ORDER SHEET

IN THE HIGH COURT OF SINDH, KARACHI

C.P. No.D-5218 of 2014

DATE	**ORDER WITH SIGNATURE OF JUDGE**

Dates of hearing: 19 and 25.08.2015

Mr. Ali Asadullah Bullo, Advocate for petitioner
Mr. Furqan Ali, Advocate for respondent No. 2
Mr. Asim Mansoor Khan, DAG

Munib Akhtar, J.: The petitioner joined service in the Pakistan National Produce Company Ltd. (herein after referred to as "National Produce") on or about 04.02.1978. This company was then in the public sector, being a subsidiary of the Rice Export Corporation of Pakistan. On 01.07.1996 the petitioner was transferred to and permanently absorbed in the National Insurance Corporation, a statutory corporation set up under the National Insurance Corporation Act, 1976. In 2000 this statutory corporation was "converted", by Ordinance XXXVII of that year, into a public limited company registered under the Companies Ordinance, 1984. The "converted" entity, the National Insurance Company Ltd., is the present respondent No. 2, the Federation being the first respondent. The petitioner continued in service with the company, ultimately retiring on 04.05.2014. The petitioner is entitled to pension for his service in the statutory corporation and subsequently with the company. The question is whether the pensionary and associated/related benefits are to be computed (as the petitioner claims, but the respondent No. 2 denies) while also taking into consideration his period of employment with National Produce.

2. Learned counsel for the petitioner submitted the corporation had framed certain regulations, the National Insurance Corporation Employees (Pension) Regulations, 1986 under s. 25 of the Act of 1976. By Office Order No. 39 dated 16.01.1998 the services of the petitioner were regularized under Regulation 13, for pensionary purposes, with effect from 04.02.1978, i.e., the date on which the petitioner had earlier joined service with National Produce. Thus, learned counsel submitted, the petitioner's pension and other associated rights in the statutory corporation and the company had to be computed accordingly, i.e., with effect from 04.02.1978. The petitioner had received a sum of Rs. 223,226.22 from National Produce vide cheque dated 17.09.1996 in respect of his C.P. Fund entitlement, which amount he had paid over to the statutory corporation by cheque dated 10.10.1996. However, on 31.08.2000 (i.e., at around the time that the statutory corporation was being "converted" into the company) the petitioner was intimated by an office memorandum that

in terms of Regulation 6(3) of the aforesaid regulations, the period of his service with National Produce could not and would not be taken into consideration. The Office Order No. 39 dated 16.01.1998 was purported to be withdrawn. The amount of Rs. 223,226.22 deposited by the petitioner was directed to be returned to him. (We may note that there is some slight confusion in the record as to whether the petitioner's initial service started on 04.02.1978 or 14.02.1978. Nothing material for present purposes however turns on this and we have taken the date to be 04.02.1978.) The office memorandum was followed up by a formal letter dated 10.07.2001, by which date the statutory corporation had been "converted" into the company (i.e., the present respondent No. 2). The letter was to the same effect. The petitioner received the letter, but he reserved his right to "defend" his absorption in the event that the relief being denied to him was granted to any other employee. The petitioner has placed on record papers relating to one Mr. M. Ashraf Khan, to whom such relief was apparently granted and withdrawn but then restored. Ultimately, as noted above, the petitioner retired in 2014 when he was denied pensionary and related benefits and rights in terms as claimed by him.

3. Learned counsel submitted that the petitioner was entitled to the benefit of s. 4 of the aforementioned Ordinance of 2000, which provided for the transfer of the employees of the statutory corporation to the company and their continuance in service with the latter on the same terms and conditions as before. Learned counsel submitted that this provision applied to the Office Order of 1998 and hence the petitioner could not be denied the benefit of the period of his earlier service while computing his entitlement to pension, etc. Reliance was placed on *Masood Ahmed Bhatti and others v. Federation of Pakistan and others* 2012 SCMR 152 and *Pakistan Telecommunications Employees Trust and others v. Muhammad Farid and others* 2015 SCMR 1472. It was prayed accordingly.

4. Learned counsel for the respondent No. 2 submitted that the petitioner was not entitled to any such relief. It was submitted that on its true interpretation, Regulation 6(3) of the aforementioned regulations of 1986 required that the period of earlier service would count towards entitlement to pension only if the organization in which such period had been served itself had had a pension scheme. However, there had been no such scheme in the Rice Export Corporation of Pakistan, the parent entity of National Produce. Thus, the petitioner had no such entitlement and Office Order No. 39 of 16.01.1998 was erroneous and had been rightly withdrawn. The petitioner had admittedly received all benefits relating to his retirement other than on the basis as claimed by him, which claim was unsustainable in law. It was prayed

that the petition be dismissed. We may note that it was also submitted that the company had, for its purposes, adopted regulations in terms materially the same as the regulations of 1986.

5. Learned DAG adopted the submissions by learned counsel for the respondent No. 2 and also raised two objections to the maintainability of the petition. It was submitted that the petition was hit by laches since the petitioner admittedly knew that Office Order No. 39 of 1998 had been withdrawn as long ago as 2000/2001. It was also submitted that the relevant rules relating to the terms and conditions of service were non-statutory in nature since, inter alia, the petitioner had admittedly retired from a company. If the terms and conditions of service were non-statutory, then a petition was not maintainable. It was submitted that the case law relied upon by learned counsel for the petitioner was distinguishable. Exercising his right of reply, learned counsel submitted that the petitioner had retired in 2014, which was when the cause of action now being pursued had accrued. Hence the petition was not barred by laches.

6. We have heard learned counsel as above, examined the record and considered the case law. It will be appropriate to first take up the objections raised by learned DAG as to the maintainability of the petition. The objection as regards laches can be disposed off swiftly as it is, with respect, without merit. In our view learned counsel for the petitioner is correct in submitting that the actual denial of the relief and right now being claimed arose only when the petitioner retired on 04.05.2014. Since the petition was filed within a few months thereafter, it cannot possibly be hit by laches.

7. The other preliminary objection, as regards the nature of the terms and conditions of service and the effect thereof on the maintainability of the petition, is more formidable. It has been raised in any number of cases, and experience shows that it continues to be so raised whenever the respondent employer is a statutory corporation or a company that was "formerly" a statutory corporation. A consideration of this objection as to maintainability has resulted in the accretion of a large body of case law. If we may be allowed to say so with the utmost respect, learned counsel appearing for the respective parties are not always careful and particular in citing the cases before the Courts. It will therefore be appropriate and, we respectfully hope, not out of place to examine this objection in some detail in the paras herein below.

8. The general rule regarding the maintainability of a constitutional (or "writ") petition, as here being considered, can be stated simply enough: a petition is maintainable if the terms and conditions of service are governed by

statutory rules or regulations or are regarded as statutory in nature. As will be seen below, there is somewhat more to this rule (what might be regarded as its "extensions"), but we intend to focus on the above since it is what may be called the "core principle". The question in the majority of cases is whether the core principle is engaged. The petitioner (the employee) of course contends for an affirmative answer, while the respondent (the employer) denies that this is so. Although the core principle can be easily stated, an answer to the next question—what are statutory rules or regulations and/or when can terms and conditions be regarded as statutory in nature?—emerges less readily. As first sight this may seem somewhat surprising. One would expect the answer to be fairly straightforward. However, this is not quite the case.

9. As already noted, the question of maintainability (in its different forms) has generated a plethora of case law. The reported cases are from both the High Courts and (much more importantly) the Supreme Court. It will not be possible to consider each and every case. However, in our respectful view, it may be advantageous to look at the decisions from the beginning (which will take us back to the 1950's) till the present since that will show, if only in broad contour, how the jurisprudence of the Supreme Court has evolved over the decades, and the question of maintainability has taken the shape that it does today (i.e., is as stated above as the core principle). Like any judicially developed principle of law, the rule here being considered has a context to it and in our respectful view it can on occasion be helpful and illuminating to look at a rule of law from the historical perspective. Before we consider the cases however, we would respectfully like to make certain general observations.

10. Firstly, the nature of the entity that is the contesting respondent (i.e., the employer) ought to be kept in mind. As presently relevant, such entities can be divided into three categories. The first category comprises of statutory corporations (which term includes authorities, commissions and the like). Statutory corporations are created or established (or, occasionally, continued) by or under a specific statute and examples abound of such enactments. Such entities are often (though by no means always) regarded as persons carrying on functions in connection with the affairs of the Federation or a Province within the meaning of Article 199 of the Constitution. The second category are companies registered under what may be called the "general" law relating to juristic persons, i.e., the Companies Ordinance, 1984 and its predecessor legislation. Different classes of such entities may be regulated by specific legislation (e.g., insurance companies, banks, etc.) but the entity itself is in general terms governed by company law. In respect of such entities a question

that arises not infrequently is whether it is a person carrying on functions in connection with the affairs of the Federation or a Province and an affirmative answer is by no means inevitable even if the entity is majority-owned by the State or under its control. The third category of entities comprises of statutory corporations which have, by a subsequent law, been "converted" into companies registered under the Companies Ordinance. In the analysis below, we will be considering cases involving entities that fall in the first and third categories, i.e., statutory corporations and "former" statutory corporations.

11. Secondly, while considering the case law (and especially the decisions of the Supreme Court) it is pertinent to keep in mind the litigation history, i.e., the proceedings prior to the Supreme Court decision. This is so because not all the relevant cases started out as writ petitions in the High Courts. Some started out as civil suits and came to the Supreme Court by way of an appeal against an appellate or revisional decision of the High Court, while others came to the Supreme Court from the Service Tribunals by way of appeal. Clearly, in the latter two types of proceedings, the question whether a writ petition was maintainable could not arise directly. (Exceptionally, the very first case considered below had elements of both a civil suit and a writ petition.) Furthermore, it should also be noted that some of the relevant decisions of the Supreme Court were in fact leave refusing orders. Thirdly, some of the decisions of the Supreme Court that are considered below were reported some (and in one case, several) years after the decision was announced and it is a matter of regret that the law report publishers do not alert the reader to this aspect. It is important to keep this point in mind since, as noted above, we have attempted to analyze decisions over the past several decades, and an orderly exposition of how the issue of maintainability has developed, and the core principle emerged, requires that some attention be paid to the chronological sequence of the case law.

12. Fourthly, since the rule under consideration requires that the terms and conditions of service be governed by statutory rules or regulations or be regarded as statutory in nature, the provisions of the relevant statute must also be given due consideration. Here, broadly speaking, a distinction can be made between the grant and vesting of the power on the one hand, and the exercise of it on the other. Thus, the statute may expressly grant the power to appoint officers, employees and servants and determine their terms and conditions of service, and may also specifically vest it in a particular "organ". It may also expressly deal with the manner in which the power is to be exercised. Now, different possibilities exist on the plane of principle. The first possibility is that the relevant statute does not at all refer to the employees of the corporation (and hence to the terms and conditions of their service). This

statutory silence poses no difficulty since it is well established that a statutory corporation has all such powers, in addition to those expressly granted, as are reasonably incidental for the attainment and pursuit of the objects or purposes for which it has been brought into existence. It can hardly be denied that a statutory corporation needs officers, employees and servants in order to carry out and attain its objects or purposes. Therefore, if such powers are not expressly granted they would be readily implied on the foregoing basis. Such examples (though something of an exception) can be found. One such is the Pakistan Red Crescent Society, which features in no less than three cases here relevant. The Pakistan Red Crescent Society Act, 1920 confers no express powers in this regard. Indeed, it appears not to refer at all to the Society's employees.

13. The second possibility, which is to be found in the majority of enactments, is that the statute does expressly confer the necessary power. This is usually done in either of two ways. There can be a specific section that deals with this matter. An example is s. 10 of the Pakistan International Airlines Corporation Act, 1956 ("PIAC Act"), which grants the corporation generally (i.e., without expressly vesting it in any particular "organ") the power to "appoint such officers, advisers and employees as it considers necessary for the efficient performance of its functions on such terms and conditions as it may see fit". Or, the power to control, manage and administer the affairs of the corporation can be vested generally in a particular "organ" (typically its managing board howsoever described) and the section can then, as part of an illustrative list, refer to the power to appoint officers, servants and employees and determine the terms and conditions of their service.

