

**IN THE HIGH COURT OF SINDH, CIRCUIT COURT
LARKANA**

C.P. No.D- 598 of 2012.

PRESENT:

**Mr. Justice Khadim Hussain M. Shaikh
Mr. Justice Arshad Hussain Khan**

Petitioner : Through Mr. Abdul Rehman A. Bhutto,
Advocate.

Respondent No.1. : Through Mr.Abdul Rasheed Abro,
Assistant Attorney General.

Respondents 2 to 6 : Through Mr. Safdar Ali Ghouri, Advocate.

Date of Hearing : 03.9.2019.

ORDER

ARSHAD HUSSAIN KHAN, J:- The petitioners through
instant constitutional petition have sought following relief(s):-

- a) *To declare the impugned order dated 27.04.2012, removing the petitioner from service, issued by the General Manager (HRO), PTCL Islamabad without lawful authority, arbitrary, in violation of fundamental right of petitioner and also against the principles of natural justice, hence set aside and petitioner be reinstated in service with all back benefits.*
- b) *Award costs of the Petition.*
- c) *Any other relief as deemed fit and proper and in the interest of justice.*

2. Brief facts of the case as presented by the petitioner are that on 03.09.1995 the petitioner was employed as Engineering Supervisor (BPS-11) in the then Telephone and Telegraph Department which was later on converted into PTCL by virtue of Ordinance No.XVI of 1990, subsequently repealed by the Pakistan Telecommunication Corporation Act of XVIII of 1991 published in the gazette of Pakistan on 27.11.1991. It is further averred in the petition that in pursuance of Section 9 of the said Act all departmental employees stood transferred and became employees of the Corporation on the same terms and conditions to which they were entitled before such transfer. It is also

averred that Section 9 *ibid* came under interpretation before the Superior Judiciary of Pakistan to the effect as to whether such transferred employees qualify to be civil servants within the meaning of section 2 of Civil Servants Act 1973 and it was held that such employees would continue to be civil servants as held by Hon'ble Apex Court in the case of Divisional Engineer Phones v. Muhammad Shahid (1999 SCMR 1526). It is further stated that in the backdrop of such legal position, the status of petitioner undergone another change of the repeal of Pakistan Telecommunication Corporation Act 1991, by Section 59 of Pakistan Telecommunication (Re-organization) Act 1996, however, the service of the petitioner was protected by Pakistan Telecommunication (Reorganization) Act, 1996, thus his status remained as civil servant. While those employees who joined services of PTCL after 01.01.1996 ceased to have benefit of protection as held by the Hon'ble Supreme Court in the case reported as Masood Ahmed Bhatti v. Federation of Pakistan and others (2012 SCMR 152). Subsequently, on 01.11.2005 the post of the petitioner was upgraded from BPS-11 to BPS-16 and since then the petitioner was serving as Technical Officer (Engineering) at Switching Division Larkana and in the meantime, he also undergone trainings/courses conducted by the department and throughout his service, the petitioner earned unblemished record by extending duties efficiently. It is further averred that while performing his duties, the petitioner received a letter dated 20.7.2010 whereby he was asked to submit explanation/reply as to why he held unauthorized meeting in Equipment Room creating anonymous situation in a peaceful atmosphere. The petitioner furnished his explanation denying the above allegation but the same was not accepted and it was followed by show cause notice dated 30.12.2011 which contained entirely different allegations that the petitioner has allegedly committed misappropriation in fuel oil to which also the petitioner furnished his reply denying the allegations contained in the show cause notice but the same was also not considered and ultimately he was removed from service vide impugned order dated 27.04.2012 on the basis of alleged investigation report furnished by the investigating committee comprising of two officers, which was communicated to the petitioner by the General Manager (HRO) Communicating Officer, Head Quarter, Islamabad. Being aggrieved by the impugned removal

order dated 27.04.2012; the petitioner filed Departmental Appeal which remained un-responded, giving rise to filing of instant petition before this Court.

