

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE MUSHIR ALAM
MR. JUSTICE QAZI MUHAMMAD AMIN AHMED
MR. JUSTICE AMIN-UD-DIN KHAN

CIVIL APPEAL NO. 491 OF 2012 AND

(On appeal from the judgment/order dated 29.03.2012 passed by Islamabad High Court, Islamabad in W.P.1206/2011)

CIVIL APPEALS NO.536-546,580/2012, 452,453,43/2013 AND

(On appeal from the judgment/order dated 29.03.2012 passed by Islamabad High Court, Islamabad in W.P. 1206, 1433, 1604,1981/2011 and judgment/dated 24.10.2012 passed by High Court of Sindh, Karachi in Const.P.214-D/2011 and dated 13.09.2012 passed by Peshawar High Court, Abbottabad Bench, Abbottabad in W.P.813/2011)

CIVIL PETITIONS NO.150-151/2013 AND

(On appeal from the judgment/order dated 31.10.2012 passed by Peshawar High Court, Abbottabad Bench, Abbottabad in W.P.368, 770/2012)

CIVIL APPEALS NO.1081,1084/2011,432/2013 AND

(On appeal from the judgment/order dated 16.05.2011 passed by High Court of Sindh, Karachi in C.P.1107-D, 605-D/2010 judgment/order dated 22.11.2012 passed by Peshawar High Court, Bannu Bench, Bannu in W.P.150-B/2010)

CRIMINAL PETITIONS NO.138-140/2014 AND

(On appeal from the judgment/order dated 19.03.2014 passed by Islamabad High Court, Islamabad in I.C.A.143-145/2014)

CIVIL APPEALS NO.1151/2012,1026-1027/2013 AND

(On appeal from the judgment/order dated 01.04.2011 passed by High Court of Sindh, Karachi in Const.P.3515-D/2010 and judgment/order dated 14.05.2013 passed by Peshawar High Court, Peshawar in W.P.2685/2011, W.P.363-P/2012)

CIVIL PETITIONS NO.677-P/2014,1567/2015 AND

(On appeal from the judgment/order dated 21.10.2014 passed by Peshawar High Court, Peshawar in W.P.3504/2012 and judgment/order dated 05.05.2015 passed by Federal Service Tribunal, Islamabad in A.3099(R)CS/2012)

CIVIL APPEALS NO.637-651,660,/2015 AND

(On appeal from the judgment/order dated 02.03.2015 passed by High Court of Sindh, Karachi in C.P.298, 304-308,310-318/2014 and 10.12.2014 passed by High Court Of Sindh, Sukkar Bench in W.P.2756/2012)

CIVIL PETITIONS NO.842/2015,3612/2015 AND

(On appeal from the judgment/order dated 02.03.2015 passed by High Court of Sindh, Karachi in C.P.309/2014 and dated 14.10.2015 passed in Peshawar High Court, D.I. Khan Bench, D.I. Khan in W.P.177/2015)

CIVIL APPEALS NO.101/2016,1106/2015 AND

(On appeal from the judgment/order dated 06.10.2015 passed Peshawar High Court, Peshawar in W.P.3848/2014 and dated 12.12.2014 passed by High Court Of Sindh, Karachi in C.P.1905/2011)

CIVIL PETITION NO.3366/2015 AND

(On appeal from the judgment/order dated 12.12.2014 passed by High Court of Sindh, Karachi in C.P.1998/2011)

C.R.P.231-236,256/2016 IN C.P.405-411/2016 AND

(review of the judgment/order of this Court dated 05.05.2016)

CIVIL APPEALS NO.4-K & 5-K/2017 AND

(On appeal from the judgment/order dated 07.09.2016 passed by High Court of Sindh, Karachi in C.P.D-4078/2011 and C.P.D-2841/2012)

CIVIL PETITION NO.19-P/2016 AND

(On appeal from the judgment/order dated 29.10.2015 passed by Peshawar High Court, Peshawar in W.P.2758-P/2015)

CIVIL APPEAL NO.65-K/2013 AND

(On appeal from the judgment/order dated 24.10.2012 passed by High Court of Sindh, Karachi in C.P.214-D/2011)

CIVIL APPEAL NO.518 AND 519/2018 AND

(On appeal from the judgment/order dated 27.10.2017 passed by High Court of Sindh, Karachi in C.P.6370-D/2016 and C.P.3411-D/2016)

CIVIL PETITIONS NO.588-K, 589-K/2018 AND

(On appeal from the judgment/order dated 14.03.2018 passed by Federal Service Tribunal, Camp At Karachi in Appeals 4(K)CS and 5(K)CS /2017)

CIVIL APPEAL NO.1098/2018 AND

(On appeal from the judgment/order dated 25.05.2018 passed by Islamabad High Court, Islamabad in W.P. 1479/2012)

CIVIL APPEAL NO.1921-1923/2019

(On appeal from the judgment/order dated 30.01.2019 passed by Federal Service Tribunal, Islamabad in Appeals No.156(R)CS to 158(R)CS /2017)

AND

C.M.A.4382/2016 in C.A.637/2015 AND

C.M.A.7274/2017 in C.A.637/2015 AND

(Impleadment applications)

C.M.A.6842/2018 in C.A.1098/2018

(Stay)

Muhammad Afzal & others	(in CAs 491/12)
D.G., IB Islamabad	(in CAs 536-539/12, CP 3612/15)
Shahabuddin Ahmed Khan & another	(in CA 540/12)
Ahmed Raza & another	(in CA 541/12)
Waseem Ahmed & another	(in CA 542/12)
Muhammad Tahir Faisal & another	(in CA 543/12)
Syed Muhammad Saeed Ahmed Gillani & others	(in CAs 544, 580/12)
Ejaz Ahmed & others	(in CA 545/12)
Daulat Ali Khan & others	(in CA 546/12)
Javed Akhtar Arbab & others	(in CA 452/13)
Chairman National Highway Authority, Govt. of Sindh Karachi & others	(in CA 453/13)
Commissioner Afghan Refugee, KPK, Peshawar & others	(in CA 43/13, CPs 150, 151/13, CA 101/16)
PTCL thr. its President/CEO Islamabad	(in CAs 1081, 1084/11)
M/s Pakistan Telecommunication Company Ltd thr. its Director Islamabad & another	(in CA 432/13)
Pakistan Telecommunication Company Ltd	(in CAs 4-K, 5-K/17)
National Highway Authority thr. its Chairman,	(in CrI.Ps. 138-

NHA & another	140/14)
Overseas Pakistani Foundation Islamabad (O.P.F.) thr. its Director & others	(in CA 1151/12)
State Life Insurance Corporation of Pakistan thr, its Chairman	(in CAs 1026, 1027/13, CRPs.231-236, 256/16)
Naushad and others	(in CP 677-P/14)
Rai Muhammad Abbas	(in CP 1567/15)
Civil Aviation Authority thr. its D.G., Quaid-e-Azam International Airport, Karachi	(in CAs 637-651, 842/15, 518, 519/18),
WAPDA thr. its Chairman, WAPDA House, Lahore & another	(in CA 660/15)
Muhammad Riaz & others	(in CA 1106/15)
Abdul Rasheed & another	(in CP 3366/15)
Sari Had	(in CP 19-P/16)
Jawaid Akhter Arbab	(in CA 65-K/13)
Fazal Mehmood Mithani	(in CA 588-K/18)
Muhammad Arshad Khan	(in CA 589-K/18)
Chairman, Trading Corporation of Pakistan (Pvt) Ltd, Karachi	(in CA 1098/18)
Qamar ul Islam	(in CA 1921/19)
Tanveer Saeed	(in CA 1922/19)
Muhammad Nadeem Khan	(in CA 1923/19)
	...Appellant(s)

VERSUS

The Secretary Establishment Division Islamabad & others	(in CAs 491, 540, 545,546, 580/12, CPs 588-K, 589-K/18, CAs 1921-1923/19)
Waqar Alam & others	(in CA 536/12)
Rafaqat Ali Goraya & others	(in CA 537/12)
Abdullah Khan & others	(in CA 538/12)
Muhammad Akram & others	(in CA 539/12)
D.G., I.B. Islamabad & others	(in CAs 541-544/12, CP 1567/15)
Javed Hussain Langha & others	(in CAs 452, 453/13)
Syed Sabir Hussain Shah & others	(in CA 43/13)
Gohar Habib	(in CP 150/13)
Waheed Ahmed	(in CP 151/13)
Federation of Pakistan thr. Secy. M/O IT & Telecommunications & others	(in CAs 1081, 1084/11)
Usman Ghani & others	(in CA 432/13)
Shahid Zaheer	(in Cr.P 138/14)
Shoukat Hayat	(in Cr.Ps 139, 140/14)
Muhammad Nawaz Abbasi & others	(in CA 1151/12)
Mazullah Khan & others	(in CA 1026/13)
Muhammad Anwar Swati	(in CA 1027/13)
Commissioner Afghan Refugees, K.P Commissionerate of Afghan Refugees and others	(in CP 677-P/14)
Noor Alam & another	(in CA 637/15)
Muhammad Arif & another	(in CA 638/15)
Kamran & another	(in CA 639/15)
Sultan Sikandar & another	(in CA 640/15)

