

B/R

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
PESHAWAR
(Judicial Department)

W.P.No.3337-P/2023 with
Interim Relief

Mst. Shehla Naeem

Versus

Chief Secretary, Khyber Pakhtunkhwa and others

JUDGMENT

For petitioner: Mr. Saad-ul-Faisal, Advocate.

For respondents: Mr. Danial Khan Chamkani, Addl: A.G.

Date of hearing: **08.8.2023.**

DR. KHURSHID IOBAL, J.- The petitioner (Mst. Shehla Naeem) is working as Assistant Professor of law (BPS-18) in the Government Girls Degree College, Sheikh Maltoon Town, Mardan. Vide Notification dated 26.5.2023, respondent No.2 (Ms. Humaira Syed) Assistant Professor Zoology (BPS-18) was transferred to GGDC Sheikh Maltoon, Mardan. As there was no vacant sanctioned post, therefore, on the same date a corrigendum was issued, whereby the petitioner was transferred to GGDC Rustam, Mardan. Subsequently vide Notification dated 29.5.2023, complete ban was imposed on inter-District postings/ transfers and on 03.7.2023, she was relieved from her duties. Thus the respondent No.2 was adjusted on her post. She filed a departmental

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appeal/representation. In the meanwhile, vide Notification dated 17.7.2023, the respondent No.2 was transferred back to GGDC Rustam, Mardan, but the order of transfer/posting of the petitioner was not made. However, vide corrigendum dated 25.7.2023, the Notification dated 17.7.2023 was withdrawn ab-initio to the extent of respondent No.2. Thus the petitioner filed the instant constitutional petition with the following prayer:

That the impugned orders/notifications dated 26.5.2023, 03.7.2023, and of dated 25.7.2023, be declared null and void whereby the petitioner was shuffled from her post and respondent No.2 was wrongly posted against an irrelevant post at GGDC, SMT, Mardan. Further, a direction to the concerned authorities/respondent No.4 and 6 be given to issue notification whereby the petitioner be retained on her actual/earlier post of Assistant Professor of law in GGDC, SMT, Mardan and the respondent No.12 be declared transferred from the said college/GGDC, SMT, Mardan to any other proper post.



2. We have heard the arguments of learned counsel for the petitioner as well as learned Addl: A.G. representing the respondents and perused the record.


3. At the very inception, the learned Addl: A.G. raised a preliminary objection that the instant petition is not maintainable in view of the embargo put under Article 212 of the Constitution. He explained that the petitioner is a civil servant, and the proposed transfer relates to the terms and conditions of the petitioner's service. He further explained that

as a civil servant, the petitioner has to approach his Departmental Authority and then to the Service Tribunal.

4. There could be no escaping from the fact that the petitioner is a civil servant. There is also no doubt at all that the impugned transfer relates to the terms and conditions of her service. Section 10 of the Civil Servants Act, 1973, provides that a civil servant can be transferred anywhere in the province. The provision reads as under:

10. Posting and transfers. – every civil servant shall be liable to serve anywhere within or outside the province in any 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 favourable than those to which he would have been entitled if he had not been so required to serve.

5. The law, however, doesn't put a clog on a civil servant to question a transfer order on the ground of mala fide. The law, then provides the Service Tribunal as the forum before which a civil servant can vindicate his grievance. It needs not to be mentioned that the Service Tribunal is a constitutional forum established under Article 212, having exclusive jurisdiction in matters relating to the terms and conditions of a person who is or has been in the serviced of

Pakistan. Despite this express constitutional barrier, civil servants do seek their remedy before other courts, notably the High Court and the Supreme Court. The higher courts thus have dealt with the question in numerous cases which have built vast jurisprudence on the issue of jurisdictional competency of the courts. We deem it pertinent that reference to a few cases may be sufficient for the purpose of proper understanding of the issue in hand. In *Ali Azhar Baloch and others vs. Province of Sindh and others, (2015 SCMR 456)*,

the Supreme Court held:

Article 212 of the Constitution of Islamic Republic of Pakistan, 1973 ousts the jurisdiction of High Courts and civil Courts in respect of the matters pertaining to terms and conditions of civil servants. In other words, the provisions of Article 212 do not confer a concurrent jurisdiction to Civil Courts, High Courts and Tribunals. The ouster contemplated under the said Article is a Constitutional command and, therefore, of necessity restricts the jurisdiction of Civil Courts and High Courts on the subject, which squarely falls within the exclusive domain of Tribunal.



In a more recent case titled *Chief Secretary Government of Punjab, Lahore and others vs. Ms. Shamim Usman, (2021 SCMR 1390)*, the Apex Court has cautioned the High Courts not to transgress the bar on its jurisdiction under Article 212 of the constitution and held:

The High Court had no jurisdiction to entertain any proceedings in respect of terms and conditions of service of a civil servant which could be adjudicated upon by the Service Tribunal. The High Court as a Constitutional Court should always be mindful of the jurisdictional exclusion

contained under Article 212 of the Constitution. Any transgression of such constitutional limitation would render the order of the High Court void and illegal.

In the case of Federation of Pakistan through Secretary

Establishment v. M. Labib ur Rehman and others, (2021

SCMR 1554), the Supreme Court ruled:

It is now established that any matter relating to terms and conditions of service is within the domain of administrative courts and tribunals established under Article 212 and even if the element of mala fides, ultra vices or coram non iudice is pressed into, the same can be entertained and decided by the said courts in its jurisdiction. There is no denial to this fact that the bare reading of the said Article is of significant importance especially with reference to its exclusive jurisdiction to entertain matters relating to terms and conditions of service. Hence, in all eventualities any petition relating to terms and conditions of service is to be dealt with by administrative courts and tribunals specifically established for its adjudication in pursuance of Article 212 of the Constitution. As a general principle, the framers of the Constitution while inserting the said provision have ousted the jurisdiction of other courts including the High Court under Article 199 of the Constitution. There are certain exceptions depending upon the facts and circumstances on case to case basis because of the reason that the law is not static and the same is growing day by day, therefore, it cannot be said with certainty that in all eventualities the service issues cannot be called in question in Constitutional jurisdiction before the High Court. The Constitutional jurisdiction is always considered as extraordinary, which is to be exercised in extraordinary circumstances if so warranted, hence, the Constitutional jurisdiction cannot be curtailed stricto sensu leaving some room for its application where it is so demanding for safe administration of justice and fair play. The superior courts while exercising Constitutional jurisdiction must satisfy themselves that they may not interfere or infringe the jurisdiction of any other


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statutory forum in any manner when an equally efficacious/adequate remedy is available under the statute for the redressal of the grievances of the litigants. Hence, the superior courts should be reluctant to frustrate the statutory remedies while exercising their Constitutional jurisdiction, which otherwise has to be exercised sparingly while enabling to advance the legislative intent.

Reference may be made to the cases of Peer Muhammad vs. Government of Baluchistan through Chief Secretary and others, (2007 SCMR 54) and Kalimullah Kakar and others v. Provincial Police Officer, Balochistan and others, (2021 SCMR 1168).

6. In light of the above referred bar put in Article 212 of the Constitution and its interpretation by the higher courts in the case law discussed, the instant petition is found as not maintainable for want of jurisdiction. However, the petitioner is at liberty to approach to the competent forum, if so advised.

Announced.
Dt: 08.8.2023.
Imran/*


JUDGE


JUDGE

(D.B)
Hon'ble Mr. Justice Muhammad Naeem Anwar
Hon'ble Mr. Justice Dr. Khurshid Iqbal