

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE SARDAR TARIQ MASOOD
MR. JUSTICE MUHAMMAD ALI MAZHAR

CIVIL PETITION No.803 OF 2019

(Against the judgment of the Peshawar High Court, D.I.Khan dated 26.11.2018 in C.R.No.33-D/2017 alongwith C.M.No.51-D/2018)

Sardar Ali Khan

...Petitioner

VERSUS

State Bank of Pakistan & others

...Respondents

For the Petitioner:

Mr. Abdul Rehman Khan, ASC
Mr. Rifiqat Hussain Shah, AOR
Along with the Petitioner.

For the Respondents:

N.R.

Date of Hearing:

11.04.2022

JUDGMENT

MUHAMMAD ALI MAZHAR, J:- This Civil Petition for leave to appeal is directed against the judgment dated 26.11.2018 passed by Peshawar High Court, D.I.Khan Bench in C.R. No. 33-D of 2017, whereby Civil Revision was disposed of in terms of Suo Motu action initiated by this Court regarding non-Payment of retirement benefits by the relevant departments. (Ref: Suo Motu Case No. 20 of 2016 and Human Rights Cases No.7094-P, 26591-P, 15518-P/2015 & other connected cases decided on 13.2.2018)

2. The short and snappy chronicles of the case are as under:-

The petitioner had joined UBL on 21.09.1977 and after rendering 34 years' service attained the age of superannuation on 23.01.2012 as Officer Grade-I. According to the petitioner the calculation of full and final settlement including the pensionary benefits were not properly worked out therefore the petitioner approached the Respondent Nos. 2 to 5 for proper correction and calculation of full and final settlement amount accrued to the petitioner on his retirement but the said respondents paid no heed. Being aggrieved, the petitioner filed Writ Petition No.335 of 2012 in the Peshawar

High Court which was withdrawn by him on 6.2.2013. He filed second Writ Petition No.123 of 2013 which was also dismissed on the ground that private bank is not amenable to the Writ jurisdiction. Consequently, he filed Civil Suit No.74/1 of 2013 in the Court of Civil Judge, Dera Ismail Khan for declaration and permanent injunction in which he prayed that being retired employee of the UBL, he is entitled for his pensionary benefits in accordance with the law and the rules of the Bank cannot curtail such benefits. The learned Trial Court vide judgment dated 12.05.2015 dismissed the civil suit of the petitioner thereafter, he filed an appeal in the Court of Additional District Judge-II, Dera Ismail Khan which was also dismissed vide judgment dated 7.11.2006. In the end, the petitioner assailed the Appellate Order in the Peshawar High Court by means of in Civil Revision which was disposed of vide Order dated 26.11.2018 in terms of the directions contained in paragraph 26 of the Judgment passed by this Court in Suo Motu Case No. 20 of 2016.

3. The learned counsel for the petitioner argued that the impugned judgment of the learned High Court is based on incorrect comprehension of law in which the learned High Court ignored that pension and retirement benefits should have been calculated on the basis of last drawn pay. The Courts below failed to scrutinize the Circulars No.942 & 943 of 2001 and 984 of 2002 in its true perspective. The judgment of Trial Court and Appellate Court are based on misreading and non-reading of evidence. He further argued that it was obligation of the Respondent-Bank to calculate the pensionary benefits of the petitioner on monetized basic salary rather than frozen basic salary on the basis of revised pay structure emerging from Staff Circular No.943/2001 dated 18.7.2001. He further argued that the learned High Court wrongly placed reliance on the Judgment passed by this Court in Suo Motu Case No. 20 of 2016.

