

IN THE HIGH COURT OF SINDH, KARACHI

C.P No.D-3979 of 2015

Present

Mr. Justice Irfan Saadat Khan

Mr. Justice Adnan-ul-Karim Memon

Muhammad Asif Petitioner

V E R S U S

Federation of Pakistan and others Respondents

Date of hearing: 19.01.2017

Mr. Nasir Rizwan Khan, Advocate for Petitioner.
Mr. Shaikh Liaquat Hussain, Standing Counsel.
Lt. Col. Imran-ul-Haq, for respondents.

JUDGMENT

Adnan-ul-Karim Memon-J. Through the instant Petition, the Petitioner is seeking to have the Order dated 28.5.2015 (“the Order”), passed by Commander Pakistan Navy (Respondent No.3) set aside and thereby, praying for his reinstatement in service as Sailor and restoration of all back benefits.

2. In a nutshell, the facts of the case are that the petitioner, who was a Sailor in the Pakistan Navy, was sent for training to PNS Karsaz for one year promotion course of Petty Officer. However, on 06.06.2014, the Petitioner was suddenly refrained from continuing his training, and was taken in custody by the Naval

Police/Intelligence, in order to conduct an investigation against him on the basis of allegations pertaining to harassment of ladies and being involved in discreet private business/loan transaction with other persons. After confinement of 9 days, the Naval Intelligence released the Petitioner, who again joined the course classes and also qualified the first term examination of the said training, but he was prevented from continuing to attend his Classes. Thereafter, the Petitioner received a letter dated 28.05.2015, wherein he was informed that he stood discharged from service on the basis of “undesirable”.

3. The Respondents No.2 to 4 have filed their parawise comments, wherein they have denied all allegations.

4. It is, inter-alia, contended by the learned counsel for the petitioner that the impugned order of discharge from service on the basis of “undesirable” is illegal and discriminative in nature, which is liable to be set aside. Per learned counsel, the Petitioner was not given fair opportunity of hearing and was discharged from his service without issuing any Show Cause Notice or conducting any Domestic Enquiry and that he was condemned unheard.

5. Learned counsel for the petitioner has argued that the instant petition is maintainable under the law as the Order passed by the Respondent No.3 is based on malafide, quorum non judice and is without jurisdiction. The learned counsel further argued that the petitioner has served in the Pakistan Navy for 19 years with a

clean and unblemished service record. However, he was condemned on the ground of being undesirable person in service, which is an unconstitutional act and in violation of fundamental rights of the Petitioner.

6. The learned counsel has relied upon the case of Federal Government M/o Defence Rawalpindi verses Lt. Col. Munir Ahmed Gill [2014 SCMR 1530], Federation of Pakistan and others verses Raja Muhammad IshaqQamar and others [PLD 2007 SC 498] and Ex. Lt. Col. Anwar Aziz versus Federation of Pakistan through Secretary, Minister of Defence, Rawalpindi and others [PLD 2001 SC 549].

7. On the other hand, learned Standing Counsel appearing on behalf of the Respondents, has vehemently opposed the instant petition on the ground of maintainability. The learned Standing Counsel argued that the matter pertains to the terms and conditions of the service of the Petitioner, as enunciated in the Pakistan Navy Ordinance, 1961 ("the Ordinance") and Pakistan Navy Rules, 1961 ("Rules") framed there under and as such the jurisdiction of this Court is clearly barred under Article 199(3) of the Constitution. He further argued that the disciplinary matters of the Defence Personnel do not fall under the ambit of Part II of the Constitution, pursuant to Article 8(3)(a) of the same.

8. He further argued that the order was neither malafide nor coram non judice or without jurisdiction, therefore, the

Constitutional Jurisdiction of this Court could not have been invoked by the Petitioner.

9. Per learned Standing Counsel, the complaint of the petitioner with respect to his detention was considered by the competent authority and he had sent his grievance application to the competent authorities and the same was considered by them and subsequently addressed via letter dated 4.2.2015 whereby he was informed that the same was not acceded to. He further argued that the petitioner, in his grievance application, has made false and frivolous allegations against the Respondents. The learned Standing Counsel referred to Regulation number 0209(2) of the Navy Regulations, 1987 ("Regulations") which is reproduced as follows:

"No officer, chief petty officer or sailor will lend money to or borrow from any person belonging to the Defence Services, nor will be engaged in any transaction whereby he will become, in a private capacity, a debtor or creditor to any individual employed in the Services."