14. Invariably (though again, by no means always) the statute also confers a power on the corporation to make regulations. As will be seen later, the manner in which this power can be exercised has proved to be crucial for how the core principle has developed and been applied in the jurisprudence of the Supreme Court. For immediate purposes, it may be noted (and this is the third possibility) that the power to make regulations can either be cast in general terms, without anything more (an example being s. 30 of the PIAC Act), or it may, in addition, contain an illustrative list of what it is that the regulations can provide for. Such a list may provide for appointing the officers, employees and servants of the corporation and/or determining their terms and conditions of service. An example is the (West Pakistan) Government Educational and Training Institution Ordinance 1960, which was the statute involved in the pivotal case of *Principal, Cadet College Kohat and another v. Muhammad Shoaib Qureshi* PLD 1984 SC 170. Section 8 of this statute conferred generally the powers of management, control, etc. and

supplemented the general grant by an illustrative list, which (in its clause (b)) conferred the power of "recruitment and determination of the terms and conditions of service of the principal and other members of the staff of the institution and of other officers and servants of the Board". Section 18 conferred on the Board the power to make regulations and also had an illustrative list, clause (e) of which related to "the recruitment, tenure of office, terms and conditions of service of the officers and servants appointed by the Board".

15. Usually, there is no linkage as such between the (express) grant of power to appoint employees and determine their terms and conditions of service, and the (express) grant of power to make regulations. Sometimes however (and this is the fourth possibility) there is an express link. An example is provided by the Agricultural Development Bank Ordinance, 1961, which was the statute under consideration in two important decisions, both involving the same employee, one Mr. Anwar Hussain: see the decisions (considered below) reported at PLD 1984 SC 194 and 1992 SCMR 1112. Section 30 of the Ordinance empowered the Bank to "appoint or employ such persons including advisors … on such terms and conditions *as may be prescribed by regulations*" (emphasis supplied). Section 39 conferred a general power on the Bank's Board to make regulations and, by clause (e) of the illustrative list, such regulations could be made for the "recruitment of the employees of the Bank, their terms and conditions of service … and all other matters connected with any of these things".

16. The possibilities given in the above are of course not exhaustive. Others undoubtedly exist on the statute book, including different combinations of the ones described above. The point being respectfully made is the importance of giving due weight to the actual statutory provisions, which may, in the end, prove decisive. We now turn to a consideration of the various cases and as indicated above start with the 1950's, from which two decisions require consideration.

17. The two cases, decided only a few months apart, are *State of Pakistan and another v. Mehrajuddin* PLD 1959 SC 147 and *Lahore Central Co-operative Bank Ltd. v. Pir Saif Ullah Shah* PLD 1959 SC 210. (We may note that in some of the subsequent cases where the first decision is cited, the year is erroneously mentioned as "1958".) The first judgment disposed off three appeals, in all of which the employer was the Railways. In each case, the aggrieved employee filed a civil suit, which was decreed. Each decree was declaratory in form, and no appeal was preferred against it by the Railways (except, ineffectively, in one case). The employees then filed writ petitions in

the High Court seeking, in each case, a writ of mandamus to enforce the decree by way of suitable directions to the Railways to comply with the same. It is pertinent to remember that at that time, the proceedings were governed by the 1956 Constitution, Article 170 of which (like Article 226 of the Indian Constitution, but unlike Articles 98 and 199 respectively of the 1962 and the present Constitutions) provided, in material part, that the High Courts were empowered to issue "writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari". In each case, the High Court issued a writ of mandamus. On appeal, the Supreme Court unanimously reversed and, holding the orders of the High Court to be without jurisdiction, allowed the appeals. The Supreme Court examined in detail the nature and history of a writ of mandamus and the power of the High Court to issue the same. It was observed as follows (pg 159):

> "Its [i.e., of the writ of mandamus] object is usually to enforce a plain, positive, specific and ministerial duty presently existing and imposed by law upon officers when there is no other adequate and specific legal remedy and without which there be a failure of justice. A mandamus could not confer a new authority and is neither a law nor a source of law. The person claiming a *mandamus*, in order to be entitled to receive it must at least have a clear legal right to the performance by the Respondent of the particular duty sought to be enforced and in the case of a public officer the duty must be one which is clearly defined, imposed or enjoined by law as a duty resulting from the office. A right founded purely on private contract, however clear it might be, is not enforceable by *mandamus*."

As regards the relief sought by the aggrieved employees from the High Court, the Supreme Court observed as follows (pp. 159-60):

> "Now, in each of these cases before the High Court what was sought by the Petitioner was a writ of *mandamus* and in the alternative any other appropriate writ or order of direction. If regard be had to the incidents which are requisite for the issue of a writ or order of *mandamus*, there can be no question but that the requisite of the Petitioner in each case was an order falling strictly within the four corners of *mandamus*, since it was sought to be directed to the North-Western Railway administration, requiring it to do a specific thing particularized, which appertained to the office or duty of that administration. Therefore, it would have been proper for the High Court to have considered in the first instance whether the circumstances which are necessary for the issue of a writ or order of *mandamus* were proved to exist. Cases in which the duty of the public body, which was sought to be enforced by *mandamus*, arose out of anything not contained in a statute are, it seems, very rare. No such case has been placed before us and our researches have failed to produce any such case. It is plain that here the duty sought to be enforced by means of the writ which was claimed was not a duty deriving strictly from a law, i.e., it was not a statutory duty of the kind for the enforcement of which the writ of *mandamus* has been by long practice and precedent almost exclusively reserved.

Secondly, a *mandamus* may be claimed for the implementation of a legal right, i.e., a right which is derived from a law. Here, it is clear that the right claimed by the Petitioners, was not a right derived directly from any law. But even if that strict sense be not insisted upon and if it be assumed, without conceding, that a judicial order might serve as a foundation of a right such as may be enforced by *mandamus*, it still remains to be asked whether there was a clear right of a legal nature deriving from the decrees awarded by the Courts in these three cases which could have been enforced by *mandamus*. What the three Petitioners had succeeded in obtaining were simple declaratory decrees. They had not by their plaints sought anything more. It is significant that in the solitary case in which a decree for money had been sought, that claim had been withdrawn in the course of the proceedings. It was conceded before us that this was done because of the state of law as it then was but learned Counsel who advanced this proposition was unable to deny that the state of law to which he referred has been in existence for a great many years, and that it has not been validly altered at any stage up to the present time. This question will be considered somewhat more fully later on, but in the present discussion of the question whether the Petitioners who have been awarded the orders made by the High Court in these cases had a legal right to obtain these orders, it falls to be said further, firstly that a decree for a declaration is well understood not to be capable of execution, and that there was nothing in any of the decrees in question or in any subsequent order made by the Courts which granted these decrees which might enable the conclusion that any of these Courts had made any order from which a clear and immediate right could be construed to obtain the satisfaction which the High Court has seen fit to give in each case. If the decrees had been of executory nature for the implementation of which a warrant of execution could issue, it might have been thought that a legal right to obtain such satisfaction arose in consequence of the decrees. That is not to say that such decrees are capable of enforcement by a writ of *mandamus*, and the point is mentioned only for the purpose of showing that in the three cases here in question, there was no clear, formal, positive order of a kind which by mere enforcement could procure for these Petitioners the satisfaction which has been awarded to them by the High Court."

It was also observed as follows (pp. 161-2):

"The learned Judges appear to have acted in the belief that the power given to them by the Constitution to issue *directions* and *orders* was a power in excess of and going beyond the confines of the power given by the same Article to issue writs in the nature of the five writs specified. We find it impossible to support this inference, if indeed it forms the basis of the orders issued by the High Court in the present case. It seems to us that it could not have been the intention of the framers of the Constitution of 1956, when they enacted Article 170 containing specific references to five writs of a kind whose nature and scope was well settled by centuries of practice, not only in the country of their origin, namely, England, but also in the United States as well as the Dominions, in which the system of British justice was in full operation, to give to the High Courts of Pakistan a complete power of overriding everything contained in the law and practice delimiting the functions and jurisdiction of the High Courts, and all other laws defining legal rights and jurisdictions generally. In these cases what has been done involves extension of previously well defined powers into fields where they hitherto have never been exercised. The orders which are clearly in the nature of orders of *mandamus* have been made in cases where no statutory right or legal right or public duty was involved. They have been made in clear and unmistakable

> implementation of decrees for simple declaration, which have always been held to be incapable of execution. They have been made moreover in a manner so as to override the very carefully demarcated boundaries between the judicial power and the power of the executive in relation to public servants, in the relevant respects. We are unable to find justification for this extraordinary extension of powers assumed by the High Court in the mere addition of the words "directions" and "orders" in Article 170 of the late Constitution. It is indeed somewhat extraordinary that this Article should authorize the issue of writs, when in fact there are no settled forms of writs other than the writ of *habeas corpus* in this country such as there were at one time in England, and that this should have been done at a time when by English law the issue of a number of such writs had been abolished and they had been replaced by orders to be worded by the Courts in accordance with the exigencies of each case, to be described as orders of *mandamus* etc. The addition of the words "directions" and "orders" seems to us to be clearly relatable to the amendment of the English Law in 1938 by which certain writs were abolished, but orders of the same kind were directed to be issued. We cannot conceive that by the wording of Article 170, anything more was intended than was carried into effect by the amendment of the English Law of 1938. In the present cases we have seen that what was sought by the Petitioners in each case was clearly an order falling within the four corners of a *mandamus*, as understood and defined as a result of long practice and precedent. It was in our view not permissible for the learned Judges in the High Court to issue orders which were in substance indistinguishable from orders of *mandamus*, in cases where such orders were not competent or permissible, in the guise of issuing a *direction* or order by virtue of Article 170 of the late Constitution."

The Railways had also been directed to pay outstanding amounts of salary to the aggrieved employees. After referring to certain Privy Council decisions, the Supreme Court observed as follows (pg. 164):

> "But, as to the weighty pronouncement of the Judicial Committee in the case of *Mr. I. M. Lall* as set out in the long passage which has been quoted above, we have no hesitation in expressing, with due respect, our entire approval of the statement concerning the nature of the right to remuneration, belonging to a public servant, as against the Government, viz. that there is an implied condition in every contract between the State and a public servant that in point of remuneration, the claim of a public servant is not for a contractual debt, but is on the bounty of the State and that it must be deemed to be a term of the contract of service of every public servant that he has no right to remuneration, which can be enforced in a Civil Court of Justice, and that for the purpose of recovering his remuneration, form the State his only remedy, by necessary implication from his contract lies in an appeal of an official or political kind."

18. We have set out the relevant passages from the decision at some length both to show (as will emerge more clearly in the paras below) how much the jurisprudence of the Supreme Court has changed in the intervening decades in addressing the question of maintainability, and also because the second of two cases from the 1950's, which has been cited more often, is based on the first. We turn to consider *Lahore Central Co-operative Bank Ltd. v. Pir Saif Ullah Shah* PLD 1959 SC 210. The respondent was employed with the appellant

Bank as a commercial manager. The contract of service allowed the Bank to terminate the respondent's services, after giving an opportunity of hearing, if he were found "guilty of misconduct, incompetence, fraud, embezzlement and misbehaviour". An inspection of the Bank's books having been carried out by an Assistant Registrar of Co-operative Societies, a charge-sheet, leveling very serious allegations, was issued against the respondent by the Bank. The charges included the respondent having made loans to his son-in-law on wholly inadequate security. The respondent was given an opportunity of hearing and thereafter his services were terminated. The hearing was given, and the order of termination made, on 09.12.1954 and the respondent filed a writ petition in the High Court 23.10.1956, seeking various orders, each of which, the Supreme Court observed, was "clearly an order in the nature of a mandamus" (pg. 213). The High Court granted partial relief to the respondent, setting aside his order of dismissal but refusing to reinstate him in service both on account of the delay in approaching the Court and also because the respondent was facing criminal proceedings on the charges against him. The High Court observed that the respondent could take the benefit of the order made by it only if he were acquitted of the criminal charges. The Supreme Court held that the order of the High Court could not be sustained. It noted the (unexplained) delay in approaching the High Court and also that a writ of mandamus was discretionary in nature and no such order ought to have been made in the facts and circumstances of the case (as described at pp. 214-5). It was also held that a full opportunity of hearing, as per the contract of service, had been given to the respondent and he had been allowed to traverse the allegations against him. But, it was noted, the High Court had proceeded on the basis that the respondent was entitled to a "proper enquiry, that is to say an opportunity to present evidence in reply to the evidence led by the Bank on the various charges, etc., as is admissible to Government servants under the Civil Service Rules" (pg. 215). This sort of an enquiry and hearing had not been held or given. It was observed that the High Court came to this conclusion because the managing committee of the Bank had, in 1945, resolved that the aforesaid Rules would apply to the Bank's employees. After considering the point in some detail, the Supreme Court held that there was "considerable doubt" whether the respondent "could claim the application to himself of the Civil Service Rules" because in any case "these rules are not applicable to him of their own force, but merely by reference" and that as "these Rules embody safeguards provided for public servants under the then Constitution i.e., the Government of India Act, 1935, as then in force, they cannot be availed of by such a person as [the respondent] as a matter of legal right" (pg. 216).

