

IN THE HIGH COURT OF SINDH, AT KARACHI

Present:

Mr. Justice Adnan-ul-Karim Memon

Mr. Justice Adnan Iqbal Chaudhary

C.P No.D-317 of 2008

Mst. Mehar Bano Petitioner

Versus

The President Executive Board
Defence Officers Housing Authority..... Respondent

Date of hearing: 23.10.2018

Mr. Mr. Muhammad Arshad Khan Tanoli and
Mr. Imdad Khan Advocates for the Petitioner.
Mr. Khalid Jawed Advocate for the Respondent
Shaikh Liaquat Hussain, Assistant Attorney General.

J U D G M E N T

ADNAN-UL-KARIM MEMON, J: - Through the instant Petition, the Petitioner has called into question her termination from service letter dated 04.12.2007 issued by the Respondent-Authority. Per Petitioner the same is issued without lawful justification, and jurisdiction.

2. As per record, the Petitioner was initially appointed as Teacher in BPS-13 in the Respondent-Authority's Montessori school on probation for a period of one year vide office Order dated 07.08.1997, however during her service tenure; she was proceeded against for her long absence without leave, with effect from 16.07.2006 to 11.09.2007. As per record, Petitioner submitted her reply to the aforesaid charges, which was later on found

unsatisfactory, resultantly an enquiry officer was appointed on 19.10.2007 to probe the allegations leveled against the Petitioner, who opined against the Petitioner and recommended disciplinary action for overstaying leave from 16th June 2007 to 07.09.2007 (88 days) and finally, her service was terminated vide impugned order dated 04.12.2007. Petitioner being aggrieved by and dissatisfied with the Termination Order dated 04.12.2007, filed the instant petition on 15.2.2008, on the ground that the Termination Order dated 04.12.2007 issued by the Respondent-Authority was in gross violation of various Articles of the Constitution of the Islamic Republic of Pakistan, 1973; that the Respondent-Authority had wrongly terminated the service of the Petitioner under DHA Service Rules, and not under the Removal of Service (Special Powers) Ordinance 2000 (RSO); that such termination of the Petitioner from service was not permissible under DHA Service Rules; that the action on the part of the Respondent-Authority was arbitrary and whimsical, which negates the principle of natural justice and provisions of the Constitution, thus nullity in the eyes of law; that Petitioner was being victimized by the officials of the Respondent-Authority; that Petitioner had been condemned unheard on the issue involved in the matter; that the Petitioner had pleaded her justification on the aforesaid charges before the Competent Authority of DHA but the Respondent-Authority terminated her service without reasonable cause. She lastly prayed for allowing the instant petition.

3. Conversely Mr. Khalid Jawed, learned counsel for the Respondent-Authority has raised the question of maintainability of

the instant Petition and argued that the Respondent-Authority has not acted malafidely nor violated any provisions of law or prescribed Rules in discharging their duties; that Petitioner was given full opportunity to plead her case, more particularly in compliance with the order dated 13.1.2010 passed by this Court; that the aforesaid assertion of the Petitioner is misleading, in order to achieve her favorable result from this Court, which disentitles her to the relief claimed for. Per learned counsel the plea of not appearing before the enquiry as ordered by this Court amounts misconduct. He further stated that the Respondent-Authority has not violated any Provision of RSO-2000 as demonstrated by the Petitioner, therefore, the Petitioner is not entitled to be reinstated in service and she was dismissed from service vide impugned order dated 04.12.2007, after complying all requisite formalities and after providing ample opportunities to the Petitioner to defend her case, but to no avail, the Counsel concluded on the aforesaid points.

4. However, on the maintainability point he argued that the Respondent-Authority is Body Corporate, which is controlled and regulated by President's order No. 7 of 1980, having no statutory Rules of service. He further argued that by virtue of non-statutory rules of the Respondent Authority employment of the Petitioner with the answering of the Respondent-Authority was purely contractual; hence, the Petitioner was governed by the principle of "Master and Servant"; that no action and/or inaction on the part of the Respondent-Authority impugned in this Petition has been

taken in disregard of any of the procedural requirements and there is no violation of principle of Natural Justice; therefore, the Constitutional jurisdiction of this Court under Article 199 of the Constitution, 1973 cannot be invoked and as such the interference by invoking writ jurisdiction of this Court cannot be asked for as prayed by the Petitioner. Learned counsel for the Respondent-Authority in support of his contention has relied upon the case of Pakistan Defence Housing Authority vs. Mrs. Itrat Sajjad Khan & others (2017 SCMR 2010) and prayed for dismissal of the captioned petition.