Azimuddin & another	(in CA 641/15)
Maqsood Siddique & another	(in CA 642/15)
Rana Abdul Qayum & another	(in CA 643/15)
Khalil Ahmad & another	(in CA 644/15)
Muhammad Arif & another	(in CA 645/15)
Abdul Aziz & another	(in CA 646/15)
Tariq Mahmood & another	(in CA 647/15)
Manzoor & another	(in CA 648/15)
Azad Khan & another	(in CA 649/15)
Syed Fida Hussain Jafry & another	(in CA 650/15)
Muhammad Piral & another	(in CA 651/15)
The Federation of Pakistan thr. Secretary M/o Water & Power Development Authority, Islamabad & another	(in CA 660/15)
Syed Abdul Waheed & another	(in CP 842/15)
Kamran Iqbal Kundi & others	(in CP 3612/15)
Sher Bahadar Khan & others	(in CA 101/16)
M/o Petroleum & Natural Resources thr. its Secretary, Islamabad & others	(in CA 1106/15, CP 3366/15)
Rana Zulfiqar Ahmad & another	(in CRPs 231/16)
Abdul Majeed Klair & another	(in CRPs 232/16)
Nazar Muhammad Warraich & another	(in CRPs 233/16)
Muhammad Yasin Tariq & another	(in CRPs 234/16)
Muhammad Ayub Rizvi & another	(in CRPs 235/16)
Malik ABdul Ghafoor & another	(in CRPs 236/16)
M. Nawaz Bhatti & another	(in CRPs 256/16)
Ghulam Ali and others	(in CA 4-K/17)
Aijaz Ali Chachar and another	(in CA 5-K/17)
District Education Officer (Male) (E & S) Education, Buner & others	(in CP 19-P/16)
Federation of Pakistan & others	(in CA 65-K/13)
Syed Yawar Hussain Shigri & another	(in CAs 518, 519/18)
Akhtar Abbas Bharwana & others	(in CA 1098/18)
	...Respondent(s)

For the Appellants/
Petitioners:

Mr. M. Shoaib Shaheen, ASC.

Mr. M. Akram Sheikh, Sr. ASC.

Mr. M. Asif Vardag, ASC.

Rai M. Nawaz Kharral, ASC

Mr. M. Tariq Tanoli, ASC.

Mr.M. Munir Paracha, ASC.

Hafiz S. A. Rehman, Sr. ASC.
Hafiz Hifzur Rehman, ASC.

Raja M. Ibrahim Satti, Sr. ASC.

Mr. Haider Waheed, ASC.

Mr. Altaf Ahmed, ASC.

Mr. Sanaullah Noor Ghauri, ASC.

Raja Muqsat Nawaz Khan, ASC.

Mian Shafaqat Jan, ASC.

Mr. Zafar Iqbal Chaudhry, ASC.

Mr. Zahid Yousaf Qureshi, Addl. AG,
KPK.

For the Federation:

Mr. Sajid Ilyas Bhatti, Addl. AGP.
Mr. Ishrat Bhatti, Director IB
Mr. Amjad Iqbal, Asstt. Dir. (Lit.)

For the Respondent(s):

Mr. Sohail Mehmood, DAG.
(in CAs 1081, 1084/11, 432/13)
Mr. Tariq Asad, ASC.

Mr. S. A. Mehmood Khan Sadozai,
ASC.

Qari Abdul Rashid, ASC/AOR.

Mr. Pervaiz Rauf, ASC.

Syed Wusat-ul-Hassan Taqvi, ASC.

Mr. Fawad Saleh, ASC.

Mian M. Hanif, ASC.

Raja Abdul Ghafoor, AOR

Mr. M. Ilyas Siddiqui, ASC.

Mr. M. Yousaf Khan, ASC.

Kh. M. Arif, ASC.

Mr. Hazrat Said, ASC.

Mr. Asim Iqbal, ASC.

Mr. Fazal Shah Mohmand, ASC.

Mr. Wasim ud Din Khattak, ASC

Mr. Khalid Rehman, ASC.

For intervenor:

Mr. Kamran Murtaza, Sr. ASC.
Syed Rifaqat Hussain Shah, AOR

Mr. Fawad Saleh, ASC.

Syed Zulfiqat Abbas Naqvi, ASC

Dr. Babar Awan, Sr. ASC.

In-person.

Khalil Javed, M. Nawaz Abbasi, Sari Had, Fazal Mehmood Methani, Arshad Khan, Waheed Ahmed, Ilyas,

Date of Hearing:

16.12.2019

JUDGMENT

MUSHIR ALAM, J.— Through this common judgment, this Court shall dispose of the above title cases in the following manner.

2. There are a number of groups of cases, in which appellants/petitioners have impugned the appointments/promotions under the Sacked Employees (Reinstatement) Ordinance Act, 2010, (*hereinafter referred as to 'Act of 2010'*). Those groups can be divided into two categories, i.e. (i) those employees who were the regular employees of the organizations/departments, whose seniority has been affected by the employees inducted under the Act of 2010; and (ii) those persons who have not been extended the benefit of the Act of 2010.

3. First group of cases pertains to the Intelligence Bureau (IB), in which there are two categories of cases. The first category of employees who filed Civil Appeals No.491, 540-546, 580/12, Civil Petitions No.1567/15, 588-K, 589-K/18 and Civil Appeals No.1921-1923/19 are the regular employees of the IB appointed in regular course through due process and are civil servants, whose seniority has been

affected by the Respondents, who have been inducted in IB in 1996 and 1997, were dispensed with service and were reinstated/restored in service and have been given benefit of one step above promotion under the provisions of the Act of 2010. The second category of the employees of IB, who have filed Civil Appeals No. 536-539/12, C.P. 3612/15, and are the employees, who have not been extended the benefit of the Act of 2010. Leave has been granted in these cases *vide* order dated 18.05.2012 in Civil Appeals No.491, 540-546, 580/12 in the following terms:

“After hearing learned counsel for the petitioner, leave to appeal is granted, inter alia, to consider as to whether section 4 of the Sacked Employees (Reinstatement) Act, 2010 is ultra vires and repugnant to Article 48 and 25 of the Constitution of Islamic Republic of Pakistan and as to whether without prejudice to the case the learned High Court had the jurisdiction to grant leave on the point noted above, in view of the bar under Article 212 of the Constitution”

Leave has also been granted in Civil Appeals No.1921-1923/19 *vide* order dated 20.11.2019 in the following terms:

“Learned counsel for the petitioners contends that the petitioners were reinstated in service under the Sacked Employees (Reinstatement) Act, 2010. He contends that petitioners were employed as Sub-Inspector (BPS-14) and that pursuant to Section 4 of the said Act, they were required to be re-instated one scale higher than the post on which they were terminated. He contends that the Tribunal in the impugned judgment has omitted to consider this very aspect of the matter.

2. The submission made by the learned counsel for the petitioners requires consideration. Leave to appeal is granted to consider, inter alia, the same. As connected

cases i.e. C.A. No.491 of 2012 etc are already fixed before this Court on 25.11.2019, the appeals arising from these petitions be also fixed on the said date."

4. Second group of cases pertains to the Commissioner Afghan Refugee, Khyber Pakhtunkhwa. In this group of cases, there are two categories of cases. The first category of employees who filed Civil Appeals No.43/13, Civil Petitions No.150,151/13 and Civil Petition No.677-P/14 are the former employees who have not been extended the benefit of the 2010 Act or the organization/department is not extending the benefits under the provisions of the Act of 2010 to such employees, whereas Civil Appeal No.101/16 have been filed by the Commissioner Afghan Refugee KPK challenging the order of the learned High Court, whereby the petitioners/appellants were directed to reinstate the respondents enforcing earlier decision of the learned High Court dated 22.11.2011 under the provisions of the Act of 2010. Leave has been granted in C.A. No.101/16 on 21.01.2016 on the basis of leave granting order dated 18.05.2012 in C.A.491/12, whereas in C.A. No.43/2013 on 02.01.2013 in the following terms:

"By the impugned order of the learned Peshawar High Court, Abbottabad Bench, the petitioner have been directed to reinstate the respondents into service, pursuant to Section 4 of the Sacked Employees (Re-instatement) Act, 2010 (Act No.XXII of 2010).