4. Heard the arguments. The whole controversy is roaming around the niceties and nitty-gritties of Staff Circular No. 943/2001 which was also produced during evidence in the Trial Court. This Office Circular was issued by the Chief HRD, Chief Financial Officer/HCA and Head of the Credit Policy of Human Resources Development of UBL. By dint of this document, the Bank announced and proclaimed a Policy for revision of pay structure of Officers and Executives which was issued with the concurrence of and approval of Board of Directors of the Bank dated 1.7.2001. To make known the employees of Bank, the copy of the Circular was endorsed and transmitted to all Branch Managers, Media Managers/Officials Heads, Regional Operations Heads, Regional Chief Executives and Business/Divisional Heads at the Head Office. In order

to resolve the controversy raised in this Civil Petition, Paragraph 8 of the Policy document is quite relevant which is reproduced as under:-

"8.Pension and Gratuity:

Going forward the Pension Schemes is being replaced by the Scheme of Gratuity & Provident Fund for the existing employees. However, to extend more benefits to the employees, they will be given two options:

Option 1:

Either to continue in the pension scheme: in such cases, on retirement /death, they will get their pension benefits calculated on the basis of their frozen basic pay admissible to them as on 30th June 2001. However, length of service up to the last day of their service will be taken into account for calculating all pensionary benefits.

Option II:

Or, To opt out of the pension scheme and to join Provident Fund and Gratuity scheme on the following terms:

- (i) Employee's Contribution to Provident Fund @ 8.33% of MBP.
- (ii) Matching Contribution by the Bank w.e.f. the Date of their option.
- (iii) Income in the Contribution at (i) & (ii) above.
- (iv) Gratuity @ ½ month's MBP for each completed year of service. Therefore, no gratuity shall be paid to them for the period prior to the Date of their option.
- (v) The Actuarial Balance in the Pension Fund provided for by the Bank in respect of the employees will be isolated and retained/transferred to a Trust Fund and will grow with the profit yield and paid to the employees at the time of final settlement. It is expected that the amount in this fund shall earn returns similar to Provident Fund Account.
- (vi) Employees may exercise their options on prescribed format (Annexure-O) by August 14, 2001. Those who do not exercise such option by August 14, 2001 shall be deemed to have opted for Option-II mentioned above.

Those who are already on Provident Fund-cum-Gratuity scheme shall remain in the scheme but their gratuity in future would be calculated @ ½ of Monthly Monetized Basic Pay for every year of service. However, they will also have the option to get their gratuity calculated @ one (01) non-monetized basic per year (which was admissible to them as on 30.06.2001). Needless to add that their service up-to the date of retirement shall be taken into account for the calculation of gratuity".

5. According to aforesaid Revised Pay Structure document, two options were available and the employees coming within the domain of the policy were given choice and discretion to opt any of the available

options. However, in Clause (vi) of Option-II it was encapsulated that employees may exercise their options on prescribed format by 14th August, 2001 and those who do not exercise such option shall be deemed to have opted for Option-II.

6. The judgment of learned Trial Court reflects that out of pleading 10 issues were settled and parties were allowed to adduce the evidence. Though the petitioner tried to prove that such policy document was never circulated to him hence question of availing any option did not arise and in order to prove his claim, he produced and examined Zaffar Ali, DCM UBL, Limited as PW-1 and himself appeared in the witness box as PW-2. The petitioner's witness Zaffar Ali (PW-1) during the cross-examination produced Staff Circular Nos. 943 of 2001 dated 18.07.2001 as Ex:PW-1/D-1. The petitioner (PW-2) narrated a long story since 1977 to 1993 but he admitted in his cross-examination that such long story is not mentioned in the plaint. Petitioner (PW-2) further admitted during cross-examination that in the year 2002-2003, 51% shares of UBL were privatized. Though he deposed that he is not in knowledge of Circular 942 & 943 of 2001 but at the same time he admitted that during the privatization his basic pay was increased. It is also reflected from the evidence that the pension documents of the petitioner were prepared as per Staff Circular No. 943 of 2001 according to which the basic pay of the plaintiff was increased as per Option-I which was evident from Ex:DW-1/2 and Ex:DW-1/3 and the said basic pay was received by the petitioner from 2001 till his retirement but he never objected which conduct of the petitioner shows that he accepted the Option-I. While recording the findings on Issues No.2, 3 & 4, the learned Trial Court also minutely considered the intrinsic value of the deposition of DW-1 which is quite significant at this juncture and for the ease of convenience it is reproduced as under:-

