

IN THE HIGH COURT OF SINDH KARACHI
Constitutional Petition No. D – 169 of 2020

Date	Order with Signature of Judge(s)
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Before:
Mr. Justice Irfan Saadat Khan
Mr. Justice Adnan-ul-Karim Memon

Fajjar Din,
Petitioner, through : Mr. Abbad-ul-Hussnain, advocate.

Federation of Pakistan
& 04 others, respondents
through : Mr. Muhammad Nishat Warsi, DAG
a/w Ahmed Noor, Dy. Director H.Q,
Airport Security Force.

Dates of hearing : 06.04.2021, 06.05.2021 &
26.05.2021

J U D G M E N T

ADNAN-UL-KARIM MEMON, J. – This Constitutional Petition has been filed under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, praying this Court to issue a writ of certiorari/ mandamus to call for the records relating to the Compulsory Retirement Order dated 01.11.2012 and Appellate Order dated 30.10.2017 passed by the respondent-Airport Security Force (hereinafter referred to as `ASF'), and to quash the same and to direct the respondents to reinstate services of the petitioner as an Inspector (ASF).

2. The case of the petitioner is that, he was inducted as Assistant Sub Inspector (Grade-5) in ASF and was promoted to the post of Sub-Inspector, and thereafter as an Inspector. During his tenure of service allegations of Misconduct were leveled upon him and he was awarded Major penalty of Compulsory Retirement from Service, vide office order dated 01.11.2012; however, via intervention of this Court, his Departmental Appeal was heard and was rejected vide office order dated 30.10.2017. He being aggrieved by and dissatisfied with the aforesaid decision has filed the instant petition on 07.12.2019.

3. We have heard the arguments of Mr. Abbad-ul-Hussnain, Advocate, for the petitioner and Mr. Muhammad Nishat Warsi learned DAG, for the

respondents. Available record has also been gone through and the case law cited has also been examined.

4. It was argued for the petitioner that the petitioner's purported proceedings, whereby he was awarded Major penalty, as discussed supra, by the respondent-ASF, was unauthorized as mandatory provisions of the law were violated, moreover the right of cross-examination was also denied to the petitioner. Powers exercised under sections 7-A of the Airport Security Force Act, 1975 (herein-after referred to as the 'ASF Act,1975') are stated to be inconsistent with the petitioner's fundamental rights guaranteed under the Constitution of Islamic Republic of Pakistan, 1973 (hereinafter referred to as the '**Constitution**'), and the impugned Major penalty of Compulsory Retirement of the petitioner was required to be declared without jurisdiction, Coram non iudice, mala fide and the petitioner may be directed to be reinstated in service with all ancillary benefits. He further argued that the case of the petitioner does not fall within the ambit of Section 7-A of the ASF Act, 1975, as such, Section 12(2) Pakistan Army Act, Rules (**PAAR**) does not apply to him as his service was governed under the ASF Act,1975, and Service Rules framed thereunder and not under the Pakistan Army Act, 1952 (hereinafter referred to as **PAA**). He further added that it was incumbent upon the respondent-ASF to have resorted to Section 13 of the Civil Servants Act, 1973, which provides procedural safeguard and in pursuance thereof the respondents were required to serve him with the disciplinary proceedings, inclusive of the Show cause notice, Charge sheet, etc., which have not been done in his case. Per learned counsel, no opportunity of show cause notice was given to him before taking the purported action of his Compulsory Retirement. Learned counsel contends that PAA and Rules framed thereunder did not apply to the petitioner. In support of his contention, he referred to Section 7-A of the ASF Act, 1975 and argued that officers and members of the force, unless they are subject to the PAA, could not be construed to be the Members of the Pakistan Army. In this view of the matter, the provision of Rule 12(2) of PAA which relates only to an officer of the Army so far as petitioner's Compulsory Retirement is concerned, he was entitled to procedural safeguard as set out in Section 13 of the Civil Servants Act, 1973. In support of his contentions, he relied upon the order dated 07.03.2012 passed by the Hon'ble Supreme Court in the case of Ch. Sikandar Ali v. Chief Secretary Officer, ASF, etc. passed in Civil Petition No.2056-L of 2011. Per learned counsel, Major penalty could not be

