

JUDGMENT SHEET
PESHAWAR HIGH COURT, PESHAWAR
Judicial Department

WP No.4771-P/2018

Mst. Shabana Younas & others **Vs. Chief Secretary**, Govt:
of Khyber Pakhtunkhwa & others

Date of hearing : **17.09.2020**

Mr. Inam Ullah Khan Hoti, Advocate, for the petitioners.

Mr. Arshad Ahmad, AAG, for the respondents.

JUDGMENT

SYED ARSHAD ALI, J. The petitioners, who are the
LRs of Nazir Ahmad deceased civil servant (Subject
Special in Education Department), have filed this
Constitutional Petition, seeking the following relief:-

“It is humbly prayed that on acceptance of the instant writ petition, the order of the respondent No.1 may kindly be set aside and all the back benefits, financial benefits, pension gratuity and past salary etc may be awarded to the petitioners. Further the period of the past absence (caused due to unavoidable circumstances) of the predecessor of the petitioners may also kindly be treated as leave without pay and the same may be awarded to the petitioners.”

2. It is averred in the petition that Nazir Ahmad deceased, had joined the respondent/department as Senior English Teacher (SET) on 16.12.1987 and was later promoted to the post of Subject Specialist (S.S) PBS-17 in the year 2010.

3. In the year 2013, he was diagnosed HVC positive and as such was hospitalized. The Principle of the School, where the deceased was posted, had issued a show cause notice to him on 24.01.2013, asking for

his explanation for absence from duty, which was duly replied by him. The said notice was followed by another notice from the Secretary Elementary & Secondary Education Department, Government of Khyber Pakhtunkhwa, and a publication in the newspapers, similarly asking for an explanation for his absence from duty.

4. It is the case of the present petitioners that, time and again, it was conveyed to the respondents that the predecessor of the petitioners could not join the duty due to his illness and requested for grant/extension of leave, but the said request was ignored and resultantly the worthy Chief Secretary, Government of Khyber Pakhtunkhwa ordered, vide impugned order dated 05.06.2013, the removal of the predecessor of the petitioners from service.

5. During his life time, the predecessor of the petitioners had challenged his removal from service through a service appeal which was filed by him before the Khyber Pakhtunkhwa Service Tribunal. However, during pendency of the said appeal, he died on 26.10.2013 and resultantly, his appeal stood abated.

6. Later, the present petitioners, being LR's of the deceased civil servant, had also filed service appeal before the Service Tribunal, questioning the order of removal of their predecessor civil servant from service,

but the same was returned due to lack of jurisdiction by the Tribunal.

7. Respondents in their comments have denied the assertions of the petitioners and stated that no medical prescriptions were provided to the respondent/department. It was further contended that the predecessor of the petitioners was removed from service by the Competent Authority after fulfilling all codal formalities, due to his absence from duty.

8. Arguments heard and record of the case was perused with the able assistance of the learned counsels for the parties.

9. Admittedly, the predecessor of the petitioners was a School Teacher, who joined the Education Department as SET on 16.12.1987 and was removed from service on 05.06.2013 owing to his absence w.e.f 04.01.2013 to 04.06.2013. Thus, at the time of his removal from service, the predecessor of the petitioners had about 26/27 years of service to his credit.

10. A close perusal of the various letters available on the file would reveal that the respondent/department was aware of the precarious medical condition of the predecessor of the petitioners. In this regard, the Deputy Director Establishment, through letter No. 2941 dated 24.05.2013, had apprised the worthy

Secretary Education Department regarding the said illness of the predecessor of the petitioners. The petitioners have also placed on file various medical prescriptions reflecting the gravity of ailment of their predecessor during the relevant period. However, the officials of the Education Department could not place the said documents before the worthy Secretary, E&SE, Peshawar, as well as the worthy Chief Secretary and it is probably for that reason, the worthy Chief Secretary, Government of Khyber Pakhtunkhwa, has passed the impugned order of removal. The predecessor of the petitioners had challenged the said order before the Khyber Pakhtunkhwa Service Tribunal but the same could not be decided owing to his death. Therefore, the present petitioners have approached this Court through the instant petition, seeking direction for grant of family pension etc to them being his LRs albeit the order of removal of the deceased civil servant has also been challenged.

11. The grant of pension to a civil servant, on attaining the age of superannuation or after qualifying the required length of service, is the state bounty, duly regulated through rules known as the West Pakistan Civil Servants Pension Rules, 1955.

12. Similarly, Chapter-C of the said Rules envisages for the family pension of the deceased civil servant to

his widow and children. Therefore, the moot question before this Court is as to whether a civil servant, who is removed/dismissed from service, and challenges the said penalty before the competent forum, would the death of the civil servant during such proceedings abate the legal action?

13. A civil servant, guilty of misconduct, indiscipline or absence from duty, is liable to a departmental action under the Khyber Pakhtunkhwa, Civil Servants (Efficiency & Discipline) Rules, 1973 (hereinafter called as E&D Rules). A penalty imposed against a civil servant, under the E&D Rules, is amenable before the Khyber Pakhtunkhwa Service Tribunal established u/s 4 of the Khyber Pakhtunkhwa Service Tribunal Act, 1974 “**the Act**”. The Service Tribunal, under Section 5 of the Act, has the jurisdiction either to rescind, amend or alter the penalty imposed on a civil servant. However, the Service Tribunal, having a limited jurisdiction, cannot entertain a petition from the family/LRs of the civil servant, who dies during the pendency of an appeal before it, even if the right to sue is survived by his legal heirs.

