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**JUDGMENT SHEET
IN THE LAHORE HIGH COURT, BAHAWALPUR BENCH,
BAHAWALPUR
JUDICIAL DEPARTMENT**

W.P No.10464 of 2021/BWP

Muhammad Khawar Ilyas

Versus

*Federation of Pakistan through Secretary Finance & Economic Affairs
Division, Government of Pakistan, Islamabad & others*

J U D G M E N T

Date of hearing: 15.11.2023.

Petitioner by: M/s. Dr. Malik Muhammad Hafeez, Muhammad Shahid Shaheen, Kashif Mehmood Babar and Malik Khaleel Ahmad Mamra, Advocates.

Respondents by: Mr. Mahmood Ahmad Bhatti, Advocate.
Miss Riffat Yasmeen, Assistant Attorney General for Pakistan.
Mr. Zafar Iqbal Awan, Additional Advocate General on Court's call.
Rai Mazhar Hussain Kharal, Assistant Advocate General on Court's call.

MUHAMMAD SAJID MEHMOOD SETHI, J.- Through instant petition, petitioner has challenged the correspondence dated 23.06.2021 & 03.12.2021, issued by respondent No.3 / Chief Commissioner Inland Revenue, Regional Tax Office, Bahawalpur, whereby pursuant to an Enquiry Report dated 19.06.2021 – recommending imposition of major penalty of *dismissal from service* – show cause notice, followed by personal hearing notice, was issued to petitioner in connection with disciplinary proceedings under the Removal from Service (Special Powers) Ordinance, 2000 (“**the Ordinance of 2000**”).

2. Learned counsel for petitioner submits that disciplinary proceedings under the Ordinance of 2000 could not have been initiated as the same stood repealed by the Removal from Service (Special Powers) (Repeal) Act, 2010 (“**the Act of 2010**”),

published in official Gazette on 06.03.2010, which specifically envisaged that the disciplinary proceedings would be conducted under the Act *ibid*, relating to persons in government service, to whom the Civil Servants Act, 1973 and the Government Servants (Efficiency & Discipline) Rules, 1973 are applicable. Adds that petitioner stood retired from service after attaining the age of superannuation on 08.07.2021, therefore, pending inquiry / disciplinary proceedings stand abated in view of Rule 54-A of the Fundamental Rules.¹ Contends that petitioner has been acquitted by the Accountability Court on the same set of allegations, which are now part of the disciplinary proceedings, thus he cannot be vexed twice on the same charges. Argues that even otherwise, the National Accountability Ordinance, 1999 has overriding effect over all other laws for the time being in force (section 3). He has relied upon Deputy Director Food and 2 others v. Akhtar Ali, Foodgrains Inspector (1997 SCMR 343), Muhammad Anwar Bajwa, Executive Director, Agricultural Development Bank of Pakistan, 1-Faisal Avenue, Zero Point, Islamabad v. Chairman, Agricultural Development Bank of Pakistan, Faisal Avenue, Zero Point, Islamabad [2001 PLC (C.S.) 336], Syed Abdus Salam Kazmi v. Managing Director, WASA, Multan and another [2005 PLC (C.S.) 244].

3. Conversely, learned Law Officer, assisted by learned counsel for respondents, submits that petitioner has raised factual controversy which cannot be resolved by this Court in exercise of constitutional jurisdiction. Further submits that charge sheet, order of enquiry, show cause notice and personal hearing notice were issued to petitioner under the applicable law inasmuch as writ does not lie against the show cause notice. Contends that no order regarding petitioner's dismissal, removal or suspension from services has been passed, therefore, instant petition being premature

¹ Government of Pakistan Finance Division, *Compilation of the Fundamental Rules and Supplementary Rules, Volume I, Updated Edition-2018*, inserted by S.R.O.1143(I)/80 dated 10.11.1980, Gazette of Pakistan., Extra., Part II, Page 2215, dated 20-11-1980.

is unsustainable, besides being not maintainable in view of the bar contained in Article 212 of the Constitution of the Islamic Republic of Pakistan, 1973. Adds that the departmental proceedings were paused due to non-availability of record of refund cases being in custody of the NAB authorities and the Accountability Court, and upon receipt of the record, proceedings have been initiated, hence no illegality has been committed. Lastly submits that the department has ample legal authority to proceed against petitioner as per applicable rules, regulations and law. Reliance has been placed upon Naseer Pervaz Qureshi v. Board of Directors, ZTBL, through Company Secretary and 3 others [2015 PLC (C.S.) 1293] and Muhammad Azim Khan Leghari v. Federation of Pakistan and others [2017 PLC (C.S.) 336].

