JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

I.C.A.No.83 of 2022
Federation of Pakistan and others
Versus
Tanvir Akhtar Butt and others

Date of Hearing:	19.10.2022
Appellants by:	M/s Suleman Ahmed Kazmi Legal Advisor and Huma Noreen Hassan, Advocates. Raja Muhammad Jawad Arslan, learned Assistant Attorney-General.
Respondents by:	M/s Muhammad Shoaib Shaheen and Zahid Hussain, Advocates.

MIANGUL HASSAN AURANGZEB, J:- Through the instant intra Court appeal, the appellants impugn the judgment dated 30.12.2021 passed by the learned Judge-in-Chambers whereby writ petition No.664/2020 filed by the respondents was allowed and the appellants were directed to issue formal regularization orders without any condition and also to release the pensionary benefits of respondent No.3, Muhammad Ilyas (who had retired from service), within a period of 30 days.

2. The facts essential for the disposal of the instant appeal are that Pakistan Railways had incorporated a company by the name of Pakistan Railway Advisory & Consultancy Services Limited (**"PRACS"**). Respondents No.1 to 3 were appointed in PRACS on contract basis through letters dated 17.07.1990, 01.06.1992 and 23.06.1992, respectively, for a period of one year. The contractual nature of their services was extended from time to time. Respondents No.1 to 3 were transferred from PRACS to the Information Technology, Directorate of Pakistan Railways vide letters dated 29.10.2002, 31.12.2002 and 31.12.2002, respectively. The respondents' employment continued to remain on contract basis.

3. The respondents filed writ petition No.2081/2006 before the Hon'ble Lahore High Court seeking the regularization of their services.

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After the establishment of this Court, the said petition was transmitted to this Court. During the pendency of the said petition, the names of the respondents were sent by Pakistan Railways to the Cabinet Sub-Committee on the Regularization of Contracts / Daily Wages Employees in the Ministries / Divisions / Attached Departments / Autonomous Bodies / Organizations (“the Cabinet Sub-Committee”). The said Committee considered the names of several contract employees of Pakistan Railways, including the respondents. The said Committee, in its meeting dated 29.11.2012, approved the regularization of contract employees, including the respondents, subject to the fulfillment of the recruitment criterion and the availability of posts. The minutes of the said meeting show that the respondents were serving against BPS-18 posts.

4. Apparently, Pakistan Railways had regularized the services of several contract employees through notification dated 16.03.2012 without resort to the Federal Public Service Commission. The respondents were not amongst the employees whose services had been regularized through that notification. Writ petition No.2081/2006 that had been filed by the respondents was allowed vide judgment dated 03.03.2014 passed by this Court. This Court had held that Pakistan Railways could not treat the respondents differently from the employees who were similarly placed and whose services had been regularized through Pakistan Railways’ notification dated 16.03.2012.

5. Civil petition No.1007/2014 preferred by Pakistan Railways against the judgment dated 03.03.2014 passed by this Court was dismissed as withdrawn by the Hon'ble Supreme Court vide order dated 27.06.2014. With the dismissal of the said petition, the judgment dated 03.03.2014 passed by this Court in the respondents’ favour attained finality.

6. Since Pakistan Railways did not comply with the said judgment dated 03.03.2014 passed by this Court, the respondents filed a contempt petition (criminal original No.05/2015) before this Court. During the pendency of the said contempt petition, Pakistan Railways

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issued a notification dated 09.01.2020 whereby the respondents' services were conditionally regularized with prospective effect. The said notification had been issued subject to the final outcome of writ petition No.3917/2015 filed before the Hon'ble Lahore High Court by the employees of Pakistan Railways whose regularization notification dated 16.03.2012 had been modified.

7. Vide order dated 13.01.2020, this Court disposed of the said contempt petition with the observation that the direction issued by this Court in the judgment dated 03.03.2014 passed in writ petition No.2081/2006 had been complied with by Pakistan Railways by issuing notification dated 09.01.2020 whereby the respondents' services were conditionally regularized with prospective effect. Furthermore, in the said order dated 13.01.2020, this Court observed that if the respondents are aggrieved by the said notification dated 09.01.2020, they were at liberty to challenge the same before a competent forum in accordance with the law.

