

ORDER SHEET
THE HIGH COURT OF SINDH, AT KARACHI

Constitutional Petition No.D-3083 of 2015
(Pir Bux Solangi v. Federation of Pakistan and 2 others)
Constitutional Petition No.D-1916 of 2015
(Pir Bux Solangi v. Federation of Pakistan and another)

Order with signature of Judge(s)

1. For hearing of Misc. No.14033/2015
2. For hearing of main case

Date of hearing and order: 25.1.2022

Mr. Aziz-ur-Rehman Akhund, advocate for the petitioners in both petitions
Mr. Muhammad Nishat Warsi, DAG
Mr. Munawar Ali Isani, advocate for respondents No.2 and 3

ORDER

Petitioner in principle, has called in question the vires of the orders dated 04.6.2014 and 13.5.2015 passed by the respondent-Port Qasim Authority (**PQA**), in both the petitions, whereby, they imposed the major penalty of compulsory retirement from service under the Removal from Service (Special Powers) Ordinance, 2000 (**RSO 2000**) (Repealed Act 2010) and subsequently initiated recovery proceedings about pensionary benefits made to him vide Office Order dated 13.5.2015, during the intervening period in pursuance of the interim order dated 15.11.2011 passed by this Court in C.P. No.663 of 2011.

2. The case of the petitioner in nutshell is that he was appointed as Assistant Engineer (BPS-17) in PQA in the year 1989 and earned promotion as Executive Engineer (BPS-18) in the year 1999. Petitioner during his service tenure was charge-sheeted on 08.05.2003 under Section 3 of the RSO 2000 and Statement of Allegations was issued and finally, the major penalty of compulsory retirement from service was imposed upon him under Efficiency & Disciplinary Rules 1973 vide order dated 26.2.2011. Per learned counsel for the petitioner, the impugned order dated 26.02.2011 was set aside by this Court vide order dated 26.11.2013, an excerpt of the order dated 26.11.2013 is reproduced as under:

“Learned counsel for respondent No.2 further submits that impugned order of compulsory retirement may be set aside and matter may be remanded back to competent authority for deciding the same after providing ample opportunity to petitioner. Learned counsel for petitioner is satisfied however, he submits that earlier he challenged show cause notice in C.P.No.D-1951/2007 which was disposed of by learned DB of this court on 07.12.2010 with certain directions to same respondent that may also be kept in mind while providing right of hearing to petitioner and passing further orders. Consequently, the petitioner is reinstated in service, however, question of back

benefits will depend on the final outcome of an order passed by competent authority which shall decide the case of petitioner within a period of two months.”

However the respondents did not stop here and again the petitioner was condemned on the same charges vide order dated 04.06.2014, an excerpt of the order dated 04.06.2014 is reproduced as under:

“OFFICE ORDER

Whereas, you Mr. Pir Bux Solongi S/o Ghulam Hussain, Executive Engineer (Civil) BS-18, P. No. 08249, PQA were called upon in writing to furnish a reply to Show Cause Notice dated 02.08.2007, issued under section 3(2) of the Removal from Service (Special Powers) Ordinance 2000, and thereafter heard you in person on 18.04.2014, against the charges of 'INEFFICIENCY' contained in the statement of allegations dated 08.05.2003

2. That now in compliance of the order passed by Hon'ble Sindh High Court in C.P.D.No.663/2011 dated 26.11.2013 and in light of the findings of the inquiry committee and available material/record, I being the Competent Authority is not satisfied with your defense and charges leveled against you have been proved beyond any shadow of a doubt.

3. That I am in capacity of Competent Authority, in pursuance of the power conferred under Section 8 of the Removal from Service (Special Powers) Ordinance 2000, read with Section 2(2) of Removal from Service (Special Powers) Ordinance 2000 (Repeal) Act 2010, decided to impose upon you the major penalty of compulsory retirement from service.

