JUDGMENT SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

W.P No.2205 of 2022

ZAHEER ABBAS.
Vs.
FEDERATION OF PAKISTAN, ETC.

Petitioner by	**:**	**Mr. Usman Lateef Baig, Advocate.**
Respondents by	**:**	**Rana Imran Farooq, AAG.**
Date of hearing	**:**	**27.01.2023.**

SAMAN RAFAT IMTIAZ, J. Through the instant writ petition, the Petitioner [Zaheer Abbas] seeks direction to the Respondent No. 2 [Director General, Intelligence Bureau, Islamabad] to decide the Petitioner's appeal in accordance with Section 24-A of the General Clauses Act, 1895.

2. Briefly stated, the facts as per the Memo of Petition are that the Petitioner was working as an Inspector in the Intelligence Bureau when the Respondent No.4 [Director (Admin), Intelligence Bureau, Islamabad] issued order dated 26.02.2021 imposing major penalty of compulsory retirement from government service upon the Petitioner with effect from 25.02.2021 in terms of Rule 4(1)(b)(ii) of the Government Servants (E & D) Rules, 1973. The Petitioner filed an appeal dated 19.03.2021 before the Respondent No. 2, which is pending to date, hence the instant petition.

3. The learned counsel for the Petitioner submits that the Petitioner seeks early disposal of his departmental appeal which has been pending since 19.03.2021 and for which purpose no alternate adequate remedy is available at law. The learned counsel for the Petitioner has relied upon *Abdul Bari Khadim vs. Govt. of Balochistan through Chief Secretary and 3 others* 2016 PLC (C.S) 177, *Noor Azad Khan vs. FOP through Secretary Cabinet Division and 2 others* 2014 PLC (C.S) 1255, *Mir Ajab Khan and another vs. Deputy Postmaster-General, SRP, Dera Ismail Khan and others* 2013 SCMR 1053, *Sultan Khan and others vs. Public Functionaries* 2009 PLC (C.S) 77 [Peshawar High Court], *Malik Mushahid Ali vs. Bahauddin Zakariya University and 4 others* 2007 MLD 1898 [Lahore], *Chief Engineer (North) and another vs. Saifullah Khan Khalid* 1995 SCMR 776, *Haji*

Kadir Bux versus Province of Sindh and another, 1982 SCMR 582, and *S.H.M. Rizvi and 5 others vs. Maqsood Ahmad and 6 others*, PLD 1981 SC 612 to support his contention that the High Court, in exercise of its Constitutional jurisdiction, is empowered to direct the department to decide the appeal.

4. On the other hand, the learned AAG has objected to the maintainability of the instant writ petition in view of bar contained in Article 212 of the Constitution of the Islamic Republic of Pakistan, 1973 and by relying upon 4(1)(a) of the Service Tribunal Act 1973, whereby an alternate remedy is available with the Petitioner to approach the Federal Service Tribunal **("FST")** in case departmental appeal has not been decided within a period of 90 days.

5. It is well settled that this Court before exercising extraordinary jurisdiction must be satisfied about the unavailability or inefficacy of alternate remedy provided under the law and once it is shown to the satisfaction of this Court that alternate remedy is available, expedient and effective then Courts are reluctant to exercise writ jurisdiction. Reliance is placed upon *Mrs. Zeenat Ahmed versus Federation of Pakistan through Secretary Defence and others*, 2014 PLC (C.S.) 1032.

6. It would be beneficial to reproduce Section 4 of the Service Tribunals Act, 1973 **("Act")** for this Court to be satisfied about its adequacy as an alternate remedy for the alleged grievance of the Petitioner:-

> ***"4.— Appeals to tribunals.*** *(1) Any* ***civil servant*** *aggrieved by any [xxxx][1]* ***order,*** *whether original or appellate, made by a departmental authority in respect of any of the terms and conditions of his service may,* ***within thirty days of the communication of such order to him,*** *or within six months of the establishment of the appropriate Tribunal, whichever is later, prefer* ***an appeal to the Tribunal****:---*
>
> ***Provided that,---***
>
> *(a) where an appeal, review or representation to a departmental authority is provided under the Civil Servants Act, 1973 (LXXI of 1973), or any rule against any such order,* ***no appeal shall lie to a Tribunal unless*** *the aggrieved civil servant has preferred an appeal or application for review or representation to such departmental authority* ***and a period of ninety days has elapsed from the date on which such appeal, application or representation was so preferred;***
>
> *(b) no appeal shall lie to a Tribunal against an order or decision of a departmental authority determining the fitness or otherwise of a person to be appointed to or hold a particular post or to be promoted to a higher grade; and*
>
> *(c) no appeal shall lie to a Tribunal against an order or decision of a departmental authority made at any time before the 1st July, 1969.*

[1] The word "final" was omitted from Section 4(1) of the Act vide Service Tribunal (Amendment) Act, 1997.

