

IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

Present:

Mr. Justice Ijaz Ahmed Chaudhry

Mr. Justice Mushir Alam

Civil Petition No. 2515 of 2015.

(Against judgment dated 11.06.2015 of
Federal Service Tribunal, Lahore, passed in
Appeal No.238(L)/CS of 2013.)

Senate through its Chairman

...Petitioner (s)

VERSUS

Shahiq Ahmed Khan

...Respondent(s)

For the Petitioner(s) : Mr. Sajid Ilyas Bhatti, DAG
Rana Mazharul Haq, Dy. Secy.

For Respondent No.1 : Mr. Aftab Alam Rana, ASC.

Date of Hearing : 17.11.2015.

ORDER

Ijaz Ahmed Chaudhry, J.- Through this petition, the petitioner-Senate of Pakistan has sought leave to appeal against judgment dated 11.06.2015 whereby the Federal Service Tribunal, Lahore, while allowing the Appeal No.238(L)/CS of 2013, filed by the respondent Shahiq Ahmad Khan, set at naught the Notification and order of Appellate Authority dated 10.03.2011 and 26.07.2013, respectively and also directed the petitioner to grant pensionary benefits to the respondent, in accordance with the notification dated 20.10.2004.

2. The terse details of the facts obtaining between the parties, are that the respondent was working as Director in National Construction Limited (Public Limited Company and hereinafter to be referred as NCL) under the administrative control of Ministry of Housing and Works, Government of Pakistan, Islamabad. His services were requisitioned by the petitioner for appointment, on deputation, as Director General,

Public Relations (BS-20) in the Senate Secretariat, Islamabad. The respondent accordingly joined the aforesaid position and subsequently vide notification dated 18.10.2003, he was permanently absorbed in BS-20 in the Senate Secretariat w.e.f. 29.09.2003. Thereafter, another notification was issued on 20.10.2004, whereby the competent authority directed that "services of the respondent in his parent department will count towards his seniority in the Senate". On 18.11.2005, the respondent was appointed as Additional Secretary Senate (BS-21) and superannuated on 21.10.2010.

3. The respondent deposited Rs.2,80,897/- on account of over payment of salaries to him and then he was directed to deposit Rs.3,97,814/- in the office of AGPR on account of G.P. Fund and Rs.4,50,555/- in the State Bank on account of pension contribution. The respondent filed a writ petition before Learned Islamabad High Court, Islamabad, which was dismissed on 25.11.2008. In order to assail the said order, the respondent filed CPLA No.173/2009 before this court, which was disposed of, vide order dated 27.10.2009, diverting the respondent to approach Federal Services Tribunal for remedy. The respondent filed Appeal No.13(R)CS of 2010 in Federal Service Tribunal, Islamabad. It was decided on 24.11.2010 and the matter was remanded to petitioner/Chairman Senate for deciding the status of the respondent and his claim to seniority in presence of the notification of 20.10.2004. The petitioner issued another notification dated 10.03.2011 whereby the earlier notification of 20.10.2004 was withdrawn. The departmental appeal, filed by the respondent, was also rejected vide order dated 26.10.2013.

4. The respondent filed appeal before Federal Service Tribunal, Camp Office, Lahore, which was allowed vide judgment dated 11.06.2015 and the notification of 10.03.2011 and order of the Appellate Authority dated 26.07.2013 were set aside and the petitioner/Chairman Senate of Pakistan was directed to grant the pensionary benefits to the respondent in accordance with notification of 20.10.2004. The

petitioner felt aggrieved therefrom and has brought this petition, seeking leave to appeal.

5. Mr. Sajid Ilyas Bhatti, learned DAG contends that the respondent was not a civil servant at the time, when his services were requisitioned from NCL. He could not have been inducted as such in the Senate Secretariat, Islamabad. He was not working on a pensionable post. After absorption, his previous service would not have been counted under the law and he was also not entitled to claim seniority on account of his previous service in NCL. It is further submitted that the respondent was working as Acting Secretary in the Senate Secretariat, when he got prepared a summary for his absorption in the Senate Secretariat, per paras Nos.32, 33 and 65, but the then Chairman Senate did not approve the summary and para No.67 shows that he posted a query "why this, pl. discuss". Learned DAG maintained that despite the development, the respondent managed to get issued direction for issuance of revised notification as per para 68 of the summary, without any approval of the Chairman Senate/Competent Authority. It is submitted that the previous service of the appellant in NCL could not be reckoned for the purpose of seniority and pensionary benefits. The notification and order of the Appellate Authority issued on 10.03.2011 and 06.07.2013 were passed after observing lawful procedure. No illegality has been committed by the petitioner.

