

IN THE HIGH COURT OF SINDH, AT KARACHI

Present:

Mr. Justice Irfan Saadat Khan

Mr. Justice Adnan-ul-Karim Memon

C.P No.D-5839 of 2015

Arshad Noor Khan Petitioner

Versus

Government of Sindh through Secretary
Finance Department & 02 others Respondents

Date of hearing: 19.04.2018

Petitioner, Arshad Noor Khan, present in person.

Barrister Shahryar Mehar, AAG Sindh for the respondents
alongwith Farrukh Hamidi, Accountant General Sindh, and
Mohsin Ali, Deputy Accountant General.

ORDER

ADNAN-UL-KARIM MEMON-J. Through the instant petition,
the Petitioner has sought the following relief(s):-

- (i). To direct the respondents to implement the judgment of Hon'ble Supreme Court passed in Civil appeal No.637/1998 mentioned in notification / memorandum of the respondent No.1 annexure "K", in letter and spirit.***
- (ii) To declare that the memorandum dated 4.9.2015 Annexure "K" issued by the respondent No.1 is illegal, inoperative malafide and if of no legal effect being hit***

under the principle of natural justice and doctrine of LOCUS PONETENTIA.

- (iii) To declare that the pension, commutation, benevolent fund, GP fund, leave encashment etc being payable after retirement of the government employees which are post retired benefits which as per existing rules standing orders, law and practice of the respondents vide annexure "J" and "O" could not be deducted or recovered.***
- (iv) The respondents could not deduct or withhold amount of Rs.190, 300/- from the leave encashment bill of the petitioner.***
- (v) To direct the respondent No.2 and 3 to issue cheque of full amount of Rs.10, 72, 800/- being leave encashment which was sanctioned by the Hon'ble High Court vide notification annexure "E".***

2. Briefly the facts of the case are that Petitioner had retired from the judicial service as District & Sessions Judge in BPS-21 vide Notification dated 05.3.2014. Petitioner has submitted that the post of District & Sessions Judge was upgraded to BS-21 vide Notification dated 13.11.2007, issued by the Government of Sindh, Law Department. Petitioner has averred that after his retirement from service, he moved an application on 10.5.2014 to the Accountant General of Sindh, Karachi for award of premature increment on account of up-gradation of the post of District & Sessions Judge from BPS-20 to BPS-21 and re-fixation of pay w.e.f 13.11.2007, which was allowed and the Petitioner was awarded the financial benefits w.e.f. the date of up-gradation of the post i.e. 13.11.2007. Petitioner has added that the Finance Department Government of Sindh issued Office Memorandum on 04th September, 2014 and the Respondents started recovering the

financial benefits awarded by the office of the Accountant General Sindh from the pensionary benefits of the Petitioner on the premise that Petitioner was not entitled to the payment of enhanced pay and allowances and arrears w.e.f. from 13.11.2007, rather than from 01.7.2013, which were wrongly paid to the him in the light of the Office Memorandum dated 04th September, issued by the Government of Sindh.

3. Petitioner present in person has submitted that the action of the Respondents is against the judgment passed by the Hon'ble Supreme Court of Pakistan in Civil Appeal No.637/1998. The relevant portion of the aforesaid Judgment is reproduced as under:-

“ After careful consideration of all the facts of the case were are of the view that although up-gradation has been described as placement but in fact in amounts to promotion because all the criteria for the same as laid down by law has been fully dealt with.

In this view of the matter we do not find any substance in this appeal and the same is dismissed leaving the parties to bear their own costs.”

Petitioner has added that the post of District & Sessions Judge was up-graded from BPS-20 to BPS-21 on 13.11.2007 and the Respondents rightly awarded the financial benefits to the Petitioner from the date of up-gradation of the aforesaid post but they malafidely withheld the arrears from the month of November, 2007 on the basis of the impugned Notification dated 4th September, 2014 which is illegal and against

the principles of natural justice and doctrine of locus poenitentiae; that the Respondent No.1 has no authority to make any recovery from the Petitioner after his retirement on 13.8.2014; that the Respondents sanctioned and paid benevolent fund in the month of January, 2015 and payment of arrears of the pension in the month of December, 2014 and in the intervening period they did not deduct or recover the aforesaid amount but unexpectedly they had recovered the leave encashment bill of the Petitioner on a vague plea; that the payment of arrears were to be given to the Petitioner from November, 2007 when the post of District and Session Judge was upgraded; that the Respondents cannot interpret the judgment of the Hon'ble Supreme Court as discussed supra at their own wish and will rather they have flouted the same by not giving the due effect to the judgment of the Hon'ble Supreme Court. Petitioner lastly prayed for allowing the instant Petition.