> *(2) Where the appeal is against an order or decision of a departmental authority imposing a departmental punishment or penalty on a civil servant, the appeal shall be preferred,---*
>
> *(a) in the case of a penalty of dismissal from service, removal from service, compulsory retirement or reduction to a lower post or time-scale or to a lower stage in a time-scale, to a Tribunal referred to in sub-section (3) of section 3 ; and*
>
> *(b) in any other case, to a Tribunal referred to in subsection (7) of that section.*
>
> ***Explanation.---****In this section, "departmental authority" means any authority, other than a Tribunal, which is competent to make an order in respect of any of the terms and conditions of civil servants."* [Emphasis added].

7. It is relevant to note that the word "order" in Section 4(1) of the Act was preceded by the word "final" but the latter word has been omitted vide the Service Tribunal (Amendment) Act, 1997.

8. The scheme that emerges from the said provision of law is that where a civil servant is aggrieved by an original or appellate order pertaining to the terms and conditions of his service, he may file an appeal with the FST within thirty days of the date of communication of such order pursuant to sub-section (1) of Section 4 of the Act. However, pursuant to proviso (a) to sub-section (1) of Section 4 of the Act, the appeal before the FST would not be maintainable unless a departmental appeal, review or representation, if provided for, has been preferred and ninety days have elapsed since the filing thereof.

9. In other words, a civil servant like the Petitioner against whom an original order has been passed and who has filed a departmental appeal, review or representation against such an order may, pursuant to proviso (a) to sub-section (1) of Section 4 of the Act, prefer an appeal to the FST within thirty days of expiry of ninety days from the date of filing of such departmental appeal, review or representation in case no decision is communicated to him within such period. I am fortified in my view by the following judgments of the Honorable Supreme Court:-

> *Chief Engineer (North) and another vs. Saifullah Khan Khalid,* 1995 SCMR 776:
>
> > *"The above contention is devoid of any force as rightly pointed out by Hafiz Tariq Nasim, learned ASC for the respondent/Caveator.* ***The respondent had the choice either to file appeal immediately on the expiry of 90 days from the date of filing of Departmental Appeal or he could have waited for the decision upon his Departmental Appeal****, as has been held by this Court is the case of Haji Kadir Bux v. Province of Sindh and another reported in 1982 SCMR at page 582. The respondent opted for the latter, which was in consonance with the above judgment of this Court."*

Mir Ajab Khan and another vs. Deputy Postmaster-General, SRP, Dera Ismail Khan and others 2013 SCMR 1053:

> *"6. ... Thus we held as follows:--*
>
> *(a) Where a departmental appeal has been filed within prescribed period, if provided, the affectee or* ***Civil Servant had to wait for 90 days in case of filing appeal under section 4 of the Service Tribunal Act 1973****;*
>
> *(b)* ***If within the stipulated period the affectee or Civil Servant is not communicated the decision of the competent authority, he had an option to file appeal within next 30 days without waiting the decision of the departmental authority****;*
>
> ***OR***
>
> *(c)* ***He can wait till the time of communication of the decision by the departmental authority and from the said date he could file appeal within next 30 days****..."* [Emphasis added].

10. In the instant case, the order imposing major penalty upon the Petitioner was passed on 26.02.2021 whereas the Petitioner preferred a departmental appeal against such order on 19.03.2021. Therefore, pursuant to the proviso (a) of sub-section (1) of Section 4 of the Act, the remedy of filing an appeal before the FST became available to the Petitioner on 17.06.2021 when ninety days from the date of filing the departmental appeal expired. The limitation period for filing of such appeal i.e., thirty days from the expiry of the ninety day period lapsed on 17.07.2021 but no appeal was filed by the Petitioner before the FST. Yet the Petitioner has filed the instant writ petition on 10.06.2022 claiming that he has no alternate adequate relief for disposal of his departmental appeal.

11. However, the right to approach the FST in case no order is passed in respect of a departmental appeal, review or representation against an order within a period of 90 days from the date of its filing is an adequate remedy available at law to a civil servant who is aggrieved by delay in such proceedings. The consequence of not availing such remedy within the stipulated period of time i.e., thirty days of the expiry of ninety days from the date of filing of the departmental appeal, review or representation is that the civil servant must wait for the departmental decision (once that decision is communicated to him he may file an appeal with the FST within thirty days of such communication). If he has chosen to wait, he is not entitled to

invoke the Constitutional jurisdiction of this Court by claiming he does not have an adequate remedy available as a consequence of the expiry of the limitation period.

