(1)

IN THE HIGH COURT OF SINDH AT KARACHI

C. P. No. D-1311 of 2009

Presented on 29.6.09

Addl. Registrar (Writ)
Deputy Registrar (Writ)
on leave

Muhammad Mustafa Kamal,
Son of late Muhammad Amir Malik,
Muslim, adult,
Additional Director,
Directorate of Training & Research (Income Tax),
Block 48-C, Pak Secretariat,
Saddar,
Karachi..Petitioner

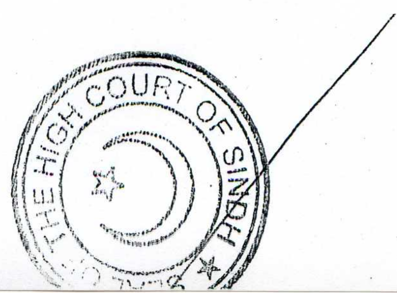
Versus

1. Federation of Pakistan,
Through the Secretary,
Revenue Division /
Chairman,
Federal Board of Revenue,
FBR House.
Constitution Avenue,
Islamabad.

2. Haroon Khan Tareen,
Son of not known to the petitioner
Muslim, adult,
Special Assistant to Chairman,
Federal Board of Revenue,
Constitution Avenue,
Islamabad.

3. Imtiaz Ahmed Barakzai
Son of not known to the Petitioner
Muslim, adult,
Commissioner of Income Tax Audit /
Chairman, Inquiry Committee,
Large Taxpayer Unit,
PRC Towers,
M.T. Khan Road,
Karachi..Respondents

PETITION UNDER ARTICLE 199 OF THE CONSTITUTION OF PAKISTAN, 1973.



IN THE HIGH COURT OF SINDH, KARACHI

Constitution Petition No. D-1311 of 2009

Present

Mr. Justice Sajjad Ali Shah.

Mr. Justice Shahid Anwar Bajwa.

Muhammad Mustafa Kamal,
S/o late Muhammad Amir Malik,
Additional Director,
Directorate of Training & Research (Income Tax),
Block 48-C, Pak Secretariat,
Saddar, Karachi. ----------- Petitioner.

Versus

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   Through Secretary
   Revenue Division/Chairman,
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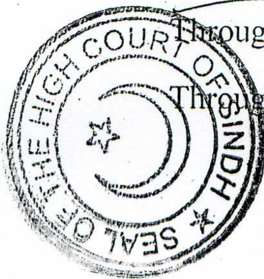
3. Imtiaz Ahmed Barakzai S/o not known,
   Commissioner of Income Tax Audit/ Chairman
   Inquiry Committee, Large Taxpayer Unit,
   PRC Towers,
   M.T. Khan Road,
   Karachi. ----------- Respondents

Date of hearing: 26.08.2010.
Date of Judgment 22.09.2010.

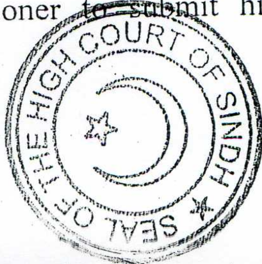
Petitioner. Through Mr. Khalid Jawaid Khan, Advocate.

Respondent. Through Mr. Akhtar Ali Mehmood, Advocate



JUDGEMENT

SHAHID ANWAR BAJWA, J- Factual context of the petition is that in 1990 the petitioner joined as Income Tax Officer. On 5.2.2008 an order of inquiry was passed by the Secretary General Revenue Division/Chairman F.B.R. constituting a two member inquiry committee under the provisions of the Removal From Service (Special Powers) Ordinance, 2000 for conducting an inquiry in respect of allegations against the petitioner which allegations were stated in the order of inquiry. The Inquiry Committee issued charge-sheet/statement of allegations and called upon the petitioner to submit his written defence. Thereafter inquiry was held and on or about 23.12.2008 Inquiry Committee submitted it report. The Inquiry Committee recommended punishment of "censure". However, the competent authority on 14.01.2009 issued show-cause-notice under Section 3 of the Removal From Service (Special Powers) Ordinance, 2000 calling the petitioner as to why major penalty of dismissal from service prescribed in section 3 of the said Ordinance should not be imposed upon him. The petitioner submitted reply to the Show-Cause-Notice. After this reply was received on 7.4.2009 the competent authority ordered that denovo inquiry be held and a fresh Inquiry Committee comprising of two officers was constituted. The committee called upon the petitioner to submit his written defence. In this petition the

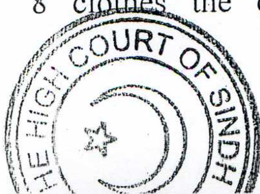


petitioner has challenged the order by which denovo inquiry has been ordered besides challenging the first statement of allegations.