2. In C.P. No.718 of 2012, in the case of Muhammad Afzal & others v. Secretary Establishment Division, Islamabad & others through order dated 18.05.2012, this Court

has already granted leave to appeal, inter alia, to consider as to whether Section 4 of the Sacked Employees (Re-instatement) Act, 2010, is ultra vires and repugnant to Article 25 and 48 of the Constitution of Islamic Republic of Pakistan and as to whether without prejudice to the case the learned High Court had the jurisdiction to grant leave on the point noted herein above, in view of the bar contained in Article 212 of the Constitution.

3. This matter also give rise to similar question, as noted in the order dated 18.05.2012, passed in C.P. No.718 of 2012, with addition that vires of the Act may also be considered on the threshold of Article 3 of the Constitution of Islamic Republic of Pakistan, 1973, and thus leave to appeal is granted."
[emphasis provided]

5. Third group of cases belongs to the regular employees of National Highway Authority whose seniority has been affected by allowing benefits under the provisions of the Act of 2010 *vide* impugned judgment of the learned High Court and they have filed Civil Appeal No.452/13, whereas in Civil Appeal No.453/13, Civil Appeal No.65-K/13 and Criminal Petitions No.138 to 140/14 (*arising out of contempt proceedings before the learned High Court*) have been filed by the certain employees, wherein benefits under the Act of 2010 have not been extended to the appellants/petitioners or the department is not willing to extend the same. Leave was granted mainly *vide* order dated 23.04.2013 in the following terms:

"Rai Muhammad Nawaz Kharal learned ASC for the petitioner in CPLA No.1978/2012 has brought to our notice a certificate of the learned AOR attached at the bottom of the petition which reads as under:

Certificate:

- i. That this is the first CPLA on behalf of Petitioners against impugned Judgment dated 24.10.2012 passed in CP No.D-214/2011 by Sindh High Court, Karachi.*
- ii. That the Respondents No.5 to 293 have filed a separate CPLA No.1949 of 2012 against the impugned judgment dtd. 24.10.2012 passed in CP No.D-214/2011.*
- iii. That on the same question of law this Apex Court was very much pleased to grant leave to Appeal vide Order dated 18.05.2012 passed in CPLA No.718/2012 and in CP 890/893/980/983/987 and 989 of 2012 regarding the same question of law.*
- iv. That CPLA No.1949/2012 is also against the said impugned Judgment dtd. 24.10.2012 passed in CP No.D-214/2011.*

2. In view of the above, leave to appeal is granted in this petition as well as other connected Civil Petition No.1949/12. Office is directed to fix the appeal arising out of this petition along with appeal arising out of other connected petition as detailed in paragraph-iii of the certificate."

6. Fourth group of cases belongs to the employees of M/s Pakistan Telecommunication Company Ltd, who have not been extended certain benefits under the provisions of the Act of 2010 or the organization does not want to extend the benefits to such employees and as such they have filed Civil Appeals No.1081, 1084/2011, 432/13, 4-K and 5-K/2017.

Leave was granted in these cases based on main order dated 03.11.2011 in the following terms:

"Counsel for the petitioner states that the learned Division Bench of the High Court of Sindh at Karachi has held that the services of the respondent employees were not governed under the statutory rules, thus a petition under Article 199 of the Constitution was not maintainable despite proceeded to grant relief to the respondents by holding that when the right is claimed in terms of the provisions contained in the Sacked Employees (Re-instatement) Act, 2010 and a right prayed to be enforced, is sought under statute, the petition was held maintainable thus there is contradiction in the impugned judgment.

2. In view of the above submission, this petition is allowed and converted into appeal which shall be heard on the basis of available paper books, subject to option to the parties to file additional documents."

7. Civil Appeal No.1151/2012 has been filed by the Overseas Pakistani Foundation Islamabad, assailing the judgment of the learned High Court of Sindh whereby they were directed to extend the benefit of the Act of 2010 to the respondents. Leave was granted in this case on the basis of earlier order dated 08.05.2011 passed in CP 718/2012, which has been reproduced above.

8. Civil Review Petitions No. 231 to 236 and 256/2016 in Civil Petitions No.405 to 411/2016 have been filed by the State Life Insurance Corporation of Pakistan, seeking review of the judgment of this Court dated 05.05.2016, whereby the judgment of the learned High Court in favour of the respondents was maintained through which the respondents were extended certain benefits under the

provisions of the Act of 2010. Civil Appeals No.1026 & 1027/2013 have also been filed by the State Life Insurance Corporation of Pakistan, wherein leave was granted *vide* order dated 13.09.2013 in the following terms:

"In order to consider the question, when the respondents services have been terminated by the competent authority on account of the poor performance and such termination order, when challenged by the respondents, has been upheld by this Court; whether on the promulgation of the Sacked Employees (Reinstatement) Act No.XXII of 2010, the respondents were entitled to the reinstatement; whether the respondents ipso jure were entitled to the reinstatement notwithstanding the judgments/verdicts passed against them, leave is granted. In the meantime, operation of the impugned judgment is suspended."

9. Civil Appeals No.637 to 651/2015, 518, 519/2018 and Civil Petition No.842/2015 have been filed by the Civil Aviation Authority, assailing the judgment passed by learned High Court of Sindh, whereby Writ Petition filed by the Respondents, seeking reinstatement and regularization of service under the provisions of the Act of 2010, was allowed *vide* judgment dated 02.03.2015. Leave was granted *vide* order dated 17.06.2015 in the following terms:

"Leave is granted, inter alia, to consider the following:

1. *Whether Act No.XXII of 2010 titled Sacked Employees (Reinstatement) Act, 2010 ("Act") is a valid piece of legislation being violative of law laid down by this august Court in cases reported as PLD 2010 SC 265 and PLD 2012 SC 923?*
2. *Whether Sacked Employees (Reinstatement) Act, 2010 can be legally extended to cover and apply to the kind of*

employees like the Respondent No.1, i.e. daily wagers?

3. *Whether the terms of engagement and the nature of duties performed by the Respondent No.1 can be legally considered as falling within the definition of a "sacked employee" under section 2(f) of the Act?*
4. *Whether employment of the respondent No.1 on daily wage basis for a term of 89 days and upon expiry of which a fresh and successive term of employment after a gap of one or two days may be legally regarded as a continuous term of employment by the Respondent No.1 with the Petitioner?*
5. *Whether the definition of "sacked employee" contained in section 2(f)(i) requires a continuous terms of employment or simply appointment to have been between 1st November 1993 till 30th November, 1996 and departure between 1st November, 1996 till 12th October, 1999?"*

10. Civil Appeal No.660/2015 has been filed by WAPDA, challenging the order of the learned High Court of Sindh dated 10.12.2014 allowing the petition of the respondent No.2 for his reinstatement under the provisions of the Act of 2010. Leave was granted in this case *vide* order dated 06.07.2015 in line with the leave granting order dated 17.06.2015 passed in Civil Appeals No.637 to 651/2015, reproduced above.

11. Civil Appeal No.1106/2015 and Civil Petition No.3366/2015 have been filed by the former employees of the Sui Southern Gas Company Limited, who are seeking certain benefits under the provisions of the Act of 2010 and

settlement agreement dated 07.07.2003, which benefits, according to the appellants/petitioners, are not being extended to them. Leave was granted on 26.10.2015 in the following terms:

"It is submitted that the petitioners were the employees of Sui Southern Gas Company Limited (company) since 1995 and their services were terminated in 1999. They challenged the termination order before the learned Federal Service Tribunal (as at the relevant time Section 2A of the Service Tribunals Act, 1973 was in vogue) and their appeals were accepted on account of which they were reinstated vide order dated 13.04.2001. The respondent-company did not challenge such order which had attained finality. Be that as it may, a settlement was arrived at between the petitioners and the Company on 07.07.2003 on account of which besides the reinstatement having been made per the order of the learned Tribunal certain other terms and conditions regarding seniority and further promotion were also settled. Subsequently, the Sacked Employees (Reinstatement) Act, 2010 (the Act) was enforced and according to the provisions of Section 16, the petitioners were entitled to certain back benefits which were denied to them compelling the petitioners to invoke the constitutional jurisdiction of the learned High Court. Moreover, the terms and conditions of the settlement were also not adhered to by the respondent and this also was a part of the cause of action for the petitioners. The learned High Court through the impugned judgment has dismissed the petition holding it to be not maintainable; that the petitioners are not entitled to the benefit of the provisions of Section 16 of the Act; that they have approached the court with inordinate delay and thus are hit by laches; and that contractual obligations cannot be enforced through invocation of the constitutional jurisdiction of the court in terms of Article 199 of the Constitution. It is argued that the provisions of Section 16 of the Act are clear and do not permit any doubt that all the sacked employees defined in Section 2(f) are