3. Upon notice, respondents 2 to 6 filed comments denying the allegations contained in the petition, mainly stated that Pakistan Telecommunication Company Limited has no statutory rules, it is a private entity which was privatized in the year 2006 and now PTCL is managed and controlled by Etisalat Telecommunications and no more organ of State, hence it is not amenable to writ jurisdiction, and that the petitioner enjoys status of a civil servant, as is claimed by the petitioner himself in para No.4 of the petition, therefore, the petitioner cannot challenge his removal from service by filing instant constitutional petition under Article 199 of the Constitution of Islamic Republic of Pakistan which is barred under Article 212 of the Constitution. It is further stated in the parawise comments filed by respondents / company that the petitioner committed misappropriation of fuel for which a departmental investigation was conducted through M/s. Arshad Ahsan, SM (E&M) PTCL Headquarters and Mohammad Mudassar Aijaz, SM (HRA) Hyderabad and based upon their investigation report, the petitioner was served with show cause notice. As regards not conducting proper inquiry, it has been stated that as per rules, it is up to the Authority to decide that in the light of facts of the case, whether any inquiry is necessary or not and once the Authority decides that the inquiry is not necessary, the accused involved would be informed, through a letter in writing, about the proposed action to be taken against him and afford him reasonable opportunity to show cause, therefore, in line with the said rules, petitioner was served with show cause notice. It has been further stated that the petitioner furnished reply to the show cause notice and after due consideration given to his reply in defense, personal hearing was afforded to the petitioner on 9th March, 2012 by HR Team thus after exhausting such disciplinary proceedings as per rules and regulations, the petitioner was awarded major penalty of removal from service finding him guilty of gross misconduct and misappropriation.

4. Mr. Abdul Rehman Bhutto, learned Counsel for the petitioner, during the course of his arguments, has contended that the impugned

order has been passed without adopting due process of law, rules and regulations, without exhausting the requisite formalities of issuing final show cause notice and conducting proper inquiry as well as affording a chance of personal hearing to the petitioner, therefore, the same being based on malafide is not sustainable in law; that in view of the protection available to the petitioner by virtue of Pakistan Telecommunication (Reorganization) Act, 1996, the petitioner cannot be proceeded or removed from service in exercise of powers under PTCL Services Regulations, 1996, hence the impugned order has been passed without justification and it is nullity in the eyes of law. It has been further argued that the impugned order of removal from service is based merely on unilateral investigation without issuing final show cause notice or conducting proper inquiry as well as affording the petitioner a chance of personal hearing, whereby the petitioner has been deprived of recording evidence in his defence and cross-examining the witnesses to thrash out the truth, which is against the principles of natural justice and in violation of his fundamental rights. It is further argued by the learned counsel for the petitioner that no cogent reasons have been recorded for substantiating the major penalty of removal from service, thus the impugned order being non-speaking has been passed in violation of provisions of Article 24-A of the General Clauses Act. He further argued that looking to the fact that the allegations/charge leveled in the show-cause notice were entirely different to the explanation initially issued to the petitioner, which shows that the officials were personally involved in conspiracy to get rid of the petitioner at any cost. He further argued that as regard the allegation of committing misappropriation of fuel/diesel as alleged in the show cause notice, several staff members recorded their statements in favour of the petitioner besides other documentary evidence provided by the petitioner viz. log books etc. were sufficient to prove his innocence but yet the same were not considered while passing such an arbitrary and void impugned order. On all these scores, the learned counsel urged that the impugned order is liable to be set aside and the petitioner may be reinstated with all back benefits. In support of his contentions, learned counsel for the petitioner has relied upon the following case law