6. The learned DAG has raised serious objections on the judgment of the Federal Service Tribunal, passed on 11.06.2015 and stated that the observations, recorded by FST that proper opportunity of hearing was not afforded to the respondent before issuance of the notification and order of the Appellate Authority and that such stance is not supported from the record, as the respondent was heard in person by the Acting Chairman Senate on 22.07.2013, before passing the order on 26.07.2013. It was in compliance with the order dated 18.12.2012, passed by the learned Lahore High Court, in Writ Petition No. 31121/2012. It is submitted that Federal Services Tribunal,

while setting aside the order and notification mentioned above, did not take into consideration the facts available on the record and erroneously recorded its finding to blame the petitioner for not providing the opportunity of hearing to the respondent and that even if it is presumed that the respondent was not heard prior to the disposal of his departmental appeal, Federal Service Tribunal was not justified in passing an order for grant of pensionary benefit to the respondent and to restore the notification dated 20.10.2014. At the worst, it could remand the matter to the petitioner for a fresh decision on merits. That, Federal Service Tribunal showed colourful exercise of power. That the notification dated 20.10.2004 was void and had been manipulated by the respondent, therefore, had to be withdrawn and the judgment of the Federal Service Tribunal is meriting to be set aside.

7. The learned counsel for the respondent contended that the petitioner has twisted the facts. In fact, no opportunity of hearing was provided to the respondent before passing the order dated 10.03.2011. Similarly, the notification of 20.10.2004 was defended, as the same had been issued to reflect the order of the Competent Authority. The petitioner did not initiate any measures during the past so many years and the respondent has been targeted in the backdrop of some personal grudges, but only after his superannuation. The learned counsel added that no proceedings could have been initiated against the respondent, in view of the bar, contained in section 54-A of the Fundamental Rules. Reliance has been placed on the judgment of this Court reported as **2000 SCMR 1864** whereby it was pronounced that the services rendered in statutory body can be taken into consideration for the grant of pensionary benefits. That the whole proceedings, prior to the notification and order dated 10.03.2011 and 26.07.2013, respectively had been solemnized in a lawful manner and the petitioner was divested of any legal justification to pass an order on 26.07.2013 for withdrawal of the notification dated 20.10.2004. It was prayed that the leave may not be granted as

the judgment of the learned Federal Service Tribunal is impregnable on any legal ground.

8. We have heard the learned counsel for the parties and also had the opportunity of appraising the record. The respondent was inducted in the Senate Secretariat in BS-20, vide notification dated 18.10.2003. A few months later, a summary was got prepared and also put up, ordaining that "his services in his parent department will count towards his seniority in the Senate from the date of promotion to Director Grade equivalent to BS-20 of Government scales". Needless to state that in the said notification of 20.10.2004, there is absolutely no mentioning of the pensionary benefits. The version of the petitioner is that the said notification of 20.10.2004 was without any lawful basis. The summary was moved to this effect, but it did not fancy the Chairman Senate and he had posted a query "why this, pl. discuss", meaning thereby that the summary had not been approved by the Competent Authority which was none other than the Chairman Senate. It is also significant that the respondent was working as Acting Secretary Senate, during those days and without formal approval of the Chairman Senate/Competent Authority, the notification for permanent absorption of the respondent in Senate Secretariat in BS-20 and for counting of his service in the Parent Department was issued. The crux of the controversy lies in the legal status of this notification. The cardinal question, cropping up in this case, was that whether notification dated 20.10.2004 had been issued lawfully. Incidentally the answer is in the negative. Without approval of the Competent Authority, the respondent could neither be permanently absorbed in Senate Secretariat nor his previous service, counted for the purpose of seniority. It is manifest in the circumstances that the notification dated 20.10.2004 was void ab-initio as the same had been issued without any legal authority and the beneficiary was none other than the respondent who was working as Acting Secretary Senate during those days.

