

(Appellate Jurisdiction)

Mr. Justice Yahya Afridi  
Mr. Justice Sayyed Mazahar Ali Akbar Naqvi  
Mr. Justice Muhammad Ali Mazhar

Against the Judgment dated 16.04.2021 passed by the Federal Service Tribunal, Islamabad, in Appeal No.2137(R)CS/2018 with MPs No.2262/2018 & 215/2019.

...Petitioners

...Respondent

For the Petitioners: Mr. Umer Sharif ASC

For the Respondent: N.R.

Date of Hearing: 12.07.2023

**MUHAMMAD ALI MAZHAR, J.** This Civil Petition for leave to appeal is directed against the Judgment dated 16.04.2021 passed by the Federal Service Tribunal, Islamabad ("**Tribunal**") in Appeal No.2137(R)CS/2018 and MPs No.2262/2018 & 215/2019 whereby the Appeal filed by the instant respondent was accepted and the impugned order dated 02.08.2018 was set aside with the direction to the petitioner-department to permit the respondent to continue his service as Guard Grade-I on the analogy of the similarly placed official absorbed as Guard Grade-I.

2. The transient facts of the case are that the respondent was appointed in Pakistan Railways as SM/Group Student in BS-05 on 09.06.1983, and thereafter, in the year 1989, he was posted as Signaler Grade-I (BS-06). In 1994 he was promoted to the post of

Signaler Grade-II (BS-07), and later, on 10.02.2000, he was declared surplus but subsequently his services were utilized as Telephone Operator in PBX Exchange and in 2007 again his services were spared on filling the vacant post of PBX Operator. The grievance of the respondent was that he was absorbed as Guard Grade-I on 06.08.2012 but his absorption was denied vide letter dated 02.08.2018. Being aggrieved, the respondent filed a departmental appeal which was dismissed and ultimately, he filed the appeal before the learned Tribunal which was allowed *vide* the impugned judgment dated 16.04.2021.

3. The learned counsel for the petitioner informed us that the respondent has died and made a request to implead the legal heirs of the deceased to continue his challenge to the impugned judgment on the ground that the learned Tribunal's direction to absorb the deceased respondent is illegal, unlawful and without any legal justification. He further argued that the impugned judgment was passed in violation of the settled canons of justice, as well as codified law, and was based on misreading and non-reading of the material available on record.

4. A survey of the impugned judgment depicts that the respondent filed an appeal under Section 4 of the Service Tribunals Act, 1973 to challenge the departmental order dated 02.08.2018. The respondent was absorbed as Guard Grade-I *vide* Notice dated 06.08.2012, but, after a lapse of six years, he was denied the absorption *vide* Notice dated 02.08.2018 when certain valuable rights had already accrued in his favour which could not be denied keeping in mind the principle of *locus poenitentiae*. It is a well settled exposition of law that the power of rescission remains with the relevant authorities to undo the action till a decisive step is taken or as long as certain rights are not created or the action was found to be patently illegal. The record reflects that the department before the learned Service Tribunal failed to justify the action of rescinding the earlier order issued in favour of respondent, therefore, the learned Tribunal reached to the conclusion that the respondent was discriminated and the action taken against him was illegal and as a consequence thereof, the service appeal was allowed.

5. The most crucial aspect of this case is whether the right to sue survives on the death of respondent or not. According to the Latin legal maxim "*actio personalis moritur cum persona*" the personal right to an action dies with the person. There are certain categories of legal proceedings or lawsuits in which the right to sue is personal and does not survive or pass on to the legal representatives and, as a consequence thereof, the proceedings are abated. In case of survival of cause of action, according to the genres of the *lis*, the legal representatives may be impleaded to continue the suit or other legal proceedings for which the relevant provisions are mentioned under Order XXII, Rule 1, C.P.C, i.e. that the death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives, and further modalities are mentioned in succeeding rules such as how to implead the legal heirs in case of death of one of several plaintiffs or the sole plaintiff and in case of death of one of several defendants or of the sole defendant.

6. The deceased respondent was absorbed as Guard Grade-I *vide* Office Order dated 06.08.2012 and, after a lapse of six years, the benefit of absorption was withdrawn on 02.08.2018. The learned Tribunal declared this action illegal after affording an ample opportunity of hearing to the parties with further directions to maintain the respondent's job status as Guard Grade-I on the analogy of the similarly placed official absorbed as Guard Grade-I. A deceased person cannot be a party to any legal proceeding and, on his death, legal proceedings are suspended until and unless his legal representatives are impleaded and swapped as party provided that the cause of action survives which is indeed a prime consideration to declare any legal proceedings abated before the final adjudication. By and large, the right to sue survives except the right to sue which is closely associated with the individual or is a personal right of action. The case adjudicated in the service appeal is not the claim lodged by respondent in his life time for the recovery of unpaid dues, pension or gratuity etcetera, rather the service appeal had direct nexus with the act of withdrawing the absorption of the respondent after a considerable period of time without providing any right of audience. More so, it was not pleaded that the respondent was accorded the benefit of absorption due any misunderstanding, error, misconception of law, therefore, in our view, the right created could not have been

withdrawn or cancelled in a perfunctory manner on mere presupposition or conjecture which action is also hit by the doctrine of *locus poenitentiae* which is well acknowledged and embedded in our judicial system.

7. We do not any illegality or perversity in the impugned judgment and no substantial question of law of public importance as envisaged under Article 212 (3) of the Constitution of Islamic Republic of Pakistan 1973 has been raised in the petition to grant the leave to appeal.

8. This Civil Petition was dismissed and leave was refused vide our short order dated 12.7.2023. Above are the reasons in aid of short order.

Judge

Judge

Judge

ISLAMABAD

12.07.2023

Khalid

Approved for reporting