

JUDGMENT SHEET
IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

Writ Petition No.66980/2017

Muhammad Zahid Saleem Vs. Secretary, Government of Punjab etc.

Date of hearing	09-10-2023
Petitioner by	Mr. Allah Nawaz Khosa, Advocate.
Respondents by	Ms. Baby Tabassum, Law Officer LG&CD Department. Mr. Omer Farooq Khan, Assistant Advocate-General, Punjab alongwith Muhammad Saleem, M.O. (F), MC TT Sing.

ABID AZIZ SHEIKH, J. Through this Constitutional Petition, the petitioner has challenged four **impugned orders** passed by respondents No.1 and 2 i.e. order dated 21.07.2017 (wrongly mentioned as 27.07.2017 in the petition), whereby his representation for grant of pensionary benefits against the post of “Assistant Finance” (BS-16) was declined, order dated 19.08.2017, whereby his promotion as “Assistant” (BS-11) was withdrawn, Corrigendum dated 08.01.2020, whereby his retirement order dated 14.04.2016 was modified mentioning the retirement against the post of “Senior Clerk” and the order dated 25.01.2020, whereby he was held eligible to get his pensionary benefits of “Senior Clerk”, and consequently seeking his pensionary benefits against the post of “Assistant Finance” (BS-16).

2. Relevant facts are that the petitioner was appointed as “Clerk” (BS-5) in Municipal Committee (MC), Toba Tek Singh

(**TT Singh**) on 06.06.1984 and finally he was retired on 30.09.2016 as “Assistant Finance” (BS-16), however, his pension was not released and consequently, the impugned order dated 21.07.2017 was passed by respondent No.1 to the effect that petitioner’s promotion as “Assistant” in BS-11, vide order dated 13.10.2005, was not valid under the relevant Rules, therefore, he will receive the pension against the post of “Senior Clerk” and not “Assistant Finance” (BS-16), however, while taking lenient view the salary already received by him as “Assistant Finance” (BS-16) was not to be recovered. Consequently, the impugned order dated 19.08.2017, Corrigendum dated 08.01.2020 and order dated 25.01.2020 were passed by respondent No.2, hence, this Constitutional Petition.

3. Learned counsel for the petitioner submits that the petitioner being a retired employee of the Punjab Local Government and not a Civil Servant, this Constitutional Petition is maintainable. He submits that the petitioner was promoted from time to time and finally retired in BS-16, therefore, he is entitled for pensionary benefits of BS-16. He, in support of his arguments, placed reliance on “CDA THROUGH CHAIRMAN, ISLAMABAD and others Vs. SHABIR HUSSAIN and others” (2022 SCMR 627), “MUHAMMAD ISRAR, ASI and 138 others Vs. GOVT. OF KHYBER PAKHTUNKHWA and others” (2017 PLC(CS) 1128) and “TANVEER HUSSAIN Vs. DIRECTOR, AGRICULTURE

(ECONOMICS AND MARKETING), PUNJAB, LAHORE and 3 others” (2012 PLC(CS) 948).

4. Learned Law Officer, on the other hand, submits that the petitioner was appointed as “Clerk” (BS-5) in MC, TT Singh on 06.06.1984 and later on promoted as “Senior Clerk” (BS-7) on 04.02.1992. Submits that after promulgation of the Punjab Local Government Ordinance, 2001 (**Ordinance**), Tehsil Municipal Administrations (**TMA**s) were established and District Councils were dissolved. Submits that the employees of *defunct* District Councils were adjusted in TMA's. Contends that the petitioner was promoted as “Assistant” (BS-11) on 13.10.2005 against the post of *defunct* District Council, whereas he was an employee of MC, TT Singh and not District Council, hence, the said promotion being not valid the subsequent upgradations of the petitioner are also nullity in the eyes of law.

5. Arguments heard. Record perused. There is no dispute that the petitioner was appointed as “Clerk” (BS-5) in MC, TT Singh on 06.06.1984 and was promoted as “Senior Clerk” (BS-7) on 04.02.1992 and served as “*Perokar*”. Subsequently, after promulgation of the Ordinance, TMA's were established and District Councils were dissolved and the petitioner was promoted against the post of “Assistant” (BS-11) on 13.10.2005 by the relevant authority and his post was twice upgraded to BS-14 on

01.07.2007 and to BS-16 on 01.01.2016 and he stood retired as “Assistant Finance” (BS-16) on 14.04.2016 w.e.f. 30.09.2016. It is not the case of the respondents that petitioner’s promotion order dated 13.10.2005 was not passed by the competent Authority or he had no prescribed qualification or he lacked experience against the post of “Assistant” (BS-11) but the only ground, raised by the respondents to deny him pensionary benefits of BS-16, is that said post was relating to District Council whereas the petitioner was employee of MC, TT Singh. This defect in the promotion proceedings is not attributable to the petitioner rather at best it was a fault or irregularity on part of the Department. It is well settled that in absence of any fraud, misrepresentation or fault on part of the employee in promotion proceedings, he cannot be deprived of his right of pensionary benefits after lapse of considerable period.