4. Submissions of learned counsel for the parties have been heard at length and available record has been perused with their able assistance.

5. Record reflects that disciplinary proceedings commenced against petitioner in the year 2007 under the Ordinance of 2000 vide Order of Enquiry dated 07.11.2007, on the following charges:-

- a) Mr. Khawar Ilyas, Special Officer of Income Tax E&IP Unit-04, Bahawalpur issued refunds of Rs.12.87 million in 80 cases of Army Contractors (washermen / hair-dressers) from Unit-04, Bahawalpur whereas the jurisdiction of E&IP Unit-04 relates to Cotton Ginners / Oil Mills. It is established that you have proceeded unlawfully with mala fide intention exercising the powers beyond your jurisdiction. List of cases enclosed as ANNEX-A.
- b) Mr. Khawar Ilyas, Special Officer of Income Tax E&IP Unit-04, Bahawalpur issued refunds in all the above cases without proper verification from relevant DPC/DPU/Controller of Military Accounts / District Accounts, Bahawalpur as the payments were deposited on TR Challans at National Bank of Pakistan Limited, Bahawalpur and verification of tax deposited into treasury could easily be made therefrom. Thus, you flouted the instructions contained in CBR's Circular No.05 of 2003 Dated 30.06.2003.
- c) Mr. Khawar Ilyas, Special Officer of Income Tax E&IP Unit-04, Bahawalpur was required to provide refund voucher / advice books and certain assessment record of Unit-04, Bahawalpur to Mr. Muhammad Akhtar Suraj, ACIT duly authorized to examine and collect it by this office. You telephonically informed that refund voucher / advice books are not available with you and are

lying with some official of your unit at his residence. However, subsequently you changed your stance and stated in writing that these refund / advice books are in the custody of higher authorities vide letter No.106 dated 23.10.2007. The CIT, Bahawalpur (look after charge) has denied it vide his letter No.Ad.PF/07-08/CIT-BWP/1379 dated 23.10.2007. Non production and mis-statement on your part is insubordination and tantamount to "Misconduct".

Petitioner furnished reply on 04.02.2008, Inquiry Officer furnished recommendation on 18.04.2008, however the competent authority ordered issuance of fresh charge sheet. Second inquiry, consisting upon two members, triggered vide order dated 01.07.2008 and after accomplishing different stages, final show cause notice was issued on 29.06.2011. However, vide order dated 29.03.2012, fresh inquiry – constituting Inquiry Committee consisting upon three officers – was ordered. But the same encountered a halt as the record was with the NAB authorities and the Accountability Court, however after petitioner's acquittal vide order dated 05.04.2019 and receipt of record, the inquiry again commenced and finalized vide Inquiry Report dated 19.06.2021, whereby penalty of *dismissal from service* was proposed against petitioner. Whereupon, impugned show cause notice and personal hearing notice were issued, which are under-challenge before this Court.

6. It is evidently clear from above history that disciplinary proceedings commenced in the year 2007 when the Ordinance of 2000 was in field and subsequent proceedings / stages of inquiry are in continuation of initial inquiry proceedings. Undeniably, the Ordinance of 2000 was repealed by the Act of 2010, however under sub-section (2) of Section 2 of the Act *ibid*, all proceedings pending under the repealed Ordinance against any person whether in government service or corporation service were held to be continued. In these circumstances, the repeal of Ordinance of 2000 cannot be made a shield to save petitioner from the disciplinary proceedings commenced much before the repeal. And, under sub-

section (3) of Section 2 of the Act *ibid*, all fresh disciplinary proceedings from 5th March, 2010 onwards relating to persons in government service, to whom the Civil Servants Act, 1973 (LXXI of 1973) and the Government Servants (Efficiency & Discipline) Rules, 1973, apply were held to be governed under the Act *ibid* and the rules made thereunder. In the given circumstances, there is no harm to the disciplinary proceedings initiated under the Ordinance of 2000 well before its repeal and petitioner cannot claim to wriggle out the same on this misconceived plea.