19. The Supreme Court then adverted to "another strong reason" why a writ of mandamus ought not to have been issued and referred to its decision in the *Merajuddin* case. Reference was made to a legal treatise (Ferris on "Extraordinary Legal Remedies") and to the relevant volume of *Halsbury's Laws of England*, both of which had been cited in the earlier decision. The nature of a writ of mandamus was again explicated and it was observed as follows (pg. 218):

> "The superior Courts in England have not found it possible to extend the scope of *mandamus* to restoration to office in private corporations. All the offices mentioned in the list contained in the quotation above appear to be of a public nature, and to have a quality which is entirely foreign to that belonging to the post of Commercial Manager in a Co-operative Bank. That post was clearly of a contractual nature, falling within the category of employment, and having nothing of the true character of a statutory or corporate office."

20. In our respectful view, the decisions considered above turned essentially on two grounds. Firstly, the nature of the writ of mandamus and whether such a writ could properly (or at all) be issued in the relevant facts and circumstances. Secondly, the fact that the constitutional safeguards available to civil servants under s.240 of the Government of India Act, 1935 were not available to those who were not in service in such capacity, notwithstanding that the service rules were otherwise made applicable to them. It will be recalled that the constitutional guarantees just referred to were continued in the 1956 Constitution (Article 181) and the 1962 Constitution (Article 177). Of course, these guarantees are not available under the present Constitution. As will be seen, these were the primary grounds on which the Supreme Court continued to examine the issue of maintainability in the 1960's, from which five decisions may be considered.

21. The first case is *Faiz Ahmed v. Registrar, Cooperative Societies West Pakistan and another* PLD 1962 SC 315. The appellant was the employee of a cooperative bank (the second respondent) and was served a charge-sheet on account of various allegations of misconduct, etc. in service. The matter was referred to the concerned Assistant Registrar of Cooperative Societies and an enquiry was held. The appellant having been found guilty, he was removed from service by the managing committee of the cooperative bank ("Bank"). An appeal was preferred by the appellant to the Registrar who held that as the Bank had adopted the Government's Civil Service Rules, the enquiry ought to have been held in terms thereof. The order of dismissal was set aside and the case remanded. This started a second round, and after enquiry the appellant was again found guilty and removed from service. This time his appeal to the Registrar failed and the appellant filed a writ petition in the High Court. One

of the grounds taken was that the proper procedure as required by the Civil Service Rules had not been followed. The writ petition was dismissed. The appellant was granted leave to appeal by the Supreme Court to consider whether the second enquiry had been vitiated by failure to comply with the rules of natural justice. The Supreme Court held that there had been no such denial. When the appeal was heard (and this is the point material for present purposes), it was contended on behalf of the appellant that the second enquiry was vitiated also by reason of a failure to comply with the Civil Service Rules, as adopted by the Bank. It was held that this submission was based on the assumption that simply by virtue of such adoption the protection provided by s.240 of the Government of India Act was available to the appellant. The assumption was repelled as being "totally unwarranted". The prayer for a writ of mandamus was also repelled on the ground that such a writ could not be issued for "any and every kind of office". The office held by the appellant (who had been a cashier in the Bank) was found not to be an office for which such a writ could be issued. The appeal was dismissed.

22. In the second case, *Zainul Abidin v. Multan Central Cooperative Bank Ltd.* PLD 1966 SC 445, the employer was again a cooperative bank. (It may be noted that, as observed by the Supreme Court, the writ petition had been filed at a time when such proceedings were governed by the 1956 Constitution.) The respondent Bank had also adopted the Civil Service Rules and eventually the appellant's services were terminated on the basis of certain charges amounting to misconduct, etc. The appellant preferred an appeal in terms of said Rules, which was allowed, it being held that the Rules had been violated. The appellant was directed to be reinstated. The Bank however did not do so and the appellant filed a writ petition in the High Court. The writ petition was dismissed in limine on the ground that the appellant's remedy was only by way of a civil suit for damages. The appellant preferred an appeal to the Supreme Court and leave was granted to consider whether the case was not a fit one in which the writ ought to have been issued. The appeal was dismissed. It was observed that the office held by the appellant (that of an accountant) was not one for which a writ of mandamus could properly be issued. Reliance was placed on the two 1959 cases considered above. It was also held, relying on the case considered in the last preceding para, that simply because the Bank had adopted the Civil Service Rules, that did not mean that the appellant became entitled to the constitutional safeguards. The appeal was dismissed also with the following observation: "The appellant's remedy as observed by the High Court, was by a suit in which he could also have claimed arrears of salary, for, service under the co-operative bank being of a contractual character under a private autonomous institution the salary attached to such a post would not be in the nature of a bounty" (pg. 450)

23. The third case, *Chairman, East Pakistan Industrial Development Corporation and another v. Rustom Ali and another* PLD 1966 SC 848, involved a statutory corporation, the East Pakistan Industrial Development Corporation. As explained by the Supreme Court, this corporation came about as a result of the dissolution in 1962, by statute, of the Pakistan Industrial Development Corporation ("PIDC"), which had been set up under Act XLV of 1950, and its "bifurcation" into two statutory corporations, one for East Pakistan ("EIDC") and the other for West Pakistan ("WIDC"). These corporations were set up by separate statutes; the three statutes involved were Ordinance Nos. XXXVI to XXXVIII of 1962. The respondent No. 1 (Rustom Ali; herein after the "employee") had joined the service of PIDC in 1958. After the statutory rearrangement just referred to, the employee was transferred to EIDC (in exercise of a statutory power conferred by the Ordinance whereby PIDC was dissolved), where he was working in one of the projects allocated to the latter, the Jaipurhat Sugar Mills (the respondent No. 2). In 1963, the employee was served with a charge sheet and after an enquiry was removed from service by the Secretary of the EIDC. He filed a writ petition in the High Court, which was allowed on the ground that the Secretary was not competent to dismiss the employee. On appeal, the Supreme Court reversed. It had been contended for EIDC before the High Court that the relationship between it and the employee was governed by the law of master and servant. This submission had been repelled on the ground (as set out in an extract from the High Court judgment reproduced at pg. 852) that the employee's services had been transferred from PIDC to EIDC, and confirmed in the latter, by way of statutory provisions and that his further terms and conditions of service were recognized and maintained by provisions of an order made under the statute. Thus, the High Court had held, the matter was at least in part governed by statute. In the Supreme Court it was observed as follows: "It has not been and could not be contended that the safeguards provided for public servants under the Constitution could not be availed as of legal right by the [employee]. He was an employee of a statutory corporation" (pg. 853). Referring to *Lahore Central Co-operative Bank Ltd. v. Pir Saif Ullah Shah* PLD 1959 SC 210, it was observed that the "true character" of such employment had been pointed out in that case, as had the question of entitlement of a writ of mandamus for alleged wrongful dismissal from service. After citing a passage from the earlier judgment, it was observed as follows: "It is, therefore, clear that a writ is not a proper remedy in a case of this type in our jurisdiction" (*ibid*). It was also held on the facts that in any case the High Court ought, in its discretion, to have refused to issue the writ. The appeal was accordingly allowed.

24. The last two cases that require consideration were both leave refusing orders. The first was made on 31.03.1964, but only reported several years later as *Shahid Khalil v. Pakistan International Airlines Corporation* 1971 SCMR 568. The petitioner had been removed from service as secretary to the Managing Director of the corporation and had filed a writ petition on the ground that he was entitled to the protection accorded civil servants under Article 181 of the 1956 Constitution (the writ petition having been filed in 1962 when the Constitution promulgated in that year had not yet come into force). The writ petition was dismissed on the ground that the petitioner, as an employee of a statutory corporation, was not entitled to such constitutional safeguards. The Supreme Court declined leave to appeal, observing that the correctness of the view taken by the High Court was "scarcely questionable". It was also held that the office held by the petitioner was not one to the restoration of which a writ of mandamus might be claimed. Reference was made to *Lahore Central Co-operative Bank Ltd. v. Pir Saif Ullah Shah* PLD 1959 SC 210 and it was observed that "on the same reasoning, we entertain no doubt that the post in question is in no way to be regarded as equivalent to a "public office", and that on the law as it stands, a writ is not available to secure restoration thereto". In the second case leave was refused on 10.10.1967 and it was reported some years later as *Aslam Salam Mehta v. Chairman, Water and Power Development Authority and another* 1970 SCMR 40. As presently relevant this case was the same as the first one, the petitioner claiming the constitutional safeguards available to civil servants on the ground that he was an employee of a statutory corporation. The only difference was that in this case, the claim was made with reference to Article 177 of the 1962 Constitution. The High Court rejected this submission and the Supreme Court refused leave to appeal.

25. Coming to the 1970's, the first case, a leave refusing order reported as *Lt. Col. Shujauddin Ahmed v. Oil & Gas Development Corporation* 1971 SCMR 566, does not require any detailed consideration. The reason is that it was, as presently relevant, no different from the two cases considered in the last preceding para. It need only be pointed out that the litigation started by way of a civil suit in which the petitioner claimed relief against his dismissal from service. An interim injunction was sought but refused by the trial court. On appeal, the District Judge granted the relief. The corporation filed a revision in the High Court, which was allowed and the petitioner then came before the Supreme Court. The petitioner claimed entitlement to the safeguards provided by Article 177 of the 1962 Constitution. The Supreme Court refused leave, observing as follows: "The consistent view of this Court hithertofore has been that the employees of … statutory corporations do not

acquire the status of Government servants nor are the guarantees given by the Constitution applicable in their case".

26. The next case, *R.T.H. Janjua v. National Shipping Corporation* PLD 1974 SC 146, was also a leave refusing order. The petitioner was employed with the respondent, a statutory corporation, and was served a charge-sheet containing seventeen allegations. After an enquiry and hearing, six allegations were found to be proved and after certain further proceedings he was removed from service. The petitioner filed a writ petition in the High Court, which was dismissed in limine. In the Supreme Court it was noted that the "main argument" raised by learned counsel appearing on behalf of the corporation "was on the broad legal aspect of the question namely that the petitioner being an employee of a statutory Corporation could not seek redress in writ jurisdiction of the High Court, *generally available to a civil servant against his removal from service*" (pg. 148; emphasis supplied). On behalf of the petitioner it was contended that there had been a violation of the regulations framed under s. 32 of the relevant statute, the National Shipping Corporation Ordinance, 1963. It was contended that the regulations had the force of law and any breach or non-observance would sustain a writ petition against the corporation. It was also contended that the corporation was a person within the meaning of Article 98 of the 1962 Constitution (and Article 201 of the Interim Constitution). Learned counsel for the petitioner sought to distinguish *Chairman, East Pakistan Industrial Development Corporation and another v. Rustom Ali and another* PLD 1966 SC 848. As to this it was observed as follows (pp. 149-50; emphasis supplied):

> "It is important to point out that Rustom Ali's case was decided with reference to the provisions of Article 98 of the Constitution, which unlike the corresponding provision in the 1956 Constitution, omits reference to the prerogative writs of certiorari, mandamus, quo warranto etc. and instead contemplates the issuance of orders and directions in the nature of classical writs to the authority concerned….
>
> … *The determining factor for the relevant purpose, is the origin or nature of office and the duties attached to it*…."

Referring to various cases, including *Lahore Central Co-operative Bank Ltd. v. Pir Saif Ullah Shah* PLD 1959 SC 210, the Supreme Court considered the nature of an office in relation to which the constitutional jurisdiction of the High Court could be invoked. It will be recalled that in the 1959 decision just referred to the office was that of commercial manager of a cooperative bank. Another case to which reference was made was *Maqbool Rahi v. Abdul Rehman Khan* PLD 1960 SC 266, in which a writ of mandamus was refused to restore a person to the office of secretary of a company registered under company law. It was observed in relation to the petitioner as

follows: “The petitioner before us whose main function was to secure business for the Corporation from the Lahore region cannot possibly claim a better or higher status than the Commercial Manager of a Bank or the Secretary of a Joint Stock Company”. Leave was accordingly refused and the petition dismissed “because apart from its facts, a writ petition did not lie in such a case” (pg. 151).

27. The last decision that requires to be considered from the 1970’s is another leave refusing order, which was made on 24.12.1979 but reported only some years later as *Evacuee Trust Property Board and another v. Muhammad Nawaz* 1983 SCMR 1275. However, for reasons that will subsequently become apparent, this decision will be considered later.

