

IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE JAMAL KHAN MANDOKHAIL
MR. JUSTICE MUHAMMAD ALI MAZHAR
MR. JUSTICE SYED HASAN AZHAR RIZVI

CIVIL APPEAL NO.33-K OF 2018

(On appeal against judgment dated 25.07.2017
passed by Federal Service Tribunal, Karachi
Bench in Appeal No.191(K) CS/2015)

Federation of Pakistan through Chairman Federal Board of Revenue FBR House, Islamabad and othersAppellants

VERSUS

Zahid Malik ...Respondent

For the Appellants: Mr. Irfan Mir Halepota, ASC
Mrs. Abida Parveen Channar, AOR

For the Respondent: Malik Naeem Iqbal, ASC
Mr. Ghulam Rasool Mangi, AOR

Date of Hearing: 26.12.2022

JUDGMENT

MUHAMMAD ALI MAZHAR, J. This Civil Appeal with the leave of Court is directed against the judgment dated 25.07.2017, passed by the learned Federal Service Tribunal, Karachi Bench ("**Tribunal**") in Appeal No.191 (K) CS/2015 whereby the appeal filed by the respondent was allowed and the major penalty of dismissal from service was converted into the minor penalty of stoppage of one increment for a period of one year and the respondent was also reinstated in service.

2. The short-lived facts of the case are that while the respondent was serving as Inland Revenue Officer, Regional Tax Office-II, Karachi, he was issued a charge sheet with the statement of allegations of misconduct in terms of Rule 3 (a), (b) and (c) of the Government Servants (Efficiency & Discipline) Rules, 1973 ("**1973 E&D Rules**"). After conducting the inquiry, the Inquiry Officer reached the conclusion that the charges of misconduct are proved and recommendation was sent for the imposition of the major penalty of dismissal from service. An opportunity of personal hearing was afforded to the respondent to rebut the charges, thereafter, the competent authority imposed the major penalty of dismissal from

service under Rule 4(1) (b) (iv) of the 1973 E&D Rules vide Notification dated 05.11.2014. The Departmental Appeal preferred by the respondent was also rejected by the Appellate Authority vide order dated 03.03.2015. As a last resort, the respondent filed the appeal before the learned Tribunal which was allowed in the aforesaid terms.

3. The leave to appeal was granted vide order dated 26.7.2018 to consider whether the finding of the learned Tribunal *vis-à-vis* the defects and shortcomings in the inquiry proceedings are sustainable and while converting the major penalty into minor penalty, whether the learned Tribunal has committed any error on law and facts of the case.

4. The learned counsel for the appellant argued that the learned Tribunal allowed the appeal without appreciating the fact that the respondent never pointed out any witness which was required to be cross examined by him. It was further contended that as per documentary evidences, it was proved that the respondent had signed the back dated orders under Section 161 and 205 of the Income Tax Ordinance 2001 ("**ITO 2001**") and also issued notices unauthorizedly under Section 122 (5) for proposing additions under Section 111 (1) of the ITO 2001 for making amendments in the assessment orders for personal gains. He further argued that the department had conducted the proceedings according to law and also provided proper opportunity of defence, including the right of personal hearing to the respondent.

5. The learned counsel for the respondent argued that no documents were supplied to the respondent on the basis of which the charge sheet and statement of allegations were issued. He further argued that the inquiry was conducted in violation of Rule 6 of the 1973 E&D Rules and no opportunity was provided to the respondent for cross-examining the witness against him.

6. Heard the arguments. In order to thrash out the bone of contention, we have also surveyed the relevant rules. By virtue of Rule 21 of the Civil Servants (Efficiency and Discipline) Rules, 2020 ("**2020 E&D Rules**"), the 1973 E&D Rules were repealed vide S.R.O 1331(I)/2020 dated 11.12.2020. According to Rule 10 of the 2020 E&D Rules, a comprehensive procedure has been laid down that is to be followed by the inquiry officer or inquiry committee which *inter*

alia provides that on receipt of reply of the accused or on expiry of the stipulated period, if no reply is received from the accused, the inquiry officer or the inquiry committee, as the case may be, shall inquire into the charge or charges and may examine such oral or documentary evidence in support of the charge or charges or in defense of the accused as may be considered necessary, and where any witness is produced by one party, the other party shall be entitled to cross-examine such witness; the statements of witnesses shall be recorded in the presence of the accused and the departmental representative. The respondent on the allegations of misconduct was proceeded in terms of the 1973 E&D Rules before its repeal by the subsequent 2020 E&D Rules. Even in the repealed 1973 E&D Rules, the procedure of inquiry was laid down in Rule 6 which was to be followed by Inquiry Officer and or Inquiry Committee which *inter alia* provided that the Inquiry Officer or Inquiry Committee shall frame a charge and communicate it to the accused together with the statement of allegations explaining the charge and any other relevant circumstances which were proposed to be taken into consideration; the Inquiry Officer or the Committee, as the case may be, was also obligated to enquire into the charge and they could examine such oral or documentary evidence in support of the charge or in defence of the accused as might be considered necessary and the accused was also entitled to cross-examine the witnesses against him.