*entitled to reinstatement benefits notwithstanding that they have been reinstated under the order of the court. The only condition is that they must fall within the purview of the law quoted above. it is also argued that since the respondent is an autonomous body, therefore, even the breach of a contractual obligation could be enforced against it as per the law down in the judgment reported as **Pakistan Defence Officer's Housing Authority vs. Javaid Ahmed (2013 SCMR 1707)**. Moreover, as there is recurring cause of action, consequently the rule of laches would not be attracted. Leave is granted to consider the above."*

12. In Civil Petition No.19-P/2016, the respondents (*Education Department*) had not reinstated the Petitioner but did reinstate his colleagues under the provisions of the Khyber Pakhtunkhwa Sacked Employees (Reinstatement) Act, 2012. Learned Peshawar High Court *vide* judgment dated 29.10.2015 has dismissed the petition of the petitioner. Hence the petitioner filed this petition for leave to appeal. However, *vide* our order 28.11.2019, we had de-clubbed certain cases (*i.e. Civil Appeals No.1448/2016, 1483/2019, Civil Petitions No.288-P,372-P/2016, 43-P to 45-P/2018, 416-P,517-P/2017, 491-P,568-P,633-P,634-P/2018, 6-P,118-P/2019, 439-P, 485-P/2017, 147-P,541-P and 704-P/2019 and 2122/2018*) relating to the Khyber Pakhtunkhwa Sacked Employees (Re-instatement) Act, 2012 but inadvertently this case could not be separated. Accordingly, office is directed to de-club this case from the titled cases and fix the same separately.

13. Civil Appeal No.1098/18 has been filed Chairman, Trading Corporation of Pakistan (Pvt) Ltd, Karachi, challenging the impugned short order dated 25.05.18, passed by learned Islamabad High Court, allowing certain benefits to respondent No.1 under the provisions of the Act of 2010. However, the petitioner claims that they do not fall within the purview of the Act of 2010. Leave was granted in this case *vide* order dated 18.09.2018 in the following terms:

*"The point raised and noted in the order dated 29.08.2018 needs further consideration in the light of the law laid down by this Court in the judgment reported as **WAPDA and 2 others vs. Mian Ghulam Bari (PLD 1991 SC 780)**. Leave is therefore, granted in this case to thoroughly consider the same."*

14. We have heard the learned counsel for the Petitioners and Respondents as well as perused the record.

Issue 1:

THE SCOPE OF THE NON-OBSTANTE CLAUSE:

15. The *vires* of the Sacked Employees (Re-instatement) Act 2010 has been challenged before us. Prior to addressing the merits of the case, we will first address the issue of the non-obstante clause present within the Act of 2010.

16. The Act of 2010 also mentions a non-obstante clause under S.4 as:

"Notwithstanding contained in any law, for the time being in force, or any judgment of any tribunal or any court including the Supreme Court and a High Court or any terms and conditions of appointment on appointment basis or otherwise, all sacked employees shall be re-instated in service and

their services shall be regularized with effect from the date of enactment of this Act."

17. The first issue that requires examination is what would be the effect of a non-obstante clause when this Court is examining the *vires* of a statute. Given that the constitutionality of The Act of 2010 has been challenged, the precise proposition that requires consideration is whether a non-obstante clause can override the provisions of the Constitution itself.

18. Article 240 of the Constitution is prefaced by the phrase '*subject to the constitution*' that serves as a clear indicator that the drafters intended the Parliament and/or Provincial Assemblies to be subservient to it. This Court, in the case of **Contempt Proceedings Against Chief Secretary, Sindh and Others**,¹ has held that:

"Article 4(1) provides that all citizens are entitled to enjoy equal protection of law and have inalienable right to be treated in accordance with law. In this respect the Act of 1973 framed under the command of Articles 240 and 242 of the Constitution provides protection to all the Civil servants by assuring them that the law promulgated by the Parliament and/or Provincial Assemblies will be subject to the Constitution. The phrase "subject to the Constitution" has been used as prefix to Article 240 which imports that Assemblies cannot legislate law against service structure provided in Part XII of Chapter 1 of the Constitution."

19. Furthermore, the legislation derives its power to legislate on matters pertaining to employees in service of Pakistan by virtue of the Constitution. It has been observed by this Court in the case of **Fazlul Quader Chowdhry v. Muhammad Abdul Haque**² that the

¹ 2013 SCMR 1752 at Paragraph 117

² PLD 1963 SC 486

Constitution is at the pinnacle of legislative hierarchy compared to any other law and that each and every body acting under it must, in exercise of delegated authority, be subservient to the instrument by which the delegation is made.

20. The Constitutional framework under Article 240 and Article 242 clearly envisions that any appointments in the service of Pakistan shall be done so under the Act of Parliament for the Federation and under the Act of Provincial Assemblies in the case of services of a province. Pursuant to Article 240 of the Constitution, the Parliament enacted The Civil Servants Act, 1973, which was adopted by all Provinces with minor modifications. Article 240 of the Constitution is further supplemented by Article 242, which envisioned the creation of a Public Service Commission that is intended to be the supervisory body to oversee recruitments for the Province and the Federation. Any act of Parliament that attempts to evade the constitutional mandate and extend undue favor to a specific class of citizens could constitute a clear violation of the constitutional rights of the Civil Servants enumerated in Articles 4, 9, 25 as well as Articles 240 and 242 of the Constitution.
21. Therefore, given the fact that the legislature itself is subservient to the Constitution, a non-obstante clause cannot be deemed to override the provisions of the Constitution itself.
22. Interestingly, the non-obstante clause also excludes the application of the judgments of this Court or any High Court. The effect of the non-obstante clause, is, in essence, to nullify a judgment of this Court. However, it is a settled position in law that a legislature cannot destroy, annul, set aside, vacate, reverse, modify, or impair

a final judgment of a Court of competent jurisdiction as most recently been upheld by the decision of this Court in **Contempt Proceedings Against Chief Secretary, Sindh and others**:³

"With respect to legislative interference with a judgment, a distinction has been made between public and private rights under which distinction a statute may be valid even though it renders ineffective a judgment concerning a public right. Even after a public right has been established by the judgment of the court, it may be annulled by subsequent legislation."

166. This Court in the case of Fecto Belarus Tractor Ltd. v. Government of Pakistan through Finance Economic Affairs and others (PLD 2005 SC 605) has held that when a legislature intends to validate the tax declared by a Court to be illegally collected under an individual law, the cause for ineffectiveness or invalidity must be removed before the validation can be said to have taken place effectively. It will not be sufficient merely to pronounce in the statute by means of a non-obstante clause that the decision of the Court shall not bind the authorities, because that will amount to reversing a judicial decision rendered in exercise of the judicial power which is not within the domain of the legislature. It is therefore necessary that the conditions on which the decision of the Court intended to be avoided is based, must be altered so fundamentally, that the decision would not any longer be applicable to the altered circumstances...

167. In order to nullify the judgment of the Court, unless basis for judgment in favour of a party is not removed, it could not affect the rights of a party in whose favour the same was passed. The issue of effect of nullification of judgment has already been discussed in the case of Mobashir Hassan reported in (PLD 2010 SC 265), Para-76 discusses the effect of nullification of a judgment by means of a legislation. In the said case, the view formed is identical to the one in the case of Indira Nehru Gandhi v. Raj Narain (AIR 1975 SC 2299) and Fecto Belarus Tractor Ltd. v. Government of Pakistan through Finance Economic Affairs and others (PLD 2005 SC 605) and it was observed that legislature cannot nullify the effect of the judgment and there are certain limitations placed on its

³ 2013 SCMR 1752

powers including the one i.e. by amending the law with retrospective effect on the basis of which the order or judgment has been passed thereby removing basis of the decision...

168. In the case in hand the Provincial Assembly has validated/regularized the absorptions and out of turn promotions by the Ordinance of 2011, Act XVII of 2011 and Act XXIV of 2013 without providing mechanism by which the absorptions and out of turn promotions with backdated seniority were given to the employees. The judgments on the issue of absorption were clear and in fact through impugned instruments, the Assembly validated the absorptions/out of turn promotions without noticing that while granting concessions to few blue eyed persons, rights of all the civil servants guaranteed under the Constitution and Civil Servant Act were impaired. In fact the impugned instruments are in the nature of legislative judgment as they purport to take away jurisdiction of the Superior Courts to abridge the writ and legality of the provisions by which Sindh Government has conferred undue favours on a select group of undeserving persons by way of deputation, posting, absorption out of turn promotions, ante-date seniority and re-hiring, hence they are violative of Article 175 of the Constitution. It goes without saying that a repugnancy to the Constitution declared by this Court or a High Court cannot be validated or condoned by a legislature unless the Constitution is itself amended."