6. Some of the judgments and the law settled therein, on aforesaid proposition, are reproduced as under:-

- (I) The Supreme Court of Pakistan in “CAPITAL DEVELOPMENT AUTHORITY through Chairman, Islamabad and others Vs. SHABIR HUSSAIN and others” (2022 SCMR 627) held as under:

“In the instant case, on the face of it, neither any fault or defect of respondents was pointed out by CDA nor any oversight or error on the part of DPC members or its composition or jurisdiction which could result an unceremonious withdrawal of promotion order after considerable period. In these set of circumstances, the doctrine of vested right is

quite applicable which conserves that once a right is lawfully created, its existence should be recognized and acknowledged, therefore, the benefit of promotions earned on DPC recommendations have become an undeniable and incontrovertible right of the respondents which could not be cancelled or withdrawn.The existing Rules or Regulation if amended and notified by CDA will obviously come into field prospectively and not retrospectively. No such ground or reason was assigned in the withdrawal/cancellation order, albeit, the alleged intention or idea to amend the rules or regulation could not justify to undo or withdraw the promotion orders of the respondents under the garb of future amendments of rules/regulations which are non-est. Even the rules are amended, the CDA would not be able to upset or disturb the past and closed transaction. It is not the case of CDA that promotion was accorded to the respondents due to some misunderstanding, error, misconception of law or without sanction of competent authority, therefore, the principle of locus poenitentiae is also attracted to ameliorate and ventilate the sufferings of the respondents.

- (II) The law laid down in “Mian TARIQ JAVED Vs. PROVINCE OF PUNJAB through Chief Secretary, Government of Punjab, Lahore and 2 others” (2008 SCMR 598) is as follows:

“5-A. There is no cavil to the proposition that the appointment in departure to the rules is against the policy of law but notwithstanding the legal defect in the initial appointment, the principle of locus poenitentiae would not permit the competent authority to undo an appointment after such a long time on the ground that the appointment was in violation of rules and remove the incumbent from the office. The Tribunal without adhering to the principle

of equality and equal treatment before the law as enshrined in Article 25 of the Constitution that the persons placed in similar situation in the alike circumstances, cannot be dealt with differently in departure to the rule of fairness and equal treatment, disposed of the appeal of the appellant with conversion of penalty of removal from service awarded to him into compulsory retirement. The Tribunal also did not attend the pivotal question regarding the retrospective application of the Ordinance to the transaction past and closed.”

(III) In “PROVINCE OF PUNJAB through Secretary, Agriculture, Government of Punjab and others Vs. ZULFIQAR ALI” (2006 SCMR 678) it was held as under:

“7. We are afraid that the contention so raised by him is not correct as the Director Agriculture appointed him on 10-11-1990 and thereafter his service was regularized w.e.f. the same date in the year of 1993. He served the department for about 11 years as a regular employee and during course whereof, there was no complaint of whatsoever nature against him, calling for action under the Punjab Civil Servants (Efficiency and Discipline) Rules, 1975. It may be noted that these rules contemplate an action against an employee who is guilty for the breach of good service order, indiscipline, misconduct etc. but it does not, contain any provision on the basis of which appointment of an employee can be cancelled on the ground that it has been made illegally. In other words in such-like situation instead of taking action against an appointee it is appropriate if an action is taken against the Appointing Authority who apparently committed a misconduct by making such appointment, as it has been observed by this Court in the case of Abdul Hafeez Abbasi and others v. Managing Director, Pakistan International Airlines

Corporation, Karachi and others 2002 SCMR 1034.”

