

# IN THE HIGH COURT OF SINDH KARACHI

Before:

Mr. Justice Muhammad Shafi Siddiqui

Mr. Justice Adnan-ul-Karim Memon

## **Constitutional Petition No. D –6309 of 2018**

Muhammad Naeem Akhtar

*Versus*

National Industrial Relations Commission and another

Date of hearing : 19.03.2021

Date of announcement : 26.03.2021

Mr. Muhammad Fahad Pirzada, advocate for petitioner.

Mr. Muhammad Faheem Akhtar, advocate for respondent No.2.

Mr. Muhammad Nishat Warsi, DAG.

## **ORDER**

**Adnan-ul-Karim Memon, J.** – Through the instant Constitutional Petition, filed under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, the petitioner has challenged the order dated 13.8.2018 passed by the Full Bench of National Industrial Relations Commission, Islamabad (NIRC-FB) in Appeal No.12A(04)/2018-K, filed by the respondent-The Space & Upper Atmosphere Research Commission (SUPARCO), whereby the objection about the maintainability was sustained and the order dated 28.2.2018 passed by the learned Single Bench of National Industrial Relations Commission, Karachi (NIRC-SB) in Grievance Application No.4B(586)2014-K filed by the petitioner was held to be not maintainable and returned the Grievance Application to the petitioner to approach the proper forum, having jurisdiction under the law. He being aggrieved by the aforesaid decision has filed the instant petition on 29.8.2018.

2. At the outset, we queried from the learned counsel for the Petitioner as to how this Petition is maintainable in its form against the National Command Authority (NCA) under the National Command Authority (Amendment) Act, 2016; besides that SUPARCO, comes under the definition of NCA as provided under clause (A) of Section 2 of the NCA Act, 2010.

3. The similar objection has also been raised by the respondent-Department, as to the maintainability of the Constitutional petition before this Court, on the touchstone of the second proviso to section 9(2) of the NCA Act, 2010, as

according to respondent No.2, the petitioner being an ex-employee of SUPARCO, was/is subject to the provisions of Pakistan Army Act, 1952, thus attracts Article 199(3) of the Constitution; that the SUPARCO employees are legally deemed to be NCA Employees under section 9 of the NCA Act 2010; that this Court lacks jurisdiction under Section 22 of NCA, Act 2010 to try the instant case; that in the exercise of powers conferred under section 7, 9(2) read with Section 15 of the NCA, Act 2010, the Authority has framed the NCA, Employees Services Rules-2011, (NCAES Rules, 2011), quite under the NCA, Act 2010. Learned counsel further pointed out that the Industrial Relations Act is not applicable to the employees of SUPARCO as envisaged in Section 19 of the Ordinance 1981. He pointed out that the petitioner approached the learned FST by filing Appeal No.284(K)(CE)/2003 which was disposed of for want of jurisdiction. He being aggrieved by and dissatisfied with the aforesaid decision approached the Hon'ble Supreme Court by filing CPLA No.492-K/2010 which was not pressed vide order dated 15.11.2010 with the observation that if the petitioner approaches any forum for redressal of any grievance and an application for condonation of delay is filed the delay is caused in approaching the proper forum will be considered sympathetically. He preferred Civil Review Petition No.61-K/2011 which was dismissed vide order dated 22.10.2012 with the observation that if the petitioner approaches the Labor Court, the Labor Court will decide the matter sympathetically in respect of the limitation but strictly under law. Per learned counsel, he approached the Labor Court which later on transferred to the learned NIRC-SB and vide order dated 28.2.2018 the learned Bench ordered for recording evidence which order was assailed before the NIRC-FB and the decision dated 13.08.2018 came in favor of the respondent-department and now the petitioner has approached this Court. In support of his contentions, he relied upon Ordinance 1981, amendment brought therein, Act 2010, Judgment of the Hon'ble Supreme Court of Pakistan passed in National Telecommunication Corporation through Chairman v. National Industrial Relations Commission and others (2014 SCMR 1833) and argued that NIRC Act 2012, could not apply to the officers and employees of respondent-authority. He also relied upon the order dated 10.3.2017 passed by NIRC-FB, order dated 21.07.2008 passed by the learned Islamabad High Court (2009 PLC (CS) 368) in the case of Muhammad Zulfiqar Ahmed and 25 other v. Chairman Pakistan Atomic Energy Commission and 02 others, unreported order dated 15.3.2017 passed by the learned Single Bench Lahore High Court Multan Bench, Multan, in Writ Petition No.4863/2012, abatement order dated 30.06.2006, order dated 28.11.2007 of learned SLC No.1 Karachi, application for withdrawal of application