2. Mr. Khalid Jawaid Khan, learned counsel for the petitioner made the following submissions:-

1. Learned counsel referred to definition of misconduct given in Section 2(b) of The Removal from Service (Special Powers) Ordinance, 2000 (hereinafter referred to as the Ordinance of 2000) and Section 3(b) thereof and compared it with Rule 2(4) of the Government Servants (Efficiency & Discipline) Rules and contended that whereas a violation of Government Servants (Conduct) Rules, 1964 is included in the definition of misconduct under the Government Servants (Efficiency & Discipline) Rules the same do not find mention in Section 2(b) and therefore even if all the allegations made in the statement of allegations are admitted as true even then no misconduct as defined is made out and therefore very initiation of Ordinance of 2000 is without lawful authority and of no legal effect.

2. Learned counsel referred to Section 8 of the Ordinance of 2000 as well as to Section 3(1) thereof and contended that it is not available to competent authority to order denovo inquiry because kinds of orders that can be passed by the competent authority are specifically mentioned in Section 3(1) and Section 8 clothes the competent authority to pass order only in



accordance with the provisions of the Ordinance of 2000. Learned counsel therefore contended that competent authority could not have ordered denovo inquiry. Learned counsel relied upon **Muhammad Hayat, Superintendent Engineer v. Government of West Pakistan & another, PLD 1964 (W.P) Lahore 264** to contend that no denovo inquiry could be ordered.

3. The Inquiry Committee had recommended censure and without disclosing any reason for disagreeing with the recommendations of the Inquiry Committee show-cause-notice had been issued proposing penalty of dismissal from service. This competent authority could not have done.

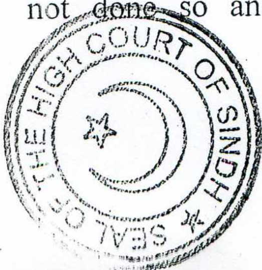
4. The order of denovo inquiry is not speaking order because no reason is disclosed for such an order.

5. Under Rule 5(1) (iv) of the Civil Servants (Efficiency & Discipline) Rules, 1973 power is much wider because the power is to pass such order "as it may deem proper". Learned counsel submitted that this is much wider than the power conferred under the authority under the Ordinance of 2000. Learned counsel relied upon **Shibli Farooqi v. Federation of Pakistan and others, 2009 PLC (CS) 616** for his contention that competent authority must record reasons for its decision of deviating for recommendations of the Inquiry committee.

6. Since objection regarding maintainability of the petition, had been taken in comments learned counsel submitted that under Section 10 of the Removal From Service (Special Powers) Ordinance, 2000 a remedy against final order is provided before the Federal Service Tribunal and there is no remedy provided within the four corners of the Ordinance, 2000 or any other law against an order of denovo inquiry. He therefore contended that petition in such a situation would be maintainable. Learned counsel relied upon **Mushtaq Ahmed Sabto & Others v. Federation of Pakistan & Others, 2001 PLC (CS) 623, Syed Aftab Ahmed Jafri v. Pakistan through Secretary, Ministry of Health (Health Division), Government of Pakistan, Islamabad and others, 2004 PLC (CS) 52, Commissioner of Income Tax v. M/s. Eli lilly Pakistan (Pvt) Ltd., 2009 SCMR 1279.**

3. Mr. Akhtar Ali Mehmood, appearing for the respondents on the other hand made the following submissions:-

1. The Inquiry Committee in this case has not reached unanimous verdict and there was difference of opinions between two members of the Inquiry Committee, whereas one member has held the petitioner guilty of charges and other member has not done so and has held him guilty of negligence only.



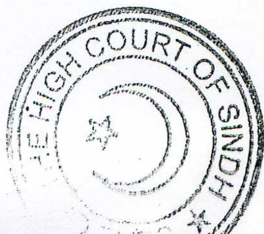
Therefore this is a case where there is no finding, definite or precise, denovo inquiry could always be ordered.

