

ORDER SHEET
IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD.

C.P. No.D-68 of 2014

DATE	ORDER WITH SIGNATURE OF JUDGE
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Date of hearing: 05 .12.2016.

Date of order:

Mr. K.B. Lutuf Ali Leghari, Advocate for petitioner.
Mr. Atta Hussain Gaddi Pathan, Advocate for respondent nos.2 to 7
Mr. Ali Abbas Memon, State Counsel
Mr. Zulfiqar Ali Rajput, standing Counsel

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SALAHUDDIN PANHWAR, J- Through this petition, Petitioner has challenged legality of order dated 02.01.2014 passed by respondent no.5 (Deputy Secretary (Admn) Evacuee Trust Property Board, Lahore) whereby appointment order dated 05.7.2010 of petitioner was cancelled.

2. It is pleaded by petitioner that he was appointed as Patwari (BPS-7) against existing vacancy in Evacuee Trust Property Board; after medical examination and police verification the petitioner joined his duties on 06.9.2010; after completing probation period of one year the respondent no.7 recommended for confirmation of petitioner's job; he had been performing his duties but vide order No.053 dated 02.01.2014 the appointment of petitioner was cancelled while holding it as bogus and illegal which *however* was claimed to be without serving of any show cause notice e.t.c. In such back ground, the petitioner prayed as:

a) Declare the impugned order dated 02.01.2014 issued by the respondent no.5 with approval of the respondent no.3 of cancellation of appointment order dated 05.7.2010 of the petitioner is null, void ab-initio, illegal, without justification, without fulfillment of mandatory requirements of hearing,

issuance of explanation, show cause notice etc and the same is liable to be cancelled / withdrawn;

b) Direct the respondents to cancel / withdraw the impugned order dated 02.01.2014;

c) Grant ad-interim relief thereby restraining the respondents not to appoint any person against the post, on which, the petitioner was working and allow the petitioner to continue performing his duty, till the final decision of the instant petition;

3. The respondent no.7, filed the written reply / comments thereby stating that *per record* the petitioner was appointed as Patwari vide order bearing no.8167 dated 05.7.2016 but no approval of authority, minutes of the Departmental Selection Committee is available; post was never advertised in the press hence scrutiny of record unearthed above mentioned gross *irregularity* therefore, fake appointment order of petitioner was cancelled.

4. Counsel for petitioner contended that appointment of petitioner was legal, valid and lawful hence cancellation thereof without issuance of a show cause is not legal therefore, such order be declared so.

5. Counsel, representing respondent nos.2 to 7, has vehemently denied claim of the petitioner while stating that since the appointment order of petitioner was *fake* and bogus hence same was rightly cancelled.

6. Heard the respective contentions and have also gone through the available record.

7. Without any hesitation, it can well be said *safely* that when one claims to have earned something after due process the same *legally* should not be withdrawn or cancelled except following the due process for withdrawal / cancellation thereof. Such due process must match the test,

defined by honourable Apex Court in the case of Ishtiaq Ahmed v. Hon'ble Competent Authority (2016 SCMR 943). There can be no *denial* to the fact that an 'appointment letter / order vests a legal right hence same cannot be withdrawn or cancelled except following the due process which must include a right of hearing. The reference in this regard can well be made to the case of Mst. Basharat Jehan v. D.G, Federal Government Education & Others 2015 SCMR 1418

18. Under these facts and circumstances a right had come to vest in the appellant on issuance of appointment letter and more so after joining the service. In the case of Ghulam Murtaza v. Federation of Pakistan (2011 PLC (C.S) 709) passed by learned Division Bench of Sindh high Court placing reliance on the case of Jabbar Malik v. province of Sindh and others, last mentioned judgment was also upheld by this Court in Civil Petition Nos.426-K to 436-K of 2008, it was held that once a person is appointed after fulfilling all the codal formalities, appointment letter is issued, it was held that a vested right is created and appointment letter could not be withdrawn. Similar view was taken in the earlier decision of the same Court by another learned Bench reported as Muhammad Farooq Memon v. Government of Sindh 1986 CLC 1482).

The respondent nos.2 to 7 *though* have not denied continuity of services of the petitioner in department against an appointment order / letter though the same is claimed to be '*fake & bogus*' hence was *cancelled* after more than three and half years. Before diving deep any further, it would be conducive to *first* refer operative part of the order in question which reads as:

“ 1.Mr. Karim Bux Leghari s/o Haji Lutuf Ali Leghari, Patwari, was shown as appointed on regular basis vide order No.8167 dated 05.7.2010 and his place of posting was shown at ETPO, Hyderabad but **no codal formalities for regular appointment as required under the rules have been observed as neither any post was advertised nor any approval of the authority exists.**

2. *After examination / scrutiny of the office of the Head Office and ETP Office Hyderabad, it has been revealed that appointment of Mr. Karim Bux Leghari s/o Haji Lutuf Ali Leghari, Patwari, is **bogus and illegal**, therefore, same is hereby cancelled being void ab-initio.*

8. From above, it is quite evident that reasons for cancellation of appointment order of petitioner is for reasons that;

- i) *no codal formalities were observed as required for regular appointment;*
- ii) *no post was advertised*
- iii) *no approval of the authority exists*