7. It is ridiculous that the conclusion of the impugned inquiry is not in sight despite lapse of almost 14-years (till personal hearing notice) and in the meanwhile, petitioner was retired from service on 08.07.2021. It is irony that the respondents have no plausible explanation and legal excuse for this lapse. The so-called interruption on the basis of proceedings before the NAB authorities/ the Accountability Court, is misconceived as the underlying principle of initiating disciplinary proceedings is to ascertain whether the charges of misconduct against the delinquent are proved or not, and in case his guilt is proved, what action, which may include imposition of minor or major penalties, should be triggered against him under the applicable Service Laws, Rules and Regulations. The purpose of departmental inquiry is to maintain and uphold discipline and decorum in the institution and efficiency of the department to strengthen and preserve public confidence. Whereas proceeding under the penal statutes are altogether different where the prosecution has to prove the guilt of accused beyond any reasonable doubt, and if proved, punishment is awarded for the offences committed by the accused. It is well-settled exposition of law that the prosecution in the criminal cases as well as the departmental inquiry on the same allegations can be conducted and continued concurrently at both venues without having any overriding or overlapping effect. Reference can be made to Syed Ali Shah Bukhari v. Chief

Secretary, Government of Punjab, Lahore and another (PLD 2004 Supreme Court 51), Syed Muhammad Iqbal Jafri v. Registrar, Lahore High Court, Lahore (2004 SCMR 540), Province of Punjab through Special Secretary, Specialized Healthcare and Medical Education Department, Lahore and others v. Khadim Hussain Abbasi (2021 SCMR 1419), Faraz Naveed v. District Police Officer Gujrat and another (2022 SCMR 1770) and Postmaster General, Karachi and another v. Arshad Ali (2022 SCMR 1796).

8. Admittedly, the disciplinary proceedings initiated against the petitioner were not concluded during his tenure of service and as such the charges alleged against him could not be established. In view of Rule 54-A of the Fundamental Rules, if the disciplinary proceedings, including an inquiry, against an employee or public servant started during his / her service and are not concluded until the age of superannuation, such proceedings shall stand abated upon retirement and such government servant is entitled to get full pensionary benefits. Rule 54-A *ibid*, is reproduced hereunder for ease of reference:-

"[F.R. 54-A. If a Government servant, who has been suspended pending inquiry into his conduct attains the age of superannuation before the completion of inquiry, the disciplinary proceedings against him shall abate and such government servant shall retire with full pensionary benefits and the period of suspension shall be treated as period spend on duty.]"

The effect of afore-referred provision is mandatory because of the word "shall" used therein, as a result, the disciplinary proceedings initiated against petitioner stood abated upon his retirement on 08.07.2021, and he is entitled to full post-retirement benefits permissible under the law. Reliance is placed upon Muhammad Zaheer Khan v. Government of Pakistan through Secretary, Establishment and others [2010 PLC (C.S.) 559], Parveen Javaid v. Chairman WAPDA and 5 others [2011 PLC (C.S.) 1527]. Irshad Ahmed v. Port Qasim Authority through

Chairman and 2 others [2019 PLC (C.S.) 557] and Nasir Kamal v. Federation of Pakistan through Secretary, Ministry of Maritime Affairs, Islamabad and another [2021 P L C (C.S.) 1226].