9. We have also noticed that the Office Memorandum was issued by the Finance Division, Government of Pakistan on 22.10.1985, wherein the guidelines have been provided to meet such eventualities, as had arisen in this case. The contents of the same are available in para No.1(iii) of said O.M. It is to be read in juxtaposition with U.O.No.F.4(1)R-2/2006-527, dated 03.11.2006, whereby it was observed that NCL is a company registered in the Security and Exchange Commission of Pakistan under the Companies Law, having its own pay scale and services rules and its employees were not civil servants and their pay on appointment to a civil post under the Government is not protectable under the prescribed policy of Government, circulated vide Finance Division's O.M. dated 12.08.2002 and also that NCL is not a pensionable organization having Contributory Provident Fund Scheme for its retiring employees. Therefore, the service rendered in NCL could not be counted towards pension in terms of Article 361 of Civil Service Regulations (CSR) and that the respondent was of the view that he should not sustain a loss on account of his basic pay and in this backdrop, the Finance Division recommended that the respondent be compensated through grant of six advance increments in the light of F/R 27. The Chairman Senate approved six premature increments to the respondent w.e.f. 29.09.2003. The question arises that when the respondent had been compensated by means of six premature increments, how the pensionary benefits could be awarded? It is evident from the above reference that the advance increments were sanctioned in favour of the respondent w.e.f. 29.09.2003, keeping in view the facts that he was disentitled for pensionary benefits. Furthermore, the grant of pensionary benefits could not be envisioned from the notification of 20.10.2004.

10. We have perused the impugned judgment dated 11.06.2015, passed by Federal Service Tribunal, Lahore, carefully. In para 8, the Members of Federal Service Tribunal conceded that there was factual and legal controversy about the notification of 20.10.2004. Though there is some confusion of the date apparently in the minds of the

members, who cited the date as 10.03.2011, whereas it was to be 20.10.2004 and observed that no regular inquiry had been conducted, which, in fact, was needed. The question falls for determination that when the very basis of the notification is in controversy, how the same could be sustained on legal premises. It was ineluctable course, in the circumstances, for the Federal Service Tribunal to precisely determine the sanctity of the notification of 20.10.2004 before taking pains to crucify the notification of 10.03.2011 which was meant for the withdrawal of the notification of 20.10.2004. A void notification cannot be enforced. From the facts and circumstances of this case, the allegation of forgery is also made out, to which the petitioner did not advert, for unknown reasons. The respondent appears to be beneficiary of notification of 20.10.2004 and could have been dealt with accordingly.

11. This Court has held repeatedly that no limitation is prescribed to competently and successfully challenged a void order/notification. We are also astonished to note that the Federal Service Tribunal passed a direction to the petitioner to grant pensionary benefits to the respondent in accordance with the notification dated 20.10.2004. In fact, there was no reference of any pensionary benefits in the notification of 20.10.2004. Such observations by Federal Service Tribunal are perverse and based on misreading of the record. Wrong mentioning of the dates in paras Nos. 8 and 11 apart, there was absolutely no justification for such decision, which was passed in an arbitrary and capricious manner. It demonstrates colourful exercise of power and is shorn of any judicial acumen.

12. In the impugned judgment, there was import of the principle of locus poenitentiae to rescue the respondent. We are constrained to observe that the principle is meant to condone a bona-fide mistake and not to be pressed into service for reaping the benefit of any fraud or to camouflage the same. The members of the Federal Service

Tribunal were not justified in the circumstances to invoke the principle of locus poenitentiae, in the fact and circumstances of this case.

13. Besides the legal status of the notification of 20.10.2004, some other controversies like the status of the respondent as civil servant while serving in NCL, right of pensionary benefits as such and the reckoning of his service in NCL for the purpose of seniority in the Senate Secretariat are also involved, which have not been comprehensively adverted to in the impugned judgment, passed by the Members of Federal Service Tribunal on 11.06.2015 in a perfunctory manner and their judicial approach is leaving much to be desired. Keeping in view the observations recorded hereinabove; the listed petition is converted into appeal and allowed. Consequently, the impugned judgment passed on 11.06.2015 by Members of Federal Service Tribunal is set aside. The Appeal No.238(L)/CS/2013 is remanded with the direction that the learned Chairman Federal Service Tribunal will entrust this Appeal to a Bench at Islamabad for decision within a period of three months, in accordance with law and keeping in view the above observations.

14. However, it is directed that the observations made hereinabove regarding the conduct of the Members of the Service Tribunal, who have passed the impugned judgment, dated 11.06.2015, will be transmitted to the concerned quarters for necessary action, in accordance with law. The same will also be placed before the Hon'ble Chief Justice of Pakistan for perusal and necessary action.

Judge

Judge

Islamabad, the
17th of November, 2015
ZR/*

APPROVED FOR REPORTING