14. The essential question, as to whether after the death of a petitioner in any judicial proceedings, would the proceedings abate, primarily depends upon the

nature of the cause of action. An action may abate on the death of the party but the cause of the action may survive his death (**Mst. Itrat Zahida's Case** [2006 SCMR 1287]). Indeed, any right which is personal to the suer dies with his death. This principle is based on the maxim, "*action personalis moritur cum persona*" (a personal right of action dies with the person). However, a right to sue, other than one intrinsically connected with the individuality of the deceased petitioner, will always survive to, or against, his legal representative (**Ali Muhammad Mirza's Case** [PLD 2004 Supreme Court 185]). In cases, when on the death of the deceased petitioner, his legal heirs are entitled to the relief or benefit which the deceased petitioner had claimed during his life time, by succession or through any other legal instruments, then obviously the death of the deceased petitioner would not abate the proceedings and his legal heirs may continue to proceed with the matter. The apex Court in **Mst. Itrat Zahida's Case** *ibid*, after referring to various jurisprudences from foreign jurisdictions, has finally held in para-10 of the judgment, relating to survival of lis by the legal heirs of deceased civil servant, as follows: -

10. Coming to the facts of the instant case, we note that the predecessor-in-interest of the petitioners was seeking enforcement of his service/civil rights. The Punjab Labour Court No.IV having considered the entire evidence led

during the departmental proceedings set aside the order of dismissal from service and reinstated him. It was the Appellate Court which set aside the judgment of the Labour Court, vide order dated 2-5-2002 and the same had been challenged through the constitutional petition. If the constitutional petition had been allowed, the order of the Punjab Labour Tribunal would have been set aside and that of the Punjab Labour Court No.IV reinstating petitioner's predecessor-in-interest would have been restored and in that eventuality even after his death, the legal heirs would have inherited the pensionary benefits. In these circumstances, the writ petition could not have abated and the legal heirs had a right to be impleaded as a party and to pray for a decision on merit.

15. The predecessor of the present petitioners had served the respondent/department for a good 26/27 years and had his request for leave or pension on medical ground been considered by the department, he, most certainly, would have been entitled to the pension, and in case of his death, his LRs would have been entitled for pension in terms of the Pension Rules. However, the predecessor of the petitioners was removed from service and he died shortly after filing an appeal against the impugned order before the Service Tribunal. The proceedings before the appellate forum, had the same been decided in his favour, would have definitely had a direct effect on his service and in case of his death during service, his LRs would have been obviously entitled for the pensionary benefits. Therefore, in view of the above, this Court has reached the inevitable conclusion that the death of the predecessor of the present petitioners would not abate the cause of action of the present petitioners to challenge the impugned order of removal of their

predecessor from service to the extent of getting pensionary benefits

16. Moving onto the jurisdiction of this Court. *Ubi jus ibi remedium*, where there is a right, there is a remedy, is a settled principle of law. Although, the Service Tribunal has been established for the purpose of enforcement of terms and conditions of service of a civil servant, however, under the Act, the Tribunal has limited jurisdiction, and it is only a civil servant who can approach it for enforcement of his terms and conditions of service. Therefore, in case of death, the right of the aggrieved party cannot be left in limbo/vacuum on the pretext that no forum is available to decide the same and when there is no alternate remedy available to the petitioners, being LR's of a civil servant and seeking setting aside of order of removal of their predecessor from service, they can very well agitate their claim before this Court in its constitutional jurisdiction. In this regard, we are fortified by, and derive wisdom from, the case law laid down in “Sarfaraz Saleem V/s Federation of Pakistan [PLD 2014 Supreme Court 232], Mst. Zahida Sattar's Case [PLD 2002 Supreme Court 408], Imtiaz Ahmad Mehmood's Case [PLD 2003 SC 40], Ghazal Tariq's case reported as [2005 PLC (CS) 271] and the case of Mari Muthu Vs

Superintendent of Police of the Madras High Court (India) reported as [1986 ILLI 229 Madras] .

17. Moving on further to the merit of the case. The record placed on file shows that the predecessor of the petitioners had served the department for 26/27 years with an unblemished record but could not perform his duties, for just five (05) months, as he was seriously ill, having been diagnosed positive for HCV. His medical condition was known to the respondent/ department, as evident from the letter referred to above, However, the respondents, while placing the file before the worthy Chief Secretary for appropriate action, had concealed this material fact from him, which unfortunately resulted into the dismissal/ removal from service of the predecessor of the present petitioners through the impugned order. Thus, not only is the impugned order the result of procedural impropriety, but is obviously against the principle of proportionality as well. The extreme action of removal from service against a civil servant, who had a very long service at his credit but remained absent from his duties for only five (5) months, and that too for a valid reason, is not sustainable.

18. In this view of the matter, we allow this petition, set aside the impugned order of removal of the predecessor of the petitioners from service and remand

the case to the worthy Chief Secretary, Government of Khyber Pakhtunkhwa, Peshawar, to consider the reasons of absence of the predecessor of the present petitioners and, thereafter, pass an appropriate order relating to the grant of pension etc to the present petitioners. The needful be done within a month, positively, from receipt of this judgment.

Announced;
17.09.2020

JUDGE

JUDGE