dated 19.4.2008 of the petitioner and order passed thereon dated 28.4.2008, order dated 12.6.2012 passed by the Hon'ble Supreme Court in Civil Appeals No.30-K and 31-K/2012 out of Civil Petitions No.529-K and 523-K/2010, order dated 15.11.2010 passed by the Hon'ble Supreme Court of Pakistan in CPLA No.492-K/2010 and order dated 22.10.2012 passed by the Hon'ble Supreme Court of Pakistan in Civil Review Petition No.61-K/2011.

4. Mr. Muhammad Fahad Pirzada, learned counsel for the petitioner, attempted to give a brief history of the case and contended that initially the Petitioner was appointed as Unskilled Manual Labour in SUPARCO, vide appointment letter dated 15.3.1981. During his service tenure, he was served with a show-cause notice dated 26.3.2002 with allegations of misconduct having remained absent from duty for 295 days. Finally, his services were dispensed with vide order dated 19.11.2003 under the Government Servants (Efficiency and Discipline) Rules, 1973. The petitioner after traveling various forums approached the learned Sindh Labour Court No.1 (SLC) by filing a grievance petition under Section 46 of Industrial Relations Ordinance 2002 on 19.11.2012, praying therein for setting aside the impugned orders dated 19.11.2002 and 17.01.2003. The learned SLC in the year 2014 because of the judgment passed by the Full Bench of this Court transferred the matter to NIRC Karachi for disposal. The learned Member NIRC rejected the objections of the respondent-department and proceeded with the matter. The respondent-department being aggrieved by and dissatisfied with the decision dated 28.2.2018 passed by the learned NIRC-SB in case No.4B(586)/2018-K approached the NIRC-FB by filing Appeal No.12A(04)/2018-K which was decided vide order dated 13.08.2018 by setting aside the order dated 28.02.2018 passed by the learned NIRC-SB and returned the grievance petition to the petitioner for approaching before the appropriate forum having jurisdiction, thereafter he approached this Court on 29.08.2018.

5. We have been informed that in the year 2010, National Command Authority Act 2010 was enacted and it has overriding effect including Ordinance 1981 as amended upto 2002 and the services of all the employees of SUPARCO were/are governed under National Command Authority and rules framed thereunder, however, their terms and conditions of service were/are protected. Per learned counsel, the respondents are mistaken on the aforesaid analogy. He referred to the various sections of Pakistan Space and Upper Administration Commission Ordinance, 1981 (PSUACO, 1981) as well as section 2 (C) of the NCA Act, 2010 and robustly argued that all employees of (SUPARCO), now in (NCA) are entitled to be treated under the law and the Authority was under an

obligation to frame Rules in consonance with the Act, 2010 and the rights and benefits of the employees including Petitioner were protected under the proviso of section 9 of Act 2010. He also referred to the provision of sub-section 3 and 4 of section 19 of the Act of 2010 and contended that all orders passed before the promulgation of the aforesaid Act were saved including the Employees' service rights and that the respondent-authority had assumed the liability, therefore their terms and conditions of service were protected, hence, the same could not be altered; that National Command Authority Employees Service Rules, 2011 (NCAES Rules, 2011) had been kept in secret and were not provided to any of the employees of the Authority. He further argued that the "Authority" is defined in Section 2(a) as the National Command Authority. He emphasized that the 'Strategic Organization', which includes the SUPARCO has been defined in section 2(d) of the National Command Authority Act, 2010, and the same have never been subject to the Pakistan Army Act, 1952. As such the barring clause of Article 199 would not be available to the respondents to attack the maintainability of the Constitutional petition before this Court by the petitioner being an EX-employee of a strategic organization; that National Command Authority Act, 2010 does not supersede the very concept of fundamental right and principle that nobody should be left remedy less and condemned unheard. We confronted to him that NCA, 2010 is meant to deal with the affairs, which are highly sensitive and classified area or working, especially when the said strategic organization is dealing with nuclear establishment, nuclear system, nuclear material, and space technology, which are the backbone of Pakistan Defense System.