23. Therefore, the non-obstante clause has failed abysmally to provide unfettered protection to the Act of 2010 and is rendered ineffective through the very judicial pronouncement it sought to oust. Hence, we will now proceed to examine the constitutionality of The Act of 2010 in light of judicial pronouncements.

ISSUE 2:

THE VIRES AND CONSTITUTIONALITY OF THE ACT OF 2010:

I. VIOLATION OF FUNDAMENTAL RIGHTS

24. The preamble of The Act of 2010 provides that this Act is to:

“provide relief to persons in corporations service or autonomous or semi-autonomous bodies or in a Government service who were dismissed, removed or terminated from service.”

25. The relief envisioned in The Act of 2010 is of reinstatement and then regularization into service for all sacked employees. The term ‘reinstatement’ has not been defined in The Act of 2010. Therefore, we will be relying on the jurisprudence of this Court to clarify on the meaning of the term ‘reinstatement’. In the case of **Muhammad Sharif v. Inspector General of Police, Punjab**,⁴ reinstatement was defined as:

“Reinstate in service means to place again in a former state or position⁵ from which the person had been removed.⁶ Reinstatement is effected from the date of dismissal with back pay from that date.⁷ A reinstated employee is to be treated as if he had not been dismissed and is therefore entitled to recover any benefits (such as arrears of pay) that he has lost during his period of unemployment. However, pay in lieu of notice, ex gratia payments by the employer, or supplementary benefits, and other sums he has received because of his dismissal or any subsequent unemployment will be taken into account.⁸

26. This Court further went on to state that:

“An employee, i.e. civil servant in this case, whose wrongful dismissal or removal has been set-aside goes back to his service as if he were never dismissed or removed from service. The restitution of employee, in this context, means that there has been no discontinuance in his service and for all purposes he had never left his post. He is therefore entitled to arrears of pay for the period he was kept out of service for no fault of his own. No different is the position where an employee has been served with a penalty

⁴ 2021 SCMR 962 at Paragraph 8

⁵ Black’s Law Dictionary (10th Edition, Thomson Reuters, 2014) 1477

⁶ Black’s Law Dictionary, (6th Edition, St. Paul, MINN., West Publishing Co., 1990) 1287

⁷ Aiyar’s Judicial Dictionary (10th Edition, 1988) 871

⁸ Oxford Dictionary of Law (Fifth Edition, Reissued with new covers, 2003) 419- 420.

like reduction in rank or withholding of increment(s) or forfeiture of service, etc. and the penalty has been set-aside. The employee stands restored to his post with all his perks and benefits intact and will be entitled to arrears of pay as would have accrued to him had the penalty not been imposed on him. This general principle of restitution fully meets the constitutional requirements of fair trial and due process (Article 4 & 10A) besides the right to life (Article 9) which includes the right to livelihood ensuring all lawful economic benefits that come with the post. Reinstating an employee but not allowing him to enjoy the same terms and conditions of service as his colleagues is also discriminatory (Article 25). All this snowballs into offending the right to dignity (Article 14) of an employee for being treated as a lesser employee inspite of being reinstated or restored into service.”⁹

27. Interestingly, this Court has also held that the term ‘reinstatement’ and ‘absorption’ are synonymous in nature. This was held in the case of **Dr. Anwar Ali Sahto v. Federation of Pakistan**,¹⁰ wherein this Court observed that:

“we are of then view that ‘reinstatement’ and ‘absorption’ for all intents and purposes, are synonymous expressions, in that, ‘reinstatement’ in service involves an element of ‘absorption’, therefore, the expression ‘absorbed’ used its Abdul Samad (supra) by this Court is to be construed accordingly and to that extent the case of Abdul Samad (supra) also stands revisited.”

28. The aforementioned principle can be distinguished on the facts. While the intent of the legislature, through the enactment of the Sacked Employees (Re-instatement) Act 2010, is to reinstate “sacked employees”,¹¹ the constitutionality of such a blanket legislation extending relief to a specific class of citizens requires examination.

⁹ 2021 SCMR 962 at Paragraph 9

¹⁰ PLD 2002 SC 101

¹¹ S.2(f) of the Sacked Employees (Re-instatement) Act, 2010

29. We will now proceed to examine the constitutionality of The Act of 2010 on the touchstone of Article 8 of the Constitution which provide for laws inconsistent with or in derogation of fundamental rights to be void. The fundamental rights that are under consideration before us are Article 4, 9 and Article 25 of the Constitution which reads as follows:

"4. To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan

9. Security of person.- No person shall be deprived of life or liberty saves in accordance with law.

25. Equality of citizens.- (1) All citizens are equal before law and are entitled to equal protection of law."

30. The principles for adjudging the constitutionality of legislation have been enumerated time and again by this court. It was stated in the case of **Shahid Pervaiz v. Ejaz Ahmad**¹² that:

"112. Undoubtedly, the legislature enjoys much leeway and competence in matters of legislation, but every law enacted may not necessarily be tenable on the touchstone of the Constitution. It is the sole jurisdiction of this Court, under the law and the constitution to look into the fairness and constitutionality of an enactment and even declare it non est, if it is found to be in conflict with the provisions of the Constitution. Thus, legislative competence is not enough to make a valid law; a law must also pass the test at the touchstone of constitutionality to be enforceable, failing which it becomes invalid and unenforceable."

31. Therefore, the proposition then becomes whether the law has placed the regular employees, who remained in

¹² 2017 SCMR 206

service, at a disadvantageous position in terms of seniority and other benefits to reinstated employees. If so, then The Act of 2010 would be violative of right enshrined under Article 9 and Article 25 of the Constitution of the regular employees.

32. A similar matter was addressed by this Court **Contempt Proceedings Against Chief Secretary, Sindh and Others**¹³ where the vires of the legislative instruments known as the Sindh Civil Servants (Regularization of Absorption) Ordinance, 2011 and the Sindh Civil Servants (Regularization of Absorption) Act, 2011 were examined. Through the operation of these legislative instruments, the employees of the Federal Government, Corporation, Council, statutory body, or any other authority absorbed in the Sindh Civil servants on or before the commencement of the aforementioned ordinance were granted backdated seniority from the date of their absorptions. Therefore, the question before the court was whether such regularization, among other legislative instruments, could be validated through statutes? In holding that the statute was ultra-vires, this Court held that:

"118. Article 9 of the Constitution provides protection to every citizen of life and liberty. The term "life and liberty", used in this Article is very significant as it covers all facets of human existence. The term "life" has not been defined in the Constitution, but it does not mean nor it can be restricted only to the vegetative or animal life or mere existence from conception to death. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The term "life" includes 'reputation' 'status' and all other ancillary privileges which the law confers on the citizen. A civil servant is fully protected under Article 9 and cannot be deprived of his right of reputation and status. Under the impugned instruments a person,

¹³ 2013 SCMR 1752 at Paragraph 117

who without competing through the recruitment process is conferred status of a civil servant. The impugned legislation has amended service laws in a manner to deprive the civil servants from their rights to status and reputation under Article 9 of the Constitution.

119. A civil servant, who after passing the competitive exam in terms of the recruitment rules, is appointed on merits, loses his right to be considered for promotion, when an employee from any other organization is absorbed under the impugned legislative instruments, without competing or undertaking competitive process with the backdated seniority and is conferred the status of a civil servant in complete disregard of recruitment rules. Under the impugned enactments, it is the sole discretion of the Chief Minister to absorb any employee serving in any other organization in Pakistan to any cadre in the Sindh Government. The discretion of the Chief Minister to absorb any employee from any part of Pakistan to any cadre with backdated seniority directly affects the fundamental rights of all the civil servants in Sindh being violative of the Article 4 which provides equal protection of law to every citizen to be treated in accordance with law, which is inalienable right of a citizen. The impugned legislative instruments have been promulgated to extend undue favour to few individuals for political consideration and are against the mandate of the Civil Servant Act and recruitment rules framed thereunder. The impugned instruments are discriminatory and prejudicial to public interest as such enactments would be instrumental in affecting the Civil servants' tenurial limitations and their legitimate expectancy of future advancement. The provision of absorption on the plain reading reveals that this provision has been promulgated to circumvent and obviate the very framework of the Provincial civil structure, as envisaged by the Constitution and law. By such impugned instruments, a parallel system based on discrimination and favoritism has been

imposed to supersede the existing law, Rules and Regulations governing the important matters of civil servants like 'absorption', therefore, it can be safely held that the impugned instruments being discriminatory are violative of Article 25 of the Constitution, as it is not based on intelligible differentia not relatable to the lawful object.