8. Since the respondents wanted their regularization to be made effective from 29.11.2012 (i.e., the date when the Cabinet Sub-Committee approved the regularization of the respondents' services subject to the fulfillment of recruitment criterion and availability of posts), they filed writ petition No.664/2020 before this Court. In the prayer clause of the said petition, the respondents did not just want their regularization to be made effective from 29.11.2012 with all consequential back benefits but also for their services during the period when they had remained contract employees of PRACS to be counted for pay protection, pensionary benefits and promotion.

9. Vide impugned judgment dated 30.12.2021, the writ petition was allowed with the direction to Pakistan Railways to issue formal letters of regularization without any condition and also to release the pensionary benefits of respondent No.3 who had retired from service. The said judgment has been assailed by Pakistan Railways in the instant appeal.

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10. Learned counsel for the appellants, after narrating the facts leading to the filing of the instant appeal, submitted that since the respondents were civil servants, they could not have filed a writ petition seeking the regularization of their services to be made with retrospective effect or to seek any other service benefit; that the thrust of the judgment dated 03.03.2014 passed by this Court in writ petition No.2081/2006 was that the respondents should be treated at par with the employees of Pakistan Railways whose services had been regularized through notification dated 16.03.2012 without resort to the Federal Public Service Commission; that Pakistan Railways had complied with the said judgment dated 03.03.2014 by regularizing the respondents' services vide notification dated 09.01.2020 with prospective effect; that the respondents' services could not have been regularized with effect from 16.03.2012 since the notification dated 16.03.2012, whereby the services of other contract employees of Pakistan Railways had been regularized, was withdrawn vide notifications dated 04.09.2013, 08.05.2014 and 30.05.2014 which have been assailed before the Hon'ble Lahore High Court in writ petition No.3917/2015; that the respondents' services have been regularized subject to the final outcome of writ petition No.3917/2015; and that in the event the said petition is dismissed by the Hon'ble Lahore High Court, the respondents will have no reason to seek their regularization to be made with retrospective effect. Learned counsel for the appellants prayed for the appeal to be allowed and for writ petition No.664/2020 filed by the respondents to be dismissed.

11. On the other hand, learned counsel for the respondents reiterated the facts leading to the filing of the instant appeal and submitted that the impugned judgment dated 30.12.2021 does not suffer from any legal infirmity; that this Court, in its judgment dated 03.03.2014 passed in writ petition No.2081/2006, had issued an unequivocal direction for the regularization of the respondents' services; that when the said judgment was passed, Pakistan Railways had not asserted that the regularization of similarly placed employees

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made through notification dated 16.03.2012 had been withdrawn or was in the process of being withdrawn; that the plea regarding the withdrawal of the said notification dated 16.03.2012 was available to Pakistan Railways when it filed civil petition No.1007/2014 before the Hon'ble Supreme Court but with the dismissal of the said petition, the said plea would be deemed to have been turned down; that the learned Judge-in-Chambers was correct in turning down the said plea raised on behalf of Pakistan Railways on the ground of constructive *res judicata;* that the observations made by this Court in the order dated 13.01.2020 passed in a contempt petition (criminal original No.05/2015) cannot operate to the respondents' detriment as this Court had permitted them to assail the notification dated 09.01.2020 before the competent forum; and that since the Cabinet Sub-Committee had approved the regularization of the respondents' services in its meeting dated 29.11.2012, it was obligatory on Pakistan Railways to have made the respondents' regularization effective from the said date. Learned counsel for the respondents prayed for the appeal to be dismissed.

12. We have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance. The facts leading to the filing of the instant appeal have been set out in sufficient detail in paragraphs 2 to 9 above and need not be recapitulated.

13. We propose, in the first instance, to determine whether this Court could, in exercise of its jurisdiction under Article 199 of the Constitution, hold that the respondents' regularization be made without any condition. We have noticed that the learned Judge-in-Chambers has not issued directions for the respondents' services to be regularized with retrospective effect.

