

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
MINGORA BENCH (DAR-UL-QAZA), SWAT
(Judicial Department)

W.P No.1089-M/2023

Gul Lalai and five others Vs. Govt. of Khyber Pakhtunkhwa through
Secretary Elementary and Secondary Education and others.

Present: Muhammad Riaz Muhammadzaie, Advocate for
petitioners.

Mr. Kamal Khan, A.A.G for official Respondents.

Date of hearing: 17.04.2024

JUDGMENT

MUHAMMAD NAEEM ANWAR, J.- Mst. Gul Lalai and 5 others, class-IV employees of education department, whose appointment orders were withdrawn "till further orders" being perturbed have challenged the order of respondent No.3 (District Education Officer Female Dir Upper) dated 31.03.2023 under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, being illegal, unconstitutional, against the law and inoperative upon their rights. Respondent No.3, through her comments, has admitted that the petitioners were eligible & qualified and were appointed through proper procedure, however, resisted the issuance of writ on the plea that impugned was issued after receiving the letter from Provincial Election Commission, through which, it was suggested to get No Objection Certified from Election Commission of Pakistan for rectification of irregularities in the appointment of petitioners.

2. Arguments heard and record perused.

3. Admitted position is that the respondent No.3 has initiated the process for filling the vacancies of Class-IV employees through

advertisement published in daily AAJ Peshawar dated 16th April, 2022. The petitioners and others have applied through their respective applications, their applications were processed. Departmental/ Recruitment Committee was constituted in consonance with the letter No.3391-3441/Estab: dated Peshawar 24-02-2014 issued from Directorate of Elementary & Secondary Education Khyber Pakhtunkhwa, the District Education Officer (female), Dir Upper was the Chairperson whereas the Assistant District Education Officer (Male) Secondary Establishment Dir Upper, Superintendent District Education Officer (Female) & representative of Directorate of Elementary & Secondary Education Khyber Pakhtunkhwa were the members, meeting was held on 18.01.2023, recommendations were issued and pursuant to the said recommendations, the petitioners were appointed vide appointment orders dated 15.02.2023 & 28.02.2023. Record also reflects that the respondents through impugned order dated 31.03.2023 have withdrawn the appointment orders of the petitioners on the ground that there was a ban on posting /transfer of civil servants, which reads as under:

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“Appointment orders of Class-IV issued vide this office endorsement No.1878-82 dated 15.02.2023, endorsement No.2050-54 dated 28.02.2023 and endorsement No.2045-49 dated 28.02.2023 are hereby withdrawn till further orders.”

When the learned A.A.G was questioned that when the ban was imposed by the Election Commission of Pakistan (ECP) on posting and transfer of civil servants, neither he could produce any order with particular reference of the date nor any such order is annexed with the

comments of the respondents. No doubt that Election Commission of Pakistan Islamabad vide order dated 15th December, 2023 bearing No. No.F.2(1)/2023-Cord-Vol-IX has imposed ban on any kind of posting & transfer within the purview of Articles 218 (3) & 220 of the Constitution of Islamic Republic of Pakistan read with Section 5 and Section 230 (2) (f) of the Elections Act, 2017, till the publication of the names of the Returned candidates in the official Gazette with further directions that in case of any exigency proposals of postings/transfers with cogent reasons, if in public interest, be sent to Election Commission for consideration.

4. Undeniably, the process for filling the posts of Class-IV was initiated much earlier to the imposition of ban by the ECP, working papers in that respect were prepared, meetings of Departmental Selection Committee (DSC) were held and recommendations for appointment of the petitioners were made. The date of meeting as reflected from the comments of the respondents was 18th January, 2023 whereas, the appointments orders were issued on 15.02.2023 & 28.02.2023. The date of notification of the election commission of Pakistan through which the ban was imposed was 15th December, 2023 and the petitioners were appointed earlier to the imposition of ban and receipt notification of ban by respondent No. 3. The notification of ban is available on website of Election Commission of Pakistan issued on 15th December, 2023, thus no retrospective effect could be given to the ban and the appointment order of the petitioners could not be withdrawn or suspended till further orders. Moreover,

conflict arose regarding the date of general election for national assembly and provincial assemblies when through vote of no confidence the former premier was ousted. In the afore mentioned state of affairs, neither there was any requirement for getting the NOC from ECP nor the details were required to be submitted to the ECP. The impugned order is self-explanatory that it is not in respect of the withdrawal of the appointment orders rather it seems to be a suspension order for the time being reflecting 'till further orders', which definitely reflects the lifting of ban by the Election Commission of Pakistan. Lifting of ban has already been notified on 4th of March 2024. Though there was no illegality or irregularity in the appointment orders of the petitioners but even if the appointments made during ban and without NOC from the Election Commission of Pakistan, it could be termed as an irregularity, which continues till rectification. Thus, the irregularity, if any, committed by the respondents in continuation of the services of the petitioners has already been done away, and in the above state of affairs, there was no fault of the petitioners. It appears from the impugned order that it was for specific time and was required to be reversed, cancelled, abolished or taken back just after the lifting of ban. When confronted, learned AAG submitted at the bar that after lifting of ban, the impugned order is unjustified and unwarranted.

