

Order Sheet

IN THE HIGH COURT OF SINDH KARACHI

Constitutional Petition No. D – 3075 of 2015

Before :

Mr. Justice Nadeem Akhtar

Mr. Justice Adnan-ul-Karim Memon

Muhammad Tufail V/S The Chief of Naval Staff and 02 others.

Date of hearing
& decision : 17.03.2020.

Mr. Raees Ahmed Khan Tanoli, advocate for the petitioner.
Mr. Muhammad Nishat Warsi, DAG along with Ms. Saba Rasool, Lieutenant Commander Pakistan Navy and Captain Nawaz Mirza, Deputy JAG, Pakistan Navy.

ORDER

ADNAN-UL-KARIM MEMON, J. Petitioner was discharged from service of Pakistan Navy vide office order dated 11.3.2014 in terms of rule 0240 of Naval Regulation. The petitioner has invoked the constitutional jurisdiction of this Court, seeking declaration to the effect that the entire disciplinary proceedings initiated against him by the respondent-Pakistan Navy, culminating into his conviction were mala fide, without jurisdiction and coram non judice, thus liable to be annulled.

2. On perusal of record, it appears that the petitioner preferred statutory appeal before the Competent Authority, which was dismissed on 24.6.2014. In the present matter the following questions of law are involved :

i) Whether jurisdiction of this court is barred under Article 199(3) of the Constitution?

ii) Whether major punishment awarded by the Field General Court Martial against the petitioner was mala fide, without jurisdiction and coram non judice?

iii) Whether the offence, said to have been committed by the petitioner, was a civil offence or a military offence falls under the Pakistan Army Act, 1952, if so, to what effect?

3. Mr. Raees Ahmed Khan Tanoli, learned counsel for the petitioner, has submitted that the impugned orders of the Naval authorities are mala fide, coram non judice and without jurisdiction, therefore, the present petition is not barred under Article 199 (3) of the Constitution of Islamic Republic of Pakistan, 1973. It

is further contended by him that the impugned order of discharge from service on the basis of summary trial is illegal and discriminative in nature, which is liable to be set aside. Per learned counsel, the petitioner was not given fair opportunity of hearing and was discharged from his service without issuing any show cause notice or conducting any Domestic Enquiry and that he was condemned unheard. He further argued that the petitioner has served for 22 (twenty two) years active service in the Pakistan Navy with a clean and unblemished service record. However, he was condemned on the ground of misconduct ; that factum could not be proved during summary trial, which was an unconstitutional act and in violation of fundamental rights of the petitioner. Learned counsel has relied upon the case of Federal Government M/o Defence Rawalpindi v. Lt. Col. Munir Ahmed Gill, **2014 SCMR 1530**, Federation of Pakistan and others v. Raja Muhammad Ishaq Qamar and others, **PLD 2007 SC 498** and Ex. Lt. Col. Anwar Aziz v. Federation of Pakistan through Secretary, Minister of Defence, Rawalpindi and others, **PLD 2001 SC 549**.

4. Mr. Muhammad Nishat Warsi, learned DAG, has briefed us with the factual and legal position of the case and submitted that petitioner made severe allegations against his superior for which he was tried summarily by the competent authority under Sections 42 and 72 of Pakistan Navy Ordinance, 1961, and was awarded punishment of dismissal from Naval service, and all his pay and allowances were also forfeited vide order dated 11.03.2014. He filed an appeal before the Court of Appeals against the award of punishment with the prayer to reinstate him in service. Petitioner was heard and order of the competent authority was maintained in appeal. He submits that the petitioner filed an application for grant of pensionary benefits which was regretted vide order dated 16.04.2015, however, appellate authority has taken lenient view so far as provision of monetary benefit is concerned, if applicable under the rules. On legal position, he submits that the Writ Jurisdiction of this Court is barred under Article 199(3) of the Constitution as the matter related to the terms and conditions of the petitioner's service and also with respect to action taken against him as a member of the Armed Forces.