4. You may exhaust remedy in terms of section 9 of the Removal from Service (Special Powers) Ordinance 2000.”

3. Per learned counsel, the agony of the petitioner continued to perpetuate when respondents / PQA issued another Office Order dated 13.5.2015, whereby they initiated recovery proceedings, concerning benefits he earned during the intervening period in pursuance of the interim order dated 15.11.2011 passed by this Court in C.P. No.D-663 of 2011, an excerpt of the office order dated 13.5.2015 is reproduced as under:

“OFFICE ORDER

In partial modification to office order of even number dated 04.06.2014 and with the approval of the Competent Authority, the intervening period w.e.f., 26.02.2011 to 26.02.2014 of Mr. Pir Bux Solongi S/o Ghulam Hussain, Ex - Executive Engineer (Civil) BS-18, P. No. 08249, is treated as Extraordinary Leave (EOL) without pay and allowances.

The pensionary payments made to him during the intervening period in pursuance to the interim order dated 15.11.2011 passed in CP No. 663/2011 by the Honorable High Court of Sindh, Karachi shall be recovered/adjusted, in accordance with the rules.

This issues with the approval of the Competent Authority.”

4. Mr. M.A. Issani, learned counsel for the PQA / respondents No.2 and 3 referred to comments filed on their behalf and raised the question of maintainability of the instant petition and submitted that the petitioner is not entitled to any relief from this Court by extensively reading the paragraphs of

the comments. Learned counsel also referred to the documents attached with the statement dated 29.3.2016 i.e. Annexures 'A' to 'N' and submitted that in compliance with the order dated 26.11.2013 passed by this Court in C.P. No. D-663/2011, the petitioner was reinstated in service, and subsequently, he was heard by the competent authority and was found guilty of the charges leveled against him and the penalty of compulsory retirement was imposed upon him vide order dated 04.6.2014. On the issue of back benefits, learned counsel submitted that since the order dated 26.11.2013 passed by this Court was conditional subject to the final order of this Court, therefore, he was punished accordingly, thus, the question of back benefits does not arise. On the issue of taking action under the repealed Act 2010, he submitted that the respondent-department in continuation of the disciplinary proceedings initiated against him under RSO 2000, the protection has already been provided in law, thus no indulgence of this Court is required in the matter, besides that the petitioner had a remedy under RSO 2000. Finally, he submitted that the petitioner is getting the pension in terms of Office Order dated 04.6.2014, therefore, this petition is legally not maintainable and liable to be dismissed.

5. Mr. Muhammad Nishat Warsi, learned DAG has supported the stance of the learned counsel, representing the PQA, and submitted that the petitioner has rightly been dealt with under the repealed Act 2010 and this petition is liable to be dismissed.

6. We have heard the learned counsel for the parties and perused the material available on record.

7. The questions involved in the present proceedings are whether the respondent-PQA could initiate recovery proceedings from the pension through the Office Order dated 13.5.2015, after the compulsory retirement of the petitioner from service of PQA vide Office Order dated 04.06.2014. And whether the petitioner is entitled to back benefits upon his reinstatement in service by the ratio of the order dated 26.11.2013 passed by this Court, which has attained finality. And whether the second major penalty of compulsory retirement from service could be imposed upon the petitioner on the same charges earlier discarded by this Court, and the impugned order could be passed under a repealed law i.e. RSO 2000.

8. In the present case, the petitioner stood reinstated in service by the order dated 26.11.2013 passed by this Court in the aforesaid petition; and, the direction was issued to the respondent-PQA to decide the case of the petitioner, which does not mean to directly impose the major penalty of compulsory retirement upon the petitioner on the same charges without adopting the codal formalities as provided under the law. A perusal of record explicitly shows that allegations leveled by the respondents against the petitioner were not probed after the order dated 26.11.2013 passed by this Court in the manner as prescribed under

the relevant law and the required procedure was not followed, so as, to ensure transparency in deciding the issue of imposing the major penalty of compulsory retirement from Service upon the petitioner. The charges/statement of allegations against the Petitioner, as discussed supra, clearly depicts that the same was required to be established through proper inquiry as provided under the law and not otherwise.

9. We have further noticed that after reinstatement in service vide office order dated 27.2.2014, petitioner was again bothered by Chairman PQA to appear before him on the same day; and, no fresh inquiry proceedings were conducted, the only questionnaire was handed over to him, however, petitioner, appeared and denied the allegations vide reply dated 16.5.2014, this all happened randomly without recording the evidence of the parties on oath and opportunity of cross-examination of the witnesses to the Petitioner.

