

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

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

CIVIL APPEAL No. 1653 OF 2021

(Against the Judgment of Punjab Service
Tribunal Rawalpindi Bench dated 20.10.2020
in Appeal No.3950/2020)

Homoeo Dr. Asma Noreen Syed

...Appellant

VERSUS

Government of the Punjab through its Secretary
Health, Department and others

...Respondents

For the Appellant:

Syed Rifaqat Hussain Shah,
ASC/AOR

For the Respondents:

Mr. Shaukat Rauf Siddiqui, Additional
Advocate General, Punjab,
Mr. M. Johar Aqeel, Lit. Officer Health
Department.

Date of Hearing:

12.05.2022

JUDGMENT

MUHAMMAD ALI MAZHAR, J:- This Civil Appeal with leave of the Court is directed against the judgment dated 20.10.2020 passed by the learned Punjab Service Tribunal, Rawalpindi Bench in Service Appeal No. 3950 of 2020, whereby the Appeal filed by the appellant was dismissed.

2. The brief facts of the case are that the petitioner was appointed as a Homeopathic Doctor in BPS-15 vide appointment Order dated 07.03.1988 and her name was placed at Serial No.15 of the Seniority List dated 31.01.2014. On the recommendation of the Departmental Promotion Committee, eighty-two doctors were promoted in BPS-16 on 02.10.2014 but the appellant's promotion was deferred due to some pending inquiry. After some time, on 19.07.2017, thirty-four Homeopathic Doctors were promoted to BPS-17. However, on the

basis of another complaint against the appellant alleging tampering of three ACRs, an inquiry was conducted and in the inquiry report, a severe warning was recommended but the DG Health Services, Punjab closed the inquiry and in the meanwhile, the appellant attained the age of superannuation. The appellant submitted a departmental representation for her proforma promotion from BS-15 to BS-16 with effect from 2.10.2014 and from BS-16 to BS-17 from 19.07.2017 when petitioner's junior colleague Doctors were promoted. Since the departmental appeal was not decided, therefore, the appellant filed Service Appeal No. 532/2019 in the Punjab Service Tribunal which was disposed of with a direction to the Department to decide the pending appeal within 45 days. The departmental appeal was dismissed, hence the appellant filed another Service Appeal No.3950/2020 in the Punjab Service Tribunal, Lahore which was dismissed vide the impugned judgment.

3. The learned counsel for the appellant argued that the respondent-Department was bound to finalize the issue of promotion of the appellant prior to her retirement. The appellant had served the respondent Department for more than 29 years and she by all means was entitled to proforma promotion with all other pecuniary benefits from the date when her juniors were promoted. It was further contended that the impugned judgment is against the law and facts of the case as the learned Tribunal relied on an incorrectly published text of Section 8 (5) of the Punjab Civil Servants Act, 1974 and nonsuited the appellant on that basis.

4. We have cautiously evaluated the impugned judgment and take notice that the learned Service Tribunal, rather than deciding the service appeal on merits, dismissed it on a hyperactive technical ground, conceivably, either owing to improper and disorientated assistance or due to the misguidance and wrongheaded plea of Department based on a wrongly published version of the amended Act which culminated in the adverse findings of the learned Tribunal that, after retirement of service, the appellant was not entitled to proforma promotion. The relevant text of the impugned judgment is reproduced as under:-

"Appellant filed instant appeal under Section 4 of the Punjab Service Tribunal Act, 1974 praying that the appeal may kindly be accepted and respondents may very graciously be directed to promote appellant from BS-15 to BS-16 w.e.f. 2.10.2014 and from BS-16 to BS-17 w.e.f. 19.07.2017 as petitioner's junior colleague Homoeopathic Doctors are promoted.

2. Learned District Attorney at the very outset pointed out that the appellant stand retired from government service after obtaining 365 days LPR w.e.f. 12.2.2018 to 11.2.2019.

