

Judgment Sheet

IN THE HIGH COURT OF SINDH AT KARACHI

Constitutional Petition Nos. D-876 & D-877 of 2020

Before :

Mr. Justice Nadeem Akhtar

Mr. Justice Adnan-ul-Karim Memon

Petitioners : Shakir Ali and Sarvech Shaikh
through Malik Naeem Iqbal Advocate.

Mr. Akram Javed, Special Prosecutor NAB.

Mr. Muhammad Nishat Warsi, DAG.

Date of hearing : 12.10.2020.

J U D G M E N T

NADEEM AKHTAR, J. – Vide separate notifications dated 27.02.2019, major penalty of “removal from service” was imposed by the respondents upon both the petitioners ; and, vide separate letters dated 11.12.2019 issued by the respondents, the petitioners were informed that the appeals filed by them against the above major penalty were dismissed by the President of Pakistan. Through these Constitutional Petitions, the petitioners have impugned the above notifications and appellate orders. Since common questions of law and facts are involved in both these petitions, the same were heard together with the consent of the parties and are being disposed of through this common judgment.

2. Relevant facts of these cases, as averred in the petitions, are that Shakir Ali, petitioner in C.P. No.D-876/2020, and Sarvech Shaikh, petitioner in C.P. No.D-877/2020, were appointed on 06.03.2013 through competitive process of recruitment on merits as Deputy Assistant Director in BS-16 and Assistant Director in BS-17, respectively, in the National Accountability Bureau (**‘NAB’**) / respondent No.1. Sarvech Shaikh was promoted on 09.10.2017 to the next post of Deputy Director in BS-18. One Sikandar Ali Abro (**‘the accused’**), who was accused in a case before NAB, lodged FIR No.683/2017 on 19.12.2017 with Darakhshan Police Station Karachi, wherein it was alleged that Sarvech Shaikh and other persons had demanded bribe of Rs.10.000 million from him. Thereafter, a Fact Finding Inquiry Committee (**‘the Committee’**) comprising two officers from NAB Islamabad was formed by the Chairman NAB in order to inquire into the above allegation. The Committee submitted its inquiry report by recommending that severe disciplinary action should be taken against Sarvech

Shaikh under Rule 11.03(1)(b) of National Accountability Bureau (NAB) Employees Terms and Conditions of Service (TCS), 2002 (**'NAB Employees TCS 2002'**), as he was found to be involved in the incident. The Committee also recommended registration of FIR against one Iqbal Channa on the ground that he had impersonated as a NAB officer. It was also recommended by the Committee that the NAB officers mentioned in paragraphs 11-b(3), (4), (5) and (6) of the analysis portion of the inquiry report may be kept under observation, and DG NAB (K) may change the portfolio of the officer mentioned in paragraph 11-b(4) supra i.e. Shakir Ali, petitioner in C.P. No.D-876/2020.

3. Pursuant to the above report / recommendations by the Committee, show cause notices dated 11.01.2018 and 30.03.2018 were issued by NAB to the petitioners Sarvech Shaikh and Shakir Ali, respectively, calling upon them to show cause within fourteen days why one or more penalties, including the penalty of dismissal from service, may not be imposed upon them. It was stated in both the show cause notices that the same were being issued as, according to the authorized officer, there was no need for a formal inquiry in view of the above report. The said show cause notices were responded to by the petitioners through their separate detailed replies. It appears that their replies were rejected and accordingly impugned notifications were issued, stating that the charges of "corruption and misconduct" had been proven against them, and after adopting the due process of law, the competent authority had imposed major penalty of "removal from service" upon them with immediate effect. Being aggrieved with the above major penalty, both the petitioners filed appeals before the President of Pakistan / appellate authority under Rule 13.01(1) and (2) of NAB Employees TCS 2002. Vide separate letters, both dated 11.12.2019, petitioners were informed by the respondents / NAB that their appeals had been dismissed by the appellate authority.

4. The main ground urged by Malik Naeem Iqbal, learned counsel for the petitioners, was that the impugned major penalty of dismissal from service could not be awarded to the petitioners without a formal / regular inquiry and without allowing them the opportunity to cross-examine the prosecution witnesses ; and, as no such inquiry was conducted, the entire impugned exercise undertaken by the respondents and the impugned major penalty imposed by them are contrary to the law laid down by the Hon'ble Supreme Court in (1) Muhammad Idris Khan V/S Secretary / Chairman, Ministry of Railways Islamabad and 5 others, 2006 SCMR 104, (2) Fatima Bibi V/S Deputy District Education Officer and others, 2007 PLC (C.S.) 597, (3) Divisional Forest Officer Kasur and another V/S Zahid Ali, 2011 PLC (C.S.) 1382, (4) Muhammad Afzal V/S Regional Police Officer, Bahawalpur and others, 2012 PLC (C.S.)

728, and (5) *Muhammad Naeem Akhtar V/S Managing Director Water and Sanitation Agency LDA, Lahore and others*, **2017 SCMR 356**. In addition to the above, it was further urged on behalf of the petitioners that the respondents had no authority whatsoever to dispense with the inquiry against them in the facts and circumstances of the case ; the impugned major penalty could not be awarded merely on the basis of the recommendation of the Committee ; the petitioners had no nexus with the accused or with the offence alleged by him in his FIR, thus they could not be implicated in the said criminal case ; proper opportunity of hearing was not afforded to the petitioners by the respondents in accordance with law before taking the impugned action against them ; the petitioners were condemned unheard in violation of Article 10-A of the Constitution of the Islamic Republic of Pakistan, 1973 ; and, the entire exercise undertaken by the respondents was arbitrary, malafide, discriminatory and illegal.