5. In the case of 'Shamsul Haq vs. District Health Officer and 3 others' (2017 PLC(CS) Note 22) it was held by the Sindh High Court

that:

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HON'BLE MR. JUSTICE MUHAMMAD NAEEM ANWAR
HON'BLE MR. JUSTICE SHAHID KHAN

“This notification has been issued by the ECP under Article 218 (3) of the Constitution of Islamic Republic of Pakistan, 1973, and palpably its purpose is to hold fair, free and transparent elections, and in the process of which to thwart the Federal and Provincial Governments from making any appointments in the times close to the elections, because such practice is usually seen a dishonest way to woo the votes. Admittedly this notification very specifically bans only the appointments from 31.08.2012 for the reason as discussed above, but here in the present case it is obvious that the petitioners were not appointed, and for this reason it can be safely said that no violation of the said notification ever took place in the case of petitioners. Infact it seems that the respondents duly complied with the above notification and did not proceed further to appoint the petitioners after issuing them offer letters. However, when the ban was lifted vide notification No.F.8 (12)/2012-Cord dated 28th March, 2013 by ECP after expiry of the term of National and Provincial Assemblies and resultantly the elections were held; there was no justification available to the respondents to still refuse to appoint the petitioners on the posts they were already selected by the selection committee. The object for which the ban was imposed on the recruitments stood satisfied on completion of the elections process. And thereafter resuming the process of appointments of the petitioners (particularity when there was no apparent illegality to it) by the respondents held back due to above notification would not be termed illegal and/or in violation of the said notification.”

In the case of “Farooq Umar and 2 others vs. Inspector-General of Prisons and another” (2009 PLC(CS) 195), it was observed by the Sindh High Court that:

“It is agitated in our mind that when there was a ban why such posts were advertised in newspapers and medical tests held, written test and interview was taken and consequently appointment letters were issued whereafter the petitioners joined services. After joining service, the order for staying their appointment was uncalled for. We hold and declare that the impugned letter dated 22-11-2006 issued by the respondent No.1 for temporarily staying the petitioners from performing their duties is illegal and the same is struck down being issued arbitrarily. Consequently, petitions are allowed. The respondent No.1 is directed to take all the petitioners on duties and pay their due salaries and usual admissible allowances with effect from 22-11-2005 till date. However, after joining duty their monthly salaries be paid accordingly

including any increments or increase in usual admissible allowances thereto if so, announced by the Government.”

In the case “Chief Secretary, Sindh, Karachi and another vs. Haji Muhammad Punjal Narejo” (PLC 2007 (CS) 343), the case before the apex Court was against the decision of Service Tribunal, which accepted the appeal of civil servants (appointing authority) and set aside the order of imposition of penalty for making appointment during the period of ban, the Hon’ble Supreme Court has held that:

“There is no cavil to the proposition that **functionaries of the Government are presumed to have the knowledge of instructions regarding the policy matters concerning with the Government business and willful violation of such instructions would definitely bring the matter within the ambit of misconduct but in the present case, we find that nothing was brought on record to show that the order regarding ban on the recruitments was circulated at all levels and the respondent having the conscious knowledge of such instructions, made appointment in violation thereof to bring the matter within the ambit of misconduct. There is also nothing on record to show that appointments were made for some ulterior motive or extraneous consideration and consequently, it would be seen that if the respondent, who was otherwise competent to make such appointment, proceeded to fill the two vacant posts in good faith during the period when there was ban on die recruitments, he would not be liable to be proceeded against for committing an act of misconduct. Learned Additional Advocate-General has not been able to point out any illegality in the impugned judgment or the involvement of any substantial question of law in the matter calling for interference of this Court. This petition has no substance and the same is accordingly dismissed.**”

In the case of “Mirra Khan and others vs. Government Of Balochistan, through Secretary, Agriculture Department, Civil Secretariat, Quetta and others” (2005 PLC(CS) 102), the appointees were terminated from service on the grounds that they were appointed during the period of ban, their appeal was allowed by the Tribunal by

holding that neither there was any fault on the part of appellants nor the appointments were made without authority, it was held that the appellants were not treated in accordance with law, as they have not been provided with any opportunity to defend their rights. Likewise, in the case of "Muhammad Bux and 2 others vs. D.E. Telegraph, Nawabshah" (2005 PLC(CS) 435I) it was ruled by Federal Tribunal that the termination has taken place in violation of the principles of natural justice, as no show-cause notice was served upon the appellants nor they were afforded any chance of personal hearing to put up their defence, we are of the view that the action of the respondents is nothing but colourful exercise of powers, as once they have appointed the appellants, they cannot take the plea that the appointments were made during ban period or that they were appointed on stop-gap arrangement, as such, we while allowing the appeals in ban order that the appellants be reinstated in service in the same position, from which, they were terminated with continuity of service.