10. It is a well-settled law that when a major penalty is imposed upon a public servant and is punished with stigma, the requirements enumerated in law had to be adhered to i.e. charge shall be framed and the said employee would be allowed to give reply of those charges after which evidence is to be recorded by examining the witnesses in respect of the charges. The said employee can also produce witnesses in his/her defense. In the present case, it is noted that this procedure has not been followed in its letter and spirit and the witnesses were not examined in respect of the charges on oath, as provided under the law, which was necessary before imposing a major penalty upon the said employee.

11. We are surprised to note that respondent to get rid of the petitioner was called in the office and simply handed over the questionnaire to fill, without initiating the departmental proceedings afresh, examination of witnesses, in support of the charge or defense, in our view this practice could not be approved as it did not align with the requirements of law. On the aforesaid proposition of law, we are fortified with the decision rendered by the Hon'ble Supreme Court of Pakistan in the case of *Pakistan Defense Housing Authority & others Vs. Lt. Col. Syed Jawaid Ahmed* (2013 SCMR 1707). Hence, in our view, the action taken by the chairman PQA for imposing a major penalty upon the petitioner, which is in disregard of the procedural requirements and is violative of the principles of natural justice, was/is not sustainable under the law. On the aforesaid proposition, our view is supported by the decision rendered by the Honorable Supreme Court in the case of *Jan Muhammad Vs. The General Manager, Karachi Telecommunication Region, Karachi and another* (1993 SCMR 1440) wherein it was held as follows:-

“6. In Government Servants (Efficiency and Discipline) Rules, 1973, “misconduct” is defined. Rule 4 contemplates minor and major penalties. Compulsory retirement is included in major penalties. Rule 5 empowers authorized officers to direct inquiry against Government

servants through an Enquiry Officer or Enquiry Committee or if he is satisfied, may order that there would be no inquiry in the interest of the security of the country. If it is decided that there should be inquiry either by Enquiry Officer or Enquiry Committee then procedure laid down in Rule 6 is to be followed and the requirements enumerated therein are that charge shall be framed and Government servant proceeded against would be allowed to reply to the charge after which evidence is to be recorded by examining witnesses in support of the charge allowing the opportunity to the affected Government servant to cross-examine the witnesses and he can also produce witnesses in his defence. It appears that in the instant case this procedure as such was not followed in letter and spirit and witnesses were not examined in support of the charge. It was necessary for that reason that ultimately major penalty has been imposed upon the appellant. **The manner in which enquiry proceedings were conducted by way of questionnaire without examination of witnesses in support of charge or defence cannot be approved as it is not consistent with requirements of Rule 6 of the abovementioned Rules.** Before the Service Tribunal in written objections filed on behalf of respondents order of compulsory retirement has been defended on other unconnected grounds that appellant was inefficient and unwilling worker. In the inquiry report, no comment is made upon plea of appellant that his immediate superior officer recommended that appellant was overburdened with his own work and should not be given additional work. For the facts and reasons mentioned above, **we are of the view that order of compulsory retirement is not sustainable as enquiry was not held in accordance with procedure laid down in Rule 6 of Government Servants (Efficiency and Discipline) Rules, 1973. We, therefore, set aside impugned judgment of Service Tribunal and order of compulsory retirement of appellant and direct that he be reinstated with back benefits. Since we are striking down order of compulsory retirement of appellant on the ground that enquiry was not held as required under the rules, it is open to the respondents to take action against the appellant on that ground but strictly according to law and rules. Appeals is allowed.** {Emphasis Added}

12. In service matters, the extreme penalty for certain acts depriving a person of the right of earning defeats the reformatory concept of punishment in the administration of justice. On the aforesaid proposition of law, we are fortified with the decision rendered by the Hon'ble Supreme Court in the case of Auditor General of Pakistan & others vs. Muhammad Ali & others (2006 SCMR 60).