According to Section 8 (5) of the Punjab Civil Servants Act, 1974 referred by the learned District Attorney is reproduced as under:-

"A retired civil servant shall not be eligible for grant of promotion or proforma promotion".

Furthermore, promotion of a retired employee has been barred by amendment in Rule 8 of the Punjab Civil Servants Act, 1974 made through Act of Assembly in 2005, therefore appellant cannot claim proforma promotion as she retired after the amendment was introduced.

3. In view of same, the appellant was admittedly retired from government service and now claiming for promotion in BS-15 to BS-16 w.e.f. 2.10.2014 and from BS-16 to BS-17 w.e.f. 19.7.2017 as petitioner's junior colleague Homoeopathic Doctors are promoted, is against the law/rules, therefore I find no substance in this appeal, dismiss the same". (emphasis supplied)

5. In order to thrash out the actual controversy and bone of contention, leave to appeal was granted vide order dated 10.12.2021 in the following terms:-

"The issue involved in the case is with regard to the provisions of Section 8(5) of the Civil Servants Act, 1974 (**the Act of 1974**) as amended by Section 3 of the Punjab Civil Servants (Amendment) Act (Act III) of 2005 (**the Amending Act of 2005**).

2. Learned counsel for the petitioner contends that the impugned order dated 20.10.2020 of the Punjab Service Tribunal is illegal as it relied upon incomplete provision of Section 8(5) of the Act of 1974. He has relied upon the provision of Section 8(5) of the Act of 1974 as contained in the Manual of the Punjab Civil Service Laws by Malik Saleem Iqbal Awan, Advocate, Supreme Court of Pakistan, Edition 2019 (**Manual of the Punjab Civil Service Laws**), which is as follows: -

8. Promotion (1)

(5) A retired civil servant shall not be eligible for grant of promotion; provided that he may be considered for grant of pro forma promotion as may be prescribed."

3. The Amending Act of 2005 is printed in PLD 2005 Provincial Statutes at page 57, which contains the amendment in Section 8

of the Act of 1974 and it has been wholly substituted by a new Section 8. Subsection (5) of Section 8 thereof is printed as follows:

8. Promotion (1)

(5) A retired civil servant shall not be eligible for grant of promotion.

4. Having noted this dissimilarity in the Provision of Section 8(5) of the Act of 1974, the Court Librarian was asked to place before the Court the status of Provision of Section 8(5) of the Act of 1974.

5. A page from the official website of Punjab Government i.e. www.punjablaws.govt.pk, was placed before the Court where Section 8(5) of the Act of 1974 is in the same words as is printed in the above referred Manual of the Punjab Civil Service Laws.

6. Further copies of the actual Punjab Gazette were sought. The Office of the Advocate General, Punjab has provided a photocopy of the Punjab Gazette Extraordinary issue published on Lahore Friday, April 15, 2005, bearing Registered No.L-7532 at page-4851, contains the Amending Act of 2005, wherein the provision of Section 8(5) of the Act of 1974 is in the same manner as is noted in the above said Manual of Civil Services Laws in Punjab so also shown in the official website of the Punjab Government.

7. The Lahore High Court, Lahore Library also provided a photocopy of the Punjab Gazette Extraordinary issue published on Lahore Friday April 15, 2005, bearing Registration No.L-7532 at page 4851 contains the amending Act of 2005, wherein the provision of Section 8(5) is printed in the same manner as is printed in PLD 2005 Provincial Statute 57 and does not contain proviso.

8. In the copy of Punjab Gazette containing the Amending Act of 2005 dated Friday April 15, 2005, available on the website of the Punjab Provincial Assembly, the provision of Section 8(5) of the Act of 1974 contains the said proviso.

9. We have also looked into the other publications in which the Punjab Statutes are published. In PLJ 2005 Provincial Statutes page 24, the Amending Act of 2005 is printed. Again, in the provision of Section 8(5) of the Act of 1974, proviso is not printed. In NLR 2005 Statutes at page 65, the Amending Act of 2005 is printed. Section 8(5) *ibid* does not contain proviso.