12. The learned counsel for the Petitioner has cited *Abdul Bari Khadim, Sultan Khan* and *Malik Mushahid Ali (Supra)*, wherein a learned Division Bench of the Honorable Balochistan High Court and that of the Honorable Peshawar High Court and a Single Bench of the Honorable Lahore High Court respectively disposed of the writ petitions before them while giving direction to decide the departmental appeals pending before the respondent authorities. However, the said judgments are not binding upon me and I with utmost respect disagree with all three pronouncements as they have not taken into consideration the availability of the adequate, alternate remedy available at law as discussed herein above.

13. The Petitioner has mainly relied upon *S.H.M. Rizvi (Supra)* however such reliance is misplaced as the facts therein are distinguishable from the facts of the case before me. In *S.H.M. Rizvi (Supra)*, the respondent filed an objection to the seniority list that was circulated and after waiting 90 days he filed an appeal to the FST under Section 4(1) of the Act. The issue was whether the appeal to the FST was maintainable. Since the case predates the amendment in the law vide the Service Tribunal (Amendment) Act, 1997, the Honorable Supreme Court observed that the seniority list was provisional whereas the right of appeal conferred by sub-section (1) of Section 4 of the Act was only against a 'final order' (as per the law as it stood at such time). However, the respondent, before the objection was disposed of and before the list was finalized, brought his claim before the FST.

14. The respondent relied upon the proviso (a) to subsection (1) of Section 4 of the Act but the apex court explained that the said proviso does not have the slightest effect of detracting from the finality of the order to be appealed against. If anything, what it accomplishes is that even if there is a final order it cannot be brought before the FST unless an appeal, review or representation to a departmental authority, if provided for, has been availed and 90 days have lapsed since then. However in the case before the Honorable Supreme Court there was no such final seniority list that had been issued yet the respondent therein filed an appeal with the FST. Therefore, the Honorable Supreme Court held that the respondent's service appeal to the FST was incompetent as the FST being a statutory forum with restricted jurisdiction cannot adjudicate upon the grievances of a civil servant in the

absence of a final order. It was explained that the object is to ensure the redress of grievances within the departmental hierarchy before ventilating in the FST.

15. It is in this context that the Honorable Supreme Court observed that where departmental authorities procrastinate or contumaciously refuse to pass a final order, the remedy for the aggrieved civil servant is to represent to the next higher authority and after waiting for a reasonable time to seek Constitutional remedy for a direction to the departmental authority to perform a duty enjoined upon it by law.

16. The background of *S.H.M. Rizvi (Supra)* as summarized herein above makes it clear that the ruling was in the context where the departmental authorities had not passed final order against which a departmental appeal, review or representation would lie under Section 4 of the Act. Given that there is no statutory remedy available to expedite departmental proceedings prior to the passage of a final order, the Honorable Supreme Court *S.H.M. Rizvi (Supra)* observed that the civil servant may invoke Constitutional jurisdiction for such purpose.

17. It has been noted above that the word 'final' was omitted from Section 4(1) of the Act vide Service Tribunal (Amendment) Act, 1997. Regardless, however, the Honorable Supreme Court has already held in *Muhammad Yar Buttar Vs. Board of Governors, Overseas Pakistanis Foundation,* 1999 PLC (C.S.) 409 that the omission of the word 'final' from Section 4(1) of the Act does not enlarge the scope of appeal thereunder. Keeping that in view what the discussion in *S.H.M. Rizvi (Supra)* crystalizes is that Section 4(1) of the Act provides a remedy for a grievance against an order whether original or appellate but not for the delay in passing such order whereas proviso (a) thereof provides not just a condition precedent to the remedy available under Section 4(1) of the Act i.e., departmental appeals, review or representations but it also provides a remedy against delays in deciding such departmental appeals, review or representations.

18. The Petitioner has also relied upon *Noor Azad Khan (Supra)* however the facts involved therein are more akin to the facts of *S.H.M. Rizvi* (Supra). In the case of *Noor Azad Khan (Supra)* the petitioner was aggrieved by the pendency of the departmental proceedings against the petitioner which had not been decided finally and were causing a hurdle in his promotion due to the stigma attached therewith. Therefore, in this case too, the issue pertained to departmental proceedings prior to the passage of an order against which departmental remedies and/or appeal before

the FST would lie as envisaged in Section 4 of the Act. Since the Petitioner could not invoke Section 4of the Act at such stage, this Court in *Noor Azad Khan (Supra)* rightly exercised Constitutional jurisdiction by directing the respondent to expedite the departmental proceedings. Thus it bears emphasis that in both *Noor Azad Khan* as well as *S.H.M. Rizvi (Supra)* the civil servant was stuck in proceedings prior to the passage of an order against which the remedy under Section 4 of the Act could be invoked. In such scenario this Court's jurisdiction is not ousted for lack of alternate remedy.