6. The learned counsel for the petitioner further argued that Rules framed under Section 15 of the National Command Authority Act, 2010 are statutory, the controversy has been set at rest in the case of Shafique Ahmed Khan and others v. NESCOM through Chairman Islamabad and others (PLD 2016 SC 377), therefore, another exercise to determine the status of Petitioner is not called for. The learned counsel by referring to Section 3 of the Act 2010 contended that where the Chairman of the Authority is the Prime Minister and its other Members include, besides Minister for Foreign Affairs, Minister for Defence, Minister for Finance, Minister for Interior, Chairman Joint Chiefs of Staff Committee, Chief of Army Staff, Chief of Naval Staff and Chief of Air Staff, approval of the Rules by any other Ministry is hardly called for; that when the provision of this Act under its provision contained in Section 21 has been given overriding effect over any other law for the time being in force in general and the Civil Servants Act, 1973,

Pakistan Atomic Energy Commission Ordinance, 1965, Pakistan Space and Upper Administration Commission Ordinance, 1981, as amended on 15.11.2002 or any other law or Rules made thereunder in particular, it has to reign supreme. He then contended that when the very purpose of making Rules is to carry out the purposes of the Act it would be a contradiction in terms to shear them of statutory status; that publication of a statutory instrument or a notification in the official gazette is not mandatory in every case, therefore, its non-compliance cannot rob the instrument or the notification of its statutory force.

7. The learned counsel lastly contended that where the Rules prescribe the terms and conditions of service and provide safeguards against their violation, they are statutory by all means and have to be treated as such. He emphasized that impugned action was much before amendment brought into the Act, 2010, therefore for all practicable purposes the case of Shafique Ahmed Khan (supra) is fully applicable in the case of the petitioner; that there is no other efficacious and adequate remedy available with the Petitioner but to invoke the Constitutional Jurisdiction of this Court for the relief(s) as prayed in the Memo of Petition.

8. We have heard the parties on the point of Maintainability of the instant Petition and perused the material available on record.

9. In the first place, we would like to examine the issue of maintainability of the instant Petition under Article 199 of the Constitution, 1973.

10. The Honorable Supreme Court in the case of Shafique Ahmed Khan and others v. NESCOM through Chairman Islamabad and others (PLD 2016 SC 377) has settled the aforesaid proposition and held that “the rules framed under Sections 7, 9 and 15 of the Act are statutory on all accounts and by every attribute. They are thus declared as such.” Progressing further, we have noticed that the impugned office order dated 12.07.2013 was much before the (Amendment) Act, 2016, and the decision of Honorable Supreme Court in the case of Shafique Ahmed Khan and others supra came on 21<sup>st</sup> January 2016, which clarified the status of NCAES Rules, 2011 of National Command Authority. Therefore, there is no further discussion on the aforesaid proposition is required on our part. Our view is supported by the various decisions rendered by the Honorable Supreme Court. The first decision of a five Member Bench of the Honorable Supreme Court in the case of Pakistan Defence Officers' Housing Authority v. Lt. Col. Syed Jawaid Ahmed (2013 SCMR 1707) after examining the statute through which the Respondent-Authority and other statutory bodies were