"Issue No.2, 3 & 4

DW-1 recorded his statement wherein he deposed that through Circular No.943 dated 18.07.2001 the bank had given options, in which one is that if the salary is that which is on 30.06.2001 then after retirement a pension will be given to the employees as per basic pay dated 30.06.2001 and other option was that the pension will not be given to the official but only a lump sum salary will be given in which the plaintiff selected option No.1, the copy of Circular is Ex: DW/1/1. According to which 40% basic pay was increased and plaintiff also availed/enjoyed the said benefits from

2001 to 2012. In this respect he also produced the salary slip of plaintiff dated 30.6.2001 which is Ex:DW-1/2 and salary slip for the month of July after increase of 40% which is Ex: DW-1/3. Similarly, he also produced another Circular No. 984 dated 14.10.2002 which is Ex: DW-1/4, in which it was decided that if any officer wants to change his option as per Circular No.943 he can do so but plaintiff has not changed his options. During cross examination the said DW admitted that till now the pension benefits were not received to plaintiff. Self-stated that plaintiff himself is not receiving the same and the bank has not stopped the said benefits". [Emphasis supplied]

In the same way, the findings of the learned Trial Court on Issue No. 6 are also very material, which are the reproduced as follows:-

"Issue No.6

The onus probandi of this issue lies on defendants. DW-1 Zafar Ali District Customer Service Manager UBL D.I.Khan recorded his statement, wherein he deposed that he perused the copy of Circular available on the file which is Ex: DW-1/1, according to which 42 % basic pay was increased and the plaintiff also get benefit from the year 2001 till the year 2012. He also produced copy of the salary slip of the plaintiff dated 30.6.2001 which is Ex:DW-1/2 and the salary slip of 40% increase was also produced which is Ex:DW-1/3. Perusal of Ex: DW-1/2 reveal that the basic pay of the plaintiff for the month of June 2001 wherein total earning is Rs.10217/- while Ex: DW-1/3 which is the salary slip for the month of July 2001 wherein the total earnings is mentioned as 26005/- meaning thereby that the salary was increased 40% as alleged by defendants in 2001 while plaintiff also received the same till his retirement and he admitted the same to be correct. Hence, the plaintiff is *estopped* to sue due to his conduct. Thus, the issue is decided in affirmative". [Emphasis supplied]

7. The mere denial to the awareness of Staff Circular by the petitioner is not sufficient to hold that he never accepted or tendered any option to the employer. It is reflecting from the very language of the Circular that it was largely circulated for the information of every employee of the bank whether posted in branches, regional offices or the head office whereby all employees were allowed to choose the option in their own discretion and fine sense of judgment. The petitioner miserably failed to substantiate in the evidence that he was not benefited by the very Circular rather the bank officials appeared to lead evidence on behalf of bank categorically explained the entire scenario and also produced the documents including the pay slip that the petitioner was availing benefits arising out of same Circular and also accepted and availed the raise in his emoluments without any objection but after retirement he lodged the claim that his retirement benefits were not calculated on

last drawn pay hence at this stage the petitioner estopped to challenge the niceties of Staff Circular No. 943 of 2001