7. According to Rule 7 of the repealed Government Servants (Efficiency & Discipline) Rules, 1973, the Inquiry Officer and the Inquiry Committee for the purpose of an inquiry had the powers of civil court as envisaged under the Code of Civil Procedure, 1908 ("**CPC**") in respect of (a) summoning and enforcing the attendance of any person and examining him on oath; (b) requiring the discovery and production of documents; (c) receiving evidence on affidavits; (d) issuing commissions for the examination of witnesses or documents with a further rider that the proceedings under the said rules shall be deemed to be judicial proceedings within the meaning of Section 193 (Punishment for false evidence) and Section 228 (Intentional insult or interruption to public servant sitting in judicial proceedings) of the Pakistan Penal Code, 1860 ("**PPC**"). However, under Rule 10-A of the 1973 E&D Rules, no party was allowed in the proceedings before the authority, the authorized officer, and Inquiry Officer or an Inquiry Committee to be represented by an advocate. The survey of the

repealed 1973 E&D Rules which are relevant in the case in hand under which the departmental inquiry was conducted against the accused officer did not provide any specific Rule with regard to the role and duty of the departmental representative. However, if we look in juxtaposition, the Civil Servants (Efficiency and Discipline) Rules, 2020 also confers similar powers to the inquiry officer or inquiry committee under Rule 12 with analogous status that the proceedings under the said rules shall also be deemed to be judicial proceedings within the meaning of Sections 193 and 228 of the PPC. Likewise, under Rule 20, the parties are not allowed to be represented by an advocate or counsel at any stage of the proceedings before the appellate authority, authority, inquiry officer or any inquiry committee as the case may be. It is somewhat attention-grabbing that under the 1973 E&D Rules, there was no specific Rule vis-à-vis the duties of the departmental representative, but with some distinctiveness, under Rule 15 of the 2020 E&D Rules, the duties of the departmental representative are also provided, who is now obligated to render full assistance to the inquiry officer or the inquiry committee, as the case may be, during the proceedings where he shall be personally present and fully prepared with all the relevant record relating to the case, on each date of hearing; cross-examine the witnesses produced by the accused and with the permission of the inquiry officer or the inquiry committee, as the case may be, may also cross-examine the prosecution witnesses and rebut the grounds of defense offered by the accused before the inquiry officer or the inquiry committee, as the case may be. As a consequence of failure to perform the duty of departmental representative efficiently and adeptly, the departmental representative has been made liable to face departmental proceedings according to the exactitudes of sub-rule (2) of Rule 15 of the 2020 E&D Rules.

8. The primary objective of conducting departmental inquiry is to grasp whether a clear-cut case of misconduct is made out against the accused or not. The guilt or innocence is founded on the end result of the inquiry. The learned Service Tribunal may observe whether due process of law or right to fair trial was followed or ignored which is a fundamental right as envisaged under Article 10-A of the Constitution of the Islamic Republic of Pakistan, 1973 ("**Constitution**"). In a regular inquiry, it is a precondition that an evenhanded and fair opportunity should be provided to the accused and if any witness is examined against him then a fair opportunity

should also be afforded to cross examine the witnesses. In a departmental inquiry on the charges of misconduct, the standard of proof is that of balance of probabilities or preponderance of evidence. Where any authority regulates and performs its affairs under a statute which requires the compliance of the principles of natural justice then it should have been adhered to inflexibly.