2. Regarding definition of misconduct, learned counsel submitted that where in Civil Servants (Efficiency & Discipline) Rules definition states it "means" under the Ordinance of 2001 it states "includes".

4. Exercising his right to reply Mr. Khalid Jawaid Khan submitted that although on the factual plan there was disagreement between the members of the Inquiry committee but as far as recommendation was concerned they are unanimous.

5. We have considered the submissions made by the learned counsel and have also gone through the record as well as case law cited at the bar.

6. Mr. Khalid Jawaid Khan referred to Section 2(b) of the Ordnance of 2000 and contended that whereas violation of Government Servants Rules (Conduct) Rules, 1964 is included in misconduct the same does not find mention in Section 2(b) of the Ordinance of 2000. His submission was that therefore the allegations stated in the Statement of Allegation do not constitute misconduct. Since learned counsel referred to Section 2(b) of the Ordinance of 2000 and Rule 2(4) of the Government Servants(Efficiency & Discipline) Rules, for ready reference, the same are reproduced as under:-



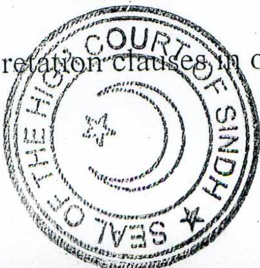
"Section 2(b) of Ordinance of 2000

(b) "misconduct" includes conduct prejudicial to good order or service discipline or conduct unbecoming of an officer and a gentleman or involvement or participation for gain either directly or indirectly in industry, trade or speculative transactions or abuse or misuse of the official position to gain undue advantage or assumption of financial or other obligations to private institutions or persons such as may cause embarrassment in the performance of official duties or functions;

Rule 2(4) of Rules of 1973.

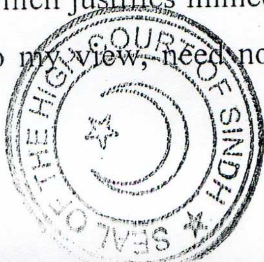
(4) "misconduct" means prejudicial to good order to service discipline on contrary to the Government Servants (Conduct) Rules, 1964 or unbecoming of an officer and a gentleman includes, any act on the part of a Government servant to bring or attempt to bring political or other outside influence directly or indirectly to bear on the Government or any Government, promotion, transfer, punishment, retirement or other conditions of service of a Government servant;"

7. It should not be lost sight of that whereas the definition given in the Rules of 1973 says that misconduct 'means', definition given in the Ordinance of 2000 states that misconduct 'includes'. It is well settled law that when a word defined is declared to mean such and such the definition is explanation and is prima facie restrictive while on the other hand where the word defined is declared to "include" so and so the declaration is exhaustive. Word 'include' is most commonly used in interpretation clauses in order to extend meaning of words or phrases



occurring in the body of the statute. Reference in this regard is made to **Qadri Brother Foundry & Workshop, Karachi v. Sindh Employees' Social Security Institution, Karachi 1977 PLC 236 and Don Baso High School v. Assistant Director, Employees Old Age Benefit Institution & Others, PLD 1989 SC 128.** Therefore, since the definition as given in the Ordinance of 2000 says that misconduct includes, the misconduct not only includes what is said in the definition but everything else which can conceivably fall in the definition. It has been stated by the Supreme Court in a number of judgment including **Shaukat and Others v. Allied Bank of Pakistan, SBLR 2007 SC 1** where the Supreme Court with approval referred to the following:

> (i) "**WORD MISCONDUCT** "Where there is mismanagement or bad management or negligence of a kind which although not necessarily reckless suggests that something was done or omitted to be done which a man of ordinary prudence would not have done or would not have omitted to do, there is a case of misconduct, ***Syed Hasham Ali Shah & Sons v. The Federation of Pakistan (PLD 1951 Lah. 425)***.
>
> (ii) "A transgression of some established and definite rules of action. Where no discretion is left, except necessity may demand: it is violation of definite law; a forbidden act. It differs from carelessness, ***M.V. Ittycheria v. State of Kerala (AIR 1958 Kar. 374)***.
>
> "If a servant conducts himself in a way inconsistent with the faithful discharge of his duty n the service, it is misconduct which justifies immediate dismissal. That misconduct, according to my view, need not be misconduct in the carrying on of the



service or the business. It is sufficient if it is conduct which is prejudicial or is likely to be prejudicial to the interests or to the reputation of the master, and the master will be justified, not only if he discovers it at the time, but also if he discovers it after wards, in dismissing that servant: ***Opal Laboratories Ltd. Vs Workers' Union 1972 PLD 83.***"