28. When the decisions so far considered, from *State of Pakistan and another v. Mehrajuddin* PLD 1959 SC 147 to *R.T.H. Janjua v. National Shipping Corporation* PLD 1974 SC 146, are reviewed, in our respectful view it becomes clear that the approach taken by the Supreme Court to maintainability focused, in the main, on three grounds. The first was a consideration of the nature, scope (and historical development) of the writ of mandamus. The second was the nature of the office to which the employee sought to be reinstated or restored by means of such a writ. And the third was whether the constitutional safeguards intended for civil servants could be availed by the employees of statutory corporations or companies. As we respectfully hope to show below, in the 1980’s there was a marked (and if we may respectfully put it so, decisive) shift in the Supreme Court’s approach. The law on maintainability was put on a substantively different path.

29. The first judgment that requires to be considered is *Principal, Cadet College Kohat and another v. Muhammad Shoaib Qureshi* PLD 1984 SC 170 (herein after “*Cadet College Kohat*”) to which reference has already (albeit briefly) been made above. Two appeals were disposed off by a common judgment since both involved impugned orders made by the Principal of the Cadet College. In one appeal the respondent employee was a head clerk in the college, while in the other the employee was a senior master. Both had been removed from service and had filed writ petitions in the High Court, which were decided in their favor. The employer appealed to the Supreme Court. As noted above, the statute involved was the (West Pakistan) Government Educational and Training Institution Ordinance 1960. The Ordinance applied, as provided in its s. 1(2), to all such institutions (defined as being an educational or training institution) as were notified by the Government. Section 3 provided for the incorporation of the Board of Governors of such an

institution. The Supreme Court referred to certain provisions of the statute of which the following may, for convenience, be reproduced here:

> "**8. General Powers of the Board.–** Subject to the other provisions of this Ordinance the Board shall have full powers to administer and manage an institution and in particular in respect of the following matters:- …
>
> (*b*) recruitment and determination of the terms and conditions of service of the principal and other members of the staff of the institution and of other officers and servants of the Board; ….
>
> **9. Transitional provisions regarding staff.–** Any person serving in connection with the affairs of the province, in an institution in any capacity immediately before the day notified under sub-section (2) of section 1, hereinafter referred to as the "said day", may be transferred by Government for service under the Board on such terms and conditions as Government may determine; provided that such terms and conditions shall not be less favourable than those admissible to him under Government; provided further that no such person shall be dismissed, removed from service or reduced in rank by an authority subordinate to that by which he was appointed.
>
> **17. Power to make rules.–** (1) Government may make rules for carrying out the purposes of this Ordinance.
>
> (2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for–
>
> (*a*) the terms and conditions on which Government servants may be transferred to the Board; ….
>
> **18. Regulations.–** (1) The Board may, subject to the approval of Government, frame regulations not inconsistent with the provisions of this Ordinance and the rules made thereunder, to carry out the purposes of this Ordinance.
>
> (2) In particular and without prejudice to the generality of the foregoing power, such regulations may provide for– …
>
> (*e*) the recruitment, tenure of office, terms and conditions of service of the officers and servants appointed by the Board; …."

30. In the High Court, the maintainability of the writ petitions had been challenged on the basis of *R.T.H. Janjua v. National Shipping Corporation* PLD 1974 SC 146 but the High Court had held that that judgment did not apply in the facts and circumstances before it. Leave to appeal had been granted to consider whether the writ petitions were maintainable. The Supreme Court considered a number of decisions and observed (pg. 176):

> "It is, therefore, evident that where the conditions of service of an employee of a statutory body are governed by statutory rules, any action prejudicial taken against him in derogation or in violation of the said rules can be set aside by a writ petition. However, where his terms

> and conditions are not governed by statutory rules but only by regulations, instructions or directions, which the institution or body, in which he is employed, has issued for its internal use, any violation thereof will not, normally, be enforced through a writ petition."

There then followed a passage that in our respectful view is pivotal. It was held as follows (emphasis supplied; *ibid*):

> "*In this view of the matter, the holding of a "public office" by an employee is not all that crucial* because, as rightly pointed out by Qazi Muhammad Jamil, learned Counsel for the respondent in Civil Appeal No.17 of 1981 this condition is relevant only in cases wherein a writ in the nature of *quo warranto* is sought whereby a person holding a public office within the territorial jurisdiction of a High Court may be required to show the authority of law under which he claims to hold the said public office. *Thus, apart from the question whether the aggrieved employee of a statutory body was a holder of a "public office", the more important question will be whether the conditions of his service were governed by any statute and/or a statutory rule, if so, whether the statute or statutory rule was disregarded while taking the action which is impugned by him*."

In our respectful view, with these passages the Supreme Court substantively reset the approach to be taken on the issue of maintainability. The nature of the office to which the employee sought to be restored was no longer of primary concern. In particular, the question whether the office was a "public office" for purposes of which a writ of mandamus could issue ceased to have the importance that it had previously enjoyed. And once that question ceased to be of importance, the question whether a writ of mandamus would be issued also necessarily lost its significance. This last question had in one sense been receding (as it were) on account of the manner in which the constitutional jurisdiction of the High Courts was cast in Articles 98 and 199 of the 1962 and present Constitutions respectively. But in any case this question now, with this decision, ceased to be of effective concern. What mattered was whether the terms and conditions of service were governed by statutory provisions or rules. If so, then action "in derogation or in violation" of the same could be challenged through a writ petition. If however, that was not the case, and the action was taken under what were only regulations, instructions or directions which the institution had made for its "internal use", then a writ petition would not normally be competent. In our respectful view, the use of the phrase "internal use" was in contradistinction with statutory provisions or rules/regulations and to emphasize the difference between the two.

31. When the Supreme Court considered the statutory provisions, it found that there was a power in the Government to make rules as regards the terms and conditions on which Government employees could be transferred to the

Board (s.17). There also existed a power in the Board to make regulations, subject to Government's approval, for the recruitment, tenure of office and terms and conditions of service of its employees. However, in the actual circumstances of the case it was held as follows:

> "It is common ground that neither any rules, as contemplated by section 17 of the Ordinance nor any Regulations under section 18 thereof were framed. The Board of Governors did frame some "rules" for "governing the appointment, promotion, retirement, termination of service, and dismissal of staff employed by the Board of Governors of the College" in its meeting held on 29th September, 1964 but these not having been made by the Government, could not be regarded as "rules" under section 17, nor having been approved by the Government, be treated as Regulations under section 18 thereof. These "rules" therefore could only be regarded to be in the nature of mere instructions issued for the guidance of the Board of Governors and the Principal of the Cadet College, Kohat."

Thus, the actual "rules" under which action had been taken against the employees were found not to be statutory in nature. Both appeals were allowed. It is not however necessary, for present purposes, to consider the other grounds that were considered by the Supreme Court.

32. It will be noted that in *Cadet College Kohat*, the power of the Board was conditional upon the regulations being approved by the Government. However, there was no link as such between the grant of the power (in s.8) to recruit employees and provide for their terms and conditions of service, and the power (in s.18) to make regulations in this regard. In other words, the manner in which the power granted could be exercised was not confined only to regulations; it could be exercised otherwise also and as held by the Supreme Court, was so exercised to frame "rules" that were not statutory in nature but only meant for the College's "internal use". In the other important case from the 1980's the statutory situation was different. However, before we take up that (and a related) case, it would be appropriate to consider another (earlier) decision, *Muhammad Yusuf Shah v. Pakistan International Airlines Corporation* PLD 1981 SC 224. This litigation started by way of a civil suit. The appellant, the employee, had been in service as a security guard and was issued a charge-sheet for dereliction of duty. After an enquiry and attendant proceedings, he was dismissed from service. The employee filed a civil suit seeking a declaration to the effect that the dismissal was illegal. The suit was dismissed, and the employee's first and second appeals, before the District Judge and the High Court, also failed. It was held that the corporation (i.e., PIAC) did not have any statutory rules and the service code applied by it was only for its "internal use". The appeal was accordingly dismissed.

33. We now turn to consider the other important case, which in our respectful view was instrumental in reorienting the approach to be taken on the issue of maintainability. This was a leave refusing order dated 14.12.1981, which however was only reported some years later as *Anwar Hussain v. Agricultural Development Bank of Pakistan and others* PLD 1984 SC 194 (herein after referred to as "*Anwar Hussain I*"). This case also started out as a civil suit. The statutory corporation, the development Bank, had been set up under the eponymous statute, being Ordinance IV of 1961. The specific facts which led to the petitioner (the employee) filing a civil suit seeking his reinstatement need not be referred to. It suffices to note, for reasons that will become clear later, that the action by which the employee was aggrieved was taken after 1973. The employee's suit was decreed and the Bank's appeal before the District Judge failed. However, the Bank had success in the High Court in revision, where it was held that a suit for declaration and injunction was not competent and the employee could, at most, sue for damages. Against this decision, the employee petitioned the Supreme Court for leave to appeal. Now, ss. 30 and 39 of the Ordinance of 1961 provided in material part as follows (emphasis supplied):

> "**30**. *Appointment of officers and advisers*.—The Bank may appoint or employ such persons including advisors as it considers necessary for the efficient performance of its operations on such terms and conditions *as may be prescribed by regulations*.
>
> **39**. *Regulations*.—(1) The Board may make regulations not inconsistent with this Ordinance or the rules to provide for all matters for which provision is necessary or expedient for the purpose of giving effect to the provisions of this Ordinance and the efficient conduct of the affairs of the Bank.
>
> (2) Without prejudice to the generality of the provisions of subsection (1) the regulations may provide for-- …
>
> (e) The recruitment of the employees of the Bank, the terms and conditions of their service, the constitutions and management of Provident Funds for the employees of the Bank and all other matters connected with any of these things;
>
> (f) The duties and conduct of employees and agents; …."

It will be seen that s.30 not only conferred the power to employ persons and determine the terms and conditions of their service but also specified the manner in which this power was to be exercised: "as may be prescribed by regulations". And s.39, which conferred the power to frame regulations, expressly provided for the recruitment of the Bank's employees and the laying down of the terms and conditions of service. Thus, there was an express link between the two powers. The only manner in which the Bank's employees could be recruited and their terms and conditions of services

established was by regulations. Regulations necessarily had to be framed and this indeed had been done: regulations had been made in 1961. The Supreme Court nonetheless held that the terms and conditions of service were non-statutory in nature. It is to be noted that the power to frame regulations under s.39 was not conditional upon approval by the Government. It was observed generally as follows (pg. 198):

> "Where a corporation is set up by a statute but the Government does not reserve to itself the power to regulate the conditions of service of the employees under the corporation and the statute itself also does not prescribe any condition but leaves the matter entirely in the discretion of the corporation who is given the power to frame rules and regulations in that regard so that the employee is left with no protection under the statute itself, then the corporation must be held to be the sole arbiter in the matter of prescribing the terms and conditions of its employees and competent to deal with them in accordance with the terms and conditions so prescribed by it. In such situation the employee cannot claim to be a person possessed of any legal character within the meaning of section 42 of the Specific Relief Act and in case of his wrongful dismissal from or termination of service, the principle of master and servant will fully apply and he can only claim damages but not reinstatement to his post."

With specific reference to ss. 30 and 39 it was observed as follows (pg. 199):

> "It is clear from the above that the Bank has complete control over its employees, their appointment and dismissal and their terms and conditions of service and that this control is not fettered by any statutory provision. The rule of Master and Servant will, therefore, apply to the case of the servants of the Bank."

Leave to appeal was accordingly refused.

34. Now, *Anwar Hussain I* had an important sequel. After leave to appeal had been refused, the petitioner (i.e., the employee) discovered that the Ordinance of 1961 had in fact been amended in 1973, by Act XII of that year. One amendment, crucial for present purposes, was that a proviso had been added to subsection (2) of s.39, to the following effect:

> "Provided that no regulation made with respect to the matters mentioned in clauses (e) and (f) shall take effect until it has been approved by the Federal Government."

In other words, the power to frame regulations with respect to recruitment of employees and the laying down of their terms and conditions of service was made conditional upon approval by the Government. The amendment had not been brought to the attention of the Supreme Court in *Anwar Hussain I* and the employee accordingly sought review of the leave refusing order. The review was allowed and leave to appeal was granted on

19.12.1990. Subsequently, the appeal was decided by judgment dated 06.05.1991, which is reported as *Anwar Hussain v. Agricultural Development Bank of Pakistan and others* 1992 SCMR 1112 (herein after referred to as "*Anwar Hussain II*"). This decision needs to be considered in some detail.