5. On the other hand Mr. Muhammad Arshad Khan Tanoli, learned counsel for the Petitioner, strongly refuted the claim of the Respondent-Authority and argued that, first of all the instant petition is maintainable on the premise that the present Petition relates to the service of the Petitioner, who admittedly, is not a Civil Servant as defined under Section 2(1) (b) of Civil Servants Act 1973, but employee of a Statutory Authority, thus cannot invoke the jurisdiction of the Service Tribunal, the only remedy if any, lies by way of filing the Constitutional petition, in view of the decision rendered by Full Bench of this Court in Muhammad Dawood and others vs. Federation of Pakistan and others (2007 PLC CS 1046) and the Honorable Supreme Court in the case of Defence Housing Authority vs. Lt. Col Syed Jawaid (2013 SCMR 1707) and Muhammad Rafi and others vs. Federation of Pakistan and others (2016 SCMR 2146). He next argued that the employees of a Statutory Authorities, who were proceeded under Removal from

Service Ordinance, 2000 can invoke the jurisdiction of this Court under Article 199 of the Constitution. In support of his contention, he heavily relied upon the decision given by the Hon'ble Supreme Court in the case of DHA (supra) and argued that the right of appeal is a substantive right as provided under the RSO-2000 (now repealed in 2010) and it was a statutory intervention, thus Constitutional petition filed by the Petitioner at the relevant time, seeking enforcement of her right is maintainable. He next added that under the aforesaid statutory intervention, Petitioner had to be dealt with under the said law and not under their disciplinary service Rules of the Respondent-Authority. He is supported by the case decided by this Court on 18.5.2009, in the case of Lt. Col. Sayed Jawaid Ahmed V.s Pakistan Defence Officers Housing Authority and others (2009 PLC (CS) 753).

6. At this juncture, we asked from the learned counsel for the Petitioner, as to how he maintains the instant petition, in view of the consent order dated 13.1.2010 passed by this Court and in compliance with the aforesaid order, the Respondents conducted re-inquiry into the allegations leveled against the Petitioner and submitted the said inquiry report before this Court, whereby the Respondents endorsed the guilt of the Petitioner on the charges leveled against the Petitioner.

7. In reply to the query, he submitted that the said inquiry report has not been provided to the Petitioner in spite of specific order dated 21.11.2014 passed by this Court, therefore at this stage Petitioner cannot say in this regard. He further submitted

that the matter may be decided on merit rather than on the basis of inquiry report relied upon by the Respondent-Authority and claim immunity on the basis of order passed by this Court, which has never been complied with by the Respondent-Authority. Be that as it may, we, under the peculiar circumstances of the case and in view of the findings of the Hon'ble Supreme Court of Pakistan in the case of DHA supra, intend to decide the issue involved in the present proceedings on merits.

8. We have heard the learned counsel for the parties and perused the material available on record and case law cited at the bar.

9. Upon perusal of the pleadings and arguments extended thereon by the learned counsel for both the parties, an important question of law requires our determinations, which is as follows:-

Whether, order dated 13.1.2010 passed by this Court for holding afresh inquiry in the case of the Petitioner regarding the allegations against the Petitioner for having remained absent without leave was complied with or otherwise?

10. We have noticed that, by consent of the parties, this Court vide order dated 13.1.2010 tried to resolve the issue between the parties in the following manner:-

“After having briefly heard both the learned counsel as well as learned D.A.G., it is ordered by consent that a fresh enquiry will be held in the case of the petitioner regarding the allegations against the petitioner of having remained absent without leave. Such enquiry shall be conducted in accordance with the well settled principles of law and natural justice, i.e., the petitioner shall have the right to produce her witnesses as well as all the documents, which she has relied upon. A proper charge sheet shall be framed by the Respondent Authority and served upon the petitioner containing in detail the charges against her, to which she will have the right of response, where-after, an enquiry

shall be conducted as stated above. An impartial Enquiry Officer shall be appointed by the DHA, who shall not belong to the Education Department of the Respondent Authority. The result of the Enquiry Report shall be placed before this Court on or before the next date of hearing. The enquiry to be conducted by such date."

11. To appreciate the controversy in its proper perspective, we think it appropriate to have a glance on the enquiry proceedings brought on record by the parties.

12. Perusal of the record shows that an impartial Enquiry Officer was appointed by the DHA to probe the allegations against the Petitioner in compliance with the aforesaid order passed by this Court, who issued various notices dated 23.2.2010, 26.2.2010 04.03.2010 & 05.03.2010, to the Petitioner which were served upon her through TCS for her appearance in the enquiry proceedings, she did not turn up on the aforesaid dates. Per learned counsel for the Respondent Authority, Petitioner failed to attend the enquiry proceedings fixed on 06.3.2010 at 10:00 a.m. in the office of the Deputy Secretary, DHA Creek Club, Zulfiqar Street, Phase-8, DHA, Karachi, consequently enquiry officer opined against the Petitioner and recommended disciplinary action against her under DHA service Rules-1992.