(IV) This Court in “AMMAD AHMAD Versus NATIONAL HIGHWAY AUTHORITY through its Chairman and 5 others” (2018 PLC (C.S.) Note 187) held as follows:

“14. There is nothing on record to show that respondents No.5 and 6 procured their appointments, regularization and promotion through fraud and illegal means. In this eventuality, when the appointees are not at fault, the appointing authority ought to have been proceeded against. It is settled law that party should not be made to suffer for action or inaction of the authority, who was obliged to follow the law. The Hon’ble Supreme Court of Pakistan, vide judgment dated 11.06.2014, passed in C.P. No.51-L of 2014 titled Ahsan Jabbar v. Government of Punjab, and others has held that if some fault was committed by the departmental authorities while assessing eligibility for appointment, the employee could not be deprived from his job due to faults of the department. At this belated stage, respondents No.5 and 6 cannot be penalized due to irregularities, if any, committed in the process of appointment and subsequent steps.....15. Under the law, decisive steps taken by the authority cannot be withdrawn. Law is well settled that once a right is created by extending benefit for no default of a person, the same cannot be taken away on mere assumption, supposition, whims and fancy. Such right, once vested, could not be destroyed or withdrawn as legal bar would come into play under the doctrine of locus poenitentiae. Even in presence of any legal defect in initial appointment, principle of locus poenitentiae would not permit competent authority to undo same after a long time and remove incumbent

from service.”

- (V) In “MUHAMMAD ISRAR, ASI and 138 others Versus GOVERNMENT OF KHYBER PAKHTUNKHWA and others” (2017 PLC (C.S.) 1128) held as follows:

“17. Lastly learned AAG while relying on 2013 SCMR 1752, contended that perpetual rights cannot be claimed on an illegal order, therefore, the authority cancelled the promotion orders of the petitioners and the same cannot be granted as of right. Indeed, perpetual rights cannot be claimed on an illegal order, but in the instant case, the order of promotion dated 24.07.2015 is quite legal and lawful, because the same has been issued with the approval by of Departmental Promotion Committee, by the Competent Authority and nowhere in the comments, so filed by the respondents and arguments at bar, they have contended that petitioners were neither fit nor eligible for promotion, rather it has been proved on record that the cancellation order is of no lawful authority and a void order. The principle of locus poenitentiae could be invoked by competent authority till the time the decisive stage was not reached. In the instant case it is established that the orders were conveyed and acted upon, the said orders were even published in the gazette part-II and petitioners have reported to their place of posting as well, then a valuable right have accrued to the petitioners and as such they cannot be deprived of vested right by the authority, in view of which this writ petition is allowed as prayed for. Petitioners are deemed to be promoted from the date of their promotion order dated 24.7.2015.”

- (VI) In “TANVEER HUSSAIN Vs. DIRECTOR, AGRICULTURE (ECONOMICS AND MARKETING),

PUNJAB LAHORE and 3 others” (2012 PLC (C.S.) 948)

also held as follows:

“14. Needless to mention that it was incumbent upon the Competent Authority to apply its conscious mind while scrutinizing the petitioner’s case and antecedents for promotion before issuing the promotion order in his favour. Once petitioner has been promoted after fulfilling all the codal formalities by the Competent Authority the same could not be questioned or reverted on the flimsy ground that the post of Auctioneer had to be filled in through initial recruitment under some Rules. Certainly a matter being past and closed transaction cannot be re-opened under the principle of locus poenitentiae. The impugned orders dated 16-3-2011 and 28-6-2011, therefore, are neither based on principle of justice and equity nor tenable in law.”

(VII) The law settled by this Court in **“ASAD ALI ALVI Versus SECRETARY, GOVERNMENT OF PUNJAB, IRRIGATION AND POWER DEPARTMENT, LAHORE and 8 others”** (2007 PLC (C.S.) 924) is as under:

“5. It is admitted fact that the petitioner was awarded promotion on the recommendation of the DPC and he was appointed as officiating Circle Superintendent and on that post he worked and performed his duties honestly and if the proceedings of the DPC were defective or there was any irregularity committed by the Department, the petitioner could not be held responsible for the same. Recovery of amount paid on basis of incorrect order received by the petitioner on a bona fide belief that he was entitled to it, as such the respondents were not entitled to recover the amount from the petitioner during the period when incorrect order remained in field and principle of locus poenitentiae

would be applicable to this case.”

7. In crux, the law settled in aforesaid judgments is that when there are no allegations of fraud, misrepresentation or using of illegal means on part of the promotee and order is also passed by the Competent Authority then merely due to defect in the proceedings on part of the Department, the promotion order cannot be withdrawn at belated stage. In such situation, the promotion order is protected under the principles of “vested right”, “past & closed transaction” and “*locus poenitentiae*”.

8. In view of above discussion, this Constitutional Petition is **allowed** and the impugned orders passed by respondents No.1 & 2, being illegal and without lawful authority, are set-aside. Consequently, the petitioner shall be extended his pensionary benefits against the post of “Assistant Finance” (BS-16) with effect from the date of his retirement i.e. 30.09.2016.

(ABID AZIZ SHEIKH)
JUDGE

Approved For Reporting

JUDGE