13. So far as merits of the case are concerned dispensing with the regular inquiry and awarding major penalty of compulsory retirement from service ought not to have been imposed upon the petitioner without holding regular departmental inquiry after the order dated 26.11.2013 passed by this Court when the charges were denied by the petitioner vide reply dated 16.5.2014.

14. We find that the petitioner was deprived of his due process rights. He was not confronted with the material based on which the show cause notice had been issued to him and he was not permitted to cross-examine the witnesses who were purportedly produced by the respondent-PQA in support of allegations in the alleged inquiry proceedings based on the allegations that petitioner was found to be responsible for processing the bills of contractor for

payment without due verification of quality and quantities; besides that the petitioner failed to defend himself. Even otherwise, the process followed by the respondent-PQA was sketchy, one-sided, non-transparent, and not supported even by the service regulations and the relevant law. We, therefore, find that both the impugned orders of PQA were unjustified prima-facie, the fact-finding inquiry does not accuse the petitioner solely responsible for committing alleged misconduct. Prima facie, the recommendation of the inquiry officer to suggest punishment for compulsory retirement from service was erroneous in terms of paragraphs 2 to 4 of the recommendations, for the simple reason that he opined that the consulting firms should be appointed to ensure the quality of work given time frame and contract amount, which explicitly shows that he was not sure about the allegations. The learned counsel for the respondent-PQA has not justified the impugned orders passed by the PQA. Our view is supported by the decision of the Honorable Supreme Court in the case of Directorate General Emergency Rescue Service 1122 Khyber Pakhtunkhwa, Peshawar. vs. Nizakat Ullah (2019 §CMR 640).

15. Adverting the issue of the back benefits, we have noticed that there are two basic principles on the subject; (a) that back benefits do not automatically follow the order of reinstatement where the order of dismissal or removal has been set aside; and (b) as regards the matter of onus of proof in cases where a workman is entitled to receive the back benefits it lies on the employer to show that the workman was not gainfully employed during the period of the workman was deprived of service till the date of his reinstatement thereto, subject to the proviso that the workman has asserted at least orally, in the first instance, that he was (not) gainfully employed elsewhere. On his mere statement to this effect, the onus falls on the employer to show that he was so gainfully employed. The reason is that back benefits are to be paid to the workman, not as a punishment to the employer for illegally removing him but to compensate him for his remaining jobless on account of being illegally removing him but to compensate him for his remaining jobless account of being illegally removed from service. On the aforesaid proposition, we are fortified by the decision of the Hon'ble Supreme Court in the case of Dilkusha Enterprises Ltd. v. Abdul Rashid and others (1985 §CMR 1882).

16. Prima facie, the petitioner was stopped by the respondent-PQA to work through the impugned orders, therefore, we deem it appropriate to take into consideration the issue of back benefits on the premise that he has specifically pleaded that he was wrongly awarded a major penalty after the order dated 26.11.2013 passed by this Court, as such he is entitled to the consequential benefits.

17. We confronted the learned counsel for the respondent-PQA and DAG that the only principle on which back benefits could be denied to the petitioner

is his gainful employment between the period of his dismissal from service to his reinstatement and there is no evidence available on the record showing that he was gainfully employed, back benefits could not be refused to him. Both the learned counsel, representing the respondents, insisted that the back benefits were dependent on the order to be passed by the Chairman-PQA afresh. Prima-facie this interpretation of the order passed by this Court is also erroneous, for the simple reason that once the petitioner was reinstated in service presumption is that he is honorably acquitted from the charges, however, the respondent-PQA maneuvered the novel story by calling upon the petitioner and handed over him the questionnaire to substitute the disciplinary proceedings, which practice has been deprecated by the Honourable Supreme Court in the cases discussed supra. In this respect, reference is made to the case of Sohail Ahmed Usmani v. Director General Pakistan Civil Aviation Authority and another [2014 §CMR 1843]. In the cited judgment, the Honorable Supreme Court has allowed back benefits on the ground that the employee was not gainfully employed during the period of his dismissal up to his reinstatement. However, the employee being gainfully employed or not while remaining out of service has not always been a reason for granting or non-granting of back benefits rather it has been held by the Honorable Supreme Court in several cases that where the Court concerned reinstates the employee in service, it is not bound to grant back benefits automatically rather it is within the discretion of that Court to grant back benefits or not and exercise of such discretion could not be interfered with by this Court in the exercise of writ jurisdiction unless it is shown that such discretion has been exercised without lawful authority and is of no legal effect. Such discretion has not been interfered with by the superior forum. In this regard, reference is made to the cases of Abdul Majid v. Chairman, WAPDA and 2 others (1990 §CMR 1458), Muhammad Tufail v. Divisional Forest Officer, Forest Division, Lahore and 3 others (1990 §CMR 1708), Humayun Badshah v. Habib Bank Limited and 3 others (1996 §CMR 1606) and Syed Kamaluddin Ahmed v. Federal Service Tribunal and others (1992 §CMR 1348).