14. When the respondents filed writ petition No.2081/2006 seeking the regularization of their services, their status was of contract employees of Pakistan Railways. When the said petition was filed in the year 2006 and when it was decided vide judgment dated 03.03.2014,

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the respondents did not have the status of civil servants. With the issuance of the notification dated 09.01.2020 issued by Pakistan Railways, whereby the respondents' services were regularized conditionally subject to the final outcome of writ petition No.3917/2015 (which is pending before the Hon'ble Lahore High Court and vide interim order dated 16.03.2015 the Hon'ble Court suspended the operation of notifications dated 04.09.2013, 08.05.2014 and 30.05.2014), the respondents became regular employees of Pakistan Railways. In other words, they have attained the status of civil servants and are entitled to all the benefits and privileges of civil servants. Through writ petition No.664/2020, the respondents wanted their regularization to be made with retrospective effect *i.e.,* with effect from 29.11.2012 when the Cabinet Sub-Committee approved the regularization of their services subject to the fulfillment of recruitment criterion and availability of posts. The respondents had also prayed for other service benefits, referred to in paragraph 8 above, to be granted to them. The respondents, as civil servants, were seeking a benefit clearly pertaining to the terms and conditions of their service with Pakistan Railways. Vide order 13.01.2020 this Court, while disposing of criminal original No.05/2015 vide order dated 13.01.2020, observed that the respondents could assail the notification dated 09.01.2020 before the *"competent forum."* It is our view that the forum competent to determine whether the respondents' regularization should have been made with retrospective effect would not be this Court but the Federal Service Tribunal.

15. We are cognizant of the respondents' grievance that the direction issued by this Court, in its judgment dated 03.03.2014 passed in writ petition No.2081/2006 to regularize their services and treat them at par with similarly placed employees of Pakistan Railways, whose services had been regularized through notification dated 16.03.2012 without resort to the Federal Public Service Commission, should have been implemented without making the respondents' regularization subject to the final outcome of writ

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petition No.3917/2015 pending before the Hon'ble Lahore High Court, but this Court can only interfere in the matter where it has jurisdiction to do so.

16. No matter how tempted this Court is while exercising jurisdiction under Article 199 of the Constitution to interfere with an order or a notification issued by the Government, it cannot do so where its jurisdiction is barred under Article 212 of the Constitution.

17. Indeed after the regularization of the respondents' services *albeit* conditionally through notification dated 09.01.2020, they have attained the status of civil servants and are entitled to all benefits and privileges of civil servants. The question as to whether their regularization should have been made unconditionally or that it should have been made with retrospective effect or that they should have been given service benefits of regular employees since 29.11.2012 are matters clearly pertaining to the terms and conditions of their services. These are matters that the respondents could have agitated before the Federal Service Tribunal and the jurisdiction of this Court is barred under Article 212(2) of the Constitution, which is reproduced herein below:-

> ***"(2) Notwithstanding anything hereinbefore contained, where any Administrative Court or Tribunal is established under clause (1), no other court shall grant an injunction, make any order or entertain any proceedings in respect of any matter to which the jurisdiction of such Administrative Court or Tribunal extends and all proceedings in respect of any such matter which may be pending before such other court immediately before the establishment of the Administrative Court or Tribunal, other than an appeal pending before the Supreme Court, shall abate on such establishment:***
> ***Provided that the provisions of this clause shall not apply to an Administrative Court or Tribunal established under an Act of a Provincial Assembly unless, at the request of that Assembly made in the form of a resolution, Majlis-e-Shoora (Parliament) by law extends the provisions to such a Court or Tribunal."***

18. It is well settled that the jurisdiction of this Court is ousted in matters which fall within the jurisdictional domain of the Service Tribunal. Even if this Court is to grant interim relief as a stopgap measure until the respondents are in a position to agitate their grievances before the Federal Service Tribunal, it would amount to

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assuming jurisdiction over the *lis.* In doing so, this Court would be going against the mandate of Article 212(2) of the Constitution. In holding so, we derive guidance from the law laid down by the Superior Courts in the following cases:-

(i) In the case of National Assembly Secretariat Vs. Manzoor Ahmed (2015 SCMR 253), it has been held as follows:

