

IN THE HIGH COURT OF SINDH, CIRCUIT COURT
LARKANA

C.P. No. D-1197 of 2014

Riaz Ali Bhutto and others
v/s.

S.S.P. Shikarpur and others

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M/s. Asif Ali Abdul Razzak Soomro and Safdar Ali Ghouri, Advocates for the Petitioners.

Mr. Abdul Hamid Bhurgri, Additional Advocate General, Sindh.

Date of hearing: 07.10.2020

Date of Order: 07.10.2020

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**ORDER**

**Muhammad Junaid Ghaffar, J.:** Through this petition, the petitioners have sought declaration that impugned Office Order dated 02.10.2014, issued by the Senior Superintendent of Police, Shikarpur, whereby the appointment orders of the petitioners have been withdrawn / cancelled is illegal and be set-aside

2. Learned Counsel for the petitioners submits that the impugned order is bad in law; that it has been issued without any notice and the petitioners have been condemned unheard; that once the petitioners were appointed under the category of son quota and joined service, it could not have been withdrawn unilaterally and the principle of locus poenitentiae would apply; that the principle of natural justice has been violated; hence the impugned order is liable to be set aside. In support he has relied upon the case of *Government of Punjab v Aamir Junaid* (2015 SCMR 74), *Hazara (Hill Tract) Improvement Trust v Mst. Qaisra Elahi* (2005 SCMR 678), *Khushdil Khan Malik v Secretary Ministry of Defence* (PLD 2017 SC 173), order dated 17.10.2012 in CP No.2159 of 2011 (*Khairuddin v Federation of Pakistan*) and order dated

13.11.2013 in CP No. D-87 of 2011 (*Syed Azhar Ali v The Zonal Manager, Utility Stores*).

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3. On the other hand, learned Additional Advocate General has opposed the petition on the ground that the very appointment orders were illegal and without lawful authority; hence no case is made out.

4. We have heard the learned Counsel for the petitioners as well as learned Additional Advocate General, Sindh and perused the record. At the very outset, we have confronted the learned Counsel for the petitioners as to maintainability of this petition in view of the fact that it is the petitioners' own case that they were appointed in the Police Department and had joined service, and therefore admittedly they are civil servants to be regulated under the Civil Servants Act, 1973 and the rules framed thereunder, and the bar as contained in Article 212(2) of the Constitution of Islamic Republic of Pakistan, 1973 ("the Constitution") would apply, and to this, learned Counsel has argued that since the very order is nullity in the eyes of law; hence the writ jurisdiction of this Court is available against such an illegal act. However, we are least impressed with this line of arguments inasmuch as the very question that whether the impugned order is lawful or not pertains to the terms and condition of service of the petitioners; hence the available remedy in law was either to file a departmental appeal or to approach the Service Tribunal and not this Court. It is settled law that a Civil Servant in respect of terms and conditions of service, if aggrieved, can only approach the Service Tribunal for redressal of his grievance and there cannot be any exception to this settled position of law. The constitutional jurisdiction of this Court is not available and barred in such circumstances. The case law relied upon by the learned Counsel for the petitioners is distinguishable inasmuch as the order in CP No.2159 of 2011 (*Khairuddin v Federation of Pakistan*) was a consent order; hence not a precedent to follow. The order dated 13.11.2013 in CP No. D-87 of 2011 (*Syed Azhar Ali v The Zonal Manager, Utility Stores*) was in respect of termination of

an employee of Utility Stores Corporation and not of a Civil Servant. The case of **Government of Punjab (Supra)** pertains to an irregularity of appointment of otherwise a sanctioned and advertised post inasmuch as one of the appointing officer from the appointment committee was found to be incompetent and not authorized; hence, the learned Lahore High Court (judgment impugned) had remanded the matter to the department with certain directions, whereas, the question of maintainability of petition of a civil servant was never under consideration. Such *order of remand of the case by consent* was not interfered with by the Hon'ble Supreme Court with the observation that it is absolutely valid. We presume that this judgment has been relied upon merits of the case; but in that also, it is not relevant due peculiar facts involved in this case. The case of **Hazara (Hill Tract) Supra** is regarding the maxim *audi alteram partem*; but again has no relevance as to entertaining a petition of a civil servant regarding terms and conditions of service. Similarly, the case of **Khushdil Khan (Supra)** is in respect of entitlement of a plot to an Employee of Directorate of Education, Garrison and not of a civil servant or his terms and conditions of service. In essence all cases relied upon are not relevant or support the case of the petitioners. In fact, as of today the law in respect of bar of jurisdiction of this Court in matter of terms and conditions of service of a civil servant is much settled and reliance may be placed on the cases reported as **Ali Azhar Baloch v Province of Sindh (2015 SCMR 456)**, **Miss Rushna Ijaz v Secretary Education, Punjab (1997 SCMR 167)** and **Manzoor Hussain v Chief Secretary, Government of Sindh [2019 PLC (CS) Note 23]**

5. Notwithstanding the above, even otherwise the question of locus poenitentiae is also inapplicable in the present case as the very appointment of the petitioners under the category of son quota was on the basis of some exercise of powers by the concerned officer and or Standing Orders issued from time to time; however, without any basis and sanctity in law, inasmuch as they were never approved by the concerned Provincial Government. It is

settled law that if the order itself is illegal, then perpetual right cannot be claimed on such basis and this principle of locus poenitentiae would not apply. 231