5. We have heard both the parties on the maintainability of the captioned petition and perused the record.

6. It is an admitted fact that the petitioner has remained a Member of the Armed Forces and as such his service was governed by the Ordinance, Rules

and Regulations of Pakistan Navy. For the sake of brevity, we would like to reproduce the relevant portion of Article 199(3) of the Constitution as follows:-

"(3). An order shall not be made under clause (1) on application made by or in relation to a person, who is a member of the Armed Forces of Pakistan, or who is for the time being subject to any law relating to any of those Forces, in respect of his terms and conditions of service, in respect of any matter arising out of his service, or in respect of any action taken in relation to him as a member of the Armed Forces of Pakistan or as a person subject to such law."

7. Article 199(3) of the Constitution clearly stipulates a bar to jurisdiction insofar as the matters pertaining to the service of any member of Armed Forces of Pakistan are concerned. Reference in this regard may be made to the decision given in the case of Muhammad Mushtaque v. Federation of Pakistan, **1994 SCMR 2286**, wherein it has been held that:-

"The High Court was approached under Article 199 for grant of a relief under Sub-Article (1) thereof. The relief regarding Fundamental Rights is included in Sub-Article (1), which is clearly barred under Article 199 (3) with reference to Sub-Article (1) thereof. The High Court had no jurisdiction in the matter."

8. In the case of Ex. Lt. Col. Anwar Aziz (PA-7122) v. Federation of Pakistan (PLD 2001 Supreme Court 549), it has been held that:

"This Court can interfere only in extraordinary cases involving question of jurisdictional defect when proceedings before that forum become coram non iudice or mala fide. The matters relating to the Members of the Armed Forces or who for the time being are subject to any law relating to any of these Forces in respect of terms and conditions of service or in respect of any action taken in relation to him as Member of Armed Forces or as a person subject to such law, is barred by Article 199 (3) of the Constitution. Article 8 (3) of the Constitution also envisages that the provisions of this Article shall not apply to any law relating to members of the Armed Forces, or of the Police or of such other forces as are charged with the maintenance of public order, for the purpose of ensuring the proper discharge of their duties or the maintenance of discipline among them."

9. We have noticed that similar matter came up for hearing before this Court in the case of Muhammad Asif Vs. Federation of Pakistan & others, **2018 PLC (C.S) Note 85**, whereby learned Division Bench of this Court dismissed the constitutional petition of an employee of Pakistan Navy, who was discharged from service. The aforesaid order was assailed before the Hon'ble Supreme Court of Pakistan in C.P No.186-K / 2016, the Hon'ble Supreme Court dismissed the petition vide order dated 12.03.2018 with the following observation:

"3. We are not satisfied with such answer of learned ASC for that the petitioner has challenged the order of his discharge from service of Pakistan Navy by filing constitutional petition in the High Court and the

High Court in the impugned order in the quoted observation has dealt with the question of maintainability of constitutional petition, which is unexceptional one.

4. Learned ASC was asked as to what remedy the petitioner has against the order of discharge of his service, he could not give any answer to such question to the Court. In this view of the matter, the petition is dismissed and leave refused.”

10. We, therefore, while deciding this writ petition, in exercise of the powers under Article 199 of the Constitution, have to be cognizant of Sub-Article (3) of the aforementioned Article, which envisages that no order shall be made in relation to a person, who is a member of the Armed Forces, or in respect of any matter arising out of his service or in respect of any action taken in relation to him as member of Armed Forces. We, therefore, in absence of the exceptions as enunciated in the case law cited above, cannot travel beyond and dilate upon the merits of the instant case and interfere with any Order passed under the hierarchy of Respondents, pursuant to their applicable laws.

11. In the light of the foregoing, we are of the view that the case of petitioner squarely falls within the ambit of the ouster clause of Article 199(3) of the Constitution, therefore, there is a bar of jurisdiction of this Court from entertaining the instant Constitutional Petition. Hence, the same is dismissed with no order as to costs. However, the petitioner would be at liberty to avail his remedy as provided to him under the applicable laws for his service benefits.

JUDGE

JUDGE

Nadir*