> ***"8. We have heard the learned counsel for the parties and have perused the record. Admittedly, respondent No.1 is a Civil Servant and, therefore, he could not have approached the High Court under Article 199 of the Constitution for redressal of his grievance, which pertained to the terms and conditions of his Service in view of the bar created under Article 212(2) of the Constitution. The High Court, therefore, was not competent to adjudicate the issue raised in the Writ Petition. The High Court has fallen in error while proceeding on the erroneous assumption that respondent No.1 had raised the issue of violation of the statutory Rules, therefore, it was competent to decide the issues. This was an incorrect approach of the learned High Court to entertain a Constitution Petition of a Civil Servant on the ground of the statutory violation. Such grievances of a Civil Servant fall within the domain of the Federal Service Tribunal as mandated by the Constitution."***

(ii) In the case of Ali Azhar Khan Baloch Vs. Province of Sindh (2015 SCMR 456), it was held as follows:-

> ***"149. Article 212 of the Constitution 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 Tribunals."***

Furthermore, it was held that the exercise of jurisdiction by way of a suit and a Constitution petition filed by a civil servant with regard to his terms and conditions of service is violative of Articles 175, 212 and 240 of the Constitution and the law. The Hon'ble Supreme Court also observed that the admission of suits and petitions by the learned Judges concerned *"obviously confront and defy Article 189, if not attract the provisions of Article 209 of the Constitution."*

(iii) In the case of Rai Ahmad Ali Vs. Province of Punjab and others (1999 SCMR 1832), it was held as follows:-

> ***"Article 212 of the Constitution is a bar against filing of a Constitutional petition in relation to the terms and conditions of civil servants. It has been repeatedly held by this Court that a Constitutional petition under Article 199 of the Constitution is not maintainable in relation to any matter connected with the terms and conditions of service in respect whereof the appropriate Service Tribunal is possessed of the requisite jurisdiction, in view of the provisions contained in Article 212 of the Constitution. This Court has also held that even in cases where the order is alleged to be mala fide, the bar of Article 212 is attracted."***

(iv) In the case of Ayyaz Anjum Vs. Government of Punjab, Housing and Physical Planning Department through Secretary and others (1997 SCMR 169), it has been held as follows:-

> ***"Clearly, the matters relating to the posting and transfer of a civil servant relate to the terms and conditions of his service. Disputes about these matters fall within the exclusive jurisdiction of the appropriate Service Tribunal. The jurisdiction of High Court is barred in these matters by the express provisions of Article 212(2) of the Constitution."***

(v) Recently, in the case of Irfan Aman Yousafzai Vs. Federation of Pakistan (2017 PLC (C.S.) 905), the Division Bench of the Hon'ble Peshawar High Court, after referring to a catena of case law, has laid down the following principles with respect to a challenge being made by a civil servant to the *vires* of rules / notification:-

> ***"(i) A Civil Servant can move the Apex Court under Article 184(3) of the Constitution, in cases where vires of service rules or notifications are challenged on the touch stone of being against their fundamental rights with the paramount condition that the matter be of public importance.***
> ***(ii) Civil Servant can move the High Court in its constitutional jurisdiction under Article 199 of the Constitution only in cases where the bar of Article 212 of the Constitution cannot be invoked, as the Federal Services Tribunal lacks the jurisdiction to entertain the impugned matter.***
> ***(iii) Civil Servant can challenge the Service Rules or Notification before the Federal Services Tribunal, as the same are deemed to be final orders, within the contemplation of section 4(1) of Civil Servant Tribunal Act, 1973.***
> ***(iv) Civil Servant can move the Services Tribunal challenging the vires of the rules even on the touch stone of being in violation of fundamental rights or mala fide.***

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(v) The Civil Servant cannot move the Constitutional jurisdiction of a High Court challenging the vires of a service rule or notifications, which affects the prospects of promotion of a civil servant even if the challenge is made on the touch stone of breach of fundamental rights of the civil servant or mala fide on the part of the Executive to frame the said rules or Notification."

19. In view of the above, the instant appeal is allowed; the impugned judgment dated 30.12.2021 is set aside; and writ petition No.664/2020 is dismissed as not maintainable.

(ARBAB MUHAMMAD TAHIR)
JUDGE

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON 08/11/2022

(JUDGE) **(JUDGE)**

APPROVED FOR REPORTING

Qamar Khan

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