

**JUDGMENT SHEET
IN THE PUNJAB SUBORDINATE JUDICIARY
SERVICE TRIBUNAL LAHORE
JUDICIAL DEPARTMENT**

Service Appeal No.06 of 2017

***Zafar Hussain Bhatti
Versus
Lahore High Court, Lahore through its Registrar***

JUDGMENT

Date of hearing: 24.04.2024.

Appellant by: Ms. Sabahat Rizvi, Advocate along with appellant.

Respondent by: Mr. Manzoor Hussain Dogar, Advocate.

MUHAMMAD SAJID MEHMOOD SETHI, J./CHAIRMAN:-

Through instant appeal, appellant has assailed orders dated 03.05.2017 and 19.05.2017, passed by respondent, whereby appellant's request for grant of proforma promotion as District & Sessions Judge was declined.

2. Brief facts are that appellant was served with show cause notice dated 29.05.2013 with the allegation that he while posted as Additional District & Sessions Judge, Pattoki, vide order dated 15.08.2012 granted post arrest bail to accused in case FIR No.57 dated 16.02.2012, registered under section 9-C of the Control of Narcotics Substance Act, 1997 (**the "CNSA"**) at Police Station, City Phool Nagar, District Kasur, for having been found in possession of 15-1/2 kilograms *Charas*, which was against the provisions of section 51 of the CNSA, which was an order passed beyond jurisdiction and amounted to inefficiency and misconduct within the contemplation of Rule 6(3) of the Punjab Civil Servants (Efficiency and Discipline) Rules, 1999. As a result, minor penalty of withholding promotion for a period of three years with effect from 2012 was imposed vide Notification dated 27.09.2016. Feeling aggrieved,

appellant filed review petition for setting aside the afore-said Notification and grant of proforma promotion, which was declined vide orders / letters dated 03.05.2017 & 19.05.2017. Hence, instant appeal.

3. Learned counsel for appellant submits that appellant's promotion was approved by the Hon'ble Chief Justice and Judges w.e.f. 06.08.2012 on the recommendations of the Provincial Judicial Selection Board, therefore, subsequent show cause notice dated 29.05.2013 cannot operate retrospectively as to impair appellant's legitimate right. He adds that grant of bail is a judicial function and a routine matter, therefore, disciplinary proceedings could not have been initiated. He contends that appellant's promotion was a regular promotion under section 2(2) of the Punjab Civil Servants Act, 1974 and not on officiating basis under Rule 13(i) of the Punjab Civil Servants (Appointment and Conditions of Service) Rules, 1974. He argues that there was inordinate delay of almost three and half years in conclusion of disciplinary proceedings, which is not a bar to consider appellant for promotion. He further submits that major penalty of withholding promotion could not have been imposed without holding regular inquiry. He contends that allegation of inefficiency is vague and is not supported by any material rather appellant earned good PERs throughout his career. In the end, he submits that appellant has been victimized for no fault of his own, therefore, he is entitled for grant of proforma promotion under the law. He has relied upon Secretary Kashmir Affairs and Northern Areas Division, Islamabad v. Saeed Akhtar and another (PLD 2008 Supreme Court 392),

4. Conversely, learned counsel for respondent submits that appellant along with others was promoted on officiating basis, with direction to remain on probation period of one year extendable to further 02 years, thus, question of retrospective effect of the penalty does not arise because promotion could be withheld from the date when it fell due. He contends that a

glaring instance of inefficiency emerged from judicial record, therefore, regular inquiry was dispensed with, however all legal and codal formalities were observed, proper show cause notice was issued and opportunity of personal hearing was also afforded to appellant.

5. Arguments heard. Available record perused.

6. Perusal of record shows that appellant was promoted as District and Sessions Judge (BS-21), on the recommendations of the Provincial Judicial Selection Board, vide Notification dated 06.08.2012, however subsequently, Vide Notification dated 27.09.2016, appellant's promotion was ordered to be withheld from the year 2012 for a period of three years, retrospectively, overlooking the fact that promotion already stood notified by the competent authority which was neither rescinded nor recalled. It is not the case of respondent that appellant was short of eligibility criteria for the promotion and admittedly, recommendations of a duly convened Provincial Judicial Selection Board were in favour of appellant. In these circumstances, subsequent events including allegations of inefficiency and misconduct on passing a bail order or pending inquiries would become irrelevant once a promotion has been made after fulfillment of all legal and procedural requirements. These matters may possibly be taken into consideration while processing case for further promotion. Reference can be made to Secretary to Government of the Punjab, Communication & Works Department, Lahore and others v. Muhammad Khalid Usmani & others (2016 SCMR 2125 = NLR 2016 Service 117).

