JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT
ISLAMABAD

CASE NO. : ICA NO.381-2016
Securities and Exchange Commission of Pakistan, Islamabad
Vs.
Muhammad Ashraf Tiwana & Another

CASE NO. : ICA NO.382-2016
Securities and Exchange Commission of Pakistan, Islamabad
Vs.
Mansoor Ahsan etc.

CASE NO. : ICA NO.383-2016
Securities and Exchange Commission of Pakistan, Islamabad
Vs.
Sohail Najib etc.

CASE NO. : ICA NO.432-2016
Rana Mustafa Yousaf Khan
Vs.
Securities & Exchange Commission of Pakistan, Islamabad through its Chairman

CASE NO. : ICA NO.405-2016
Muhammad Ashraf Tiwana
Vs.
Pakistan through Secretary, Finance Division, Ministry of Finance, Islamabad & Another

CASE NO. : ICA NO.401-2016
Mansur Ahsan
Vs.
Securities & Exchange Commission of Pakistan etc.

CASE NO. : ICA NO.381-2016
Securities and Exchange Commission of Pakistan, Islamabad
Vs.
Muhammad Ashraf Tiwana & Another

CASE NO. : ICA NO.395-2016
Sohail Najeeb
Vs.
Ministry of Finance, Government of Pakistan, Islamabad through its Secretary & Another

Appellants by : Mr. Azid Nafees, Advocate (ICA Nos.381-2016, ICA No.382-2016 & 383-2016).

Ch. Asghar Ali & Dr. Atiq Tahir, Advocate (ICA No.395-2016 & 432-2016)
Mr. Atta Ullah Hakim Kundi, Advocate (ICA No.401-2016)
Mr. Babar Sattar, Advocate (ICA No.405-2016)

Respondents by : Mr. Ashraf Tiwana/Respondent in person & Mr. Babar Sattar, Advocate (ICA No.381-2016).
Ch. Asghar Ali & Dr. Atiq Tahir, Advocates (ICA No.383-2016)
Mr. Azid Nafees, Advocate (ICA No.432-2016)
Mr. Shahid Anwar Bajwa, Advocate (ICA No.395-2016), ICA No.401-2016 & ICA No.405-2016).
Mr. Saqlain Haider, Assistant Attorney General.
Mr. Ibrar Saeed, Special Public Prosecutor, SECP.

Date of hearing : 20.12.2018

AAMER FAROOQ J. This judgment shall decide instant appeal as well as ICA No.382-2016, ICA No.383-2016, ICA No.432-2016, ICA No.405-2016, ICA No.401-2016 & ICA No.395-2016, as common questions of law and facts are involved.

2. The facts, in brief, are that appellants in ICA Nos.432-2016, ICA No.405-2016, ICA No.401-2016 & ICA No.395-2016 were employees of Securities & Exchange Commission of Pakistan; they were terminated from service who challenged the termination orders issued under sub-clause (b) of Clause 3(1) of Chapter 11 of Securities & Exchange Commission of Pakistan Human Resource Hand Book, 2007. Under the referred clause, it is provided that employees of Securities and Exchange Commission of Pakistan may be dismissed without any cause or assigning any reason. The referred employees challenged their termination orders by way of petitions under Article 199 of the Constitution. In this behalf, Muhammad Ashraf Tiwana filed W.P. No.2649-2013; Sohail Najeeb, who was appointed on 17.06.2007 and his services were terminated vide letter dated 10.06.2010, filed W.P. No.4261-2014; Mansoor Ahsan was appointed as Executive Director on 30.08.2006 and his services were terminated on 25.10.2010 filed W.P. No.4258-2016; Rana Mustafa Yousaf Khan was appointed as Deputy Director on 09.10.2012 and his services were terminated on 17.05.2013 filed W.P. No.4281-2014. The referred petitions were allowed by the Judge-in-Chambers through a consolidated judgment dated 30.06.2016. In this regard, W.P. No.2649-2013, W.P. No.4258-2014 & W.P. No.4261-2014 were allowed and the