It is not a principle of law that order once passed becomes irrevocable and is a past and closed transaction and cannot be recalled. Reliance in this regard may be placed on the case reported as PLD 1992 SC 207 (*THE ENGINEER-IN-CHIEF BRANCH through Ministry of Defence, Rawalpindi and another v/s. Jalaluddin*). It is also settled by the Hon'ble Supreme Court of Pakistan in the case reported as 1999 SCMR 2883 (*ARDESHIR COWASJEE and 10 others v/s. KARACHI BUILDING CONTROL AUTHORITY (KMC), KARACHI and 4 others*) that if an order has been issued by an authority, which by itself was incompetent to do so, said illegal action or order cannot be treated as irrevocable or past and closed transaction and no perpetual right can be gained on the basis of the same. In the case reported as 2019 SCMR 643 (*GOVERNMENT OF THE PUNJAB, EDUCATION DEPARTMENT through Secretary Higher Education, Punjab Civil Secretariat, Lahore and others v/s. MUHAMMAD IMRAN and others*), once again the principle of locus poenitentiae has been discussed and it has been held as follows:

- "10. Keeping in view the above deliberation, it is noted that there is a judicial consensus on the issues in hand in terms that:
- I) The Authority which can pass order is entitled to vary, amend, add to or rescind the same under section 21 of the General Clauses Act, 1897.
  - II) The jurisdiction to recall an earlier order is based on the principle of locus poenitentiae.
  - III) There is an exception to the principle of locus poenitentiae vesting power in an authority to recall its earlier order; if in pursuance of the order passed by the authority, an aggrieved person takes decisive steps, and changes his position.
  - IV) **None can retain the benefits of a withdrawn order, claiming the protection of having taken a decisive step, when the very order passed by the authority is illegal, void or without lawful authority. In such circumstances, it would not matter, even if decisive steps have been taken by the person in pursuance of the illegal order passed by the authority. However, the pecuniary benefit accrued and already received by a person in pursuance of an illegal order passed by the competent authority cannot be recovered from him unless the benefitting order was obtained by the person through fraud, misrepresentation or concealment of material facts."**

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6. Finally, in the case reported as **2011 SCMR 408 (MUHAMMAD NADEEM ARIF and others v/s. INSPECTOR GENERAL OF POLICE, PUNJAB, LAHORE and others)**, the Hon'ble Supreme Court while dealing with somewhat similar facts in respect of police appointment and promotion on the basis of some practice and circulars has been pleased to observe that instructions or rules or policy issued by the Inspector General of Police without approval of Provincial Government would not be valid and would have no legal sanctity, whereas, even wrong practice to follow such instructions conflicting with the parent statute or rules could not remain operative, but must be ignored, whereas no one would be obliged to obey such directions and/or instructions. It has been further held that award of benefiting a person in violation of law would not attract the principles of locus poenitentiae.

7. And lastly, a learned Division Bench in the case of **Zaheer Ahmed v Province of Sindh** (CP No.D-5682-2014) in identical facts wherein, a petitioner had come before the Court for a declaration and prayer seeking appointment on the basis of son quota (*which is also the case of the present petitioners*), by following the judgment in the case of **MUHAMMAD NADEEM ARIF** (Supra) has been pleased to hold as under:

5. In order to clarify the legal position that has emerged in the present case we first take up legal issue of appointment in Sindh Police through Standing Order No. 279/2014 issued by the Inspector General of Police, Sindh. As per AAG, the Office of Inspector General of Police, Sindh, Karachi vide order dated 09.06.2014 issued Standing Order No.279/2014 notifying the recruitment in Sindh Police against Shaheed Quota/Son Quota (children of deceased, invalidated on medical grounds, retired and in-service police officers/men). Apparently, the said Standing Order has not been approved by the Provincial Government as required under Section 12 of Police Act, 1861. We are fortified by the judgment rendered in the case of Gul Hassan Jatoi (*supra*) and *Mohammad Nadeem Arif & others vs. IGP Punjab, Lahore & others*, 2011 SCMR 408, in which Hon'ble Supreme Court has held that the Standing Orders issued by Inspector General of Police have to be approved by the Provincial Government.

6. The aforesaid legal position of the case explicitly shows that there is concept of only deceased quota subject to all just exceptions and not that of son quota. Since petitioner has applied against son quota in the police department, he is not entitled to such relief under the aforesaid provision.

7. In the light of above discussion, it is crystal clear that Police Department cannot circumvent the law to make recruitment to the post of police

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constable on the basis of son quota by issuing Standing Orders or by invoking Rule 11-A of Sindh Civil Servants (Appointment, Promotion and Transfer) Rules, 1974. The appointment of police constable can only be made through competitive process on merit as provided under the recruitment rules and not otherwise.

8. In view of what has been discussed above, the instant Constitutional Petition is dismissed along with pending application(s) with no order as to costs.

8. In view of hereinabove facts and circumstances of this case, the petition is not maintainable before this Court as such jurisdiction under Article 199 of the Constitution is barred in view of the Article 212(2) of the Constitution as the appropriate remedy was before the Service Tribunal and not before this Court. On merits though no conclusive finding is required to be recorded; however, since the learned Counsel in order to justify maintainability of instant petition has taken us to the merits; whereas, law in respect of appointment on son quota on the basis of standing orders issued from time to time by the Police Department is already settled by the Hon'ble Supreme Court, therefore we have taken this liberty to express our opinion.

9. Accordingly the petition being misconceived is hereby dismissed.

Manzoor