Furthermore, a valid promotion order had already been passed in appellant's favour, which created certain rights in his favour. We are of the considered opinion that power of receding an order is available with the authority before taking a decisive step. The purpose behind such power is to retrace the wrong steps taken by the authority, with the exception that where the order has taken legal effect, and in pursuance thereof certain

rights have been created in favour of an individual, such an order cannot be withdrawn or rescinded to the detriment of his / her rights. The principle of *animus revertendi or locus poenitentiae* demand that when an order is acted upon and certain benefits have accrued to the person concerned under the order, the same cannot be withdrawn with retrospective effect to deprive that person of the accrued rights. Reference can be made to Pakistan through the Secretary, Ministry of Finance v. Muhammad Himayatullah Farukhi (PLD 1969 SC 407), Capital Development Authority Through Chairman, Islamabad And Others v. Shabir Hussain And Others (2022 SCMR 627) and Mrs. Zeenat Parveen Jaffery versus Secretary to Government of Sind, Education Department and 4 others [1983 PL C (C.S.) 1260].

7. It is well-settled that penalty cannot be imposed retrospectively unless the authority is vested with such powers expressly provided under the applicable law / rules. No such provision has been cited by learned counsel for respondent to defend the impugned action. A passing reference to some precedents will not be out of place where the Supreme Court of Pakistan elaborated the principle of awarding major penalty retrospectively, including the cases reported as Noor Muhammad v. The Member Election Commission, Punjab and others (1985 SCMR 1178) and Syed Sikandar Ali Shah v. Auditor-General of Pakistan and others (2002 SCMR 1124), wherein it has categorically been declared that major penalty could not have been imposed with retrospective effect unless the competent authority was expressly empowered in this regard by some statute or rules made thereunder.

8. We note that show cause notice was issued on 29.05.2013, appellant furnished reply on 06.06.2013 and personal hearing was afforded on 08.06.2013 (as per stance of appellant), however the proceedings were concluded by issuing Notification dated 27.09.2016 i.e. after lapse of more than three years from personal hearing. No justification and sufficient

reasons have been advanced by respondent for the delay in concluding the proceedings, especially when regular inquiry was dispensed with on the ground that judicial order was sufficient to show the inefficiency and misconduct. We observe that pendency of disciplinary proceedings was also a punishment and appellant had suffered such agony and mental torture for such a long period. Reference can be made to Raja Muhammad Shafique Javaid v. Lahore High Court through Registrar [2005 PLC (C.S.) 1015].

9. Needless to say that a judicial officer while hearing a case is at liberty to decide the same by applying law on the facts thereof based on the available record. A decision passed by any judge may ultimately turn out to be wrong and be set aside by higher judicial forum. The erroneous exercise of judicial power resulting into passing of an order on the basis of incorrect application of law, however cannot and should not cast doubt on the integrity of the judicial officer. The quality of a judgment / order passed by a judicial officer can only be judged in appellate judicial proceedings and ordinarily not through disciplinary proceedings unless the extraneous considerations for which a judgment / order was passed are proved through cogent material brought before the inquiry officer. The inquiry officer / hearing officer while conducting disciplinary proceedings cannot act as the appellate / revisional forum over the judgments / order passed by the judicial officer. The judicial independence of subordinate judiciary is required to be observed and respected at all cost and the inquiry officer/hearing officer must tread extremely cautiously in such matters otherwise it would put a chilling effect on the working of the subordinate judiciary in performing their judicial functions freely and fairly. Reference can be made to Ishwar Chand Jain v. High Court of Punjab & Haryana (AIR 1988 SC 1395) and K.P. Tiwari v. State of Madhya Pradesh (AIR 1994 SC 1031). The observation of the Indian Supreme Court, in latter case, are as under:-

"4 The higher courts every day come across orders of the lower courts which are not justified either in law or in fact and modify them or set them aside. That is one of the functions of the superior Courts. Our legal system acknowledges the fallibility of the judges and hence provides for appeals and revisions. A judge tries to discharge his duties to the best of his capacity. While doing so, sometimes, he is likely to error. It is well said that a judge who has not committed an error is yet to be born. And that applies to judges at all levels from the lowest to the highest. Sometimes, the difference in views of the higher and the lower courts is purely a result of a difference in approach and perception. On such occasions, the lower courts are not necessarily wrong and the higher courts always right. It has also to be remembered that the lower judicial officers mostly work under a charged atmosphere and are constantly under a psychological pressure with all the contestants and their lawyers almost breathing down their necks more correctly up to their nostrils. They do not have the benefit of a detached atmosphere of the higher courts to think coolly and decide patiently. Every error, however gross it may look, should not, therefore, be attributed to improper motive..."