imposed upon the petitioner, without following the procedure as provided under (Efficiency and Disciplinary) Rules. He next argued that the Hon'ble Supreme Court in its various pronouncements has held that the employees of the ASF are not considered as Civil Servants and/or member of the Armed Forces, therefore, they can validly invoke the jurisdiction under Article 199 of the Constitution. He prayed for setting aside of the Original as well as Appellate orders passed by the respondent-ASF. In support of his contentions, the learned counsel relied upon an unreported order dated 01.01.2016 passed by a learned Single Judge of the Islamabad High Court in W.P No.2528/2012 (Tariq Ahmed Lodhi v. Chief Secretary Officer ASF BBIA Islamabad etc), Commandant Frontier Constabulary, Khyber Pakhtunkhwa, Peshawar and others v. Gul Raqib Khan and other (2018 SCMR 903).

5. Conversely, it was argued that the petitioner was explicitly communicated through his appointment letter dated 30.11.1981 that he would be governed by ASF Act, 1975, and PAA. He accepted his appointment accordingly and worked for several years under these laws. It was submitted that when major penalty was imposed upon the petitioner under the afore-said laws, on 30.10.2017, he availed the remedial process of the same laws, where-under he was denied the relief of reinstatement through the Appellate order, as discussed supra. It was also explained that the jurisdiction of this Court is barred under section 7-A (4) of ASF Act, 1975, to adjudicate on the issues raised by the petitioner about his Compulsory Retirement and the Original and Appellate orders can also not be called in question before this Court due to the bar created in Article 8(3) and Article 199(3) of the Constitution. The learned counsel also referred to the service record of the petitioner (page-61) and argued that during his tenure of service he was repeatedly superseded for promotion to the next rank. His discipline states as under:-

“a. On 09 Dec 1997, he was **Reprimanded** by the CSO ASF JIAP Karachi, for his poor performance, as he failed to check forged MA degree of US-2827 Inspector Nazir Hussain, who had submitted for advance increment on the basis of possessing higher education.

b. On 12 Sep 1998, he was severely **Reprimanded** by the CSO ASF JIAP Karachi, for leaving his duty while deployed at Perimeter.

c. On 25 Apr 2004, awarded **DG's Displeasure**, for poor performance as when he was deployed as Incharge at Domestic Hold Baggage Search Counter, the belongings of a lady

passenger were lost (i.e.Rs.15,000/-, 02 x Gold Rings and 02 x pair of eye glasses).”

d. He is involved in illegal activities as pointed out in Paragraph No.7 (a), (b) & (c) (Page-63).

e. He was not taken interest in the official duties, due to his involvement in private business / illegal activities and was tarnishing the image of ASF. Moreover, he had been continuously superseded in departmental promotion committee held in the year 2008, 2009, 2010, 2011 and 2012 for promotion to the next rank and due to his poor performance he was retired compulsory from service with pensionary benefits under the provisions of PAA Rules 12(2) by the competent authority i.e. Director General ASF. His appeal was also rejected on 30.10.2017.

6. We have considered the arguments delivered before us, in the light of relevant law and the record. The petitioner was admittedly appointed as Assistant Sub Inspector in ASF vide order dated 30.11.1981, which was constituted under ASF Act, 1975, to function under the direct control of the Ministry of Defense. Thereafter, through a statutory enactment, i.e., ASF (Amendment) Ordinance, 1984, officers and members of ASF were subjected to the provisions of the PAA. The petitioner worked under these laws and when he was awarded Major penalty of Compulsory Retirement from Service, he availed the right of Appeal unsuccessfully on 30.10.2017; whereas in the present Constitution Petition he has challenged his Compulsory Retirement Order dated 1.11.2012 as well as Appellate Order dated 30. 10.2017.

7. Primarily, the Constitution has fixed the parameters of powers of this Court under sub-Article (2) of Article 175, explicitly envisaging exercising of only that jurisdiction which is conferred by the Constitution or by or under any law. Indeed, Article 8 of the Constitution postulates that the State shall not make any law, which takes away or abridges the fundamental rights conferred on citizens by its Chapter-I and any law made in contravention of this Article shall, to the extent of such contravention, be void. However, sub-Article (3) of Article 8 of the Constitution denotes that this prohibition shall not be attracted in case of any law relating to Members of Armed Forces, or of the police or such other forces as are charged with the maintenance of Public Order to ensure the proper discharge of their duties or the maintenance of discipline among them.