1. MASOOD AHMED BHATTI and others v. FEDERATION OF PAKISTAN through Secretary, M/O. Information Technology and Telecommunication and others (**2012 SCMR 152**)
2. DIVISIONAL ENGINEER PHONES, PHONES DIVISION, SUKKUR and another (**1999 SCMR 1526**)
3. ZAIN YAR KHAN v. THE CHIEF ENGINEER, C.R.B.C. WAPDA, D.I..KHAN and another (**1999 SCJ 254**)
4. AZIZULLAH MEMON v. PROVINCE OF SINDH and another (**2007 SCMR 229**)
5. An Unreported Judgment dated 17.03.2014 of Learned Islamabad High Court passed in ICA No.08 of 2012 Re. Pakistan Telecommunication Company Ltd. v. Fazli Malik, etc.
6. An Unreported judgment dated 03.7.2014 in W.P No.D-2657 of 2014 Re. passed by a Division Bench of Peshawar High Court.
7. An Unreported Judgment dated 11.6.2016 of Division Bench of this Court in C.P No.D-2123 of 2012. Re: Shakeel Ahmed v. Pakistan Telecommunication Company Limited and other.

5. Conversely, learned counsel for respondents 2 to 6, during his arguments while reiterating the contents of the comments raised objections to the maintainability of instant petition on the premise that PTCL has no statutory service rules and the Respondent-Company is being managed by its own rules and regulations and besides the petitioner is a civil servant, as claimed by him in para No.4 of his petition, therefore, instant writ petition is not maintainable in law which is hit by Article 212 of the Constitution. He has argued that the petitioner was an employee of respondents-company and he was awarded major penalty of removal from service on the charges of misconduct, misappropriation and corruption. He further argued that the investigation was conducted regarding the allegations against the petitioner and based on the report of investigation committee comprising of two officers, the show-cause notice was issued to the petitioner narrating the charges against him, which was replied by the Petitioner, but the same was not found satisfactory, therefore, he was awarded major penalty of removal from service through impugned order. He further urged that all the rules and regulations were followed

before passing the order of removal from service and impugned order is within the parameters of law and as such not liable to be struck down. On all these scores, he has supported the impugned order of removal of the petitioner from service. In support of his contentions, learned counsel for the respondents relied upon the cases reported as under:

1. NASIRUDDIN GHORI v. FEDERTION OF PAKISTAN through Secretary and 4 others (**2010 PLC 323**)
2. Pakistan Telecommunication Co. Ltd. through Chairman v. IQBAL NASIR and others (**PLD 2011 [SC] 132**)
3. DIVISIONAL ENGINEER PHONES, PHONES DIVISION, SUKKUR and another v. MUHAMMAD SHAHID and others (**1999 SCMR 1526**)
4. EJAZ ALI BUGHATI v. P.T.C.L and others (**2011 SCMR 333**)
5. PAKISTAN INTERNATIONAL AIRLINE CORPORATION and others v. TANVEER-UR-REHMAN and others (**PLD 2010 S.C 676**)
6. PAKISTAN DEFENCE OFFICERS HOUSING AUTHORITY v. JAWAID AHMED (**2013 SCMR 1707**)
7. Syed NAZIR GILLANI v. PAKISTAN RED CRESENT SOCIETY and another (**2014 SCMR 982**)
8. PIA CORPORATION v. Syed ULEMAN ALAM RIZVI and others (**2015 SCMR 1545**).

6. Learned Assistant Attorney General also supported the respondents by adopting the arguments advanced by learned counsel for respondents 2 to 6, and submitted that the petition does not merit consideration and is liable to be dismissed.

7. We have considered the contentions of the learned counsel for the parties and with their assistance, perused the material available on the record and the case law cited at the bar.

8. Since the question of maintainability of the present petition has been raised, therefore, in the first place, we would like to examine the issue of maintainability of instant Petition under Article 199 of the Constitution, 1973. Learned counsel for respondents submits that the respondent-company is a limited company, registered under the Companies Ordinance, 1984, limited by shares having no statutory rules and as such writ petition is

not maintainable as the Hon'ble Supreme Court of Pakistan in the cases of Pakistan Telecommunication Co. Ltd. Through Chairman v. Iqbal Nasir and others (PLD 2011 SC 132), Ejaz Ali Bughti v. P. T.C.L. and others (2011 SCMR 333) held that in the absence of statutory rules, principle of master and servant is applicable between the employees of PTCL and as such constitutional petition is not maintainable. However, the Hon'ble Supreme Court of Pakistan in the case of **Masood Ahmed Bhatti and others v. Federation Of Pakistan through Secretary, M/O. Information Technology and Telecommunication and others (2012 SCMR 152)** came to conclusion that the employees who joined PTCL before 1.1.1996 are governed by the statutory rules of PTCL and employees who joined services after 1.1.1996 are governed by doctrine of master and servant.