In a judgment reported as Rao Abdul Jabbar Khan v. Registrar, Lahore High Court, Lahore [2016 PLC (C.S.) 281], this Court held that in the absence of any evidence it will not be fair to suggest that bail cancellation order passed by the judicial officer was based on malice and that malice cannot be presumed on the basis of surmises and conjectures.

10. In the present case, there is no supporting material to establish any extraneous considerations on the part of the appellant to have passed the order which was the subject matter of the inquiry. The impugned order was passed on the allegations of inefficiency and misconduct but no efforts were made to substantiate these allegations by way of a detailed inquiry, especially in view of stance of appellant that he secured outstanding PERs throughout his service career and received no adverse remarks of misconduct or being inefficient. To our mind, the allegations of inefficiency and misconduct are also not proved, hence, impugned orders are unsustainable in the eye of law.

11. Learned counsel for respondent argued that appellant was promoted on officiating basis subject to assumption of charge of the post and was placed under probation and impugned order

was passed before assumption of charge and during probation period, thus, question of retrospective punishment does not arise. Suffice it to say that as the order of imposition of penalty is not a valid order in view of judgments of the superior Courts and our afore-referred observations, therefore, there remains no justification to give different treatment to appellant from his ten other colleagues, especially when some of them were given posting immediately after issuance of the promotion order. Needless to say that the promotion was made as per eligibility criteria against the substantive posts after fulfillment of all legal requirements and same was also not rescinded at any subsequent stage. Even otherwise, the issue has been settled by the Supreme Court of Pakistan in the case of Muhammad Khalid Usmani supra. The operative part of the observations is reproduced hereunder:-

14. It is clear and obvious from a perusal of Rule 13(i) ibid that an appointment by promotion 'on officiating basis' can be made against posts which fall vacant as a result of the circumstances mentioned in the said Rule. We have specifically asked the learned Law Officer if the posts against which the respondents were promoted had fallen vacant as a result of any of the situations mentioned in rule 13(i) of the Rules. He has frankly conceded that this was not the case, and that the respondents were promoted against regular vacancies which had been available in the ordinary course of events. It is also evident from the record that the respondents possessed the qualification and experience required for promotion from the post of Assistant Engineers to Executive Engineers. In this context, reference may be usefully made to Jafar Ali Akhtar Yousafzai v. Islamic Republic of Pakistan (PLD 1970 Quetta 115)

....

21. During hearing of these appeals, we have noted with concern that the device of officiating promotion, ad hoc promotion/appointment or temporary appointment etc. is used by Government Departments to keep civil servants under their influence by hanging the proverbial sword of Damocles over their heads (of promotion 'on officiating basis' liable to reversion). This is a constant source of insecurity, uncertainty and anxiety for the concerned civil servants for motives which are all too obvious. Such practices must be seriously discouraged and stopped in the interest of transparency, certainty and predictability, which are hallmarks of a system of good governance. As observed in Zahid Akhtar v. Government of Punjab (PLD 1995 SC 530) "a tamed subservient bureaucracy can neither be helpful to

the Government nor it is expected to inspire public confidence in the administration".

....

23. We are of the view that promotion on an officiating basis should be resorted to only in the circumstances visualized in rule 13(i) of the Rules. Further, the spirit of such action, a purely temporary and stopgap arrangement for a limited period, should be kept in mind. In no circumstance should such a stopgap arrangement be allowed to continue for years on end. On our query, we have been informed that the usual period of probation provided by the law for regular posts by way of direct appointments is a maximum of two years. It would, therefore, be just and fair if the said timeframe is followed in case of promotion on officiating basis also, unless there are extraordinary circumstances necessitating extension of such period further for a limited duration, and such extraordinary circumstances must be reduced in writing by the competent authority directing such extension. We may, however, emphasize that such extensions cannot be undertaken in a routine and thoughtless manner and can only be made where circumstances spelt out in rule 13 ibid are in existence. In addition, if the law provides a specified period of probation for appointments against regular posts, we do not see any reason why a free hand should be given to Government Departments to undertake promotions on officiating basis for unlimited and unspecified periods."

12. For the foregoing reasons, instant appeal is **allowed** and orders qua imposing penalty of withholding promotion for a period of three years with effect from 2012 and declining appellant's request for grant of proforma promotion are set aside. Appellant is entitled to the grant of proforma promotion and consequent monetary benefits as per law.

(Muhammad Sajid Mehmood Sethi)
Chairman

(Abid Husain Chattha)
Member

(Rasaal Hasan Syed)
Member

APPROVED FOR REPORTING

Chairman