8. Article 114 of the Qanun-e-Shahadat Order, 1984 defines the doctrine of estoppel under which when a person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing. In fact this principle is founded on equity and justness with straightforward objective to prevent fraud and ensure justice though it is described as a rule of evidence but may have effect of constituting substantive rights as again the person estopped being well-defined legal precept that impedes someone from averring a truth that is defined as contradictory to an already established truth. The catchphrase "Estoppel" is derived from the French word "estoupe" from which the word estopped in English language emerged. A man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth" (Lord coke in Co. Litt 352 (a) as cited in the case of B.L. Sreedhar v/s K.M. Munireddy (2003) 2 SCC 355 at 365). Whereas the doctrine of acquiescence is grounded upon a conduct that if a person sighted another person about to commit an act infringing upon his rights who might otherwise have abstained from it to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act. In the case of Ramsden v. Dyson L.R. 1 E & I, Ap. 129(140)(1865), it was held that the common case of acquiescence is where a man, who has a charge or encumbrance upon certain property, stands by and allows another to advance money on it or to expend money upon it. Equity considers it to be the duty of such a person to be active and to state his adverse title, and that it would be dishonest in him to remain willfully passive in order to profit by the mistake which he might have prevented. While in the case of Duke of Leeds v. Earl of Amherst 2 Ph. 117 (123) (1846), the court held that the proper sense of the term acquiescence and in that sense may be defined as acquiescence under such circumstances as that assent may be reasonably inferred from it and is no more than an instance of the law of estoppel by words or conduct.

9. In the case in hand, besides the estoppel, the doctrine of election and doctrine of approbate and reprobate are also applicable. The petitioner accepted the increase in the salary arising out of same Staff Circular and continuously enjoyed that benefit till the verge of his retirement then all of a sudden came with the plea that he never accepted the option of any frozen figure of wages for calculation of pensionary benefits. The maxim qui approbat non reprobatur (one who approbates cannot reprobate) is firmly embodied in English common law. It is akin to the doctrine of benefits and burdens which at its most basic level provides that a person taking advantage under an instrument which both grants a benefit and imposes a burden cannot take the former without complying with the latter. A person cannot approbate and reprobate or accept and reject the same instrument. Ref: Shyam Telelink Ltd. -v- Union of India reported in 2010 (10) SCC 165. Moreover, the Halsbury's Law of England, 4th Edn, Vol. 16 (Re-issue), Para 957 (Law of Evidence by M. Munir, Seventeenth Edition) on the principle that a person may not approbate and reprobate a special species of estoppel has arisen. The principle that a person may not approbate and reprobate expresses two propositions:

- (1) That the person in question having a choice between two courses of conduct is to be treated as having made an election from which he cannot resile.
- (2) That he will be regarded in general at any rate, as having so elected unless he was taken a benefit under or arising out of the course of conduct which he has first pursued and with which his subsequent conduct is inconsistent."

10. The relationship between the petitioner and bank was of master and servant. The relationship of master and servant implies a contractual relation in which one party agrees to be under the control of other and the servant is bound to obey orders not only as to the work that he would execute but also as to the details of the work and the manner of its execution and in return, the master has to pay wages. The relationship between master and servant is the existence of right in the master to supervise and control the work done by the servant not only in the matter of directing what work the servant is to do but also the manner in which he shall do his work. Ref: Mersey

Docks and Harbour Board v. Coggins & Griffith (Liverpool) Ltd and another [1947] 1 A.C. 1 and (I) [1957] S.C.R. 152. In the instant case, obviously neither the private bank or other private enterprises were amenable to the Writ Jurisdiction of the High Court under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 nor it was a case of violation or contravention of any statutory rules of service which could be agitated in the High Court in the writ jurisdiction. So for all intent and purpose to seek out practical solution for the ventilation of grievance, the only course was to avail the jurisdiction of civil court by the petitioner but it is well settled exposition of law that lawsuits in civil court are decided on the basis of evidence and law. The petitioner throughout the proceedings failed to highlight any non-reading or misreading of evidence nor any illegality or irregularity was pointed out. Rather the bank's witnesses unequivocally proved that the petitioner was continuously drawing benefits of the Staff Circular without any objection or demur even at the verge of his retirement. This Court could not go behind concurrent findings of fact unless it can be shown that the finding is on the face of it against the evidence or so patently improbable, or perverse that to accept it could amount to perpetuating a grave miscarriage of justice or if there has been any misapplication of principle relating to appreciation of evidence or finally, if the finding could be demonstrated to be physically impossible. Ref: Syed Hussain Naqvi and others.vs. Mst. Begum Zakara Chatha through LRs and others. (2015 SCMR 1081) and Muhammad Shafi and others v. Sultan (2007 SCMR 1602)