8. Functions of `ASF' and liabilities of the officers and Members of the "Force" have been exhaustively considered by the Honorable Supreme Court of Pakistan in para. No.23 of the judgment, in the case

of "Force Commander ASF v. Muhammad Rashid" (**1996 SCMR 1614**), vis-a-vis applicability of PAA and ouster of jurisdiction.

9. In para.21 of this judgment, the Honorable Supreme Court has held that though the status of the persons working in ASF as that of the civil servants has not ceased by the amendments in the ASF Act, provisions of the Army Act and the Army Act Rules have been competently made applicable to them, thus, the following rules have been propounded in para.Nos.22 and 24 of the judgment, in the case of 'Force Commander ASF' (supra).

"22. We may state that as regards criminal liability of the employees of ASF, the provisions of the Army Act and the Army Act Rules are applicable to them by virtue of the afore-said subsection (1) of section 7-A of the Act. The same are very comprehensive which we have already referred to hereinabove in detail. It may again be pointed out that award of sentence of imprisonment may also result into dismissal from service as a consequence thereof. This dismissal cannot be equated with a dismissal from service imposed as a major penalty as a result of a departmental disciplinary proceedings."

"24. We may observe that the above provisions cannot be ignored merely on the ground that the status of the personnel of ASF remains that of civil servants. The provisions of the Act and the Army Act, and the rules framed thereunder, if contrary to the provisions of the Civil Servants Act and the rules framed thereunder, being special, shall prevail over the latter being general."

10. Principally, A.S.F. was established with the objects contained in the ASF Act which inter alia include the duty to ensure security of all airports, aerodromes, aircrafts and installations and for safeguarding the same against the acts of unlawful interference or threats of such interference, to ensure security of aircraft, passengers, baggage, cargo and mail and to take effective measures for preventing hijacking, sabotage, letter bombs, dangerous articles and carriage of arms and ammunition into the restricted areas of the airports, aerodromes and the aircrafts and to detect any contraband on the person or in the baggage of any person checked by him. To achieve the above objective it is imperative that the persons entrusted with the above functions should be honest, man of integrity -and well-disciplined. The latter objective cannot be attained unless there is an effective deterring mechanism for punishing the persons guilty of breach of the above duties.

11. In the present case, the petitioner was charged with the following allegations and consequently, a Major penalty was imposed upon him

vide order dated 1.11.2012 and his Appeal was rejected vide order dated 3.10.2017. The PAA applied to his case in the light of the above-noted quotations from `Force Commander ASF's case (supra). An excerpt of the allegations is as under:-

- a) Inspector Fajar Din was involved in human trafficking for last 15 to 16 years.
- b) A complainant Mr. Bashir Meo paid Rs.1, 80,000/- to Inspector Fajar din for sending abroad his son Mr. Amir, to Malaysia who was subsequently, then deported. The complainant repeatedly asked for recovery, but Inspector Fajar Din refused.
- c) As per intelligence reports Inspector Fajar Din was also involved in corruption/links with smugglers at the airport. The appellant cheated lot of people/relative by sending them abroad on fake documents.
- d) The appellant found involved in illegal/land mafia propriety business and performing as President of Rajput Welfare Committee, therefore, 100 plots were allotted to him. The appellant selling the plots with his own signature.

12. Besides above, prima-facie, his service record seems to be sketchy; and, in the intervening period he reached the age of superannuation in the year 2018. Apart from the above mentioned relevant dictum of the Honorable Supreme Court, attracted to the focal points involved herein, the petitioner is seeking relief for getting declared the original as well as appellate orders, as ultra vires, but granting such relief has been excluded from the ambit of Article 8(1), by its sub-Article (3). Hence, this relief(s) cannot be granted to the petitioner.

13. The present petition has been filed by the petitioner in this Court under Article 199 of the Constitution, which also contains a bar in its sub-Article (3), providing that an order shall not be passed by a High Court under sub-Article (1) of Article 199 of the Constitution, on the application made by a person who is subject to any law relating to Armed Forces of Pakistan, 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 about him, as a person subject to such law.