established and functioning, in Para-27 of its judgment held them to be statutory bodies performing some of the functions of the Federation/State and, therefore, "person" within the meaning of Article 199(1)(a)(ii) read with Article 199 (5) of the Constitution and if their actions or orders are violative of the statute creating those bodies or of rules/regulations framed under a statute, the same could be interfered with by the High Court under Article 199 of the Constitution. References are being made to the other decisions rendered by the Honorable Supreme Court in cases of Ramna Pipe and General Mills (Pvt.) Ltd. v. Sui Northern Gas Pipe Lines (Pvt.) [2004 SCMR 1274], Abdul Wahab and others Vs. HBL and others [2013 SCMR 1383], Pakistan Defence Officers' Housing Authority and others v. Lt. Col. & other connected Petitions Syed Jawaid Ahmed and other connected appeals [2013 SCMR 1707], Khawaja Muhammad Asif v. Federation of Pakistan [PLD 2014 SC 206], Pir Imran Sajid and others Vs. Managing Director/General Manager Telephone Industries of Pakistan and others [2015 SCMR 1257], Pakistan Telecommunication Employees Trust vs. Muhammad Arif and others [2015 SCMR 1472], Shafique Ahmed Khan and others versus NESCOM through Chairman Islamabad and others [PLD 2016 SC 377], P.T.C.L. and others vs. Masood Ahmed Bhatti and others [2016 SCMR 1362], Muhammad Rafi and others Vs. Federation of Pakistan and others [2016 SCMR 2146], Muhammad Zaman, etc. versus Government of Pakistan through Secretary, Finance Division (Regulation Wing), Islamabad [2017 SCMR 571], Pakistan Defence Housing Authority Vs. Mrs. Itrat Sajjad Khan and others [2017 SCMR 2010], Airline Pilots Association and others Vs. Pakistan International Airline Corporation and others [2019 SCMR 278].

11. We have also noticed that a similar constitutional Petition No. D- 3257 of 2010, came up for hearing before this Court, which was dismissed vide order dated 21.1.2011 being not maintainable under the law. The aforesaid order of this Court was assailed before the Hon'ble Supreme Court in Civil Appeal No.59-K/2011. The Hon'ble Supreme Court vide order dated 21.4.2016 set aside the order passed by this Court and remanded the matter to this Court for fresh decision under the law; it is noted that M/s Pakistan Space and Upper Atmosphere Commission and others sought review of the orders dated 21 & 27 April 2016 passed by the Hon'ble Supreme Court in CA No.59-K/2011. The Hon'ble Supreme Court vide order dated 16.7.2018 passed the following order:

“Learned ASC for the petitioner states that though the Civil Review Petition No.654/2010 is pending at principal seat of this Court but he states that this Civil Review Petition may be disposed of by observing that whatever is decided in the said review petition, the same will also be applicable in

the case in hand. The Respondent present in Court also agrees to such proposition. In the circumstances, this Civil Review Petition is disposed of with the observation that whatever is decided in Civil Review Petition No.654/2010 (Shafiq Ahmed Khan etc. V/S NESCOM Etc) by this Court, same will also apply to the present case.”

12. An excerpt of the order dated 9.10.2018 passed by the Hon’ble Supreme Court in CP No.710/2012 is reproduced as under:

“Petitioner has impugned the judgment rendered in the Writ Petition No.739 of 2010 dated 20.3.2012 wherein it was claimed that the petitioner was denied promotion. The learned Bench of the High Court seized of the matter dismissed the petition on the ground inter-alia that a writ could be issued as rule governing the service of the petitioner are non-statutory. Such controversy has since been resolved in the case titled as Shafiq Ahmed Khan Versus NESCOM (2016 SC 377) and rules were held to be statutory. Review against which has also been dismissed. When the learned counsel for the respondent was confronted he stated that he has no objection if the matter is remanded back to the High Court for decision afresh on merits.

2. Learned counsel for respondents states that the subsequent legislative development has also taken place. Whatever the case may be, same may be brought to the notice of the High Court which will examine all the contentions of both the parties and decide the matter in accordance with law. Accordingly, this petition is converted into appeal and allowed in the above terms.”

13. We are cognizant of the fact that the aforesaid matter has been remanded to this Court by the Hon’ble Supreme Court by holding that the rules framed under Sections 7, 9 & 15 of the National Command Authority Act, 2010, being statutory, thus no further deliberation is required on our part on the issue of maintainability of the instant petition. Consequently, the matter needs to be resolved by hearing the parties on merits.

14. In the light of the above discussion and the case-law referred above, the instant Petition is held to be maintainable and could be decided on merits. Learned counsel for the parties are directed to come prepared on the next date of hearing so that the matter may be heard and decided on merit. Learned DAG is also directed to assist this Court on the subject issue involved in this matter.

Re-list after two weeks.

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