120. The impugned Ordinance and Act of 2011 validating absorption by the Sindh Government are ultra vires of Articles 240 and 242 of the Constitution, as these instruments, in the first place, have been promulgated without amending the Act of 1973, and the rules framed there-under. Moreover, the impugned validation instruments are multiple legislation and do not provide mechanism by which absorption of different employees took place in complete disregard of the parent statute and the rules framed there under. By these impugned validating instruments restriction placed by Articles 240 and 242 of the Constitution has been done away. The validating instruments allowed absorption of a non Civil Servant conferring on him status of a Civil Servant and likewise absorption of a Civil Servant from non-cadre post to cadre post without undertaking the competitive process under the recruitment rules. We may further observe that the Provincial Assembly can promulgate law relating to service matters pursuant to the parameters defined under Articles 240 and 242 of the Constitution read with Act of 1973 but, in no way, the Provincial Assembly can introduce any validation Act in the nature of multiple or parallel legislation on the subject of service law.

33. Finally, in the aforementioned case, the Court concluded that:

"The impugned legislation on absorption is persons/class specific as it extends favours to specific persons infringing the rights guaranteed to all the civil servants under the service structure provided under Articles 240 and 242 of the Constitution. This Court in the

case of Baz Muhammad Kakar and others v. Federation of Pakistan and others (PLD 2012 SC 870) has held that the legislature cannot promulgate laws which are person/class specific as such legislation instead of promoting the administration of justice caused injustice in the society amongst the citizens, who were being governed under the Constitution. In the case in hand the impugned legislation, prima facie, has been made to protect, promote and select specific persons who are close to centre of power, and has altered the terms and conditions of service of the civil servants to their disadvantage in violation of Article 25 of the Constitution."

34. The matter before us bears a similar nexus to the aforementioned case. The legislature has, through the operation of The Act of 2010, attempted to extend undue benefit to a limited class of employees. This legislation has a direct correlation to the right enshrined under Article 9 of the Constitution for employees currently serving in the departments falling under section 2(d) of The Act of 2010. Under Article 9 of the Constitution, a civil servant has been extended the right to 'status' and 'reputation'. The right to 'status' and 'reputation' are not mutually exclusive and are encompassed by the wider umbrella of Article 9 of the Constitution. Upon the 'reinstatement' of the 'sacked employees', the 'status' of the employees currently in service is violated as the reinstated employees are granted seniority over them. This is an absurd proposition to consider as the legislature has, through legal fiction, deemed that employees from a certain time period are reinstated and regularized without due consideration to how the fundamental rights of the people currently serving would be affected.

35. There exists a regulatory framework of each organization which was created to ensure parity among the

employees in service of Pakistan. There exists a meritorious process that ensures completion of all codal formalities through which civil servants are inducted into the service of Pakistan. The rights of the people who have completed such formalities and complied with the mandatory requirements laid down by the regulatory framework cannot be allowed to be placed at a disadvantageous position through no fault of their own.

36. Similarly, this Act is also in violation of the right enshrined under Article 4 of the Constitution, that provides that citizens equal protection before law, as backdated seniority is granted to the '*sacked employees*' who, out of their own volition, did not challenge their termination or removal under their respective regulatory frameworks. Therefore, by doing so, the legislature has granted undue favors through circumvention and obviation of the very framework of the civil structure envisaged by the Constitution and law.

37. Given that none of the '*sacked employees*' opted for the remedy available under law upon termination during the limitation period, the transaction has essentially become one that is past and closed. They had foregone their right to be reinstated by availing the due process of law that was available to them due to which they had foregone their right to challenge their orders of termination or removal. The '*sacked employees*', upon termination or removal, were entitled to the legal remedy to challenge such orders and their inaction has closed the doors for such remedy.

ISSUE 3:

**THE REPUGNANCY OF THE ACT OF 2010 WITH
ARTICLE 240 AND ARTICLE 242 OF THE
CONSTITUTION OF PAKISTAN:**

38. Needless to mention that even in the absence of violation of fundamental rights, this Court may examine the vires of a legislation by assessing whether it can be reconciled with the Constitution of Pakistan. In the case of **Zafar Ali Shah v. Pervaiz Musharraf, Chief Executive of Pakistan**,¹⁴ a full court has held that:

"so long as the superior Courts exist, they shall continue to exercise powers and functions within the domain of their jurisdiction and shall also continue to exercise power of judicial review in respect of any law or provision of law which comes for examination before the superior Courts. "

39. This Court, as protector and defender of the Constitution, has an inherent duty to ensure that the provisions of the constitution are enforced in any case coming before us and declare any enactments invalid that abrogate the Constitution.¹⁵

40. Therefore, as discussed above, notwithstanding the non-obstante clause in The Act of 2010, there is no cavil to the proposition that this Court may examine the legislative competence to enact statutes. Therefore, the second limb of the proposition orbits around the legislative competence of the legislature to enact 2010 Act as it circumvents the constitutional process envisioned under Article 240 and Article 242 of the Constitution.

41. Another important distinction is the difference of the terms 'civil servant' and employees in 'Service of Pakistan'. This is a crucial distinction as the proposition that requires examination is whether a person can be declared by the legislature, on the basis of legal fiction, a Civil Servant, for the purposes of section 2(b) of the Civil Servants Act, and a person serving 'in service of Pakistan',

¹⁴ PLD 2000 SC 869

¹⁵ PLD 1963 SC 486. PLD 1967 Lahore 227. 1989 PTD 42. PLD 1983 SC 457. PLD 1999 SC 54. 1999 SCMR 1402. 2002 SCMR 312. 2004 SCMR 1903. PLD 2006 SC 602.

under Article 260 of the Constitution. A civil servant is defined as:

“(b) "civil servant" means a person who is a member of an All-Pakistan Service or of a civil service of the Federation, or who holds a civil post in connection with the affairs of the Federation, including any such post connected with defence, but does include-
(i) a person who is on deputation to the Federation from any Province or other authority;
(ii) a person who is employed on contract, or on work-charged basis or who is paid from contingencies; or
(iii) a person who is "worker" or "workman" as defined in the Factories Act, (XXV of 1934), or the Workman's Compensation Act, 1923 (VIII of 1923)

42. The term ‘service of Pakistan’ is defined under Article 260 of the Constitution as:

“Service of Pakistan” means any service, post or office in connection with the affairs of the Federation or of a Province, and includes an All-Pakistan Service, service in the Armed Forces and any other service declared to be a service of Pakistan by or under Act of Majlis-e-Shoora (Parliament) or of a Provincial Assembly, but does not include service as Speaker, Deputy Speaker, Chairman, Deputy Chairman, Prime Minister, Federal Minister, Minister of State, Chief Minister, Provincial Minister, Attorney-General, Advocate-General, Parliamentary Secretary or Chairman or member of a Law Commission, Chairman or member of the Council of Islamic Ideology, Special Assistant to the Prime Minister, Adviser to the Prime Minister, Special Assistant to Chief Minister, Adviser to a Chief Minister or member of a House or a Provincial Assembly”

43. A ‘sacked employee’ has been defined under The Act of 2010 under S.2(f). The employer for such organizations has been defined under s.2(f) as:

“employer means the Federal Government or any Ministry or Division or department of the Federal Government or a corporation or organization or autonomous or semi-

autonomous body established by or under a Federal law or owned or controlled by the Federal Government."