10. It seems that there is a conflict in the printed Section 8(5) of the Act of 1974 as amended by the Amending Act of 2005, as in some of the printed materials, noted above, proviso to-Section 8(5) of the Act of 1974 is printed and in some not printed.

11. The contention raised by the learned ASC for the petitioner requires consideration. Leave to appeal is granted, *inter alia*, to consider the above aspects of the matter. The appeal shall be heard on the available record but the parties are allowed to file additional documents, if any, within a period of one month. As the matter relates to service, the office is directed to fix the same, expeditiously, preferably, after three months.

12. Let notice be issued to the learned Advocate General, Punjab under Order XXVII-A CPC, to assist the Court in determining as to

what is the correct position of law, more so, provision of Section 8(5) of the Act of 1974 as substituted by the Amending Act of 2005. More particularly, whether it contains the proviso as is mentioned in some of the publications, noted above. The learned Advocate General, Punjab shall place all the materials relating to the Amending Act of 2005 and also the original Punjab Gazette before the Court". (emphasis supplied)

6. The present appeal is time barred by 39 days. We have examined the application for condonation of delay and in keeping with the peculiar circumstances of the case, the application for condonation of delay (C.M.A. No.13837 of 2021) is allowed and the delay is condoned.

7. In order to distillate and get to the bottom of the crucial points on which leave to appeal was granted, the learned Additional Advocate General, Punjab submitted the correctly published copy of the Gazette Notification of Punjab Civil Servants (Amendment) Act 2005, (Act III of 2005) disseminated on 15.4.2005 which is for ease of reference reproduced as under:-

**"PROVINCIAL ASSEMBLY OF THE PUNJAB
NOTIFICATION 15 APRIL, 2005.
THE PUNJAB CIVIL SERVANTS (AMENDMENT)
ACT 2005
ACT III OF 2005**

Preamble.--- Whereas it is expedient further to amend the Punjab Civil Servants Act, 1974 (VIII of 1974), for the purposes hereinafter appearing;

It is hereby enacted as follows:--

1. Short title and commencement. ---(1) This Act may be called the Punjab Civil Servants (Amendment) Act, 2005.

(2) It shall come into force at once.

2. Amendment in section 2 of Act VIII of 1974. ---In the said Act, in section 2, after clause (g), the following new clauses (g-a) and (g-b) shall respectively be added:--

"(g-a) "proforma promotion" means predating of promotion of civil servant or retired civil servant with effect from the date of regular promotion of his junior, for the purpose of fixation of pay and payment of arrears as may be prescribed.

(g-b) "promotion" means appointment of a civil servant to a higher post in the service or cadre to which he belongs."

3. Amendment in section 8 of Act VIII of 1974.--- In the said Act, section 8 shall be substituted by the following:--

"8. **Promotion**-(1) A civil servant shall be eligible to be considered for appointment by promotion to a post reserved for promotion in the service or cadre to which he belongs in a manner as may be prescribed; provided that he possesses the prescribed qualifications.

(2) Promotion including proforma promotion shall not be claimed by any civil servant as of right.

(3) Promotion shall be granted with immediate effect and be actualized from the date of assumption of charge of the higher post, and shall in no case be granted from the date of availability of post reserved for promotion.

(4) A civil servant shall not be entitled to promotion from an earlier date except in the case of proforma promotion.