impugned orders were set aside. It was also observed that the principles laid down by Hon'ble Supreme Court of Pakistan in case of Muhammad Ashraf Tiwana would not be applicable in case of Rana Mustafa Yousaf Khan (W.P. No.4281-2014) hence said Writ Petition was dismissed. The Judge-in-Chambers did not allow back benefits to the referred employees whose petitions were allowed hence Securities & Exchange Commission of Pakistan filed appeals against setting aside of termination notices. Muhammad Ashraf Tiwana, Mansur Ahsan & Sohail Najeeb filed appeals for disallowing back benefits, whereas Rana Mustafa Yousaf Khan also filed appeal against dismissal of writ petition filed by him.

3. Learned counsel for Securities & Exchange Commission of Pakistan, *inter alia,* contended that there are no statutory rules of service of Securities & Exchange Commission of Pakistan; that terms and conditions of service of employees of SECP are governed by Securities & Exchange Commission of Pakistan Human Resource Hand Book, 2007 and under the same, services of any employee could be terminated without assigning any reason. It was further submitted that question regarding maintainability of petitions was raised but was not decided by the Judge-in-Chambers on the mistaken belief that since there was a direction by the Hon'ble Supreme Court of Pakistan to decide the case on merits. It was submitted that merit includes the question of maintainability. It was further submitted that decision of Hon'ble Supreme Court of Pakistan in case reported as Muhammad Ashraf Tiwana Vs. Pakistan and Others' (2013 SCMR 1159) does not hold the field anymore inasmuch as in a subsequent decision of Hon'ble Supreme Court in case titled 'Muhammad Sarwar and others Vs. Federation of Pakistan through Secretary Ministry of Finance, Islamabad & Another' (Civil Appeal No.417-2013) it was not followed. It was submitted that decision of the Larger Bench is binding on this Court.

4. Learned counsel for Sohail Najeeb, *inter alia,* contended that ratio settled in case reported as 2013 SCMR 1159 still holds the field; that even if rules of service of SECP are non-statutory, a petition under Article 199 of the Constitution is maintainable in light of the decision of Hon'ble Supreme Court of Pakistan in cases reported as 'Pakistan Defence

Officers' Housing Authority and Others Vs. Lt. Col. Syed Jawaid Ahmed' (2013 SCMR 1707) & 'Pakistan Defence Officers Housing Authority Vs. Mrs. Itrat Sajjad Khan and Others' (2017 SCMR 2010). It was further submitted that under the law any authority, vested with the power to take decisions, has to do so by assigning reasons. It was also submitted that since Sohail Najeeb is out of service, therefore, he is entitled to recovery of arrears of salary. Reliance was placed on cases reported as 'Pakistan through General Manager, P.W.R. Lahore Vs. Mrs. A.V. Issacs' (PLD 1970 SC 415), 'Qadeer Ahmad Vs. Punjab Labour Appellate Tribunal, Lahore and Another' (PLD 1990 Supreme Court 787) & 'Ali Nawaz Vs. Pakistan Railway through Chairman/Secretary and Others' (1999 SCMR 1873).

5. Learned counsel for Muhammad Ashraf Tiwana, *inter alia,* contended that appellant was a permanent employee of Securities & Exchange Commission of Pakistan; that the employment was not contractual, as the same was not time bound. It was submitted that where the arrangement is not time bound, it is not contractual in nature. Reliance was placed on case reported as 'Major Retired Nisar Ali Vs. Pakistan Atomic Engergy Commission & Another' (2004 PLC (CS) 758 Supreme Court. It was submitted that writ petition was maintainable, as the petitioner is aggrieved of order dated 13.06.2011, whereby he was removed from service; that the ratio settled in case of Muhammad Ashraf Tiwana (2013 SCMR 1159) is applicable here. It was further submitted that where there is violation of law, a petition under Article 199 of the Constitution is applicable. Reliance was placed on cases reported as 'Government of West Pakistan & Another Vs. Begum Agha Abdul Karim Shorish Kashmiri' (PLD 1969 SC 14) & 'Muhammad Dawood and others Vs. Federation of Pakistan and others' (2007 PLC (CS) 1046). It was further contended that the fact that rules of service are non-statutory, does not affect the maintainability of the petition; that where there is either violation of law; principles of natural justice or of any statute, a petition under Article 199 of the Constitution is maintainable. Learned counsel further pointed out that rule of 'master and servant' is not applicable in the instant matter and that in alternative, rules of service are statutory. It

was contended that termination simpliciter of the regulatory authority undermines the regulatory autonomy.