19. On the other hand, in the case of the Petitioner before this Court, the departmental authority has already passed order dated 26.02.2021 whereby major penalty of compulsory retirement was imposed upon the Petitioner against which a departmental appeal has also been preferred by the Petitioner. Contrary to the cases relied upon by the Petitioner he is aggrieved by the delay in deciding such departmental appeal. However, proviso (a) to subsection (1) of Section 4 of the Act does provide a remedy for such delay albeit subject to limitation. Therefore, the question arises whether the Petitioner can approach the High Court in Constitutional jurisdiction seeking direction to the departmental authority to decide the Petitioner's appeal when the Petitioner failed to avail the alternate remedy available under Section 4(1)(a) of the Act of filing an appeal with the FST within the stipulated limitation period.

20. In similar circumstances, the Honorable Sindh High Court at Karachi in the case of *Lt.Cdr., (Rtd.P.N.) Engineer Abdul Aziz Narejo versus Karachi Port Trust and others*, 2006 PLC (C.S.) 88 held as follows:

> *"The matter apparently relates to terms and conditions of service - it is however, contended by learned counsel for* ***the petitioner that the petitioner is only seeking, direction to the respondent to decide the petitioner's departmental appeal*** *which was preferred in August, 1996, but remained undecided despite repeated reminders till 2003 when this petition was filed.*
>
> *2.* ***We are afraid in our view such direction cannot be issued section 4(1) read with proviso (A) to Service Tribunals Act, 1973,*** *clearly stipulates that even appeal against an original order is maintainable provided one preferred to a departmental authority has remained undecided for a period of 90 days.* ***Indeed the petitioner was entitled to move the Federal Service Tribunal within 120 days from the date he preferred a departmental appeal in August, 1996 an alternate remedy being available under the law which completely oust our jurisdiction under Article 212 of the Constitution, we regret we cannot entertain this petition.*** *The petition is, therefore, dismissed. Nevertheless the petitioner may approach the competent Service Tribunal which will indeed consider the question of granting the benefit of section 14 of the Limitation Act*

> *to the petitioner. At the same time we express our strong disapproval of the delay caused by the respondents in deciding the appeal which could possibly lead to inference of mala fide in a given case. Nevertheless we express no opinion on this question."* [Emphasis added]

21. More recently, a similar view has been taken in the case of *Mst. Saira Iram versus Chief Secretary Punjab Lahore and another,* 2019 PLC (C.S.) 427 in the context of the Punjab Service Tribunals Act, 1974 wherein the Honorable Lahore High Court while disagreeing with the judgment rendered in case of Abdul Bari Khadim *(Supra)* held as follows:

> *"I, very humbly and with all due respect to that learned court, tend to disagree with the same for the reason that there would be no question of limitation left for the Tribunal to decide, as an aggrieved civil servant has to approach the Service Tribunal within the stipulated period of 30 days. Even if his appeal is not decided he has to approach the said Tribunal within the prescribed period.* ***If such a direction is issued while exercising constitutional jurisdiction and in compliance thereof the competent authority decides the departmental appeal/representation / review, as the case may be, then a new lease of life is given to the civil servant, which would result into defiance of the statutory law.*** *As a consequence of the direction issued by that Honourable Court, the Service Tribunal could only decide the case on merits and not on the issue of limitation. On the other hand, another consequence of such a direction having been given may result into multiplicity of litigation. In case of non-compliance by the departmental authority, in the face of such a direction, the petitioner may file a contempt petition. Confronted with such a situation, the Departmental authority will either have to comply with the direction or face the consequences under the law of contempt. On the other hand, it may challenge the same before the Apex Court. This clearly is not the intention of the governing law."* [Emphasis added]

22. I am in respectful agreement with the Courts in *Lt.Cdr., (Rtd.P.N.) Engineer Abdul Aziz Narejo* and *Mst. Saira Iram (Supra)* that writ petition would not be maintainable where the civil servant has failed to avail the alternate remedy available under proviso (a) to sub-section (1) of Section 4 of the Act by approaching the FST within 30 days of expiry of 90 days commencing from the date of filing of the departmental appeal, review, or representation.

23. At the cost of repetition, it is reiterated that the Impugned Order in the instant case was passed on 26.02.2021 against which the Petitioner filed a departmental appeal before Respondent No. 2 on 19.03.2021. However, despite the lapse of 90 days since the date of filing of such appeal, the Petitioner failed to approach the FST within the limitation period of 30 days for reasons best known to him and instead filed the instant writ in June, 2022. As such, he is not entitled to invoke the Constitutional jurisdiction of this Court in such circumstances.

24. For all the foregoing reasons, this Court is unable to entertain the instant petition in view of the bar contained in Article 212 of the Constitution of the Islamic Republic of Pakistan, 1973 and the availability of an adequate alternate remedy under the proviso to sub-section (1) of Section 4 of the Act. Hence, the instant petition stands **dismissed** accordingly.

(SAMAN RAFAT IMTIAZ)
JUDGE

ADNAN

Approved for Reporting
Blue Slip added.