18. On the issue of second punishment of compulsory retirement, on the same charges, after the lapse of considerable period, the Honorable Supreme Court has already settled the legal proposition in the cases of Muhammad Zaheer Khan vs. Government of Pakistan, 2010 §CMR 1554, Muhammad Anwar Bajwa, Executive Director, Agricultural Development Bank of Pakistan vs. Chairman, Agricultural Development Bank of Pakistan, 2001 PLC (CS) 336, Province of the Punjab v. Munir Hussain Shah, 1998 §CMR 1326, Secretary, Education (Schools), Government of the Punjab, Lahore vs. Muhammad Akhtar, Ex-Headmaster, 2006 §CMR 600, it was held that the disciplinary inquiry could not have been initiated after a lapse of one year of the retirement of the respondent. The Honorable Supreme Court in the recent

pronouncement has held that the finalization of the departmental proceedings not later than two years of the retirement of the employee is a mandatory provision and any proceedings after the said statutory period shall stand abated and any orders passed after the efflux of the above period are void and have no legal effect.

19. In the instant cases, the recovery proceedings initiated against the petitioner after the order passed by this Court as discussed supra, therefore, the proceedings as discussed supra have no legal consequence, and the subsequent departmental orders are void and have no legal effect.

20. On the other proposition, we are fortified by the decision rendered by the Hon'ble Supreme Court of Pakistan in the case of *Azizullah Memon Vs. Province of Sindh others* (2007 SCMR 229).

21. In our view, from the above-discussed case law, it is clear that the Honorable Supreme Court of Pakistan has time and again regarded the provisions of Ordinance 2000 as being general and on that account held that from the date of its promulgation, it is overriding effect over other special Statutes on the subject and it has impliedly repealed the Rules in the other Statutes. This being the position, we have no option but to hold that initiation of disciplinary proceedings against the petitioner after the order passed by this court under the RSO 2000, after its repeal in 2010, thus have vitiated the whole proceedings against the petitioner including the final order regarding the compulsory retirement for his service.

22. Looking through the above perspective and keeping in view the factual position of the case, we hereby infer that the Petitioner ought not to have been awarded a major penalty under repealed law under Ordinance 2000, therefore, the action of respondent-PQA was/is also not justified by any cannon of justice.

23. In the present case, no inquiry into the allegations leveled by the respondent-PQA against the petitioner was conducted as provided under the law and the required procedure, which includes a charge sheet, so as, to ensure transparency in deciding on merits appears to be lacking. Hence, the action on the part of PQA is not sustainable under the law. The Honorable Supreme Court Judgment in the case of *Saad Salam Ansari Vs. Chief Justice High Court of Sindh through Registrar* reported in (2007 SCMR 1726) and *Muhammad Naeem Akhtar Vs. Managing Director Water & Sanitation Authority, LDA, Lahore* reported in (2017 SCMR 357) also support our above view.

24. In view of the above facts and circumstances of the case discussed above, the instant Constitutional Petitions are allowed, the impugned orders dated 04.06.2014 and 13.5.2015 are set aside, with the directions to the Competent

Authority of the Respondent/chairman PQA to award pensionary benefits (superannuation) and ancillary service benefits to him within 01 month time from the date of receipt of this judgment/order under the law by adjusting the amount received by the petitioner during the intervening period as pensionary benefits on account of compulsory retirement.

JUDGE

JUDGE

Nadir*