6. Learned counsels for Mansor Ahsan and others adopted the above arguments.

7. Learned counsels for the parties have been heard and the documents, placed on record, examined with their able assistance.

8. Learned Judge-in-Chambers, while deciding writ petitions filed by the above mentioned employees of Securities and Exchange Commission of Pakistan, rendered no finding on the maintainability of petitions inasmuch as originally, the referred employees had filed appeals against their dismissal which matter went to the Hon'ble Supreme Court of Pakistan, wherein the observation was made that petitions shall be decided on merits, therefore, the decision was made by the Judge-in-Chambers in light of decision of Hon'ble Supreme Court of Pakistan reported as 'Muhammad Ashraf Tiwana Vs. Pakistan and others' (2013 SCMR 1159). The relevant portion of the judgment, for the purposes of present controversy, is as follows: -

> *"55. It must be stated that in a civilized dispensation which is rule based and is aimed at good governance, such whimsicality cannot be countenanced. Such autocratic practices may be in consonance with the legacy of our colonial past wherein the prevalent monarchical disposition subjected senior state functionaries, even judges, to holding office at the monarch's pleasure. But, as we noted in Muhammad Yasin's case, our law has come a long way from those days. It does not allow for dismissal of "public servants" in such an imperious and arbitrary manner. There is another important reason why this cannot be done. We have repeatedly held that all functionaries of the state, be they Civil Servants or senior echelons of corporate/statutory bodies such as SECP are above all, fiduciaries of the people. As such they can only exercise their powers in good faith in the public interest and not on the basis of personal likes or dislikes or on the basis of whims and fancies. Thus, the power to terminate implies within it that it is not the power of a despot, tyrant, seth or wadera, but the power of a trustee and fiduciary in the service of the people. A seth, in the unbridled laissez faire world of private business could perhaps terminate the services of an employee on the ground that the employee is too honest, upright and law-abiding for the success of the business or that he does not defer to the seth's opinion. Such attitude and thinking have no place in a statutory public body such as SECP, which only exercises delegated authority under section 8 ibid when it "from time to time employ(s) persons to be employees of the [SECP]". It is essential that officials taking decisions in the SECP or enforcing rules, regulations and policies are not left at the whims of a capricious and unreasoned SECP. It is also important to bear in mind that the powers vested in the Commissioners/Chairman SECP are institutional and not personal. These powers whether express or implied can only be exercised in furtherance of the objects for which SECP has been established.*
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> *56. To sum up the discussion in this part, when we read the Act in the light of principles elaborated repeatedly in our precedents, it becomes clear that the SECP cannot simply be terminating the services of its employees at its whims and pleasure, without having recourse to valid reasons. It can only terminate an employment when it has reasons to do so which are fair and just and advance the purposes of the Act. Both law*

> *and public policy require this. This is why, in our short order, we declared Clause 3(1) of Chapter 11 of the SECP Service Rules (HR Handbook), which allows for termination simpliciter (without cause) of employees of SECP, as ultra vires the Constitution and inter alia, the Act. We had also directed that the above clause be replaced appropriately by provisions ensuring due process and adherence, inter alia to Articles 9, 10A, 14, 18 and 25 of the Constitution and which are consistent with the provisions of the Act ensuring independent and objective decision making without fear or favour, as required of an independent regulator"*

It is pertinent to observe that said judgment of Hon'ble Supreme Court of Pakistan was rendered by a two Members Bench and in a subsequent decision, the Hon'ble Supreme Court of Pakistan in case titled 'Muhammad Sarwar and others Vs. Federation of Pakistan through Secretary Ministry of Finance, Islamabad & Another' (Civil Appeal No.417-2013), vide order dated 16.01.2018, held that Securities and Exchange Commission of Pakistan does not have statutory rules of service and writ petition filed by the appellant, was not competent before High Court and was rightly dismissed by the learned Single Judge-in-Chambers. The said decision of august Apex Court is of Three Members Bench. In light of said position, petitions under Article 199 of the Constitution were not maintainable before this Court.