Since, there can be no denial to the fact that to follow the required *recruitment procedure* is the obligation of the appointing authority and not of a 'candidate' therefore, failure or negligence of *appointing authority* normally should not result in causing a *legal injury* to an *old employee*, claiming to have been appointed after formalities, as was deemed proper by an authority. Further, mere non-existence of 'approval' in record or a departure from procedure shall not result in declaring a '*document*' as '**fake or bogus**' because these term(s) have their *own* independent meaning i.e '**not real or genuine**'. Thus, departure from procedure *alone* shall not be sufficient to deprive a permanent employee from his right of *livelihood* which *otherwise* falls within meaning of *fundamental rights*. Reference may be made to the case of *Pir Imran Sajid & Ors v. MD /GM & Ors* 2015 SCMR 1257 wherein it is held that:

"9. It is now well established that right to life as envisaged by Article 9 of the Constitution, includes the right to livelihood and as laid down in the case of *Abdul Wahab (supra)*, the 'right to livelihood.'. Certainly, as has further been held in the said judgment; 'It shall

unmistakably be permissible that the employment of an employee can be brought to an end, **but obviously in accordance with law**'.

9. We are *also* equally conscious of the legal position that an illegally gotten things cannot operate as a bar nor lapse of time could be made a reason to declare an '*illegality*' as '**legality**' but a *suspicion* alone shall not be sufficient to escape requirement of 'due process' because it is not whims or fancy of an executive functionary to deprive one of his *right* due process alone. A document cannot be declared as *fake or bogus* without proper inquiry and providing an opportunity of hearing to beneficiary of such document. This *prima facie* appears to be the only reason which was kept in view by honourable Apex Court while passing judgment in the case of *Bisharat Jehan* supra that:

"20. Once a right is accrued to the appellant by appointment letters issued after complying with all the codal formalities could not be taken away on mere assumption and or supposition and or whims and fancy of any executive functionary. Such right once vests, cannot be destroyed or withdrawn as legal bar would come into play under the well doctrine of *locus poenitentiae*, well recognized and entrenched in our jurisprudence (One may refer to *Director, Social Welfare, N.W.F.P, Peshawar v. Sadullah Khan* (1996 SCMR 1350)

10. Besides, learned counsel for the petitioner has filed advertisement, letters regarding the deduction of G.P. Fund, order dated 30th January 2014 passed by Deputy Secretary (Admn) Evacuee Trust Property Board Government of Pakistan, order dated 17.02.2014 passed by Lahore High Court, duty joining report of Mr. Ayaz Hussain Kalhoro and the case law reported as 2004 SCMR 1077 through statement dated 09.11.2016 which shows that jobs were called through advertisement and there were five vacancies of Sindh (rural) of Tapedar, when these documents were

confronted, the learned counsel for the respondents sought time on the plea to produce order passed on application filed by the petitioner and verification of documents, matter was adjourned. Learned counsel for respondents failed to challenge the credibility of newspaper (advertisement) as well failed to produce order dated 02.01.2014 passed by Chairman Evacuee Trust Property Board Lahore.

Therefore, the respondents were not legally justified to cancel / withdraw the appointment order / letter of petitioner except after *due process* particularly when the respondents do not dispute or deny that:

- a) *there is an appointment order/letter;*
- b) *it (appointment order/letter) was given effect by allowing joining to petitioner;*
- c) *petitioner continued his services with all benefits arose / attached with such job;*

11. A departure from '*due process*' resulting in taking away or infringing a *fundamental right* will be sufficient to entertain such petition. Reference may be made to the case of Pir Imran Sajid supra that:

"11. It hardly needs to be emphasized that the whole edifice of government of the society has its genesis in the Constitution and laws aimed at to establish an order, *inter alia*, ensuring the provisions of socio-economic justice, so that the people may have guarantee and sense of being treated in accordance with law that they are not being deprived of their due rights..... Article 5(2) commands that every body is bound to obey the command of the constitution'. Every public functionary is supposed to function in goods faith, honestly and within the precincts of its power so that person concerned should be treated in accordance with law as guaranteed by Article 4 of the Constitution. It would include principles of natural justice, procedural fairness and procedural propriety. **The action which is mala fide or colourable is not regarded as action in accordance with law.** While discharging officials

functions, efforts should be made to ensure that **no one is prevented from earning his livelihood because of unfair and discriminatory act on their part.**

Since, it is *no where* claimed by respondents that before issuing impugned order they (respondents) either issued show cause notice or provided an opportunity of hearing to the petitioner. Further, it is also not claim of the respondents that while unearthing (inquiring) the genuineness or *otherwise* of appointment letter/order of petitioner the petitioner was provided an opportunity of *participation* hence the order impugned cannot stand *well* with meaning and object of 'due process'. Further, the respondents have not come forward with any plea to justify such *penal* action at cost of '**due process**'.

12. In view of above discussion, we find the petitioner entitled for the relief. Accordingly, petition is allowed as a result whereof the impugned order is declared as illegal and petitioner is allowed to continue his duties with all benefits.

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This petition stands disposed of in the above terms.

JUDGE.

JUDGE.