

IN THE HIGH COURT OF SINDH, AT KARACHI

Present:

Mr. Justice Aziz-ur-Rehman

Mr. Justice Adnan-ul-Karim Memon

C.P No. D- 475 of 2019

Muhammad Zahid

Versus

Federation of Pakistan & 06 others.

Date of hearing: 15.05.2019

Date of Order: 15.05.2019

Mr. Mushtaque Hussain Qazi, Advocate for the Petitioner.

Mr. Zafar Imam, Advocate for Respondent No.5.

Mr. Bilal Bhatti, Advocate for Respondent No.6.

Mr. Muhammad Nishat Warsi, DAG.

ORDER

ADNAN-UL-KARIM MEMON, J:- Basically, through the instant Petition, the Petitioner is seeking declaration to the effect that the impugned order dated 04.05.2018 issued by the Respondents No.4 and 5 by downgrading his post of Upper Division Clerk (UDC) to Lower Division Clerk, without taking any disciplinary action under the Government Servants (Efficiency and Discipline) Rules, 1973, and subsequent actions i.e. issuance of corrigendum dated 27.06.2018 are arbitrary, illegal, contrary to law, thus liable to be set aside.

2. The Petitioner was asked to satisfy this court with respect to maintainability of this Petition on account of the bar contained in the Article 212 of the Constitution of Islamic Republic of Pakistan [**“Constitution”**]. For convenience sake, Article 212(1) (a) of the Constitution is reproduced as under:

212. (1) Notwithstanding anything hereinbefore contained the appropriate Legislature may by Act provide for the

establishment of one or more Administrative Courts or Tribunals to exercise exclusive jurisdiction in respect of:

(a) matters relating to the terms and conditions of persons 2 [who are or have been] in the service of Pakistan, including disciplinary matters;

3. Mr. Mushtaque Hussain Qazi, learned Counsel for the Petitioner in his abortive attempt briefed us that on 07.3.1996 the Petitioner was appointed as Naib Qasid in the office of Commissioner of Income Tax Companies Zone-V, Karachi (now Inland Revenue Department), thereafter he was promoted as Lower Division Clerk [LDC] in the year 2004 and as Upper Division Clerk in BS-9 [UDC] in the year 2012 and was also posted as Supervisor on OPS in the year 2013. Learned Counsel for the Petitioner has argued that the Petitioner was confirmed and regular employee of the Respondent-department in BS-9, and his service could not be downgraded by the Respondent-department without assigning any cogent reason; that all of sudden respondents changed their mind and took unilateral decision vide office order dated 04.5.2018, whereby his designation was changed from UDC to LDC, which is contrary to the law. Per learned counsel, the regular status of the Petitioner as UDC BS-9 could not be converted into Lower grade i.e. LDC, which amounts to punishment without hearing, hence the impugned orders passed by the Respondents are nullity in the eyes of law; that the Petitioner has been condemned unheard, without holding proper inquiry into the factum whether his promotion as UDC was in accordance with law or otherwise or any other allegations if any leveled against the Petitioner, which is unwarranted under the law; that the Petitioner approached the Respondents Nos.2, 4 & 5 by moving applications dated 30th June, 2018, 10th July, 2018 and 17th September, 2018, but all his efforts went in vain; that this Court has jurisdiction to interfere in the matters involving denial of such rights of citizens of this Country by the State Functionaries.

He next contended that the Respondent-department has created chaos, by considering his services as LDC rather than as UDC; Petitioner being aggrieved by and dissatisfied with the aforesaid actions of the Respondents has filed the instant Petition on 22.01.2019. In support his contentions, he relied upon the case of Muhammad Anwar and others vs. Mst. Ilyas Begum and others (PLD 2013 SC 255) and argued that the impugned order dated 04.05.2018 passed by the Respondent-department was patently illegal and violative of law, and this Court in its constitutional jurisdiction could ratify the illegality and violation of law, and undo the harm caused by the impugned order. He lastly prayed for allowing the instant petition.

4. Mr. Zafar Imam, learned counsel for Respondent No.5, Mr. Bilal Bhatti, learned counsel representing Respondent No.6 and Mr. Muhammad Nishat Warsi, learned DAG raised the preliminary issue of maintainability of the instant Petition and argued that the Petitioner is a Civil Servant and his remedy lies with Federal Services Tribunal (FST).

5. We have heard the learned counsel for the parties on the issue of maintainability of the instant Petition and perused the material available on record.

6. Foremost point in the present proceedings is whether a Civil Servant can file a Writ Petition by invoking Constitutional Jurisdiction of this Court in respect of the terms and conditions of his service, when there is a bar contained in Article 212 of the Constitution?

7. It is the considered view of this Court that Article 212 of the Constitution ousts the jurisdiction of this Court in respect of the matters pertaining to terms and conditions of Civil Servants. The

ouster clause under Article 212 of the Constitution is a Constitutional command, which restricts the jurisdiction of this Court under Article 199 of the Constitution on the subject, which squarely falls within the exclusive domain of the Federal Services Tribunal. The expression “terms and conditions” includes Transfer and posting as well as Disciplinary matters and ‘reversion’ to a Lower post is also a punishment under Rule 4(I) of the Government Servants(Efficiency and Discipline) Rules, 1973, which provides as under:-

**“4. Penalties.–(1) the following are the minor and major penalties, namely–
(b) Major Penalties:
(i) Reduction to a lower post or time-scale, or to a lower stage in a time-scale.**

8. On the aforesaid issue, the decision of the Hon’ble Supreme Court in the case of Ali Azhar Khan Balouch and others v. Province of Sindh and others (2015 SCMR 456) is a binding principle, needs no interpretation on our part.