44. A bare perusal of the aforementioned definition reveals that the 'sacked employees' fall into either the definition of a 'civil servant' or employees 'in the service of Pakistan'. This Court, in the case of **Syed Abida Hussain v. Tribunal for N.A 69**,¹⁶ has held that the two terms are not synonymous. The relevant extract is reproduced below:

*"6. It is difficult to subscribe to the contention of the learned counsel. The expression 'service of Pakistan' has been defined in Article 260(1) of the Constitution... Learned counsel for the petitioner rightly concedes that the post of an Ambassador is a post in connection with the affairs of the Federation. It will be seen that the definition does not take notice of the manner in which a post in connection with the affairs of the Federation or a Province may be filled. Thus so far as the inclusion of the post in the service of Pakistan is concerned, it is immaterial whether the holder thereof has come to occupy it through a special contract or in accordance with the recruitment rules framed under the Civil Servants Act: consequently, the mere fact that a person is not a civil servant within the meaning of the Civil Servants Act would not put him beyond the pale of the said Constitutional definition. The contention that the case of the petitioner was covered by sub-clause (n) *ibid*, is entirely misconceived as *ex facie* it does not apply to situations where the relationship of master and servant exists between the parties. Here the petitioner was a wholetime employee of the Government and except for matters, which were specifically provided in the letter of appointment she was governed by the ordinary rules of service applicable to the civil servants. It may perhaps be of interest to mention here that these rules were framed in pursuance of the provision of Article 240 *ibid*. Thus the assertion on her behalf that while serving as an Ambassador she could not be treated as one in the service of Pakistan merely because her appointment to the post owed its origin to*

¹⁶ PLD 1994 SC 60

a special contract cannot be accepted. Admittedly, a period of two years has not passed since she relinquished charge of the said post. Therefore, she has been rightly held to be suffering from the disqualification laid down in clause (k) ibid. We find no merit in this petition. It is hereby dismissed. For the above discussion, it is quite clear that a person may be in the service of Pakistan but for that reason he cannot be classed as a 'Civil Servant' as well, as defined in the Civil Servants Act. The Service Tribunal established in pursuance of Article 212 of the Constitution has been conferred exclusive jurisdiction only in respect of the dispute relating to terms and conditions of the service of a 'Civil Servant' as defined under the Civil Servants Act, 1973 and as such the jurisdiction of the Tribunal could not be extended to any other category."

45. This reasoning was upheld in the case of **Registrar, Supreme Court of Pakistan v. Wali Muhammad**,¹⁷ wherein it was held that:

"We would like to mention here that from the trend of arguments at the bar it appeared that two expressions 'service of Pakistan' and 'Civil servants' were treated as synonymous. This in our opinion is not so. Service of Pakistan is defined in Article 260 of the Constitution as meaning, any service, post or office in connection with the affairs of Federation or a Province. This expression also includes an All Pakistan Service and service in the Armed Forces or any other service declared under an Act of the Parliament or a Provincial Assembly as Service of Pakistan. The terms 'Civil Servant' is defined in the Civil Servants Act 1973 as a person, who is a member of an All Pakistan Service or of a civil service of the Federation or a person holding a civil post in connection with the affairs of Federation, including a civil post connected with the defence. However, a person on deputation to the Federation from any Province or other authority, a person who is employed on a contract or on work-charge basis who is paid from contingencies and a person who is 'worker' or 'workman' as

¹⁷ 1997 SCMR 141

defined in the Factories Act, 1934 or the Workmen's Compensation Act, 1923, are expressly excluded from the category of 'Civil Servant'. On a careful examination of the definitions of 'Service of Pakistan' as given in Article 260 of the Constitution and the 'Civil Servant' as mentioned in Civil Servants Act, 1973, it would 'appear that the two expressions are not synonymous. The expression 'Service of Pakistan' used in Article 260 of the Constitution has a much wider connotation than the term 'Civil Servant' employed in the Civil Servants Act. While a 'Civil Servant' is included in the expression 'Service of Pakistan', the vice versa is not true. 'Civil Servant' as defined in the Civil Servants Act, 1973 is just a category of service of Pakistan mentioned in Article 260 of the Constitution. To illustrate the point, we may mention here that members of Armed Forces though fall in the category of 'Service of Pakistan' but they are not civil servants within the meaning of Civil Servants Act and the Service Tribunals Act. The scope of expression 'Service of Pakistan' and 'Civil Servants' came up for consideration before this Court in the case of Syeda Abida Hussain v. Tribunal for N.A. 69 (PLD 1994 SC 60). In that case the petitioner was disqualified from contesting the general elections of 1993 on the ground that she was a person who held the office of profit in the Service of Pakistan. It was contended by the petitioner in that case that she was appointed as an Ambassador on contract for two years and as a person employed on contract was specifically excluded from the definition of civil servant the petitioner could not be disqualified."

46. This rationale was finally upheld in the case of **Mubeen-Us-Salam v. Federation of Pakistan**¹⁸ wherein it was stated that:

"From perusal of the definition of 'civil servant' in section 2(1)(b) of the CSA, 1973, it emerges that in order to attain the status of a 'civil servant' it is necessary that the person should be member of All Pakistan Service or of a civil service of the Federation, or who

¹⁸ PLD 2006 SC 602 at Paragraph 35

holds a civil post in connection with the affairs of the Federation. There may be some employees who fall within the definition of 'civil servant' for the purpose of STA, 1973 but do not enjoy the status of All Pakistan Service or of a civil service of the Federation."

47. When assessing when the legislature can, through legal fiction, by a deeming clause, declare a person to be a person in the service of Pakistan for the purposes of Article 260, we find solace in the case of **Federation of Pakistan v. Muhammad Azam Chattha**,¹⁹ wherein it was stated that:

"In this behalf it may be noted that according to Article 260 of the Constitution, the Legislature is empowered to declare any service to be service of Pakistan by or under an Act of Majlis-e-Shoora [Parliament]. This constitutional provision nevertheless does not empower the Legislature to declare any person to be in the service of Pakistan, on the basis of a legal fiction. The Legislature by using the expression "shall be deemed" has allowed to enjoy the status of civil servant, even to those persons who were excluded from its definition in terms of section 2(l)(b) of the CSA, 1973, which also includes a person, who is a contract employee as interpreted by this Court..."

48. Further support to the proposition that the Legislature cannot, by deeming clause, confer the status of a 'civil servant' upon employees of corporation can be found in the case of **Mubeen-us-Salam v. Federation of Pakistan**,²⁰ wherein, after an elaborate discussion, it was held that that:

"71. In view of above position, we are of the opinion that Article 260 of the Constitution does not mandate to Legislature to declare any person to be in the service of Pakistan, and by deeming clause to be a civil servant for the purpose of STA, 1973. We have minutely examined the earlier judgments on the point, particularly the cases of WAPDA

¹⁹ 2013 SCMR 120

²⁰ PLD 2006 SC 602

employees, discussed above, as well as the judgment in the case of Qazi Wali Muhammad (*ibid*), to come to the conclusion that a person can be declared to be in service of Pakistan but not necessarily a civil servant, in terms of CSA, 1973.

75. This Court had an occasion to examine the effect

of a deeming clause in the case of Mehreen Zaibun Nisa (PLD 1975 SC 397), wherein the effect of a deeming clause in light of the earlier judgments was summed up as follows:

'(i) When a statute contemplates that a state of affairs should be deemed to have existed, it clearly proceeds on the assumption that in fact it did not exist at the relevant time but by a legal fiction we are to assume as if it did exist.

(ii) Where a statute says that you must imagine the state of affairs, it does not say that having done so you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.

(iii) At the same time, it cannot be denied that the Court has to determine the limits within which and the purposes for which the Legislature has created the fiction.

(iv) When a statute enacts that something shall be deemed to have been done which in fact and in truth was not done, this Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to.'

76. As pointed out herein above that on promulgation of section 2-A of the STA, 1973, the persons employed in the Government controlled Corporations, were never treated to be in the service of Pakistan, therefore, they were not allowed to enjoy the status of a civil servant. But now, by means of a legal fiction, such status has been conferred upon them notwithstanding the fact that statedly their cases are not covered by the definition of "civil servant" and on account of this legal fiction a

discrimination has been created between the persons, who have been excluded from the definition of civil servant as per section 2(1)(b) of the CSA, 1973 whereas the persons in the employment of Government controlled Corporations, either created by or under a statute, most of them incorporated under the Companies Ordinance 1984, have been declared to be in the service of Pakistan and deemed to be civil servants. Thus, it has created a classification which does not seem to be reasonable. As per the second principle, noted hereinabove, a deeming clause only permits to imagine a particular state of affairs but it does not mean that such imagination can be allowed to be overwhelmed, when it comes to the inevitable corollaries of that state of affairs, therefore, merely on the basis of imagination, status of a person cannot be converted, without ensuring compliance of the basic requirements. As in the case in hand, merely on the basis of a deeming clause, if a person is treated to be a civil servant, it has also to be examined whether remaining conditions, provided under the CSA, 1973 have been fulfilled, particularly, as to whether, while making appointments, provisions of section 5 of the CSA, 1973 have been complied with or not, according to which the appointments to an All-Pakistan Service or, to a civil service of the Federation or to a civil post in connection with, the affairs of the Federation, including any civil post connected with the defence, shall be made in the prescribed manner by the President or by a person authorized by the President in that behalf. Inevitable corollary consequent upon this provision of law and the conclusion would be that those persons, who are working in the Government controlled Corporations etc. and have been appointed in a prescribed manner, would be deemed to be in the service of Pakistan and if their status is declared to be a civil servant, only then they would be entitled to enjoy the benefits of Section 2-A of the STA, 1973, whereas the persons other than those, like persons employed on contract basis, deputationist, worker or workman, under different statutes, whose appointment has not taken place in the prescribed manner, shall not be deemed to be civil servants and merely on the basis of

fiction their status cannot be enhanced essentially, in majority of cases, they have not been appointed under any statutory provision and it is also not clear as to whether their appointment had taken place under lawful authority and such Authority had exercised its discretion fairly and in good faith or there was any mala fide etc."