14. Honorable Supreme Court has explained in the case of Ex.Lt.-Col. Anwar Aziz v. Federation of Pakistan", **(PLD 2001 SC 549)**, the scope of the jurisdictional bar under sub-Article (3) Article 199 of the Constitution. Its relevant paragraphs 8 and 9, at page 553, are reproduced below for ready reference: ---

"(8) This Court can interfere only in extraordinary cases involving the question of jurisdictional defect when proceedings before that forum become Coram non iudice or mala fide. 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 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. According to section 133(3) (B) of the Act the decision of the Court of appeal is final and cannot be called in question before any Court or Authority whatsoever."

(9) By now it is well-settled principle of law that the High Court under Article 199(3) of the Constitution can examine the cases falling within three categories, namely, where impugned order/judgment, is mala fide, or without jurisdiction or coram non iudice."

15. As a sequel to the afore-mentioned dictum, if we glance over the case of the petitioner, we find that the petitioner was a person holding the post of Inspector, in a 'Force' called ASF and, by operation of law, as well as by accepting precondition of his appointment, the petitioner was a person subject to the law, as provided under Section 7-A of ASF Act, 1975 r/w PAA Rule 12(2), relating to Armed Forces of Pakistan, in respect of his terms and conditions of service, matters arising out of his service, or in respect of actions in relation to him, as a person subject to that law.

16. The petitioner was proceeded under PAA, because as an Inspector in ASF, he was subject to PAA, under section 7-A(1) of ASF Act, 1975. The action was taken against him by the respondent-ASF bestowed upon with the power of 'Commanding Officer' by law under section 7-A(3) of ASF Act, 1975 and thus they were competent to award punishment under the law; and, in consequence thereof, he was punished accordingly. Thus, we are not inclined to modify his punishment. On the aforesaid proposition, we are fortified by the unreported order dated 22.02.2021 passed by the Hon'ble Supreme Court in the case of Secretary Elementary & Secondary Education Department, Government of KPK, Peshawar and others v. Noor-ul-Amin in Civil Appeal No.985/2020.

17. So, in our view, the impugned order is neither without jurisdiction nor Coram non iudice. There is nothing on record to convince us that

respondent-ASF had acted with any mala fide as in our view this element is lacking. Moreover, as it was observed in para 6 of the judgment of Honorable Supreme Court in Anwar Aziz v. Federation of Pakistan (ibid), the petitioner herein had also availed the jurisdiction of Armed Forces by contesting his proceedings and fully exhausting the remedy available under the relevant law.

18. It is, therefore, concluded that none of the prayers could be granted to the petitioner due to the bar contained under Article 199(3) of the Constitution. Reliance is placed on the case of Brig. (Rtd.) F.B. Ali v. The State in (PLD 1975 SC 506). The relevant portion at page 542 is quoted below: ---

"The learned Attorney-General has contended that the words relating to in clause (3) are words of wide connotation and after the amendments made in 1974, they operate as a complete bar as they cover every conceivable action taken in relation to even a person for the time being, subject to the Army Act as the appellants were. However wide the connotation of these words may be they cannot possibly act as a bar where the action impugned is itself without jurisdiction or coram non judge or has been taken mala fide as held by this Court in State v. Ziaur Rahman. On the other hand if the action is with jurisdiction and bona fide then I am prepared to concede that the bar will be operative in respect of almost anything if it is in relation to a person who is even only for the time being subject to a law relating to the Armed Force. The action must, however, be one which is taken while he is so subject and not before he becomes so subject or after he ceases to be so subject.",

19. Adverting to the assertion of the petitioner that he was not subject to the PAA, the same is misconceived on the premise that under Section 7-A of the ASF Act, every officer/member of the force is subject to the PAA, and, therefore, was competently proceeded against by the respondent-authority. The allegations as set out in the charge sheet, as discussed supra, cannot be upset unless the same is shown to have been carried out without jurisdiction or with malafide intention.