9. Despite the handiness and accessibility of well guided procedure for conducting the inquiry under the E&D Rules, the inquiry officer did not adhere to it religiously and conducted the inquiry in a slipshod manner. The Inquiry Report dated 18.7.2014 reflects that Shaikh Zahid Masood, Additional Director, Intelligence and Investigation, Inland Revenue, Karachi was appointed as an Inquiry Officer, whereas Mr. Abdul Qadeer Abbasi, Deputy Commissioner (H.Qs) Zone-II, Regional Tax Office, Karachi was appointed as Departmental Representative in the inquiry. In paragraph No.7 of the Inquiry Report, it is pointed out that the respondent/accused Zahid Malik submitted his written defence in response to the charge sheet and statement of allegations on which the departmental representative submitted his comments on 29.1.2014, but the inquiry report does not depict that any witness including any assessee/tax payer was called for recording evidence in support of the allegations leveled against the accused officer. On the contrary, the inquiry report put on view that against each charge only the defence of the accused officer is mentioned along with the rebuttal of the departmental representative and thereafter the finding of the inquiry officer is recorded and finally, the accused officer was found guilty of inefficiency, misconduct and corruption on account of charges. Mere reproduction of charge with defence submitted in writing by the accused and then the rebuttal submitted by the departmental representative in the inquiry report was not sufficient to prove the accused's guilt as there was no evidentiary value except two statements on record and allegations *vice versa* (words against words) which could only be proved one way or the other. Had the evidence been recorded, both the statements would have subjected to the cross examination accompanied by other oral and documentary evidence for sifting the grain from the chaff. Without exploring and finding guilt of accused into the charges of misconduct, neither the inquiry report can be construed as fair and impartial, nor is it commensurate to the procedure provided under the E&D Rules for

conducting an inquiry into allegations of misconduct. It is undoubtedly revealing from the inquiry report that no opportunity was provided to the accused to conduct cross examination even on the departmental representative who allegedly rebutted the defence of the accused in writing before the inquiry officer and also produced evidence against the accused; at least he should have been subjected to the cross examination by the accused officer, particularly when no other witness was called for recording evidence. The learned Tribunal has judiciously scanned the inquiry report and also discussed all factual aspects in Paragraphs 6 to 10 of the impugned judgment and rightly reached the conclusion that the inquiry was conducted in violation of Rule 6 of the 1973 E&D Rules.

10. The scrutiny and analysis of the aforesaid Rules and the procedure set forth therein (present or repealed) unambiguously divulge that the right of proper defence and cross examination of witnesses by the accused is a vested right. Whether the evidence is trustworthy or inspiring confidence could only be determined with the tool and measure of cross-examination. The purpose of the cross-examination is to check the credibility of witnesses to elicit truth or expose falsehood. When the statement of a witness is not subjected to the cross-examination, its evidentiary value cannot be equated and synchronized with such statement that was made subject to cross-examination, which is not a mere formality, but is a valuable right to bring the truth out. If the inquiry officer or inquiry committee is appointed for conducting inquiry in the disciplinary proceedings, it is an onerous duty of such Inquiry Officer or Inquiry Committee to explore every avenue so that the inquiry may be conducted in a fair and impartial manner and should avoid razing and annihilating the principle of natural justice which may ensue in the miscarriage of justice. The possibility cannot be ruled out in the inquiry that the witness may raise untrue and dishonest allegations due to some animosity against the accused which cannot be accepted unless he undergoes the test of cross-examination which indeed helps to expose the truth and veracity of allegations. The whys and wherefores of cross examination lead to a pathway which may dismantle and impeach the accurateness and trustworthiness of the testimony given against the accused and also uncovers the contradictions and discrepancies. Not providing an ample opportunity of defence and depriving the accused officer from right of cross-examination to departmental representative who lead evidence and produced

documents against the accused is also against Article 10-A of the Constitution in which the right to a fair trial is a fundamental right. What is more, the principles of natural justice require that the delinquent should be afforded a fair opportunity to converge, give explanation and contest it before he is found guilty and condemned. The doctrine of natural justice is destined to safeguard individuals and whenever the civil rights, human rights, Constitutional rights and other guaranteed rights under any law are found to be at stake, it is the religious duty of the Court to act promptly to shield and protect such fundamental rights of every citizen of this country. The principle of natural justice and fair-mindedness is grounded in the philosophy of affording a right of audience before any detrimental action is taken, in tandem with its ensuing constituent that the foundation of any adjudication or order of a quasi-judicial authority, statutory body or any departmental authority regulated under some law must be rational and impartial and the decision maker has an adequate amount of decision making independence and the reasons of the decision arrived at should be amply well-defined, just, right and understandable, therefore it is incumbent that all judicial, quasi-judicial and administrative authorities should carry out their powers with a judicious and evenhanded approach to ensure justice according to tenor of law and without any violation of the principle of natural justice. (Ref: Sohail Ahmad Vs. Government of Pakistan through Secretary of Interior Ministry, Islamabad and others(2022 SCMR 1387) & Inspector General of Police, Quetta and another Vs Fida Muhammad and others (2022 SCMR 1583).