35. It is pertinent to note at the outset that the Bank had, as indicated above, framed service regulations in 1961. These were the Agricultural Development Bank (Staff) Service Regulations. In 1975, after the approval of the Government as required by the proviso added in 1973, it had framed the ADBP Officers (Efficiency and Discipline) Regulations. The Supreme Court referred to the rule adopted in *Anwar Hussain I*, citing the passage reproduced in para 33 above, and then, referring to the proviso, observed as follows: "Therefore, if the proviso was attracted the contracting parties were not free in the matter of contract of service and the rule laid down excluding the principle of master and servant, because of the statutory rule placing fetters upon the freedom parties, would come into operation" (pg. 1120). The first question that the Court considered was whether, on account of the proviso having been added, the regulations of 1961 were still effective. This question was answered in the affirmative as it was held that the Amending Act of 1973, and hence the proviso, only had prospective effect and did not invalidate any regulations made prior thereto (pg. 1124). The next question was regarding the status of the 1961 regulations. As noted above, it had been held in *Anwar Hussain I* that the regulations were non-statutory in nature because the corporation had complete and unfettered control over the framing thereof. Did the subsequently added proviso alter this position, even with respect to the 1961 regulations? (There was of course no doubt that the 1975 regulations were statutory in nature even on the test laid down in *Anwar Hussain I*; the proviso of 1973 ensured this.) To the question just posed, the Supreme Court gave an affirmative answer in the following terms (pp. 1124-5; emphasis supplied):

> "The next question is that in the legal position thus emerging, whether the test laid down in the case of Anwar Hussain would still be satisfied in regard to matters governed by such Regulations which had already come into force before the amendment and have continued in force without the approval of the Federal Government. The simple answer to this question is that the Regulations that were in force at the time of the amendment and have continued to remain in operation, cannot be modified, replaced or repealed, by the Board of Directors of the Bank hereinafter without the prior approval of the Federal Government as contemplated by the proviso to subsection (2) of section 39. This is so because, firstly, any such action would obviously fall within the purview of the proviso; and secondly, because by virtue of section 21 of the General Clauses Act, 1897, the power to frame Regulations in respect of clause (e) and (f) of subsection (2) of section 39 vesting in the Board would include a power, exercisable in the like manner and subject to like sanction and conditions, to add to, amend, vary or

> rescind any previously made regulations. *In final analysis, therefore, for all intents and purposes, the Service Regulations of 1961 are unalterable without the prior sanction of the Federal Government and therefore, there is statutory intervention and fetters placed upon the freedom of the parties in the matter of the terms and conditions of service, which is the test laid down for excluding the ordinary rule of master and servant in such cases*."

Thus, from the date when the Amending Act took effect, the 1961 regulations also became statutory in nature. This conclusion did not however end the matter. For, the Supreme Court observed, it was not sufficient merely that the regulations framed by the corporation were (or became) statutory in nature. The employee had also to show that the action by which he was aggrieved had been taken with reference to the statutory regulations. And here, the Supreme Court held, the petitioner did not have a case. The reason was that the impugned action had been taken not in terms of the regulations of 1961 or 1975 (both statutory) but rather a Manual of Instructions (the relevant extracts from which were reproduced at pg. 1123). It was held that that Manual was non-statutory in nature, i.e., intended only for the Bank's "internal use". Certain submissions by learned counsel for the employee that the action taken came within the ambit of some of the regulations of 1961 or 1975 were repelled. It was therefore held that the High Court in revision had rightly concluded that the suit for declaration and injunction was not maintainable and the appeal was dismissed.

36. Before proceeding further, we would respectfully like to make one point. When the review filed by Anwar Hussain was allowed on 19.12.1990 and leave to appeal granted, that meant that the leave refusing order of 14.12.1981 had effectively been set aside. As is clear from the foregoing discussion, in the judgment that followed on the appeal (i.e., *Anwar Hussain II*), the Supreme Court expressly approved of the rule that had been laid down in the leave refusing order (i.e., in *Anwar Hussain I*). But, we would respectfully submit, that rule continued only because it was incorporated, and made a part of the judgment, in *Anwar Hussain II*. Insofar as that any decision in the period from 14.12.1981 to 19.12.1990 referred to *Anwar Hussain I* that was of course unexceptionable since during that period the leave refusing order continued to hold the field. However, we would respectfully submit that after the decision in *Anwar Hussain II*, since the rule continued only because of that decision, a reference to *Anwar Hussain I* ought to be made in the context of, and read along with, *Anwar Hussain II*. (Herein after, *Anwar Hussain I* and *Anwar Hussain II*, when referred to together, are referred to as the "*Anwar Hussain* cases".)

37. In our respectful view, the decisions in *Cadet College Kohat* and the *Anwar Hussain* cases, substantively and decisively reoriented the approach to be taken as regards the issue of maintainability. We would respectfully suggest that with these decisions, the approach taken in the earlier decades was effectively put to one side. Furthermore, in our respectful view, these decisions have to be read together in order to fully appreciate and apply the changed jurisprudence. A combined reading of these decisions, in our respectful view, had the following effect. The focus of attention now became the actual statutory provisions. If those provisions conferred an unfettered power on the corporation to frame the regulations then they remained non-statutory in nature even though they may have been made in express exercise of such power. "Unfettered" here meant only that the power was not curtailed or made conditional. If that power was curtailed or made conditional in some manner (and the most obvious and frequently used "fetter" was Government's approval) then the regulations become statutory in nature. But even if the power was so "fettered", it still had to be shown that the regulations (howsoever described) in terms of which the impugned action was actually taken had been made in exercise of such power. The mere existence of any regulations made in the exercise of "fettered" power was not enough, in and of itself. And finally, in appropriate circumstances, regulations, etc. that had been non-statutory in nature to begin with could subsequently become statutory (e.g., on account of a change in the law, whereby some "fetter" or condition was imposed on the power to make regulations).

38. In *Nisar Ahmed v. Director, Chilton Ghee Mills and another* 1987 SCMR 1836, which was a leave refusing order (to take up the next case), the petitioner employee's services were terminated in exercise of a contractual power that allowed for such termination on payment of three months' salary in lieu of notice. The employee challenged the action by filing a writ petition in the High Court. The petition was dismissed, the High Court relying on *Anwar Hussain I*. The employee petitioned the Supreme Court for leave to appeal. It was contended, on the basis of *Cadet College Kohat*, that the employee's terms and conditions of service were covered by statutory rules made under an Act of 1973 whereby hydrogenated vegetable oil industries were regulated. The rules on which reliance was placed had been made by the Ghee Corporation of Pakistan Ltd., it being contended that the actual employer (the respondent No. 1) was a unit of the Ghee Corporation. Relying on *Anwar Hussain I*, the Supreme Court held that it was not satisfied that the Government had reserved to itself the right to regulate the conditions of service of the Ghee Corporation. But (and here referring to *Cadet College Kohat*) the Supreme Court held that even otherwise, no rules, as actually

applied, were shown as had been framed under the aforesaid Act. Leave to appeal was accordingly refused.

39. Coming to the 1990's, the first decision that requires consideration is *Karachi Development Authority and another v. Wali Ahmed Khan and others* 1991 SCMR 2434 (herein after referred to as "*Wali Ahmed Khan*"). This appeal was decided on 24.07.1991, i.e., only a few months after *Anwar Hussain II*. It is not necessary to set out the facts in any detail, save to note that the proceedings had started by way of a writ petition in the High Court. The petition was partially allowed and therefore both the employee (the respondent No. 1) and the employer (KDA) petitioned the Supreme Court for leave to appeal (pg. 2438). In the petition filed by the employer, leave to appeal was granted to consider the true nature of the relationship between a local authority/statutory corporation and its employee and whether a writ petition could be filed by the latter against his removal from service. In the petition filed by the employee leave was granted to consider the question whether "the High Court having found that the action taken against him was mala fide, it was open to it to allow the [employee] to be again proceeded against on the basis of the same or similar sets of show-cause notices". After a review of the earlier authorities, it was observed as follows (pp. 2444-5; emphasis supplied):

> "The review of the cases discussed above shows that the general rule is that the service of a person with a statutory Corporation is essentially based on contractual relationship and is therefore governed by the law of master and servant, which implies that the remedy for illegal termination of service resulting into the breach of contract of service, is to file a suit for damages but no suit for declaration is maintainable, for the simple reason that a service contract is not specifically enforceable, which will result in compelling an unwilling master to accept a person in his service against his will. The position so far as the Constitutional remedy under Article 199 of the Constitution is identical. However, in cases where the post held by the employee of a statutory Corporation, is a public office, as defined hereinabove, then relief in the nature of quo warranto to remove a person who is unlawfully holding the post can be granted in Constitutional jurisdiction. *The other exception to the aforesaid general rule is that if the freedom of contract is placed under statutory fetters, by reserving controlling power with the Government in the matter of framing of rules or regulations touching the terms and conditions of service of the employees of such a statutory body, in such a case the pleasure of the master is taken over by the statutory provisions and the case would stand outside the master and servant rule, so that Constitutional jurisdiction would be amenable to any violation of the statutory rules or regulations*."

With regard to the specific statutory provisions involved (which were the relevant articles of the Karachi Development Authority Order, 1957), it was observed as follows (pg. 2445):

> "The rule making power for the purpose of giving effect to the provisions of the KDA Order has been given to the Government under Article 14 thereof, whereas under Article 15 of the said Order, power has been vested in the KDA to frame regulations, inter alia, in the matter of terms and conditions of service. This power is unbridled and unfettered by the statutory intervention of any outside authority. It is common ground that no rules have been framed by the Government under Article 14. Therefore, in accordance with the dictum laid down in the case of Anwar Hussain PLD 1984 SC 194, as there is no clog on the freedom of the parties in the matter of terms of contract of service, ordinarily the rights of the employee will be governed by the law of master and servant."

It was contended on behalf of the employee that he had earlier (i.e., prior to his statutory transfer to KDA) been employed with the defunct Karachi Joint Water Board, which was also a statutory corporation. The latter had framed certain rules in 1956 relating, inter alia, to disciplinary matters. It was submitted that those rules (which were contended to be statutory in nature) would continue to govern the employee's position on his transfer to KDA as provided for in Article 120 of the KDA Order, which continued the previous rules. This contention had been repelled in the High Court and this finding was upheld by the Supreme Court (pg. 2447).

40. It was finally submitted on behalf of the employee that the High Court had found that the impugned action was tainted by mala fides and was for that reason unsustainable notwithstanding that the terms and conditions of service were non-statutory in nature. It was observed as follows (pg. 2447):

> "This submission of the learned Counsel has not been controverted by the learned Counsel for the KDA, nor was any attempt made to challenge the finding recorded by the High Court to the effect that the order of removal from service passed against Wali Ahmed Khan was vitiated on account of mala fides and was therefore without jurisdiction. After giving careful consideration to the last mentioned contention it seems to me that it has great deal of force.
>
> The recent trend of authority in this Court seems to be in favour of the proposition that even where untrammelled power of removal from service under a statute has been conferred on a statutory Corporation or body, without assigning any reason the exercise of such power to be immune from judicial scrutiny, must be accompanied by absence of the taint of mala fides. In other words, any statutory power of removal from services of a body constituted under the statute to be free from challenge must be the result of a bona fide exercise of such power."

After considering certain decisions, the Supreme Court observed as follows (pp. 2448-9; emphasis supplied):

> "If the absolute discretionary power of removal from service can be subjected to judicial scrutiny and set aside on the ground of mala fides,

there is no reason to hold that a power exercised after a departmental enquiry the proceedings of which are tainted with mala fides, can be immune from scrutiny in the Constitutional jurisdiction.

In the light of the foregoing discussion it appears that the last contention raised by the learned Counsel is on a sound footing. *As has been laid down in several decisions of the superior Courts a mala fide act is a fraud on statute and wholly void*. Therefore, if an officer or an authority of a statutory body exercises power of removal mala fide, obviously such action cannot be deemed to be referable to the statutory body acting as the master terminating the service of the employee. It will be an act wholly alien to the objects and purposes for which such a statutory body has been brought into existence under the relevant legal dispensation. *Thus, there will be hardly a question of the breach of the service contract by the master*. *In such circumstances I feel that if the statutory body is amenable to writ jurisdiction, as in the present case the KDA, is as, a local authority, the remedy under Article 199 would be available to challenge the mala fide exercise of statutory authority*. Subject, however, to the well recognized rule that if disputed questions of fact relating to mala fides are raised, it will always be open to the Court not to embark upon a factual inquiry and leave the party to the remedy of a suit. In this case, the situation was that on the basis of admitted facts on the record, the Court was able to reach a finding on the question of mala fides. *In this view of the matter, the only contention raised on behalf of the KDA regarding the maintainability of the Constitutional petition stands repelled*."

Ultimately, for further reasons which, with respect, need not detain us, both appeals were dismissed.