9. Admittedly the issue dilated upon by the Hon'ble Supreme Court of Pakistan in **Masood Ahmed Bhatti's case** (Supra) was not opined in the earlier two judgments. The Hon'ble Supreme Court of Pakistan in the said case has opined as under: -

"14. We may now consider the effect of this transfer of the appellants to PTCL along with the assets and liabilities of the Corporation and the implications of such transfer on the nature of the rules of employment applicable to the appellants from the date (i.e. 1.1.1996) they became employees of PTCL. The proviso to section 35(2) of the Re-organization Act provides a clear answer to this controversy. It specifies that even after the transfer of the appellants to PTCL their terms and conditions of service which existed on 1-1-1996, would be the base and bare minimum in matters of their employment with PTCL. These terms and conditions were imposed on PTCL by the Re-organization Act, as a legal obligation and the Vesting Order was issued by the Federal Government" in exercise of powers conferred by section 35" of the Re-organization Act. The Federal Government, it will be noted, had been granted limited powers only; the constraint on it was that the terms and conditions of service of employees of the Corporation could not be varied to their disadvantage. PTCL, as the recipient of the properties and rights of the Corporation, also assumed the liabilities of the Corporation. Such liabilities necessarily include the liabilities owed to the employees, arising from the terms and conditions of their service as these could not be varied to their disadvantage.

15. Thus it is evident that at the moment of transition when the appellants ceased to remain the employees of the Corporation and became the employees of PTCL, they admittedly were governed by rules and regulations which had been protected by the PTC Act. The said rules, therefore, by definition were statutory rules as has been discussed above. PTCL, no doubt, could make beneficial rules in relation to its employees which were in addition to the rules of employment prevailing on 1-1-1996. However, by virtue of the aforesaid proviso, PTCL had no power to "vary the terms and conditions of service" of its employees who were previously employees of the Corporation, "to their disadvantage".

Even the Federal Government was debarred by virtue of section 35 *ibid*, from varying such terms and conditions of service to the disadvantage of the appellants.

16. An easy and uncomplicated test becomes available to us to help determine, the status of the employment rules governing the appellants. If the current employer of the appellants viz. PTCL is constrained by legislation such as section 35(2) of the Re-organization Act, and as a consequence, cannot vary the existing rules to the disadvantage of the appellants, because of such legislation, it must follow that such law has the effect of saving the rules which existed when the appellants became employees of PTCL. Such existing rules, having been protected by section 35(2), therefore, can only be categorized as statutory rules.

17. Section 36 of the Re-organization Act also has relevance in determining the controversy which arises in these appeals. Sub-section (2) of section 36 gives protection to the terms and conditions of service of employees such as the appellants who stood transferred from the Corporation to PTCL on 1-1-1996. Their terms and conditions of service cannot be altered adversely by PTCL "except in accordance with the laws of Pakistan or with the consent of the transferred employees and the award of appropriate compensation". When this legal provision is read together with section 35, it becomes abundantly clear that by operation of the Re-organization Act, the terms and conditions of service of the appellants as on 1-1-1996 stood conferred on them as vested right's under the said law."

And finally concluded that the employees who were initially joined Pakistan Telecommunication Corporation under the Pakistan Telecommunication Corporation Act 1991 fall within the definition of transferred employees and as such they are governed by statutory rules of Pakistan Telecommunication Corporation Act, 1991.