11. In the case of Deputy Director Food and 2 others Vs. Akhtar Ali, food Grains Inspector (1997 SCMR 343), this Court observed that the Tribunal, besides invoking the principle enunciated in the case of Bilquis Nargis, had granted the relief to the respondent on the additional grounds, firstly, that the respondent having been not only disallowed to cross-examine the AFC who had appeared against him, but also that the statement of said AFC *qua* the respondent was devoid of any evidentiary value and finally held that the two grounds being well founded were per se enough to vitiate the consequential penalty imposed as a result of the inquiry proceedings. Likewise, in the case of Secretary to Government of N.W.F.P, and 2 others Vs. Saifur Rehman (1997 SCMR 1073), this Court again held that a person facing enquiry has a right to be associated with its

proceedings and is entitled to impeach the credibility of witnesses produced against him through cross-examination. While in the case of Muhammad Zaheer Khan Vs. Government of Pakistan through Secretary, Establishment and others (2010 PLC (C.S.) 559), this Court held that nothing could be a better example of condemnation unheard where no witness was examined and cross-examined by the inquiry officer before arriving at such a serious conclusion relating to extensive questions of fact. Whereas in the case of Union of India and another Vs. Tulsiram Patel and others (AIR 1985 SC 1416), the Court held that the *audi alteram partem* rule in its fullest amplitude means that a person against whom an order to his prejudice may be passed should be informed of the allegations and charges against him, be given an opportunity of submitting his explanation thereto, have the right to know the evidence, both oral or documentary, by which the matter is proposed to be decided against him, and to inspect the documents which are relied upon for the purpose of being used against him, to have the witnesses who are to give evidence against him examined in his presence and have the right to cross-examine them, and to lead his own evidence, both oral and documentary, in his defence.

12. As a fall back argument, the learned counsel for the appellant insisted that if the learned Tribunal had detected some discrepancy or lacuna in the inquiry proceedings due to non-recording of evidence or not affording the right of cross examination to the respondent, then the right avenue was to remand the matter to the competent authority to conduct *de novo* inquiry, rather than granting the relief of reinstatement with conversion of major penalty into minor penalty. In our considerate insight, the remand of a case to the lower *fora* cannot be claimed as a vested right, but it is always the province of the Court or Tribunal to first figure out whether any material error or defect was committed by the Court in the order or judgment which really and adversely affected the corpus of the case and caused serious prejudice or injustice to the party requesting remand on some essential questions of law or fact which was ignored by the courts below while deciding the *lis*. In our analysis, we have not found any error on the part of the learned Tribunal, rather it is the inquiry officer who had committed grave procedural errors. We are sanguine that the inquiry officer cannot be expected to be trained as a judicial officer, but when the inquiry is conducted under some statute or enabling rules, then it is the onerous duty and responsibility of the

inquiry officer that he should be conversant with the applicable rules before accepting and performing the task of an inquiry officer and should also observe the principle of natural justice and due process of law. Due to the defective inquiry (deliberately or undeliberately), the ultimate sufferer would be the department which initiated the departmental proceedings on the charges of misconduct. Sometimes by dint of patent faults, blunders and/or procedural lapses, the accused is exonerated with the blessing of benefit of doubt. While conducting the inquiry, the procedure and parameters provided under E&D Rules should have been followed. The purpose of remand is not to provide an opportunity to rectify the lacunas or deliberate omissions or violations in the inquiry despite availability of unequivocal rules enumerating the procedure for guidance of inquiry officer. However, we feel it appropriate to note down that the matter of a departmental inquiry should not be conducted in a cursory or perfunctory manner and in order to improvise the norms and standards of departmental inquiry under the Civil Servants Act, 1973 and E&D Rules or in other enabling Rules, it would be advantageous that a "Handbook" of inquiry procedure be compiled by the appellant with the excerpts of all relevant Rules including the rule of natural justice and due process of law enshrined under Article 10-A of the Constitution for the step-by-step help and assistance of inquiry officers or inquiry committees so that in future, they may be well conversant with the precise procedure before embarking on the task of an inquiry and conduct the inquiry proceedings without ambiguities.

13. In view of the above discussion, we do not find illegality, perversity or impropriety in the impugned judgment passed by the learned Tribunal. Consequently, this Civil appeal is dismissed.

Judge

Judge

Judge

Karachi,
26th December, 2022
Khalid.
Approved for reporting.