41. The next case that requires consideration is the well known decision reported as *Anisa Rehman v. PIAC and another* 1994 SCMR 2232 (herein after referred to as "*Anisa Rehman*"). The appellant, the employee, had been reverted to a lower pay group, *inter alia* without having been given an opportunity of hearing. She filed a writ petition in the High Court which was dismissed in limine on the ground that the relationship between the parties was that of master and servant, i.e., the terms and conditions of service were non-statutory in nature. After a review of the earlier authorities, the Supreme Court affirmed this position, but then took up the appellant's contention that there had been a denial of the principles of nature justice. After considering some further authorities, it was held as follows (pp. 2239-40; emphasis supplied):

"7. From the above stated cases, it is evident that there is judicial consensus that the Maxim audi alteram partem is applicable to judicial as well as to non-judicial proceedings. The above Maxim will be read into as a part of every statute if the right of hearing has not been expressly provided therein. In the present case respondent No.1 in its comments to the writ petition … admitted the fact that no show cause notice was issued to the appellant nor she was heard before the impugned order dated 6th August, 1991 reverting her to Grade VI from Grade VII was passed. In this view of the matter there has been violation of the principles of natural justice. *The above violation can be equated with the violation of a provision of law warranting*

> *pressing into service Constitutional jurisdiction under Article 199 of the Constitution, which the High Court failed to exercise. The fact that there are no statutory service rules in respondent No.1 Corporation and its relationship with its employees is of that Master and Servant will not negate the application of the above Maxim audi alteram partem*. The above view, which we are inclined to take is in consonance with the Islamic Injunctions as highlighted in the case of Pakistan and others v. Public at Large (supra), wherein, it has been held that before an order of retirement in respect of a civil servant or an employee of a statutory Corporation can be passed, he is entitled to be heard.
>
> The effect of the application of the master and servant rule is that an employee of a Corporation *in the absence of violation of law or any statutory rule* cannot press into service Constitutional jurisdiction or civil jurisdiction for seeking relief of reinstatement in service, his remedy for wrongful dismissal is to claim damages."

42. In our respectful view, the decisions in *Wali Ahmed Khan* and *Anisa Rehman* marked important developments relating to the issue of maintainability and constituted the "extensions" of the core principle to which reference has been made above (see para 8). In our respectful view, these decisions have laid down that if there is a rule of law that applies generally and in various contexts (i.e., not only the context of an employee seeking specific, declaratory or injunctive relief against an employer), and the rule of law is such that a violation thereof strikes at the very root of the impugned action, then a writ petition may be maintainable notwithstanding that the terms and conditions of service are non-statutory in nature. In *Wali Ahmed Khan*, that rule of law was that mala fides taint and vitiate the impugned action. Since the action of removal from service of the employee was so tainted, the writ petition was maintainable. In *Anisa Rehman* the rule of law was that a denial of the principles of natural justice vitiates the impugned action. Since the reversion of the employee had been done without affording her an opportunity of hearing, the writ petition was likewise maintainable. We would respectfully submit that the principle established by these two decisions is of general application. In other words, any rule of law that meets the required test as described above could, in the context of a writ petition filed by an employee against his employer (the statutory corporation) be sufficient for the maintainability of the petition.

43. Certain other decisions from the 1990's may now be considered. In *Chairman, WAPDA and others v. Syed Jamil Ahmed* 1993 SCMR 346, the employee (the respondent) was served with a charge sheet alleging various counts of misconduct, etc. Thereafter his services were terminated. The employee filed a civil suit seeking suitable declaration and injunction, which was dismissed. An appeal against the dismissal succeeded before the District Judge who decreed the suit and ordered reinstatement. The corporation's

appeal in the High Court failed, and it petitioned the Supreme Court for leave to appeal. Leave to appeal was granted to consider whether, *inter alia*, the relevant rules of the corporation were statutory in nature within the meaning of *Anwar Hussain I*. The Supreme Court referred to s.18 of the WAPDA Act, 1958 which allowed the relevant authority to "prescribe the procedure for appointment and terms and condition of service" and also to take disciplinary action. The employee sought to rely on s.29 which empowered the authority to frame regulations with the approval of the Government. The Supreme Court held that the relevant rules had not been framed under s.29 nor had any approval been taken from the Government. Referring to various authorities, including *Cadet College Kohat* and *Anwar Hussain I*, the Supreme Court held that as the rules had been framed under s.18, they were non-statutory in nature. The relationship between the parties was that of master and servant and a suit seeking reinstatement was therefore incompetent. The appeal was allowed. In *Muhammad Umar Malik v. Muslim Commercial Bank Ltd.* 1995 SCMR 453, the petitioner was an employee of the respondent Bank and his services were terminated. He filed suit seeking his reinstatement, which was decreed. The Bank's appeal before the District Judge failed but it met with success in revision in the High Court. The employee petitioned the Supreme Court for leave to appeal. Leave was refused, it being held that no statutory rules governed the terms and conditions of service.

44. It will be convenient to advert here to certain decisions of the Supreme Court in which appeals against orders of the Federal Services Tribunal were decided. As noted above, it our respectful view these cases are not directly relevant for the proposition at hand, i.e., the maintainability of a writ petition in the High Court. However, some of these decisions are cited from time to time by counsel even in this context so it is appropriate to consider them as well. The first decision is *WAPDA and another v. Muhammad Arshad Qureshi and others* 1986 SCMR 18. A number of appeals were heard together, and the question before the Supreme Court was whether the jurisdiction of the Services Tribunal to entertain an appeal of an employee whose services had been terminated under s. 17(1-A) of the WAPDA Act had been properly ousted by subsection (1-C) of the said section. Subsection (1-B) of s. 17 had deemed WAPDA employees to be civil servants for the purposes of the Federal Services Tribunal Act, 1973 but subsection (1-C), added later, provided that an order of termination of service to which the latter subsection applied could not be called in question in any court or tribunal. Certain employees' services were terminated and they filed appeals before the Services Tribunal whose jurisdiction was challenged by reason of subsection (1-C). The Tribunal held that it did have jurisdiction in the matters, holding that the "tribunal" referred to in the subsection had to mean a tribunal other

than the Services Tribunal. On appeal, the Supreme Court concurred. We would respectfully submit that this decision has no direct relevance for the issues at hand.

45. In *Mrs. M.N. Arshad and others v. Miss Naeema Khan and others* PLD 1990 SC 612, which was also on appeal from the Services Tribunal, the issue was the entitlement to be promoted to the post of Headmistress of the Islamabad College for Boys ("College"). An objection to the maintainability of the appeal before the Services Tribunal was taken on the ground that the appellants (who were all teachers) were not civil servants, but rather the employees of the Board of Governors of the College. The College had been set up by a 1985 resolution of the Federal Government, which had provided that the Board would be an institution that could sue or be sued in its own name. The question was whether the resolution was sufficient to create a juristic person. The Supreme Court undertook a detailed historical review of the principles relating to the incorporation of juristic entities. The position both in English law and under the laws of Pakistan was analyzed in depth. It was concluded that the Board was not a juristic person or corporate body and hence the teachers were not its employees. The Supreme Court also noted the case law (much of which considered above) relating to the question when the terms and conditions of service of a statutory corporation were such as would entitle the aggrieved employee to maintain a writ petition, but expressly noted that that "question is not germane to the point in issue" (pg. 619). In our respectful view, this decision is also not of direct relevance for present purposes.

46. *Raziuddin v. Chairman Pakistan International Airlines Corporation and others* PLD 1992 SC 531 was again judgment in appeal against various decisions of the Services Tribunal, which were disposed off together since common questions of law were involved. The appellants were removed from service for various acts of misconduct, etc. It is pertinent to note that at the relevant time, s.10 of the PIAC Act had been amended such that certain subsections ((2) to (4)) had been added thereto, and the impugned orders were made in terms of the said subsections. These subsections were added in 1984 but were omitted in 1989. The Supreme Court cited the relevant authorities, many of which have been considered above, and reiterated that the terms and conditions of the PIAC employees were non-statutory in nature. Reference was made to the aforementioned subsections (2) and (3), of which the first gave PIAC a wide power to remove an employee from service but did provide for an opportunity of hearing, and the second provided for an appeal to the Services Tribunal. After considering the record, it was concluded that there had been compliance with the provisions of s.10 as then in force, especially as

regards the right to a hearing in terms of subsection (2). Again, in our respectful view, this decision is not directly relevant or germane for the issues at hand. In *Wilayat Ali Mir v. Pakistan International Airlines Corporation and another* 1995 SCMR 650, which was also an appeal against a decision of the Services Tribunal, the issue was whether the appellant employee was entitled to be promoted. In our respectful view this decision is also not directly relevant for present purposes. Finally, *Zeba Mumtaz v. First Women Bank Ltd. and others* PLD 1999 SC 1106, which again came to the Supreme Court from the Services Tribunal. The services of the appellant had been terminated by the respondent Bank and she had approached the Services Tribunal for relief. The appeal was dismissed by the Tribunal on the ground that the terms and conditions of service were non-statutory in nature. This conclusion was upheld by the Supreme Court, which referred to the relevant authorities, many of which have been considered herein above.

47. Before proceeding to the case law of the 2000's and the present, it will be appropriate to consider the leave refusing order made on 24.12.1979 but reported only some years later as *Evacuee Trust Property Board and another v. Muhammad Nawaz* 1983 SCMR 1275, to which reference was made in para 27 above. Leave to appeal was sought against a decision of the Lahore High Court, which is reported at PLD 1979 Lahore 903. The litigation started by way of a civil suit. The respondent (the employee) was employed with the petitioner Board and his services were terminated in 1969 for misconduct. He filed a civil suit seeking declaratory and injunctive relief. The suit was dismissed on the ground that such a suit did not lie. On appeal, the Additional District Judge reversed, and decreed the suit. Against this decree the Board filed a revision in the High Court, which was however dismissed by the aforementioned judgment. The Board petitioned the Supreme Court for leave to appeal. It was submitted on its behalf that the relationship between the Board (the employer) and the respondent was that of master and servant, i.e., that the terms and conditions of service were non-statutory in nature. This plea had not found favor with the High Court, and the Supreme Court concurred in this conclusion. It was held as follows (pp. 1276-77; emphasis supplied):

> "4. Learned Counsel, for the petitioners has argued that even though the removal or dismissal of the employee was illegal nevertheless the employee at the most could have sued for damages for wrongful dismissal from service and could not have been granted a declaration of the kind prayed for by him in the suit, because, according to the learned counsel, the relationship between the petitioners and the employee was that of a master and servant whereunder the service of the employee was in the pleasure of the master which could not be tampered with by decree of civil Court. In this respect he referred to *R.T.H. Janjua v. National Shipping Corporation* for the proposition that violation of regulations were

pertaining to the terms and conditions of employee of a corporate body were not actionable to claim a declaratory decree regarding validity of their removal. The contention has no merit. In the aforesaid case the powers of the master to deal with the service matters of his employee were not regulated by statutory rules, whereas *in the instant case the subject was covered and controlled by regular rules on the subject in the form of Efficiency and Discipline Rules which were adopted by the Evacuee Trust Property Board, as its own rules by means of a proper resolution in their meeting of May, 1969*. The matter was considered by a Bench of this Court in C.P.S.L.A 645/74 titled the *Chairman Evacuee Trust Property Board Lahore, etc. v. Noor Elahi* and C.P.L.S.A. 646/74, titled the *Chairman Evacuee Trust Property Board Lahore, etc. v. Muhammad Ramzan,* wherein it was held that dismissal in violation of those rules was illegal. The actual passage in the judgment of this Court, dated 14-11-1974 in the above cases reads as follows:-

"It appears from the order passed by the learned Chief Justice of the High Court on the two Constitution Petitions that the Board at its 6th Meeting held in May 1969, passed the following resolution:-

"Agreed. Central Government Rules would apply to the Board's employees *for all intents and purposes*."

Under paragraph 43 of the scheme the Board is authorized to make rules to carry out the purposes of the scheme framed under section 16-A(i) of the Displaced Persons (Compensation and Rehabilitation) Act 1958, and under section 14(2) of the Displaced Persons (Land Settlement) Act 1958. Paragraph 16 of the Scheme provides that no employee of the Board shall be dismissed or otherwise punished except in accordance with the rules framed by the Board and approved by the Central Government. *In our opinion the aforesaid resolution amounted to making of the rules by the Board*. It was not disputed before the learned Chief Justice that till such time the Board framed its own rules, the employees were governed by the Efficiency and Discipline Rules, 1960, framed by the Central Government.

Admittedly these rules were not followed in the cases of the two respondents and, therefore, no fault can be found with the impugned orders of the learned Chief Justice. Both the petitions are accordingly dismissed."

5. Learned Counsel has not been able to distinguish the present case from the precedent above-mentioned. Even otherwise it is well-settled that where statutory rules govern the service conditions of an employee, then the pleasure of the master stands surrendered to the extent the matter is covered by the relevant rules."