49. Furthermore, S.2(f)(i) and S.2(f)(ii) clearly envisions that reinstatement and regularization²¹ should be extended to not only regular employees who were either dismissed, removed, or terminated, but to ad-hoc and contract basis employees as well. When S.2 is read holistically, the overall effect of the enactment is that the overall recruitment process is overlooked and non-civil servants are 'reinstated' into civil service thereby deeming them to be members of civil service through a deeming clause.

50. Therefore, given the fact that it is settled law that the legislature cannot, through deeming clause, confer the status of a civil servant,²² it has overlooked the relevant framework for employees in the service of Pakistan in clear violation of Article 240 and Article 242 of the Constitution.

51. This is particularly troubling as each of the 'sacked employees' had appropriate remedies available under Article 212 read with the Service Tribunals Act, 1973 before the appropriate Service Tribunal. Given that the employees did not elect for such a remedy upon termination of services, they have foregone their right to be reinstated.

52. In conclusion, while The Act of 2010 intends for reinstatement, the jurisprudence of this Court has clearly laid down the nuances entailed by the term 'reinstatement'. The Act of 2010 does not fulfill the criteria laid down by

²¹ Under S.4 of The Act of 2010

²² 2015 SCMR 456 at Paragraph 203

this Court in numerous cases. The Act has extended undue advantage to a certain class of citizens thereby violating the fundamental rights under Article 4, 9, and 25 of the employees in the Service of Pakistan and being void under Article 8 of the Constitution.

53. The Legislature also lacked the legislative competence to enact The Act of 2010 as it has wrongfully attempted to circumvent the jurisprudence of this Court and Article 240 and Article 242 of the Constitution for which reason we are inclined to hold the Act to be *ultra vires* of the Constitution.

II. THE EFFECT OF DECLARING A LAW ULTRA VIRES:

54. The final point of contention becomes the effect of the judgment declaring the law to be *ultra vires* of the Constitution. It is settled law that the effect of a declaration of this Court deeming a statute to be *ultra-vires* of the Constitution has been aptly described in the case of **Ali Azhar Khan Baloch v. Province of Sindh**²³ that:

"129... Now, it is a settled law of this Court that no right or obligation can accrue under an unconstitutional law. Once this Court has declared a legislative instrument as being unconstitutional, the effect of such declaration is that such legislative instrument becomes void ab initio, devoid of any force of law, neither can it impose any obligation, nor can it expose anyone to any liability.

130. In the case in hand, the benefits extended to the Petitioners through the impugned legislation, were not only violative of law but were also declared ultra vires of the Constitution. In such like circumstances, the benefits, if any, accrued to the Petitioners by the said legislative instruments shall stand withdrawn as if they were never extended to them... In the present proceedings, this Court has struck down the

²³ 2015 SCMR 456

legislative instruments by which benefits were extended to a class of persons, in complete disregard of the service structure mandated by the provisions of Articles 240 and 242 of the Constitution. Through the legislative instruments, which were struck down by this Court, undue favours were extended to a few individuals, for political considerations against the mandate of the Act and the recruitment Rules framed thereunder. Such instruments were held to be violative of Articles 4, 8, 9, 14 and 25 of the Constitution. Through these legislative instruments, many of the Petitioners were absorbed and/or given out of turn promotions or back-dated seniority, depriving other meritorious Civil Servants of their seniority and smooth progression in career. A substantial number of unfit and unmeritorious Officers were thus absorbed/promoted out of turn/given back-dated seniority in important cadres, services and posts by extending undue favours by the Authorities, skipping the competitive process. Such absorptions etc, which were not permissible under the Civil Servants Act, had practically obliterated the Constitutional and legal differentiations that existed amongst various cadres, posts and services. We have already observed in our judgment that the legislative instruments, which were struck down by this Court, had engendered a culture of patronage, bringing more politicization, inefficiency and corruption in the Civil Service."

55. Furthermore, it was stated that in the case of

Shahid Pervaiz v. Ejaz Ahmad²⁴:

"111. ... If an illegal benefit was accrued or conferred under a statute, whether repealed (omitted) or continuing, and its benefits continue to flow in favour of beneficiaries of such an unconstitutional Act, and it is declared ultra vires, the benefits so conferred would have to be reversed irrespective of the fact that the conferring Act was still on the statute book or not."

²⁴ 2017 SCMR 206

56. It was also mentioned in Shahid Pervaiz v. Ejaz Ahmad (*supra*) that:

*"119. However, when a statute (whether existing or repealed) is found to be ultra vires the Constitution, the Court is empowered indeed, mandated to examine whether any person continues to enjoy the benefits of the ultra vires statute, or whether any state of affairs continues to exist as a result, and if it is found so, the Court is mandated to undo the same, provided that the benefit or state of affairs in question is not a past and closed transaction. For instance, the case of an employee who had enjoyed an out of turn promotion pursuant to a law found to be ultra vires the Fundamental Rights, who now stands retired and or died, it would constitute a past and closed transaction inasmuch as it would be a futile exercise to re-open the case of such an employee. On the other hand, employees who were so promoted under such a statute and who continue to remain in service, would be liable to be restored to the position that existed prior to the benefit conferred under the statute found inconsistent with Fundamental Rights. Indeed, once a statute has been declared as being unconstitutional for any reason, all direct benefits continuing to flow from the same are to be stopped. Reference in this behalf may be made to the case of *Dr. Mobashir Hassan v. Federation of Pakistan* (PLD 2010 SC 265).*

57. The only cavil to such a proposition is if a vested right was created, however, that can only be generated through a valid enactment. Furthermore, neither are the benefits accrued under the Act of 2010 neither a past and closed transaction as the rights created were through a *non est* legislation from its inception. Therefore, given the nature of the Act of 2010, and its blatant unconstitutional mechanism, a vested right could not have been created, let alone the vested right be protected under the doctrine of a past and closed transaction.

58. It is the duty of this Court to safeguard the rights and interests of the citizens and such application cannot be maintained as the constitutional rights of employees who have invested decades of their lifetime into the service of the country are outrightly violated. They continue to be disadvantageously placed in comparison to their peers who reap the benefits of their own inaction.

59. Therefore, in light of the discussion above, the Act of 2010 is hereby declared to be *ultra vires* of the Constitution. The effect of such a declaration is that any/all the benefits accrued to the beneficiaries are to be ceased with immediate effect.

60. This Court, in light of **Shahid Pervaiz** (*supra*), is empowered/mandated to examine the benefits accruing to each recipient and undo the same if it is not a past and closed transaction. Therefore, the cases of employees who have retired and/or passed away are past and closed transactions as we do not find it appropriate to interfere in their cases as it will be an exercise in futility.

61. Whereas, the beneficiaries of the Act of 2010, who are still in service, will go back to their previous positions, i.e. to the date when the operation of the Act of 2010 has taken effect. However, it would be inequitable to reverse any monetary benefits received by them under the Act of 2010 for the period they have served and those shall remain intact as they were granted against service. However, the lump sum received by such 'sacked employees' upon reinstatement shall be reversed.

62. In the light of above, all the Petitions, Appeals, Review Petitions and Applications are disposed of as per list below:

CPLAs converted & Allowed/CRPs allowed/CAs Allowed	Dismissed	Disposed of
CAs 491, 540-546, 580/12, CA 1151/12, CA 452/13, CAs 1026 & 1027/13, CAs 637-651/15, CAs 660/15, CA 101/16, CAs 518, 519/18 CA 1098/18 CAs 1921-1923/19, CP 842/15, CPs.1567/15, CPs 588-K, 589-K/18, CRPs 231-236, 256/16	CAs 1081,1084/11 CAs 536-539/12, CA 43/13, CAs 432/13, CAs 453/13, CA 65-K/13, CA 1106/15, CAs 4-K & 5-K/17, CPs 150, 151/13, CP 677-P/14, Cr.PLA 138-140/14, CPs 3612/15, CP 3366/15,	All listed CMAs are disposed of.

Judge

Judge

Judge

ANNOUNCED IN OPEN COURT
 At ISLAMABAD on 17.08.2021.

Judge