20. Prima-facie, the view, taken by the appellate authority aligns with the law declared by the Hon'ble Supreme Court in the case of District Bar Association, Rawalpindi and others v. Federation of Pakistan and others (PLD 2015 SC 401). Even otherwise, the allegations levelled against the petitioner were serious and he was found guilty by the competent authority to be involved in human trafficking, as discussed supra; Prima-facie, he cannot escape the availability of concrete evidence, as available on record, pointing out his culpability which could not be brushed aside through this Petition as mere denial could not be construed to declare him innocent through these proceedings and scot him free from the charges levelled against him. On the aforesaid proposition, we are fortified by the judgment of the Hon'ble Supreme Court dated 14.01.2020 passed in the

case of Fayaz Khan v. Government of Pakistan through Secretary Aviation Cabinet Secretariat, Aviation Division, Islamabad and others (2020 SCMR 432). On the issue of awarding major penalty without regular inquiry on the basis of undeniable material, no inquiry is required to be conducted. On the aforesaid proposition we are fortified with the decision passed by the Honourable Supreme Court in the case of Rizwana Altaf v. Chief Justice High Court of Sindh through Registrar (2020 SCMR 1401), therefore, the case law cited by learned counsel for the petitioner is of no help to him.

21. The learned counsel for the petitioner has also relied upon an unreported order dated 14.10.2013 passed by the Hon'ble Supreme Court in the case of Ch. Sikandar Ali supra whereby Civil Review Petitions No.9-L and 16-L of 2012 were dismissed and argued that since the view taken by the learned Lahore High Court was upheld by the Full Bench of Honourable Supreme Court, as such decision of two Member Bench could not be taken into consideration, therefore, this petition can be heard and decided on merit rather than knocking him out on the technical point of maintainability. This assertion in our view is also misconceived for the simple reason that in view of the recent decision rendered by the Hon'ble Supreme Court in the case of Fayaz Khan supra, we cannot take any contrary view. Even otherwise the Honourable Supreme Court has answered all the points raised in the present petition in the case of Mrs. Mushtar Jahan vs. Prime Minister of Pakistan and others (2005 SCMR 866) and has held as under:-

"11. The above-mentioned question has been discussed at length in the preceding paragraphs repetition whereof would be of no use but suffice it to say that the learned Federal Service Tribunal had no jurisdiction to dilate upon such appeals after addition of section 7-A(4) of the Airports Security Force Act, 1975 whereby the appeals preferred on behalf of employees of the Airport Security Force could not be heard by the Federal Service Tribunal as a result of bar of jurisdiction imposed by means of newly-added section 7-A(4) of the Airports Security Force Act, 1975. It would not be out of place of mention here that various contentions agitated by him regarding implication of Efficiency and Disciplinary Rules, 1973 and status being a civil servant were never mentioned in the review petition. The above mentioned contentions that he could not have been proceeded under the Pakistan Army Act, 1952, the Airports Security Force Act, 1975 and the rules made thereunder were made in oblivion of clause "h" of the appointment letter whereby a complete answer for all such arguments is available which is reproduced herein below for ready reference:-

"(h) Governing Rules.--- After joining the A.S.F. you will be governed by the provisions of A.S.F. Act, 1975, A.S.F. Officers and Members (Service) Rules, 1978 and A.S.C. (Discipline) Rule, 1977 and of the Rules and Regulations in Force or as may be made from time to time by the Federal Government.

A bare perusal of clause (h) of the appointment letter issued in 1983 would show that it has been made abundant clear that after joining the Airport Security Force Mr. Wasiullah Khan was to be governed by the provisions of Airports Security Force Act, 1975, Airports Security Force Officers and Members (Service) Rules, 1978 and Airports Security Force (Discipline) Rules, 1977 and all other rules and regulations which may be made applicable from time to time. Mr. Wasiullah Khan was fully aware that he was subject to Airports Security Force Act, 1975 for all practical purposes and it is too late in the day to argue that he is a civil servant and the provisions as contained in the Airports Security Force Act, 1975, the Pakistan Army Act, 1952 and the rules made thereunder are not applicable to him. Mr. Wasiullah Khan remained mum for more than two decades regarding governing rules and accepted the terms and conditions as enumerated in the appointment letter.

12. The judgments passed by the learned Federal Service Tribunal in the above captioned appeals does not appear to be open to exception and being well based hardly warrant any interference. The controversy qua the provisions as enumerated in section 7-A(4) of the Airports Security Force Act, 1975 has been set at naught by various judgments pronounced by this Court as mentioned above. It hardly needs any elaboration that the judgments delivered latter would be applicable.

In sequel to abovementioned discussion, the appeals are dismissed.”

22. For the reasons aforesaid, this Constitutional Petition fails and, accordingly, the same is dismissed. Consequently, connected miscellaneous applications are also dismissed. However, there shall be no order as to costs.

JUDGE

JUDGE