(5) A retired civil servant shall not be eligible for grant of promotion; provided that he may be considered for grant of proforma promotion as may be prescribed. [Emphasis supplied]

(6) A post referred to in subsection (1) may either be a selection post or a non-selection post to which promotion shall be made as follows;

(a) in the case of a selection post, on the basis of selection on merit; and

(b) in the case of non-selection post, on the basis of seniority -cum- fitness. "

8. By the looks of it, the impugned judgment of the Service Tribunal is based on an incorrect exposition of law as a result of advertent to a wrongly published gazette notification from which for the most part of rider enabling and facilitating the proforma promotion in certain cases was unfortunately missing which was actually in field even at the time of passing the impugned judgment by the learned Tribunal as reproduced above in the correctly published version acknowledged to be accurate by the learned Additional Advocate General whereby it is clear beyond any shadow of doubt that a retired civil servant shall not be eligible for grant of promotion; provided that he may be considered for grant of proforma promotion as may be prescribed. The defence counsel before the Tribunal placed reliance on an erroneous and inaccurate notification and the counsel for the appellant also failed to rebut it and invite attention of the Tribunal to the correctly published notification and due to inept and scant assistance, the Service Tribunal was misled which seriously

prejudiced the case of the appellant who was entangled in a prolonged litigation and deprived of deciding her case swiftly on merits by the learned Tribunal to the effect whether in accordance with the correctly published amended version of the Act , she was entitled to be considered for proforma promotion after retirement. When confronted with this situation, the learned Additional Advocate General fairly conceded that this is a fit case for remanding the matter to the Service Tribunal to adjudicate the appeal afresh on merits and a similar view was also expressed by the learned Counsel for the appellant.

9. A patent and obvious error or oversight on the part of Court in any order or decision may be reviewed sanguine to the renowned legal maxim "*actus curiae neminem gravabit*" which is a well-settled enunciation and articulation of law expressing that no man should suffer because of the fault of the court or delay in the procedure. The maxim '*actus curiae neminem gravabit*' means an act of the Court shall prejudice no one. It is interrelated and intertwined with the state of affairs where the court is under an obligation to reverse the wrong done to a party by the act of Court which is an elementary doctrine and tenet to the system of administration of justice beyond doubt that no person should suffer because of the delay in procedure or the fault of the court. This is a *de rigueur* sense of duty in the administration of justice that the Court and Tribunal should become conscious and cognizant that as a consequence of their mistake, nobody should become victim of injustice and in the event of any injustice or harm suffered by mistake of the court, it should be remedied by making necessary correction forthwith. If the Court is satisfied that it has committed a mistake, then such person should be restored to the position which he would have acquired if the mistake did not happen. This expression is established on the astuteness and clear-sightedness that a wrong order should not be perpetuated by preserving it full of life or stand in the way under the guiding principle of justice and good conscience. So in all fairness, it is an inescapable and inevitable duty that if any such patent error on the face of it committed as in this case, the same must be undone without shifting blame to the parties and without further ado being

solemn duty of the Court to rectify the mistake. In the judicial conscience and sense of right and wrong, the foremost duty in the dispensation of justice is to apply the correct law. In the case of State V. Asif Adil and others (1997 SCMR 209), this Court recapped the well-settled proposition of law that parties should not be made to suffer on account of an act or omission on the part of Court or other State functionaries and also referred to the dictums laid down in the case of Muhammad Hanif and others v. Muhammad and others (PLD 1990 SC 859), Fateh Khan v. Boze Mir (PLD 1991 SC 782), Abdul Rashid v. Abdul Salam and others (1991 SCMR 2012), Sherin and 4 others v. Fazal Muhammad and 4 others (1995 SCMR 584). Whereas in the case of pensionary benefits of the Judges of Superior Courts (PLD 2013 SC 829), this court held that it is a cardinal principle of justice, that the law should be worn by the Judge in his sleeves and justice should be imparted according to the law, notwithstanding whether the parties in a lis before the Court are misdirected and misplaced in that regard. Whereas, in the case of M. S. Ahlawat v. State of Haryana and another (AIR 2000 SC 1680), the Court held that to perpetuate an error is no virtue but to correct it is a compulsion of judicial conscience.

10. In the wake of the above discussion, this Civil Appeal is allowed and the impugned judgment is set aside. The matter is remanded to the learned Service Tribunal to decide the appeal afresh in accordance with law.

Judge

Judge

Islamabad
12th May 2022
Khalid
Approved for reporting