48. This decision (herein after referred to as *Evacuee Trust Property Board*) is cited for the proposition set out in the second sentence of its para 5, quoted above. Of course, that is the core principle. However, in our respectful view, the manner in which the rules held to be statutory came to be "framed" requires close and careful consideration. It must be kept in mind that at the relevant time (i.e., in 1969 when the action was taken against the employee and he filed his civil suit) the Evacuee Trust Properties (Management and

Disposal) Act, 1975 ("1975 Act") had not yet been enacted. The matter was regulated by the two statutes of 1958 referred to in the passage reproduced above. Under the said Acts, in terms of the provisions cited, schemes could be made by the settlement authorities with the approval of the Government. However, the said statutes did not provide for any Board or its employees. The relevant scheme was made in 1960. It provided for the constitution of a Board (which had the same name as the Board subsequently established as a statutory corporation under the 1975 Act). As noted in the passage reproduced, paragraph 43 of the Scheme enabled the Board (generally) to make rules and paragraph 16 provided that an employee could not be dismissed or otherwise punished except by rules made by the Board with the prior approval of the Government. Now, the rules as actually enforced were not so made; they were simply Government rules adopted by the Board by resolution at its meeting held in 1969, when it was resolved that the Government Rules would apply to the Board's employees "for all intents and purposes". It was this resolution which was held to have "amounted to making of the rules by the Board". In our respectful view, whatever may have been the position in 1974 or even in 1979, any "rules" so made or framed could not have come up to the approach and test subsequently formulated by the Supreme Court in *Cadet College Kohat* and the *Anwar Hussain* cases. If tested on the anvil of these decisions, the rules of 1969 would, in our respectful submission, have been regarded as non-statutory in nature and meant only for the "internal use" of the Board. However, there is an interesting sequel. The 1975 Act, in effect, provided for the taking over of any scheme or rule made under the two Acts of 1958 and the continuance thereof under the subsequent statute (see, *inter alia*, s. 32 of the 1975 Act). Now, s. 29 of the 1975 Act empowered the Board (which, it is reiterated, meant now the statutory corporation created in terms of the statute) to frame regulations with the approval of the Government. In other words, the power to make regulations was "fettered" and conditional. In our respectful view, the test laid down in *Anwar Hussain II*, in terms of which rules that were non-statutory in nature when framed could nonetheless become statutory subsequently in appropriate circumstances, applied therefore to the "rules" made in 1969 and "taken over" by the Board established under the 1975 Act and "saved" in terms thereof by s. 32. The "rules" made by the resolution of 1969 became statutory in nature under the 1975 Act. In our respectful view, the continued applicability of what is stated in *Evacuee Trust Property Board* ought therefore to be read in the foregoing terms.

49. In our respectful view, when the case law of the 2000's and the present is considered, it is found that the reoriented and refocused approach adopted by the Supreme Court in terms of *Cadet College Kohat* and the *Anwar*

Hussain cases continues. This is illustrated, *inter alia*, by the litigation involving the Pakistan Red Crescent Society. Reference has already been made to the Society and the Act of 1920 whereby it was put on a statutory footing (see para 12 above). Reference has also been made to the fact that the said Act does not, in fact, at all refer to the employees, etc. of the Society. In *Ziaullah Khan Niazi v. President Pakistan Red Crescent Society* 2004 SCMR 189, which was an appeal against a decision of the Punjab Services Tribunal, it was held that the Society was not a person performing functions in connection with the affairs of the Province. In *Pakistan Red Crescent Society v. Syed Nazir Gillani* PLD 2005 SC 806, the services of the respondent (the employee) were terminated and he challenged the same by writ petition in the Lahore High Court. A learned Single Judge of that Court dismissed the petition as not maintainable. An intra-Court appeal before a learned Division Bench however succeeded and the respondent was directed to be reinstated in service. The Society petitioned the Supreme Court for leave to appeal, which was granted to consider the question, *inter alia*, whether the terms and conditions of service were governed by the law of master and servant. The Supreme Court affirmed the earlier decision of 2004 and observed that the Society was not a person performing functions in connection with the affairs of the Federation or a Province (pp. 814-5). As regards the question whether the terms and conditions were statutory in nature, it was observed, with reference to s. 5 of the Act of 1920 which empowered the Managing Body of the Society to make rules, that there were no "fetters" or condition imposed on the exercise of the rule making power. Therefore, the terms and conditions of service were held to be non-statutory in nature (see at pg. 816). The Society's appeal was allowed. The employee subsequently filed a review petition against this decision. The review was dismissed by a decision which is also reported, but will be adverted to a little later.

50. In our respectful view it is not necessary to consider other cases from the 2000's onwards relating to the core principle because the Supreme Court comprehensively reexamined the same in a 5-member Bench decision reported as *Pakistan Defence Officers' Housing Society and others v. Lt. Col. Syed Jawaid Ahmed* 2013 SCMR 1707 (herein after referred to "*PDOHA*"), in which the earlier case law was reviewed. A number of connected appeals, involving different statutory corporations and a company under the control of the Federation, were disposed off by a common judgment. These entities were the appellants. The actual questions that fell for determination are set out at pp. 1724. The first question was whether the appellants were persons discharging functions in connection with the affairs of the Federation or a Province within the meaning of clause (5) of Article 199 and hence amenable to the writ jurisdiction of the High Court. After a consideration of the

constitution of, and material facts relating to, each appellant and a review of the relevant cases, including certain Indian decisions, this question was answered in the affirmative. It was observed in relation to the appellants as follows (pg. 1732):

> "27. … If their actions or orders passed are violative of the Statute creating those bodies or of Rules/Regulations framed under the Statute, the same could be interfered with by the High Court under Article 199 of the Constitution."

51. The second question that fell for determination was in relation to the Removal from Service (Special Powers) Ordinance 2000. The question was whether any employees, being "persons in corporation service" within the meaning of the said Ordinance, could invoke the writ jurisdiction of the High Courts against any order of the concerned authority (i.e., the appellants) or were limited only to a claim of damages to be made in a civil suit. It was while considering this question that the Court observed as follows (pg. 1734): "Before we proceed further to discuss the issue raised, a brief reference to the precedent case-law in writ jurisdiction with regard to the employees of statutory bodies generally would be relevant". The Supreme Court examined the relevant authorities, many of which have been considered above, and also referred to certain English and Indian cases. It was finally observed as follows (pg. 1742):

> "50. The principles of law which can be deduced from the foregoing survey of the precedent case-law can be summarized as under:-
>
> (i) Violation of Service Rules or Regulations framed by the Statutory bodies under the powers derived from Statutes in absence of any adequate or efficacious remedy can be enforced through writ jurisdiction.
>
> (ii) Where conditions of service of employees of a statutory body are not regulated by Rules/Regulations framed under the Statute but only Rules or Instructions issued for its internal use, any violation thereof cannot normally be enforced through writ jurisdiction and they would be governed by the principle of 'Master and Servant'.
>
> (iii) In all the public employments created by the Statutory bodies and governed by the Statutory Rules/Regulations and unless those appointments are purely contractual, the principles of natural justice cannot be dispensed with in disciplinary proceedings.
>
> (iv) Where the action of a statutory authority in a service matter is in disregard of the procedural requirements and is violative of the principles of natural justice, it can be interfered with in writ jurisdiction.

(v) That the Removal from Service (Special Powers) Ordinance, 2000 has an overriding effect and after its promulgation (27th of May, 2000), all the disciplinary proceedings which had been initiated under the said Ordinance and any order passed or action taken in disregard to the said law would be amenable to writ jurisdiction of the High Court under Article 199 of the Constitution."

52. Experience shows that when the question of maintainability arises in the High Court, the employee tends to rely in particular on sub-paras (i) and (iv) of the aforesaid para 50, where the employer (the statutory corporation) tends to rely on sub-para (ii). In our respectful view, in the foregoing summary the Supreme Court has only restated the law and affirmed the earlier position and the jurisprudence of the Court as it has developed over the decades, as described above. In our respectful view, this decision has not substantively altered the law on the core principle.

53. It remains only to consider the decision in the review petition relating to the Pakistan Red Crescent Society (see para 49 above), which is reported as *Syed Nazir Gillani v. Pakistan Red Crescent Society* 2014 SCMR 982. The review was dismissed, the Supreme Court holding that the service rules of the Society were non-statutory in nature. Reference was made to para 50(ii) of *PDOHA.*

54. In our respectful view, the following conclusions can be arrived at from a review of the case law and the analysis carried out above:

a. The core principle is that a writ petition will be maintainable only if the terms and conditions of service are governed by statutory rules or regulations or are regarded as statutory in nature.

b. If the terms and conditions are not governed by statutory rules or regulations but only by rules or instructions meant for the "internal use" of the corporation, then any violation of the same would not normally be amenable to the Article 199 jurisdiction of the High Courts.

c. In order to determine what are statutory rules or regulations the test established by a combined reading of *Cadet College Kohat* and the *Anwar Hussain* cases will be applied. Even if there is an express statutory power to make regulations, which have been framed expressly with reference thereto, the terms and conditions will be regarded as non-statutory unless the power

to frame the regulations is controlled, fettered or conditional in some manner. If the power to frame regulations is not fettered, etc. then the regulations will be non-statutory in nature. This would be so even if the only manner in which the terms and conditions can be laid down is by the framing of regulations. The typical control or fetter in this regard is that the regulations be made with the approval of Government or some body or authority outside the corporation. We would here respectfully suggest that in appropriate circumstances (such as, e.g., the "senate" of a university or equivalent authority within an educational institution) the relevant control or fetter could even be provided by an "organ" within the corporation.

d. Not only must there be statutory regulations in the sense just described but the action actually taken and impugned must be with reference or relatable to such regulations. If this is not the case, then the impugned action will be regarded as having been taken on the basis of non-statutory regulations/ instructions and a writ petition will not be maintainable.

e. If there is no express link between the (expressly) conferred power to lay down the terms and conditions of service and the (expressly) conferred power to make regulations, it will be open to the corporation to lay down such terms and conditions by either making regulations or in some other way, i.e., by instructions, etc. meant for "internal use". If the latter option is chosen, then the terms and conditions will be non-statutory in nature even if the power to make regulations is subject to fetters or control, e.g., by way of Government approval. In other words, the mere existence of a "fettered" power to make regulations is not decisive. Such power must be exercised, and the impugned action actually taken must be in terms of or with reference to regulations so framed.

f. It may be that regulations that are initially non-statutory subsequently become statutory in nature in the sense described above. This happened, e.g., to the 1961 regulations in *Anwar Hussain II* and (in our respectful view) to the rules of the Board in *Evacuee Trust Property Board* after the coming into force of the 1975 Act.

g. Notwithstanding the foregoing, even if the regulations are non-statutory in nature, a writ petition may be maintainable if the impugned action is in violation of a rule of law, such as a denial of the principles of natural justice (*Anisa Rehman*) or the impugned decision being tainted by mala fides (*Anwar Hussain II*). The rule of law must be one that applies generally and in various contexts (i.e., not only the context of an employee seeking specific, declaratory or injunctive relief against an employer), and it must be such that a violation thereof strikes at the very root of the impugned action.

55. The foregoing analysis concludes the matter as regards statutory corporations, the first of the three categories into which we have divided juristic entities for present purposes (see para 10 above). We now come to the third category, i.e., the "former" statutory corporations. In this regard reference can be made to *Zarai Taraqiati Bank Ltd. v. Said Rehman and others* 2013 SCMR 642 ("*Zarai Taraqiati Bank*"). The appellant Bank was the former Agricultural Development Bank of Pakistan ("ADBP", which, it will be recalled, has already featured in the above), which was "converted" into a public limited company registered under company law ("Zarai Bank") by means of the Agricultural Development Bank of Pakistan (Reorganization and Conversion) Ordinance, 2002 ("2002 Ordinance"). The respondents had been the employees of ADBP and under the 2002 Ordinance were transferred to the Zarai Bank. The question of promotion came up and the Zarai Bank sought to apply its own regulations, framed in 2005. These were admittedly non-statutory in nature. However the respondents contended that they were entitled to the benefit of s.6 of the 2002 Ordinance, subsection (1) of which not merely continued them in service from ADBP to the Zarai Bank, but provided that such service would be "on the same terms and conditions and shall be subject to the same rules and regulations as were applicable to them before the effective date" (i.e., the date on which the transfer occurred). The employees filed writ petitions in the High Court, which were allowed and the Zarai Bank appealed to the Supreme Court. Leave to appeal was given to consider whether s. 6 applied and had the effect as claimed by the respondents, or whether their service terms were to be governed by regulations made by the Zarai Bank. The Supreme Court set out the issues that fell for determination at pg. 654, the first of which was whether the 1961 regulations that had been framed by ADBP under the Ordinance of 1961 were statutory or otherwise. It will be recalled from the discussion above (see para 33) that s. 39 of the 1961 Ordinance had empowered ADBP to frame service regulations and as originally enacted this power was not fettered or conditional upon Government approval. However, s. 39 was

amended by the addition of a proviso in 1973, which had added such a fetter. The Supreme Court referred to *Anwar Hussain II* and the conclusion arrived at therein that the addition of the proviso did not invalidate the 1961 regulations already framed. This had been adverted to in para 35 above, and the relevant passage from the earlier judgment was reproduced by the Supreme Court at pg. 659. The Supreme Court then set out s. 6 of the 2002 Ordinance and observed as follows (pg. 660):

> "27. The above-referred statutory provision provided two fold security to the employees i.e. (i) the employees of [ADBP] stood transferred and became the employees of the [Zarai Bank], and (ii) they shall be subject to the same rules and regulations as were applicable to them before the effective date. On account of afore-referred statutory intervention, the regulations which were non-statutory, acquired a statutory status under the new dispensation and the employees acquired a legal right for their enforcement. The Constitutional petitions were, therefore, maintainable on that score."