9. Admittedly, the Petitioner is a Civil Servant and his case falls within the ambit of Section 3 (2) of the Service Tribunals Act, 1973 which says that Tribunal shall have exclusive jurisdiction in respect of matters relating to the terms and conditions of service of Civil Servants as under Section 4 of the Service Tribunals Act, a Civil Servant has a right to file an Appeal against the impugned order adversely affecting the terms and condition of his service before the Tribunal subject to the qualification provided therein.

10. Keeping in view the above mentioned facts and circumstances of the case, we do not see any infringement of right of the Petitioner which could be called in question by way of Writ Petition.

11. We have noticed that the impugned order is with regard to transfer and posting of the Petitioner and a Civil Servant has no

vested right to remain on a particular post forever or for a stipulated period. Section 10 of the Civil Servant Act, 1973 is clear in its terms, which is reproduced as under:-

“10. Posting and transfer.- Every civil servant shall be liable to serve anywhere within or outside Pakistan, in any equivalent or higher post under the Federal Government, or any Provincial Government, or local authority, or a corporation or body set up or established by any such Government; Provided that nothing contained in this section shall apply to a civil servant recruited specifically to serve in a particular area or region: Provided further that, where a civil servant is required to serve in a post outside his service or cadre, his terms and conditions of service as to his pay shall not be less favorable than those to which he would have been entitled if he had not been so required to serve.”
(Emphasis Added)

12. In our view, a civil servant can be transferred at any time under section 10 of the Civil Servant Act, 1973. Reference is made to the case of PEER MUHAMMAD v. GOVERNMENT OF BALOCHISTAN and others (2007 SCMR 54).

13. Reverting to the main contention of the Petitioner that he cannot be transferred to a lower post from higher post and there is no general or specific order regarding demotion of the Petitioner under the Government Servants (Efficiency and Discipline) Rules, 1973, thus he cannot approach the learned FST and only remedy lies with this court under Article 199 of the Constitution. The aforesaid contention is wholly misconceived for the simple reason that under Rule 4 of the Civil Servants (Appeal) Rules, 1977, he is entitled to Appeal, within a period of thirty days to the Appellate Authority, from an order passed by an authority imposing upon him any penalty under the Government Servants (Efficiency and Discipline) Rules, 1973. The second contention, that there is no order under (Efficiency and Discipline) Rules, 1973. Perusal of record explicitly shows that the Petitioner had been transferred from LTU Karachi to RTO-III Karachi. Prima-facie his designation

is LDC and not UDC and the same was affirmed vide corrigendum dated 27.6.2018.

14. Per Petitioner his designation was earlier shown as UDC vide letter dated 7.6.2018 (available at page 265 of memo of petition) but through the aforesaid corrigendum his designation was ordered to be read as LDC and not UDC, which is virtually a demotion order. He, however emphatically argued that in the present case there is no final order made by departmental authority, therefore his case did not fall within the domain of the Federal Service Tribunal within the purview of Section 4(1) of Service Tribunals Act, 1973, and Appeal before learned Federal Service Tribunal is/was not maintainable and in absence of efficacious and adequate remedy, this court is competent to hear the matter of the Civil Servants.

15. We do not agree with the assertion of the learned counsel for the Petitioner on the aforesaid proposition, for the simple reason that the jurisdiction of the Tribunal by virtue of subsection (1) of section 4 of the Service Tribunals Act, 1973 conferred the right of an appeal before the Service Tribunal to a civil servant if he is aggrieved by any final order, whether original or appellate, made by a departmental authority in respect of any of his terms and conditions of the service within thirty days of communication of such order to him or within six months of the establishment of the appropriate Tribunal, whichever is later subject to sub-clause (a), which provides a precondition for filing of a service appeal by providing that an aggrieved civil servant before approaching the Service Tribunal should file an appeal, review or representation as may be provided for, under the relevant Rules, before the departmental authority and should wait for the expiry of 90 days from the date on which such appeal, review or representation was

preferred, if the same is not decided before the expiry of above period, whereas, sub-clauses (b) and (c) provide the cases in which no appeal shall lie to the Service Tribunal namely (i) against an order or decision of departmental authority determining the fitness or otherwise of a person to be appointed to or hold a particular post or to be promoted to higher post or grade and (iii) against an order or decision of a departmental authority made at any time before the 1st July, 1969.

16. We have noticed that the Chairman Departmental Promotion Committee (DPC) vide letters dated 22.2.2017 and 27.11.2018 disputed the promotion of the Petitioner as UDC and opined that the promotion of the Petitioner was illegal (available at page No.289 and 317 of memo of petition), which is finding of fact and cannot be disturbed until and unless proper evidence is led in this behalf, which cannot be done in a Constitutional Petition. However the Petitioner was entitled to make representation to the Appellate Authority for redressal of his grievances against the demotion order, if not availed earlier or directly file an Appeal against the final order passed by the competent authority under Section 4 of Services Tribunal Act, 1974 after exhausting the remedy of departmental Appeal as provided under the law.

17. Considering the case of the Petitioner in the above perspective, this petition is not maintainable, consequently is dismissed along with pending Application[s]. However, the Petitioner may seek an appropriate remedy as provided under the law.

JUDGE

JUDGE

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