8. Thus, every transgression of every rule, every conduct inconsistent with the faithful discharge of duty and, acts of bad governance, improper conduct, doing of something by a person inconsistent with the conduct expected by him by rules of the institution or the organization would be misconduct. The Government Servants (Conduct) Rules, 1964 are admittedly applicable to the case of the petitioner and we are unable to see any reason as to why conduct of an employee in violation of these rules should not be treated misconduct in terms of definition of the term as given in the Ordinance of 2000.

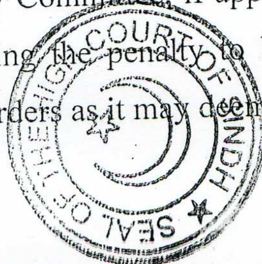
9. Next contention of Mr. Kahlid Jawaid was with reference to Section 8 and Section 3(1) of the Ordinance of 2000 and he contended that option of denovo inquiry is not available to the employer. Learned counsel submitted that kinds of order that could be passed by the competent authority are specified in Section 3(1). In this regard learned counsel referred to Section 5(1)(iv) of the Civil Servants (Efficiency & Discipline) Rules and stated that power there under is much wider than power under the corresponding provisions of the Ordinance of 2000.

For ease of reference Section 3(1) and Section 8 of the Ordinance of 2000 and Rule 5(iv) of the Rules are reproduced as under:-

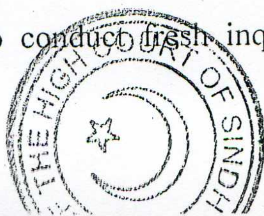
"**Section 3(1) (e)** . . . . . .the competent authority, after inquiry by the committee constituted under section 5, may, notwithstanding anything contained in any law or the terms and conditions of service of such person, by order in writing dismiss or remove such person from service, compulsorily retire from service or reduce him to lower post or pay scale, or impose one or more minor penalties as prescribed in the Government Servants (Efficiency & Discipline) Rule, 1973, made under Section 25 of Civil Servants Act, 1973."

Section 8. Order to be passed upon a finding.- Every finding recorded by the Inquiry Officer or, as the case may be, Inquiry Committee under Section 5, shall, with the recommendation provided for in that section, be submitted to the competent authority and the competent authority may pass such orders thereon as it may deem properly in accordance of the provisions of this Ordinance.

Rule 5 (iv). On receipt of the report of the Inquiry Officer or Inquiry committee or, where no such Officer or Committee is appointed, on receipt of the explanation of the accused, if any, the authorized officer shall determine whether the charge has been proved. If it is proposed to impose a minor penalty he shall pass orders accordingly. If it is proposed to impose a major penalty, he shall forward the case to the authority alongwith the charge and statement of allegations served on the accused, the explanation of the accused, the findings of the Inquiry Officer or Inquiry Committee, if appointed, and his own recommendations regarding the penalty to be imposed. The authority shall pass such orders as it may deem proper.

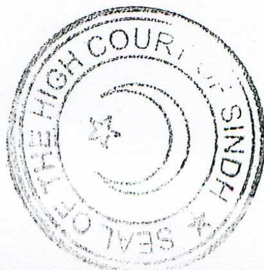


10. Precise contention of the learned counsel was that power available under Rule 5(iv) is to pass such order as it may deem proper whereas under Section 8 the power is to pass order in accordance with the Ordinance. Per learned counsel provisions of the Ordinance as contained in Section 3(1)(e) limit power of the competent authority to imposition of penalties only. On a narrow penadic view the arguments of the learned counsel might seems attractive but on closer examination it looses its lustre. If the arguments of learned counsel is taken, literally then it means the competent authority must impose the penalty and it is not available to it in an appropriate case to take a lenient view and let off the employee for any reason whatsoever. If there is a defective inquiry and some of the common defects in the inquiry has been enumerated by the Supreme Court in the case of **National Bank of Pakistan and another v. Punjab Labour Appellate Tribunal and 2 others, 1992 PLC 415** and in the case of **Muslim Commercial Bank and Others v. Mehmood Abbas Butt and others, 1997 PLC 550** and the competent authority, but for the defect in the inquiry, comes to the conclusion that allegedly delinquent employee is guilty of misconduct the arguments of the learned counsel means that competent authority must go forward and impose the punishment and when the matter is taken to the Court, the Court certainly has the power to reinstate the employee and, there being a technical effect, of giving option to the employer to conduct fresh inquiry. Thus, it appears that giving an