10. The learned Standing Counsel further referred to Regulation No. 0995(8) and (9) of the Regulations which is reproduced as follows:

"8. Discharge "*undesirable*" may be recommended for repeated misconduct and indiscipline when the Commanding Officer is satisfied that it is not in the interest of the Service to retain the man any further. Discharge "*undesirable*" is to be regarded as a punishment and is to be accompanied by forfeiture of all benefits which would normally be admissible under any other types of discharge."

"9. The procedure in Clause 5 above is normally to be followed in all cases of recommendation for discharge;

but in exceptional cases, when in the opinion of the Commanding Officer the retention of a chief petty officer or sailor is clearly undesirable, a recommendation may be forwarded and discharge may be approved although the chief petty officer or sailor has not been warned previously.”

11. As per the learned Standing Counsel, under Rule 24(2) of the Rules, the Petitioner can be discharged on the ground of “undesirable” which is regarded as a punishment and the petitioner also has a remedy pursuant to section 23 and 36 of the Ordinance, whereby he could have lodged a complaint with the competent authority, in accordance with the Rules. However, he did not avail such remedy.

12. The learned Standing Counsel further argued that there was sufficient material evidence available against the Petitioner and therefore, he was discharged from service as “undesirable”.

13. We have heard the learned counsel for the Petitioner and the learned Standing Counsel.

14. First and foremost, we would address the question of the jurisdiction of this Court to entertain the petition under Article 199 of the Constitution.

15. It is an admitted fact that the Petitioner has remained a Member of the Armed Forces and as such his service was governed by the Ordinance, Rules and Regulations. For the sake of brevity, we would like to reproduce the relevant portion of Article 199(3) of the Constitution as follows:-

“(3). An order shall not be made under clause (1) on application made by or in relation to a person, who is a member of the Armed Forces of Pakistan, or who is for the time being subject to any law relating to any of those Forces, in respect of his terms and conditions of service, in respect of any matter arising out of his service, or in respect of any action taken in relation to him as a member of the Armed Forces of Pakistan or as a person subject to such law.”

16. Article 199 (3) of the Constitution clearly stipulates a bar to jurisdiction insofar as the matters pertaining to the service of any member of Armed Forces of Pakistan are concerned. Reference in this regard may be made to the decision given in the case of Muhammad Mushtaque vs. Federation of Pakistan (1994 SCMR 2286) wherein it has been held that:-

“The High Court was approached under Article 199 for grant of a relief under Sub-Article (1) thereof. The relief regarding Fundamental Rights is included in Sub-Article (1), which is clearly barred under Article 199 (3) with reference to Sub-Article (1) thereof. The High Court had no jurisdiction in the matter.”

17. In the case of Ex. Lt. Col. Anwar Aziz (PA-7122) vs. Federation of Pakistan (PLD 2001 Supreme Court of Pakistan 549), it has been held that:

“This Court can interfere only in extraordinary cases involving question of jurisdictional defect when proceedings before that forum become coram non iudice or malafide. The matters relating to the Members of the Armed Forces or who for the time being are subject to any law relating to any of these Forces in respect of terms and conditions of service or in respect of any action taken in relation to him as Member of Armed Forces or as a person subject to such law, is barred by Article 199 (3) of the Constitution. Article 8 (3) of the Constitution also envisages that the

provisions of this Article shall not apply to any law relating to members of the Armed Forces, or of the Police or of such other forces as are charged with the maintenance of public order, for the purpose of ensuring the proper discharge of their duties or the maintenance of discipline among them.”

18. We, therefore, while deciding this writ petition, in exercise of the powers under Article 199 of the Constitution, have to be cognizant of Sub-Article (3) of the aforementioned Article, which envisages that no order shall be made in relation to a person, who is a member of the Armed Forces, or in respect of any matter arising out of his service or in respect of any action taken in relation to him as member of Armed Forces. We, therefore, in absence of the exceptions as enunciated in the case law cited above, cannot travel beyond and dilate upon the merits of the instant case and interfere with any Order passed under the hierarchy of Respondents, pursuant to their applicable laws.

19. In the light of the foregoing, we are of the view that the case of petitioner squarely falls within the ambit of the ouster clause of Article 199(3) of the Constitution, therefore, there is a bar of jurisdiction of this Court from entertaining the instant Constitutional Petition. Hence, the same is dismissed, the petitioner, however, would be at liberty to avail his remedy as provided under the applicable laws.

JUDGE

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