56. The Supreme Court also relied upon an earlier judgment reported as *Masood Ahmed Bhatti and others v. Federation of Pakistan and others* 2012 SCMR 152 ("*Masood Ahmed Bhatti*"), which was relied upon before us by learned counsel for the petitioner. The Supreme Court had there been concerned with the "conversion" of the former T&T Department into first, a statutory corporation and then (by statute) into a limited company (PTCL). The issue was as to the effect of the statutory savings in favor of the employees who were transferred from the department to the statutory corporation and to the limited company. These savings were similar to s. 6 of the 2002 Ordinance. After considering also some other cases, the Supreme Court held (at pg. 663) that the writ petitions were maintainable on account of s.6, the effect of which was to render and make statutory whatever had previously been non-statutory in nature insofar as the terms and conditions of service were concerned. The writ petitions were maintainable. It may also be noted that the Supreme Court has recently, in *Pakistan Telecommunications Employees Trust and others v. Muhammad Farid and others* 2015 SCMR 1472, reaffirmed the principle enunciated in *Masood Ahmed Bhatti*. As noted above, this decision was also relied upon before us by learned counsel for the petitioner.

57. In our respectful view, insofar as the "former" statutory corporations are concerned, the position that emerges is as follows. If the position of the transferred employees is secured by statute in a manner similar to the statutory provisions considered in the judgments cited above, then the relevant terms and conditions would be regarded as statutory in nature and a writ petition would be maintainable. This would be so regardless of the fact that any terms and conditions of service laid down subsequently by or in the "converted"

entity itself (now a company registered under the company law) would be governed by the law of master and servant. Likewise, it would be irrelevant that the terms and conditions saved in favor of the transferred employees would, had the previous dispensation continued to prevail, been regarded as non-statutory in nature. The (statutory) terms of transfer would control and, if worded appropriately, would render the relevant terms and conditions statutory, with attendant consequences for maintainability.

58. We now turn to examine the objection as to maintainability as raised in the present case by learned DAG in light of the above. On 01.07.1996, the petitioner was absorbed in the National Insurance Corporation ("Corporation") set up under the National Insurance Corporation Act, 1976 ("1976 Act"). Sections 5 and 26 of the 1967 Act provided in material part as follows:

> "**5. Management**. (1) The general direction and administration of the affairs and business of the Corporation shall be vested in a Board of Directors…."
>
> **26. Power to make regulations**. The Board may, with the approval of the Federal Government, make regulations not inconsistent with the Act or the rules to provide for all matters for which provision is necessary or expedient for the purpose of giving effect to the provisions of this Act."

The 1976 Act did not have or make provision for the employees, officers and servants of the Corporation (except to a certain extent and in a manner as set out in s.15, which however is not relevant for present purposes). The position of the Corporation was therefore to this extent somewhat similar to the Pakistan Red Crescent Society and the Act of 1920 that put it on a statutory footing, which have been examined above. Of course, as also explained above, this statutory silence posed no problems, since the necessary power to recruit employees etc. and settle their terms and conditions of service would be readily implied into the 1976 Act. Secondly, and now looking at s. 26, there was an express power to make regulations, which was "fettered" and conditional as the regulations had to have the approval of the Federal Government. The section did not contain any illustrative list of the sort of situations for which this power could be exercised, but this lack did not curtail or reduce the scope of the generality of the power conferred. Since there was no express conferment of power in relation to the recruitment of employees and the laying down of their terms and conditions of service, there was obviously no "link" as such between such (implied) power and the power to make regulations under s. 26.

59. The Corporation's Board made regulations as relevant for present purposes, being the National Insurance Corporation Employees (Pension) Regulations, 1986 ("1986 Regulations"). These were expressly made in terms of s. 26 and stated, on the face of it, that Government's approval had been obtained. Applying the test and approach articulated by the Supreme Court in *Cadet College Kohat* and the *Anwar Hussain* cases, the 1986 Regulations were clearly statutory in nature. The Corporation's Board had an option. It could simply, in exercise of its general power of administration and management read with the implied power in relation to employees, have made regulations in respect of pensions. If it had done that, then those regulations would have been regarded as instructions or a code meant only for the "internal use" of the Corporation. However, the Board did not do so. It chose to make the regulations by exercising the power conferred by s. 26. Since that power was expressly made conditional on Government's approval, the resultant 1986 Regulations were statutory in nature.

60. In 2000, the Corporation was "converted" into a company registered under the Companies Ordinance, the National Insurance Company Ltd. ("Company") the present respondent No. 2. This was done by the National Insurance Corporation (Reorganization) Ordinance, 2000 ("2000 Ordinance"). By section 4 of this statute, the existing employees of the Corporation were transferred to the Company, in terms as therein stated. When s. 4 is considered, it is in our view similar to s. 6 of the 2002 Ordinance, which was considered by the Supreme Court in *Zarai Taraqiati Bank*. The relevant provisions of the two sections can be set out conveniently in table form:

2000 Ordinance	2002 Ordinance
4. Transfer of employees from the Corporation to the Company. —(1) All whole time employees of the Corporation who had continuously served for a period of not less than six months before the effective date shall be transferred to, and become the employees of the Company, hereinafter referred to as the "Transferred Employees", on the same terms and conditions, including remuneration, tenure of office, rights, perquisites, privileges, pension benefits, gratuity, provident fund, group insurance and other matters, as were applicable to them immediately before the effective date. ... (3) The terms and conditions of service of any Transferred Employee	**6. Continuation in service of the company.--**(1) The employees of ADBP who were in the service of ADBP before the effective date shall stand transferred to and become the employees of the Company as of the effective date on the same terms and conditions and shall be subject to the same rules and regulations as were applicable to them before the effective date….

shall not be altered adversely by the Company except in accordance with the laws of Pakistan or with the consent of the Transferred Employees and the award of appropriate compensation.	

It will be seen that s. 4 of the 2000 Ordinance was, if anything, worded even more strongly than s. 6 of the 2002 Ordinance. There can be no doubt that the petitioner was a Transferred Employee within the meaning of s. 4. Therefore, in our view the law laid down by the Supreme Court in *Zarai Taraqiati Bank* applies equally in the present case, with the result that the terms and conditions of service of the petitioner, including in particular the 1986 Regulations, must be regarded as statutory in nature on the basis of s. 4. The petitioner's terms and conditions of service, including the application of the 1986 Regulations, continued to be regulated by the position as it stood on the "effective date" contemplated by the 2000 Ordinance. The Company was bound by s. 4, and had to give proper effect to the same. Thus, on either view of the matter, what we have described above as the "core principle" was applicable. The objection to maintainability taken by the learned DAG must therefore, with respect, be rejected.

61. With the preliminary objections out of the way, we turn to consider the petitioner's claim on the merits. As noted above, the petitioner relies on Office Order No. 39 dated 16.01.1998 made with reference to Regulation 13(1) of the 1986 Regulations, and contends that its subsequent withdrawal was contrary to law. The Company on the other hand submits that by reason of Regulation 6(3) the petitioner's previous service could not be taken into consideration for purposes of pension. Regulation 6 of the 1986 Regulations provided as follows:

> "**6. General conditions governing entitlement to pension**. ---(1) The Corporation reserves itself to the right of recovery from the pension of a pensioner on account of losses found in judicial or departmental proceedings to have been caused to the Corporation by the negligence or fraud of such pensioner during his services provided that such departmental proceedings shall not be instituted after a period of more than a year from the date of retirement of the pensioner.
>
> (2) In case the amount of pension granted to an employee be afterwards found to be in excess of that to which he is entitled under the Regulations he shall be called upon to refund such excess.
>
> (3) In case an employee of any other organization is permanently absorbed in the service of the Corporation, the Corporation may accept the pensionary liability in respect of such an employee subject to the condition that pension scheme exists in the former organization from where the employee has been transferred and that organization pays

> the proportionate liability for the period the employee remained in their services. Such pension contributions will be recovered from the concerned organization at the rate approved by the Corporation.
>
> (4) The pension or the gratuity under these Regulations shall not be paid unless the pensioner produces a certificate issued by a designated authority in the office or establishment or the Corporation to the effect that nothing is outstanding against the retiring employee up to the date of his retirement."

62. Having considered the matter, in our view the interpretation sought to be placed on Regulation 6(3) by the Company cannot be accepted. Clause (3) cannot be read in isolation; the other clauses provide the necessary context. When the regulation is read as a whole, it is clear that the various clauses provided specific instances of when pension, otherwise claimable by or paid to an employee, could be either recovered from, or denied to, him. In other words, Regulation 6 recognized that the concerned employee had otherwise the right to pension, but enumerated those situations in which that right could be denied or curtailed. Looking at clause (3) from this perspective, it is clear that what it meant was that in the case of an employee absorbed in service from elsewhere (like the petitioner), the Corporation could (but did not need to) accept pensionary liability for the period of previous service while making it subject to the condition that a pension scheme existed in the "former organization" (i.e., the previous employer) and that the latter paid over to the Corporation the proportionate liability for the period of the previous employment. The manner in which learned counsel for the Company has sought to read clause (3) on the other hand would mean that if at all the Corporation chose to accept the pensionary liability of the absorbed employee it could only do so subject to the condition imposed by the clause. In other words, on this reading, the clause would be interpreted and applied as though there were a comma between the words "employee" and "subject". With respect this interpretation cannot be accepted. The reason is that if the absorbed employee's previous employer did have a pension scheme and paid over the proportionate liability to the Corporation, then there would be no problem at all. The Corporation would then have had no financial burden for paying pension computed on the basis of the previous employment; the receipt of the "proportionate liability" would have ensured this. It was precisely because a liability existed (and which came into existence by reason of the absorption) to pay pension while also taking into consideration the earlier period of service that clause (3) allowed the Corporation, if it so chose, to impose the condition as therein contemplated, i.e., refuse to take the earlier period into consideration unless the "proportionate liability" was paid over by the former employer. However, clause (3) was not mandatory. It simply gave the Corporation a choice or option that it could exercise or refrain from doing.

63. Now, it is clear from the record that in the petitioner's case the choice or option was not exercised since no such condition was imposed. This is what was, in effect, confirmed by the Office Order of 1998. In our view, neither the Corporation nor its successor, the Company, could subsequently alter this position and impose the condition by a purported withdrawal of the Office Order. If at all, the condition contemplated by Regulation 6(3) could have been imposed when the petitioner was absorbed in the Corporation's service on 01.07.1996. This was not done, and could not be done subsequently. And what the Corporation could not have done, the Company also could not do. The petitioner was a Transferred Employee and the Company was bound by the terms of s. 4 of the 2000 Ordinance. In our view therefore the office memorandum dated 31.08.2000 and the follow up letter dated 10.07.2001 were contrary to law and liable to be set aside. They are hereby declared to be such, with the result that Office Memorandum No. 39 dated 16.01.1998 continues to hold the field. In computing the petitioner's pensionary benefits, his past service from 04.02.1978 till 30.06.1996 had to be taken into account and the petitioner is entitled accordingly.

64. In view of the foregoing discussion, this petition is allowed. The respondent No. 2 must recalculate the petitioner's pensionary benefits on the basis as stated above. To the extent that on the basis of any wrong computation the petitioner has, up to today, been paid a lesser amount, the differential must be paid over within 30 days. Such amount must be deposited with the Nazir of the Court within the stipulated period who shall then disburse it to the petitioner on proper verification and confirmation. Future payment(s), if any, must also be made on the basis as held above, any relevant amounts being recalculated as necessary.

JUDGE

JUDGE