9. Generally, a statute which regulates the manner in which public officials exercise the powers vested in them is construed to be directory rather than mandatory, especially when neither private or public rights are injured or impaired thereby. But if the public interest or private rights call for the exercise of the power vested in a public official, the language used, though permissive and directory in form, is in fact peremptory or mandatory as a general rule. This general principle, however, does not apply where the phraseology of the provision, or the nature of the act to be performed, or the consequence of performing or failing to perform it within the prescribed timeframe is such that the prescription of timeframe is actually a limitation on the power of the public functionary. Or where a public functionary is empowered to create liability against a citizen only within the prescribed time, the performance of such a duty within the specified timeframe is mandatory. Where a public official can impose liability on a retired employee if the power is exercised within a certain statutory timeframe and there is a delay in the exercise of such power on the part of a public official, no such liability can be imposed after the lapse of the statutory period. Reference can be made to Province of Punjab through Conservator of Forest, Faisalabad and others v. Javed Iqbal (2021 SCMR 328).

10. So far as objection qua maintainability of this petition, as urged by learned Law Officer as well as learned counsel for respondent that petitioner is obliged to resort to Federal Service Tribunal, is concerned, suffice it to say that in the cases of Parveen Javaid, Irshad Ahmed and Nasir Kamal, supra, matter involving applicability of Rule 54-A of the Fundamental Rules have been

decided while exercising extraordinary jurisdiction by the High Courts, hence this objection is overruled.

11. So far as objection that Writ Petition against issuance of Show Cause Notice is not maintainable, is concerned, admittedly in routine writ is not maintainable; however, where the show cause notice was barred by law or abuse of process of the Court or was coram non judice, and if the issuance of the show cause notice was without jurisdiction or with mala fide, the same can be challenged in Writ Petition as held in the cases reported as Commissioner Inland Revenue and others v. Jahangir Khan Tareen and others (2022 SCMR 92), Jahangir Muggo and others v. Securities and Exchange Commission of Pakistan and others (2022 CLD 1325), Pakistan Telecommunication Company Limited v. Federation of Pakistan through Ministry of Information and others (2021 CLC 159), Dr. Fatima Arshad v. Government of the Punjab and others (2020 PLC (C.S.) 688), Reliance Commodities (Private) Ltd. v. Federation of Pakistan and others (PLD 2020 Lahore 632), Dr. Seema Irfan and others v. Federation of Pakistan and others (PLD 2019 Sindh 516) and Riffat Hassan and 9 others v. Federation of Pakistan through Chairman, Federal Board of Revenue/Secretary, Revenue Division and another [2011 PLC (C.S.) 562].

12. The case law, relied upon by learned counsel for respondents, is on distinguishable facts and inapplicable to the facts and circumstances of this case.

13. I would like to observe that the scheme of the Punjab Employees Efficiency, Discipline and Accountability Act, 2006,² the Punjab Civil Services Pension Rules, 1955,³ Rule 54-A of the Fundamental Rules and instructions contained in Civil Establishment Code (ESTACODE) regarding *quick disposal of disciplinary proceedings pending against government servants who*

² Section 1(4)(iii) and Proviso to Section 21.

³ Proviso to Rule 1.8 (b).

*are about to superannuate*⁴ seems to supports the public policy that an employee who has served the Government all his life must enjoy his retirement in peace and must be spared from undergoing long drawn departmental proceedings during his retired life. Therefore, it is directed that disciplinary proceedings pending against government servants who are about to superannuate are fast tracked so that they are concluded well before the retirement date (in case of employees of Federal government) and within the prescribed timeframe (in case of employees of Punjab government) to achieve the intent of the legislature and save the rights and interests of the departments and the government servants. All the departments are required to abide by the applicable instructions / law for disposal of the disciplinary proceedings of retiring and retired employees. The Federal as well as Punjab Governments are directed to issue clear instructions to all the departments for strict observance of aforesaid provisions without fail. Office to transmit copy of this judgment to concerned quarters for information and compliance accordingly.

14. In view of the above, instant petition is **allowed** and impugned show cause notice dated 23.06.2021 and personal hearing notice dated 03.12.2021 are declared to be illegal and without lawful authority. The respondents are directed to release pensionary benefits of petitioner as per law within a period of **thirty days** from the date of receipt of certified copy of this order.

(Muhammad Sajid Mehmood Sethi)
Judge

APPROVED FOR REPORTING

Judge

Sultan

⁴ Chapter 8 – Conduct, Efficiency & Discipline – Sl. No.27.2, ESTACODE Edition-2021.