5. On the contrary Mr. Akram Javed, learned Special Prosecutor NAB, contended that it was an open and shut case against the petitioners in view of the findings and recommendations of the Committee, and as such inquiry was not required. It was further contended by him that in view of the above, the competent authority had the discretion and power to dispense with the inquiry under Sub-Rules (1) and (2) of Rule 11.05 of NAB Employees TCS 2002. It was also contended by him that the petitioners never objected when the Committee was constituted to inquire into the allegations made against them, and as such they are now estopped from questioning the findings and recommendations of the Committee and/or the action taken by the respondents in pursuance thereof. In support of his above contentions, he placed reliance upon *Hassan Raza V/S Federal Board of Revenue through Chairman and others*, **2020 SCMR 994**.

6. We have heard learned counsel for the petitioners and learned Special Prosecutor NAB at length and have also examined the material available on record as well as the law cited by them at the bar. It is an admitted position that inquiry against the petitioners was dispensed with by the respondents, and instead of conducting an inquiry against them, the respondents constituted the Committee which rendered certain findings and recommendations against them. It is also an admitted position that the impugned major penalty of removal from service was imposed upon the petitioners merely on the basis of such findings and recommendations. In this context, it is well-settled that the purpose of providing major and minor penalties in the service law was to give choice to the departmental authorities to determine the quantum of punishment in light of the nature of misconduct ; the authorities concerned may in their discretion

award major or minor penalty, but this power must not be exercised in an unjust and arbitrary manner ; except in special circumstances, a civil servant must not be awarded major penalty of dismissal from service without proper inquiry and providing him fair opportunity to explain his position ; imposition of major penalty of dismissal from service, without inquiry, would suggest the element of bias and unfair treatment at least in the matter of quantum of sentence ; findings of a fact finding inquiry / committee, without joining the civil servant against whom findings are compiled, cannot be made basis for his removal from service as such proceedings would be contrary to the principles of natural justice enshrined in the maxim *audi alteram partem* ; the competent authority must not dispense with the inquiry that may be necessary to probe into charge, particularly when there is a likelihood of imposition of major penalty of removal from service if the allegation is proven ; if inquiry is dispensed with without any plausible reason, such dispensation would not be justified ; and, imposition of major penalty of removal from service without holding inquiry would result into grave miscarriage of justice and prejudice to the aggrieved civil servant.

7. The views expressed by us in the preceding paragraph are fortified by the law laid down by Hon'ble Supreme Court in Muhammad Idris Khan, Fatima Bibi, Divisional Forest Officer Kasur, Muhammad Afzal, and Muhammad Naeem Akhtar (supra). Therefore, the impugned dispensation of inquiry against the petitioners, the impugned show cause notices issued to them and the impugned orders of their removal from service, being contrary to law, are not sustainable. In our humble opinion, the case of Hassan Raza cited and relied upon by learned Special Prosecutor NAB cannot be applied to the instant case as the facts and circumstances of the cited case were distinguishable.

8. We do not agree with the contention of learned Special Prosecutor NAB that inquiry was not required in these cases in view of the findings and recommendations of the Committee, or that the competent authority of NAB had the discretion and power to dispense with the inquiry under Sub-Rules (1) and (2) of Rule 11.05 of NAB Employees TCS 2002. Perusal of the impugned show cause notices issued to the petitioners shows that it was vaguely mentioned therein that after examining the reports and their enclosures, the authorized officer had arrived to the conclusion that there was no need for a formal inquiry. No reason whatsoever, let alone any plausible reason, was assigned in the impugned show cause notices for dispensing with the inquiry. Thus, the impugned dispensation of inquiry was not justified in view of Divisional Forest Officer Kasur (supra). Regarding the power and discretion of the authorized officer under Rule 11.05 of NAB Employees TCS 2002, needless to say exercise of such power and discretion must not be arbitrary, malafide,

discriminatory or whimsical, and it must be exercised in accordance with law and the well-established principles of natural justice. We are of the clear view that plausible reason(s) for dispensing with the inquiry against an employee must be disclosed and communicated to him even if Rule 11.05 ibid is silent in this regard.

9. There is another important aspect of these cases. The appeals filed by the petitioners before the President of Pakistan against their removal from service by NAB were rejected, however, this fact was conveyed to them by the respondents / NAB vide separate letters dated 11.12.2019 without supplying to them copies of the orders passed on their appeals. Even the dates of such orders were not disclosed in the above letters. It is stated on behalf of the petitioners that they were not provided any opportunity of hearing in their appeals and till date they have not been informed by the Secretariat of the President / appellate authority about the fate of their appeals, nor have copies of the orders of the purported rejection thereof been supplied to them. In our opinion, the petitioners were entitled to know the reasons that prevailed with the appellate authority for rejecting the grounds urged by them in their appeals. It is well-settled that every court / tribunal / authority is duty-bound to record reasons of its findings in its order / judgment, failing which the order / judgment is considered to be void. We are also of the view that while deciding statutory appeals, the President of Pakistan or the Governor of a Province, as the appellate authority under the statute concerned, are not immune of this important and fundamental legal requirement. Therefore, the order of rejection of the petitioners' appeals purportedly passed by the President of Pakistan / appellate authority is also not sustainable in law.

10. For what has been discussed above, both these petitions are allowed, however, with no order as to costs. Resultantly, the impugned orders of removal of the petitioners from service are hereby set aside and their cases are remanded back to the competent authority of NAB for holding regular inquiry against them after providing opportunity of hearing / representation to them strictly in accordance with law, which exercise shall be completed within three (03) months from the date hereof. Needless to say the question of granting back benefits to the petitioners shall depend upon the outcome of the inquiry to be held in pursuance of this judgment.

J U D G E

J U D G E