The view taken in case of **Masood Ahmed Bhatti (Supra)** was subsequently endorsed by the larger bench of the Honorable Supreme Court while deciding the Civil Review Petition filed by PTCL in the case reported as PTCL and others v. Masood Ahmed Bhatti and others (2016 SCMR 1362). The Honourable Supreme Court while dealing with issue in the Civil Review Petition has, *inter alia*, held as under:-

“A fleeting glance at the provisions quoted above would reveal that the departmental employees on their transfer to the Corporation became employees of the Corporation under section 9 of the Act of 1991 and then of the Company under section 35 of the Act of 1996. Their terms and conditions of service were fully protected under section 9(2) of the Act of 1991 and 35(2) of the Act of 1996. None of the terms and conditions could be varied to their disadvantage as is provided by the sections reproduced above. Not only that the legislature also bound the Federal Government to guarantee the existing terms and conditions of service and rights including pensionary benefits of the transferred employees. Since they by virtue of the aforesaid provisions became employees of the Corporation in

the first instance and then the Company, they did not remain Civil Servants any more. But the terms and conditions of their service provided by sections 3 to 22 of the Civil Servants Act and protected by section 9(2) of the Act of 1991 and sections 35(2), 36(a) and (b) of the Act of 1996 are essentially statutory. Violation of any of them would thus be amenable to the constitutional jurisdiction of the High Court. Though in the cases of Pakistan Telecommunication Corporation and another v. Riaz Ahmed and 6 others and Divisional Engineer Phones, Phones Division, Sukkur and another v. Muhammad Shahid and others (supra) it was held that the departmental employees on their transfer to the Corporation and then to the Company would continue to be the Civil Servants, but this interpretation does not appear to be correct as they on their transfer became employees of the Corporation under section 9 of the Act of 1991 and then of the Company under section 35 of the Act of 1996. Retention of their status as civil servants is thus not supported by the words used in the aforesaid provisions.”

10. After the judgment in Masood Ahmed Bhatti's case it is an established fact that the petitioner who joined PTCL on 03.09.1995, prior to the cutoff date, that is, 1.1.1996 as mentioned in Masood Ahmed Bhatti's case, is governed by the statutory rules and as such the writ petition is maintainable.

11. Reverting to the case on merit, the fact of the matter as transpires from the record is that on verbal directive of the management of Respondent-PTCL a two member committee was constituted for investigation regarding diesel miss-appropriation in Larkana Exchange. The said committee submitted its report on 28.10.2011 and pursuant to the said report a show-cause notice dated 30.12.2011 was issued to the petitioner, which was subsequently replied to by the petitioner 04.02.2012. Thereafter, respondent-PTCL through impugned orders dated 27.04.2012 imposed a major penalty of removal from the service. The petitioner after having been aggrieved by the said removal order, filed departmental appeal on 30.04.2012. However, petitioner having not received any decision on the said appeal filed the instant constitutional petition. For the sake of ready reference the relevant portion of the impugned order is reproduced as under:

“After having gone through the defence reply submitted by you, report of the investigating committee and other facts and circumstances of the case the “Authority”, has found your defence statement unsatisfactory. Therefore, the Authority has decided to impose major penalty of “Removal from Service” upon you with immediate effect, under PTCL service Regulations-1996.”

12. The discretion to dispense with the regular inquiry could not be

exercised arbitrarily but honestly, justly, and fairly in consonance with the spirit of law, after application of judicious mind and for substantial reasons. For this purpose, the nature of allegations against the accused has to be considered. In a case when it is clear to the authority that the allegations could be decided with reference to admitted record or it forms an opinion that un-rebuttable evidence on the touchstone of QANUN-E-SHAHADAT, to prove the charge against the accused/employee is available on the record, the procedure for regular inquiry, may be dispensed with, otherwise, the ends of justice demand an inquiry.