employee a grind through the mill of litigations for a number of years even where there is a defective inquiry and only then after reinstatement by order by a Court of law fresh inquiry can be conducted. This cannot be intent of the Legislature. We do not think such an interpretation of the provisions of the law can be countenanced. In our view, if there is a defect in the inquiry it is always available to the competent authority to say that there is a defect in the inquiry and therefore I, deem it just and proper that fresh inquiry be held rather than force the employee to face pushes and shoves of litigation for a number of years and thereafter again put him through the rigmarole of inquiry. Such power of the employer must be available to him under the principles of reasonableness and justice and it cannot be argued that both reasonableness or justice are excluded by necessary intendment by the provisions of Section 3(1)(e) and Section 8 of the Ordinance, 2000. Therefore we hold that in an appropriate case, for valid, justified and justifiable reasons it is always available to an employer to say that a fresh inquiry is called for and then hold that inquiry.

11. We must hasten to add that such power of the employer cannot be used for malafide reasons for giving the employee one dip in the pond after another and yet another. Such power must be exercised with due care and caution and for valid and bonafide reasons. No hard and fast rules can be laid down in this regard and it will depend upon facts



of each case for coming to the conclusion whether order of denovo inquiry is justified or proper in the given circumstances of a case.

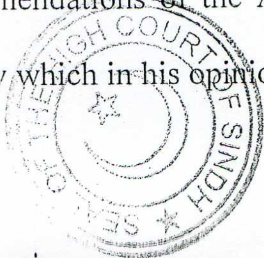
12. In the present case, perusal of the conclusion of the inquiry recorded by the two member Inquiry Committee indicates that while one member of the committee held that "evidence could not hold ground" and therefore cannot be used against the accused officer, the other member of the committee held that "allegation No.2, 4(ii) and 6(ii) have been proved against the present petitioner". While making recommendations, first it was written that "no convincing or reliable evidence was placed on record by the DR that could prove the charges leveled against the accused officer. The officer is only found guilty of acting in a negligent manner, therefore, minor penalty of Censure is proposed". Immediately after it in italics second member wrote *"I am of the considered opinion that non-declaration of investment of the spouse in the declaration of assets by the accused officer is evident, and addition in family assets is also without any substantiating evidence"*.
In view of such clear writing by the second member of the Inquiry Committee it cannot be said that there was a unanimous declaration and unanimous reaching of conclusion by the Inquiry Committee. Therefore given the circumstances of this case we do not think that the order of fresh inquiry suffers from any legal infirmity.

13. Next contention of the learned counsel was that the competent authority must record reasons for decision for disagreement with the

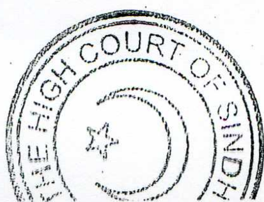
recommendations of the Inquiry Committee. Learned counsel relied upon **Shibli Farooqui'** case (Supra). In the reported case while Authorized Officer proposed reduction of pay by two stages in the time scale for a period of two years, the competent authority imposed penalty of removal from service. In this context it was observed by the Supreme Court as under:-

> "12. Nevertheless, the "authority" without taking into consideration the recommendations of the Authorized Officer of the status of the Auditor-general of Pakistan completely overlooked his recommendations and went on to impose an extremely harsh penalty of removal from service. Mr. M.M. Aqil Awan, learned counsel for the appellant relied upon the judgment of this Court in the case of Chief Director Central Directorate of national Savings v. Rahat Ali reported in 1996 SCMR 248 wherein it was held that if the authority was not inclined to agree with the findings of the Authorized Officer it was required to record proper reason for doing so after notice to the affected civil servant. It was further observed that public power could not be exercised arbitrarily or capriciously. No reasons have been recorded by the "authority"."