6. The apex Court in the case of "Abdul Razzaq vs. Secretary Government Of Pakistan and others" 2004 PLS (CS) 453) maintained the order of the High Court by holding that since the appointments were made without advertisement, thus, being illegal could not be declared legal whereas in case in hand the factum of advertisement is an admitted fact even by the respondents. Since, the respondents have resisted the issuance of writ only on the ground that Provincial Election Commission has issued a letter pointing out the

appointments made during the ban and without getting the NOC, now the questions would that:

1. Whether the petitioners were appointed during ban of ECP?
2. If question No.1 is answered in negative, weather the notification of ECP could be given retrospective effect?
3. If the appointments were made during ban of ECP, weather such appointments were illegal and if not whether irregularities in the appointments could be rectified?
4. Whether the impugned order is of termination of the services of petitioners? and
5. Whether the impugned order could be issued without providing any opportunity of being heard to the petitioners?

Since, the petitioners were appointed through appointment orders dated 15th & 28th of February, 2023 whereas, the ban was imposed on 15th December, 2023, thus, on the date of appointments of the petitioners there was no ban on the posting & transfer. Moreover, no retrospective effect could be given to the ban imposed on the appointment. The basic purpose and the object for imposition of ban is to hold free, fair and transparent election. Now, when the process for filling the post was initiated through publication by the competent authority, the petitioners were eligible for the appointment, they have been recommended for appointment, thus, the appointment, if made during ban, could never be termed as illegal, it may be irregular but could be rectified. Reliance may be placed on the cases of "Asghar Ali and another vs. Secretary, Local Government and Rural Development Department, Government of Punjab, Lahore and 4 others" [2000 PLC (CS) 333], "Fiaz Ahmed Bokhari vs Government of Punjab through Secretary Education, Punjab, Lahore and 11 others" (1999 PLC (CS) 1508), "Divisional Engineer, Transmission (VHF), Karachi and another vs. Rashid Akbar and 10 others" (1988

PLC 393), "Board Of Intermediate and Secondary Education, Multan vs. Muhammad Baqir Ali Tatari and another" (1988 PLC (CS) 855), "Director, Social Welfare, N.-W.F.P., Peshawar versus. Sadullah Khan" (1996 SCMR 1350), "Muhammad Qadeer and 10 others vs. Government of The Punjab through Secretary, Local Government and Rural Development Department" (1989 PLC (CS) 409).

7. It is significant to mention here that when the petitioners were appointed in accordance with the law, they have assumed the charge, valuable rights were accrued in their favour especially when no ban was existing on the date when the advertisement was published, the date on which the recommendations were made, the date on which the appointments were made and the date on which the charge was assumed by the petitioners, thus, neither the impugned order could be issued nor justified. In addition to the above, when no opportunity was afforded to the petitioners nor they were served with any notice and when the services of the petitioners were not terminated rather through impugned order, the order of appointment was withdrawn till further orders, the provision of section 21 of the General Clauses Act, 1897 could not be attracted against the petitioners. In similar controversy involved in the case of "Zakir Munir Vs. Executive District Officer (Health) Abbottabad and 3 others" (2011 PLC CS 1651), this Court has held that:

"Withdrawal of order of appointment could not be legitimately maintained as no show-cause notice and opportunity of being heard was

ever provided to the petitioner prior to passing of impugned order. Principle of *audi alteram partem* would be attracted to the case of petitioner. Authority under the principle of locus poenitentiae was competent to pass an order and get the same rescinded but when an order has been passed and it had taken legal effect, then notwithstanding the power available under section 21 of the General Clauses Act, 1897, same could not be withdrawn, unless and until it was established the order was obtained by practicing fraud and misrepresentation”.

Reliance may also be placed on the cases of “Muhammad Feroz Vs. Deputy District Officer (Education) and others” (2007 PLC CS 58), and “Muhammad Jamil Vs. Provincial Government Northern Areas through Chief Secretary Gilgit and 02 others” (2007 PLC CS 145). The respondents have not been able to justify issuance of the impugned order. Wisdom is also derived from the case of “Zafaran Khan and others vs. Nizam Ullah and others” (PLD 2023 SC 371).

8. Thus, for the reasons discussed above, the instant petition is disposed of in terms that:

- i. The impugned order issued by respondent No.3 dated 31.03.2023 is not in consonance with law;
- ii. There was no fraud or misrepresentation of facts on part of the petitioners rather the petitioners have assumed the charge on their respective place of posting, thus, the provision of section 21 of the General Clauses Act, 1897 could not be invoked when certain rights were accrued in favour of the petitioners unless they were provided an opportunity of being heard;
- iii. Withdrawal of the appointment orders of the petitioners seems to be an order issued for the time being with specific addition of phrase ‘*till further orders*’, however, no such order has been passed by the respondents, as such, the impugned order dated 31.03.2023 could not be given any legal effect and same is inoperative upon the rights of the petitioners rather the petitioners shall be deemed in service.

iv. No order as to cost.

Announced.
17.04.2024.



JUDGE



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Office
29/4/2024

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HON'BLE MR. JUSTICE MUHAMMAD NAEEM ANWAR
HON'BLE MR. JUSTICE SHAHID KHAN