11. Moreover, the impugned judgment of High Court divulges that the learned counsel for the petitioner as a fall back argument cited the judgment of CR.NO.634/-P/2015 which was found irrelevant by the High Court, however in the same breath, he also cited the judgment of this Court in Suo Moto Case No.20/2016. Mindful to the niceties of Article 189 of the Constitution that the judgments of Supreme Court are binding, hence the learned High Court prudently disposed of the Revision Application accordingly. In fact in the judgment rendered by this Court in Suo Moto case reported as 2018 SCMR 736, the proceedings were initially arose when a large number of complaints were submitted to the Human Rights Cell of this Court, wherein retired employees of various departments complained about non-payment of their pensionary benefits. Meanwhile, some more applicants and or

retired employees of United Bank Limited and Allied Bank Limited had also approached this Court with the grievance that they were receiving meager amounts by way of pension from the banks and the latter were not granting increases in the pensionary benefits for many years. To jot down the backdrop of case for its logical conclusion, this Court discussed each bank separately, however, the issue in hand pertains to United Bank Limited which was articulated in the following expression:

“UBL

3. The UBL was originally a private bank. It was nationalized in 1974 pursuant to the Banks (Nationalization) Act, 1974 (hereinafter the "Act 1974"), and came to be wholly owned by the Government of Pakistan. The pensioners of the UBL may be broadly divided into three categories; namely, the 'original retirees', the 'recently retired' and the 'retrenched employees'. The 'original retirees' may be typified by the petitioner in C.M.A. No.1686/2017 who joined UBL on 11.10.1973 and served for 25 years, 1 month, 17 days before retiring on 28.11.1998. His basic pay drawn as on 28.11.1998 was Rs.4,530/- per month. Fifty percent of the gross pension was commuted and paid to him at the time of retirement whereas Rs.1,321/- was held to be payable to him on monthly basis as his pension. Thereafter, 18 years later his monthly pension remains Rs.1,321/-. The pension of 'original retirees' (in clerical cadres) of the bank was calculated on the basis of Memorandum # F:6(1)-REV-I/75, dated 07.01.1977, issued by the Finance Division, Government of Pakistan. It provided that the liberalized pension rules for civil servants were also applicable to employees of nationalized banks. UBL informed its employees in clerical and non-clerical cadres through Staff Circular No.158 dated 25.02.1977 that the aforesaid Memorandum dated 7.1.1977 would be applicable to them. The grievance of these petitioners is that the UBL has illegally withheld increases in their pensionary benefits which ought to have been granted in parity with those given to civil servants over the years.

4. The 'recently retired' category of pensioners may be represented by the likes of petitioners in C.M.A. No.2825/2017 wherein the petitioner No. 1 joined UBL on 09.08.1976, and after thirty-seven (37) years in service retired on 31.10.2013 as Vice-President. His last drawn basic pay on 31.10.2013 was Rs. 93,207/-. However the monthly pension being paid to him in the sum of Rs. 3,823/- has been calculated on the basis of his basic salary as on 30.06.2001 (11 years earlier) in the sum of Rs. 9,930/-. The other five petitioners whose service history with UBL is presented in the said C.M.A. also variously served the bank for 36, 40, 38, 41 and 38 years and all retired when they were drawing handsome salaries between 2011 and 2014. They are however receiving pensions which are linked to the salaries drawn on 30.06.2001. For the 'recently retired' category the pensionary benefits were governed by the Notification No. 17 (9)-IF, XI/77 dated 30.11.1977 addressed to the Chairman, Pakistan Banking Council, the Government of Pakistan, Finance Division (Internal Finance Wing) whereby a scheme of pensions and retirement benefits for bank employees similar to that applicable to civil servants was introduced. In order to give effect to the instructions of the Federal Government, UBL issued Staff Circular No. 192 dated 24.12.1977, informing its officers and executives of the change in the scheme of pension and