14. Law is well settled law now that a competent authority is not bound to follow the report of the Inquiry Officer **(Ghulam Qasim Khan v. Federation of Pakistan through Secretary, Establishment Division, Government of Pakistan and another, 2005 SCMR 1610)** and the authority is competent to differ with the proposed recommendations of the Authorized Officer and could impose major penalty which in his opinion considered to be legal in view evidence on



record against the delinquent officer if there are just and sound reasons. Reliance in this regard can be made to **Shafaullah Khan Niazi through Legal Heirs v. Deputy Director, Food Department Multan and another, PLD 2004 SC 55.** Thus, though the competent authority is not bound by the recommendations of the Inquiry Officer or the recommendations of the Authorized Officer however, if it wishes to disagree it must have just and sound reasons and such reasons must be expressed in the order by which the competent authority disagree with the Inquiry Officer or Authorized Officer. In the present case, in the Show-Cause-Notice dated 14.1.2009 it is merely stated that Inquiry Committee had found him guilty and then he was called upon to show-cause-notice while penalty of dismissal should not be imposed upon the petitioner. Obviously such non-speaking order cannot be sustained. What was required of the competent authority was to clearly state that though in a particular case the Inquiry Committee had found him guilty and recommended such and such punishment the competent authority for such and such reasons disagrees with either the conclusion or recommendations of the Inquiry Officer or both and therefore thinks such and such punishment is called for in the given circumstances. However after the Show-Cause-Notice, in the present case, the competent authority ordered denovo inquiry. The Show-Cause-Notice therefore in any case has already lost its legal effect.



15, Next contention of the learned counsel was that order of denovo inquiry is not a speaking order. In the order of denovo inquiry (order dated April 7, 2007) fresh inquiry was ordered for the following reasons:-

> "Inquiry against Mr. Mustafa Kamal (ITG BS-19) on the charges of "Inefficiency", "Misconduct" and "Corruption" was not conducted properly as the Inquiry Committee did not carry out a probe into the sources of assets of the accused officer and his spouse. Further inquiry committee's opinion was split and consensus was not achieved between the members of inquiry committee. The inquiry proceedings are not enough to form a definite opinion and therefore, I being competent authority in this matter, order quashment of those proceedings/findings of inquiry committee in public interest and order for denovo inquiry."

16. Thus, the order of denovo inquiry proceeded on three basis firstly; the Inquiry Committee did not carry out probe into sources of assets of the accused officer; secondly the opinions of members of Inquiry Committee were split and consensus was not achieved between the members of inquiry committee; and thirdly the Inquiry Proceedings were not enough for forming a definite opinion. In our view these three basis would be sufficient for ordering denovo inquiry. Therefore it cannot be said that the order of denovo inquiry is not a speaking order.

17. While on the subject of denovo inquiry we think that it must be stated that purpose of denovo inquiry is not to remove the lacuna in the previous inquiry but either to conduct inquiry in view of defects in the

conduct of previous inquiry or to bring forth evidence which for legitimate reasons could not be or was not produced in the earlier round of inquiry. Previous proceedings are just not washed away and thrown into a waste paper basket by an order of denovo inquiry. Therefore it would be always available for the employee to contend that a particular piece of evidence produced by the employer in the first inquiry belies a piece of evidence produced in the second inquiry. He would be entitled to argue that aspect of the second inquiry constituted an improvement. Thus, the second inquiry is not for improvement but for justice and bringing out the entire evidence while at the same time giving full opportunity to the employee to defend himself. There is a distinction between proceedings of inquiry and conclusions of the Inquiry Officer. Proceeding is a fact; conclusion is an opinion. It is available to the employer to disagree with the conclusion but then if he does so he must base his disagreement on the terra firma of proceedings and not on shifting sands of conjectures and surmises.

18. As far as, question regarding maintainability of the petition is concerned, firstly; learned counsel for the respondents has not argued against maintainability of the petition and secondly learned counsel for the petitioner appears to be correct in arguing that order of denovo inquiry is not a final order challengeable in terms of Section 10 of the Ordinance of 2000.

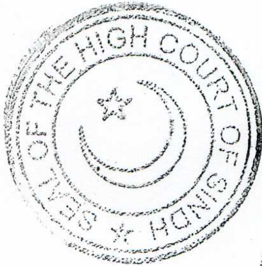
19. Result of the above discussion is that this petition is dismissed in limine. Listed application is disposed of.

Sd-Shahid Anwar Bajwa

Sd-Sajjad Ali Shah

JUDGE 22/9/2010

JUDGE



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Assistant Registrar

APPLIED FOR ... Twenty Eight Sep 2010

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Assistant Registrar