There can be a situation where real fate of allegations can only be adjudged by a regular inquiry and not by mere textual proof. The Hon'ble Supreme Court of Pakistan in the case of Abdul Qayyum vs. D.G. Project Management Organization JS HQ, Rawalpindi and 2 others (2003 SCMR 1110) has held that requirement of regular inquiry could be dispensed with in exceptional circumstances. Where recording of evidence was necessary to establish the charges, then departure from requirement of regular inquiry under the Rules would amount to condemn a person unheard.

13. Adverting to the case, there is nothing available on the record which could show that upon denying the allegations by the petitioner whether any opportunity of personal hearing was afforded to the petitioner or not and further any regular inquiry was conducted and/or any opportunity to cross-examine the witnesses was provided. In the present matter specific allegations of misappropriation and misconduct have been levelled against the petitioner, however, when the petitioner in response to Show Cause Notice, had specifically denied the charges against him and furthermore, considering the nature of charges, all those allegations required evidence, then it had become incumbent upon the authority to have ordered for a regular inquiry and in the above given situation departure from normal course does not reflect bonafides on the part of the authority. In this regard reliance can be placed on the case of Basharat Ali v. Director, Excise and Taxation, Lahore and another (1997 PLC [CS] 817) [Supreme Court of Pakistan.

It is by now well settled that right to a fair trial means right to a

proper hearing by an unbiased competent forum. Right to a fair trial has been associated with the fundamental right of access to justice, which should be read in every statute even if not expressly provided for unless specifically excluded. While incorporating Article 10A in the Constitution and making the right, to a fair trial a fundamental right, the legislature did not define or describe the requisites of a fair trial, which showed that perhaps the intention was to give it the same meaning as is broadly universally recognized and embedded in jurisprudence in Pakistan. Reliance can be placed on the SUO MOTU CASE NO.4 OF 2010 (PLD 2012 SC 553).

Besides above it may be also be observed that after the judgment of **Masood Ahmed Bhatti (supra)**, it has been distilled that the terms and condition of the employees who have been transferred to the PTCL by virtue of section 35 of Pakistan Telecommunication (Re-organization) Act, 1996 cannot be varied to their disadvantage as the same having been protected statutorily and as such the terms and condition of said employees shall be governed under Government Servant (Efficiency & Disciplinary) Rules 1973. Similar view was taken by this Court in the case of Shakeel Ahmed v. Pakistan Telecommunication Company limited and 4 others [2017 PLC (CS) Note 76].

Insofar as the present case is concerned, the respondent-PTCL carried out disciplinary proceedings against the petitioner under PTCL Service Regulations-1996, which is of no legal effect and as such liable to be struck down as it is a settled principle of administration of justice that where things have not been done in the manner as required by the law and procedure, the same cannot be given legal sanctity particularly when the same are resulting in penal consequences or causing right of an individual. Reliance in this can be placed on the case of MUHAMMAD MUSTAFA v. Syed AZFAR ALI and 3 others [PLD 2014 SINDH 224].

Moreover, the Honourable Supreme Court in the case of MUHAMMAD ANWAR and others v. Mst. ILYAS BEGUM and others [PLD 2013 SC 255], inter alia, has held as under:

“...It is a well-known principle of law that where the law requires an act to be done in particular manner it has to be done in that manner alone as such dictate of law cannot be termed as technicality”

14. The case law relied upon by the learned counsel for respondent-PTCL since has already been considered/discussed by the larger bench of the Honourable Supreme Court while dealing with issue in Civil Review Petition preferred in respect decision of Masood Ahmed Bhatti (Supra) therefore, no further discussion is required to be made in respect thereof.

15. The upshot of the above discussion is that the impugned order imposing major penalty of removal from the service, passed against the petitioners is not sustainable in law. Consequently, this petition is allowed, the impugned order dated 27.04.2012 is set-aside and the petitioner is reinstated in the service. However, the respondents-PTCL, may initiate *de novo* inquiry in the matter in accordance with law within two months from the date of this order. The payment of back benefits shall be subject to final outcome of the inquiry proceedings and report.

JUDGE

JUDGE

Larkana
Dated: .09.2019