retirement benefits applicable to them; pursuant to paragraph 3(f) of the Circular No. 192/1977, the pension payable to a retired employee of UBL was to be calculated on the basis of the "average monthly basic pay plus dearness allowances drawn ... during the last three years of service" (hereinafter the "Original Pension Scheme"). On 18.07.2001, the Human Resource Development department of UBL issued **Staff Circular No. 943/2001, to notify the management of an across the board 40% average increase in the gross salaries as on 30.06.2001. At the same time the pensionary benefits were curtailed and it was ordained that henceforth for those employees continuing with the Original pension scheme, "In such cases, on retirement/death, they will get their pension benefits calculated on the basis of their frozen basic pay admissible to them as on 30th June 2001."** The grievance of these petitioners is two-fold; firstly that UBL could not have illegally pegged their pensionary benefits to the 'frozen' pay as on 30.06.2001 and secondly, that they have received no increases in the pension since 2001.....".

12. It also appears from the above judgment that question of maintainability of petition was raised by the private banks due to lack or non-availability of statutory rules of service but the Board of the Directors of the Banks, voluntarily showed generosity, magnanimity, great sense of corporate social responsibility and came up with a scheme for the increase in the minimum pension paid to the pensioners without prejudice to the legal stance and without prejudice to the objections as to the maintainability of the petitions, therefore on their volunteer offer in good faith, this Court refrained itself from recording any findings on the merits of the case or the question of maintainability or the question whether a writ can be issued against a private/privatized bank/party/entity and left these matters to be examined in some appropriate cases. It is clearly evident from the above judgment that this Court has already examined and surveyed the nitty-gritties of Staff Circular No. 943/2001 issued by UBL and disposed the petitions in terms of Paragraph 26 of the judgment as follows:-

"1. With immediate effect the minimum pension paid to any pensioner (including their widows, where applicable) of UBL, HBL and ABL will be Rs. 8,000 (rupees eight thousand) per month.

2. The payments will be prospective, that is, from the date of this judgment.

3. There will be an increase of 5% in the aforesaid pension every year, effective on the 1st of January every year.

4. The aforesaid pension will be paid to all three categories of pensioners mentioned above, i.e. the "original retirees", those whose pensions were linked to basic pay "frozen" in past years, and in the case of UBL to retrenched employees including those who had served the bank for more than ten years on the date of

retrenchment. For avoidance of doubt it is clarified that the pension of employees who are receiving sums in excess of Rs.8,000/- shall continue to do so, and those whose pension would fall below the minimum pension (after 5% annual increase, effective on the 1st of January) they shall be paid the minimum pension with 5% annual increase. However, those who have availed the benefit of VSS (Voluntary Separation Scheme) or Golden Handshake Scheme will not be benefitted by this judgment".

13. The issue of the Staff Circular has already taken into consideration by this Court in the aforesaid judgment which cannot be questioned or reagitated by the petitioner for de novo consideration. The learned counsel for the petitioner miserably failed to accentuate or draw our attention to any defect or perversity in the concurrent findings recorded by the Trial Court and Appellate Court as well as in the impugned judgment of High Court. However, on self-reliance of the judgment of SMC by the petitioner's counsel, the learned High Court rightly disposed of the Revision application in terms of aforesaid SMC judgment of this Court rather than outright dismissal of Revision Application.

14. In view of the above discussion, the Civil Petition is dismissed and leave is declined.

Judge

Judge

Islamabad the
11th April, 2022
Khalid
Approved for reporting