13. Perusal of the record further reflects that the statement of Mrs. Asma Nayeem (Acting Principal DA Mont 1) was recorded by the enquiry officer and the record produced by her, prima facie suggest that the Petitioner applied for leave without pay from 15 Jul 04 to 15 Jul 06, which was not granted. And after 15th July 2006, instead of joining the duty, she again applied for leave from 16th July to 15 Oct 2006. However she did not join on 16 Oct 2006

and again applied for leave from 16th Oct to 15 Dec 2006. She remained absent from 16th July 2006 to 15th Dec 2006 without grant of leave by the Competent Authority. She reported for duty on 15th Dec 2006 and worked for 4 to 5 days and again applied for leave on 20th Dec 2006 for 6 months i.e. up to 20th June 2007 and did not attend to her duties without grant of leave by the Competent Authority. Petitioner did not join the department on 21st June 2007 and she remained absent till 11th Sept 2007, when she was served with a show cause notice. After receiving the notice dated 11th Sept 2007, she joined her duties on 12th Sep 2007. She remained absent without any intimation, application for grant of leave for 82 days. The aforesaid documentary evidence clearly depicts the following factual position:

- a. *It is apparent from the record that, Mst Mehar bano remained absent from duty from 16 Jul 2006 till 15 Dec 2006. Though she applied the leave but the same was not granted.*
- b. *Again she, remained absent from 20 Dec 06 to 19 Jun 2007. Though she applied for leave for this period but the leave was not granted.*
- c. *She also remained absent from 21 Jun 2007 till 11 Sept 2007 (Total 82 days). For this period she neither applied leave nor intimated her department about her absence. The same has been admitted by her in her reply dated 20 Sep 2007 in reply to department show cause notice dated 11 Sep 2007 and 19 Sep 2007."*

14. The enquiry proceedings explicitly show that the same had been conducted on merit. The relevant portion of the findings of the enquiry officer is reproduced as under:-

"Having gone through the available record, statement of Acting Principal Defence Authority Montessori - I and documents produced by her, findings and opinion of the court, it is recommended that Staff No.MON-10 Mst. Mehar Bano may be removed from service under DHA Service Rules (1992) Chapter IV para 3 a (iii)."

***Sd/-
President Court of Inquiry Lieutenant
Colonel Muhammad Ali Khan (Retired)***

15. From perusal of the pleadings of the parties and evidence recorded by the enquiry officer, it is crystal clear that all these proceedings and actions were taken against the Petitioner on the basis of documentary evidence and prima-facie no malafide on the part of the Respondent has been established in the evidence.

16. The plea taken by the learned counsel for the Petitioner through statement dated 12.03.2014 (available on record), that due to suffering from various ailments, she was unable to attend the second enquiry proceedings in compliance with the order dated 13.1.2010 passed by this Court and prayed that the instant petition may be decided on the basis of earlier inquiry report brought on record through the statement dated 19.11.2009 submitted by the learned counsel for the Respondent-Authority, whereby Enquiry Officer did not recommend harsh action against the Petitioner. We, under the circumstances of the case, do not agree with the aforesaid proposition of the Petitioner, for the simple reason that this Court passed a consent order on 13.1.2010 and allowed the Respondents to hold afresh enquiry, through an impartial Enquiry Officer, who has submitted his report through statement dated 19.02.2010 and recommended the case of the Petitioner for removal from service under DHA Services Rules 1992. In our view, in presence of the findings of the Enquiry Officer, we cannot substitute our own opinion to thwart the enquiry proceedings conducted against the Petitioner. Record reflects that the Petitioner sought review of the order dated 13.1.2010 passed by this Court, which application was dismissed

as not pressed by the Petitioner vide order dated 26.8.2013, therefore, the order passed by this Court attained finality, as such Petitioner cannot take summersault by saying that the instant matter may be decided on the basis of earlier enquiry report brought on record, which is even otherwise does not support the case of the Petitioner on merit.

17. Reverting to the defence plea taken by the Petitioner that due to her ailment she could not attend the second enquiry proceedings has lost its sanctity as the allegations leveled against the Petitioner were thoroughly probed by the Enquiry Officer, thus does not require further evaluation on the part of this Court. We do not see any violation of law, Rules and Regulations in the proceedings of enquiry conducted by the Respondent-Authority against the Petitioner as asserted by the Petitioner. Record reflects that there is no motive or malice on the part of the Respondent-Authority to put false allegations against the Petitioner in the matter.

18. After perusal of the aforementioned factual as well as legal position of the case, in our view the Petitioner has failed to establish her case for reinstatement in service on merits; therefore no inference can be drawn against the Respondent at this stage.

19. In the light of the above facts and circumstances of the case, we are of the considered view that this Court in its Constitutional jurisdiction cannot interfere in the findings of facts arrived by the Enquiry Officer appointed in compliance with the

order passed by this Court as we do not see any illegality, infirmity or material irregularity in the enquiry proceedings warranting interference by this Court, hence, the instant Petition is meritless and dismissed along with the listed application (s).

Karachi
Dated: .10.2018.

JUDGE

JUDGE

Shafi Muhammad P/A