9. It is the case of the employees that even though the rules of service of SECP are non-statutory, violation of law entitles the employees to file writ petition under Article 199 of the Constitution. Reliance was placed on case reported as 'Pakistan Defence Officers' Housing Authority and Others Vs. Lt. Col. Syed Jawaid Ahmed' (2013 SCMR 1707). In the referred judgment, while summing up the law propounded by the august Apex Court, it was observed that even where rules of service are non-statutory, a petition under Article 199 of the Constitution is maintainable, where there is violation of law and/or violation of principles of natural justice.

10. Admittedly, all the employees except Rana Mustafa Yousaf Khan were permanent employees and their services were terminated vide letter dated 13.06.2011 (in case of Muhammad Ashraf Tiwana), letter dated 10.06.2010 (in case of Suhail Najeeb), letter dated 25.10.2010 (in case of Mansur Ahsan) and letter dated 17.05.2013 (in case of Rana Mustafa Yousaf Khan). The referred letters were issued under sub-clause (b) of Clause 3(1) of Chapter 11 of Securities & Exchange Commission of

Pakistan Human Resource Hand Book, 2007 which has been struck down by the august Apex Court as being ultra vires the Constitution in 2013 SCMR 1159.

11. It is pertinent to observe that judgment reported as 2013 SCMR 1159 supra was handed down on 09.04.2013 whereas impugned letters of termination except in case of Raja Mustafa Yousaf Khan were issued prior to the judgment by the august Apex Court. It is a settled principle that judgment of the Superior Court operate prospectively and not retrospectively. Reliance is placed on case reported as 'Pir Buksh represented by his legal heirs and others Vs. The Chairman, Allotment Committee and others' (PLD 1987 SC 145). The above mentioned employees cannot take benefit of the judgment reported 2013 SCMR 1159 supra, as the impugned letters for termination of service were issued prior to the judgment of Hon'ble Supreme Court of Pakistan, however, in case of Rana Mustafa Yousaf Khan, as the petitioner was on probation and was not a regular employee, his services could be terminated by the letter simpliciter.

12. Another aspect of the case though was not argued yet we are of the opinion is pertinent that letters for termination of services were issued either in 2010 or 2011, whereas petitions under Article 199 of the Constitution challenging referred letters, were filed in 2013 after almost two to three years of the same; hence petitions suffered from laches.

13. As noted above, when the impugned letters regarding termination of services were issued, the above mentioned rules of Securities & Exchange Commission of Pakistan Human Resource Hand Book, 2007 formed part of services of employees hence no illegality was committed by the employer namely Securities and Exchange Commission of Pakistan while terminating the services.

14. For what has been discussed above, the impugned judgment by the Judge-in-Chambers setting aside the termination letters is not tenable.

15. In so far as the case of employees regarding back benefits is concerned, the same is also not tenable in light of the fact that terms of service of employees of Securities & Exchange Commission of Pakistan are non-statutory and that the employment was terminated in accordance

with Securities & Exchange Commission of Pakistan Human Resource Hand Book, 2007.

16. In view of above, instant appeal as well as ICA Nos.382-2016 & ICA No.383-2016 are allowed; the impugned judgment is set aside to the extent of setting aside of letters of termination of service; consequently, writ petitions filed by the employees stand dismissed. ICA Nos.405-2016, ICA No.401-2016 & ICA No.395-2016 are dismissed along with ICA No.432-2016.

(MOHSIN AKHTAR KAYANI)
JUDGE

(AAMER FAROOQ)
JUDGE

Announced in Open Court on _____

JUDGE **JUDGE**

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