of Pakistan and another v. Malik Ghulam Mustafa Khar PLD 1989 SC 26 along with other connected appeals, while examining the ouster clause relating to the jurisdiction of all the Courts including the Superior Courts of the country as contained in clause (4) of Article 270-A of the Constitution saving the Proclamation of the fifth day of July, 1977, all President's Orders, Ordinances, Martial Law Regulations, Martial Law Orders, including the Referendum Order, 1984, the Revival of the Constitution of 1973 Order, the Constitution (Second Amendment) Order, 1985, the Constitution (Third Amendment) Order, 1985 and all other laws made between

the fifth day of July, 1977, and the date on which the Article 270-A come into force thereby affirmed, adopted and declared, notwithstanding any judgment of any Court, to have been validly made by competent Authority and, notwithstanding anything contained in the .Constitution, shall not be called in question in any Court on any ground whatsoever and as further provided in the said Article; it was held by this Court in its judgment that the Article 270-A does not take away the jurisdiction of the High Court from reviewing acts, action or proceedings which suffered from defect of jurisdiction or where corum non judcie or mala fide; and drawing a distinction between malice in .fact and malice in law was not necessary for such purposes and; that the bar contained in Article 199(3) of the Constitution on 'the powers of the High Court is not absolute in nature, at least in respect of three categories of cases where impugned judgment is mala fide, or without, jurisdiction or corum non judice to which bar of Article 199(3) of the Constitution is not applicable.

9. The learned High Court in our considered opinion has rightly observed and concluded that notwithstanding the bar contained in the Article 199(3) of the Constitution where any action has been found to be without jurisdiction or corum non judice or mala fide; extraordinary jurisdiction of the learned High Court under section 199(3) of the Constitution could competently be invoked by an aggrieved person. In view of the law laid down by this Court each case has to be examined on the touchstone of the rule laid down by this Court in the above mentioned reported judgments which has been done so by the learned High Court, without entering into controversy of the respondents having been acquitted honourably or having earned acquittal simpliciter who admittedly, have been acquitted on the charges.

10. Para. 5 of the circular/Notification dated 13-12-1992 of the Air Headquarters reproduced in para. No.8 of the judgment impugned herein provided that if the man was involved in an offence involving moral turpitude which brought disgrace to the service and was acquitted by giving benefit of doubt, such a person is, normally not to be retained in service and should be discharged administratively. If, however; such person has been honourably acquitted, he will have to be reinstated and paid all arrears etc. irrespective of the nature of offence in which he was involved. Further, it has been provided in the said circular/Notification that all cases of the nature should be considered on merits and decided on case to case basis. The learned High Court has rightly not entered into the question of involvement of the respondents in the case of moral turpitude or otherwise; rather; simply examined the impugned action being in accordance with the law or otherwise in the light of the abovesaid relevant para. of the circular/Notification dated 13-12-1992 to ascertain, if the Authority had acted fairly and justly in accordance with the said Notification ensuring reinstatement of the incumbents involved in an offence of moral turpitude in case of his honourable acquittal and further entitled to be paid all arrears etc. irrespective of the nature of the offence. The impugned action was found by the learned High Court to be unfair and unjust, in view of the notified policy which in our opinion amounted to have suffered with mala fides. Also the learned D.A.-G. failed to satisfy that an alternate and efficacious remedy by way of appeal against the impugned action has been provided in the PAF Statute or the Rules made thereunder. As the respondents in these two appeals had admittedly earned acquittal in the case,

therefore, the learned High Court rightly concluded that since respondents cannot be retained in service they should be discharged administratively with benefits to which no exception could be taken for having not been dealt with in view of the object and spirit of the above said circular/Notification. Therefore, these appeals being without any substance are dismissed, leaving the parties to bear their own costs.

M.H./F-7/S Appeal dismissed.