4. Upon notice, Respondents No.02 has filed para-wise comments and denied the allegations.

5. Mr. Shahrayar Mehar, the learned AAG has raised the issue of maintainability of the instant Petition and contended that this is a policy decision of the Government of Sindh which cannot be interfered by this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973. He further contended that the deduction was made on the basis of revised Notification dated 04.9.2014 issued by the Finance Department, Government of Sindh; that the Petitioner is well aware of the reasons of such deduction and later on agitated his claim on the issue of recovery of

public amount wrongly paid to him, before this Court; that since the petitioner agitated the matter for grant of award of financial benefits, arising out of up-gradation of the post of District and Session Judge in BS-21 on 13.11.2007 before the office of Accountant General Office vide his application dated 10.5.2014 and the office allowed the financial benefits of up-gradation as demanded by the Petitioner, which mistake was duly rectified on the instructions of the Finance Department Government of Sindh, however the matter was referred to the learned Registrar of this Court, who under the instructions of the Competent-Authority opined that in the light of revised Notification dated 4.9.2014 issued by the Finance Department Government of Sindh a uniform policy could be adopted across the board, which was subsequently followed as per the directives of the Registrar of this Court; that all the Judges have also been paid as per the revised Notification issued by the Finance Department even those who had retired prior to the date of retirement of the Petitioner, therefore no discrimination has been meted out with the Petitioner; that the office of Accountant General considered the factual position that the deductions of Rs.190,300/- was not possible from the normal pension amount and therefore, the aforesaid amount was deducted from the bill of leave encashment of the Petitioner, which has caused no prejudice to him as the amount, which was credited in his account for which he was not entitled to. Learned AAG pointed out that the deduction as alleged by the Petitioner was not made from the regular monthly pension.

6. We have heard the Petitioner in person as well as learned AAG and perused the material available on record.

7. Perusal of the record reveals that the Respondent has taken action against the Petitioner for the recovery of certain amount from his leave encashment amount and not from his monthly pension payment.

8. Perusal of Office Memorandum dated 4th September, 2014, prima-facie show the policy decision of the Government of Sindh, an excerpt of the same is reproduced as under:-

**No.FD (SR-1) 3 (17)/2013
Government of Sindh
Finance Department
Karachi dated the 4th September, 2014**

OFFICE MEMORANDUM

**SUBJECT: GRANT OF PRE-MATURE INCREMENT
ON UP-GRADATION**

In partial modification of this Department's Office Memorandum of even number, dated 5th August, 2014, in pursuance of Finance Division (Regulations Wing), Government of Pakistan's Office Memorandum No.F.No.11(4)R-2/2011-1153/2013, dated 31.05.2013 and judgment dated 28.01.2002 passed by Honorable Supreme Court in Appeal No.637 of 1998, Government of Sindh has been pleased to grant one pre-mature increment on up-gradation of posts as on promotion which would be applicable in all cases of up-gradation taken place from 28th January, 2002 onward and would take effect from the actual date of up-gradation of each post. The payment of enhanced pay & allowances and arrears on this account would commence from 01.07.2013.

The said pre-mature increment on up-gradation shall be accommodated within the budgetary allocation for the current financial year 2014-15 by the respective departments and no supplementary / additional funds would be given on this account."

Secretary to Government of Sindh

9. We have noticed that the aforesaid Office Memorandum, as discussed supra, is based upon the Office Memorandum dated 31.5.2013 issued by the Finance Division, Government of Pakistan in pursuance of the Judgment dated 28.1.2002 passed by the Hon'ble Supreme Court of Pakistan in Appeal No.637/1998 whereby Government of Sindh started granting one premature increment on up-gradation of the post as on promotion, which would be applicable in all cases of up-gradation taken place from 28.1.2002 onwards and would take effect from the actual date of up-gradation of each post, however, it was clarified in the O.M that the payment of enhanced pay and allowances and arrears on this account would commence from 01.07.2013.

10. We are sanguine that this is a beneficial instrument and grants one pre-mature increment on up-gradation of posts as on promotion, which would be applicable in all cases of up-gradation taken place from 28th January, 2002 onwards and would take effect from the actual date of up-gradation of each post, prima-facie this is a financial issue and nobody can be prejudiced by the promulgation of a beneficial instrument issued by the Government of Sindh, including the Petitioner.

11. The present matter concerns financial implication and recovery of a certain amount from the bill of leave encashment of the Petitioner, which requires a decision by the Competent

Authority based on cogent reasons. The Accountant General Sindh, who is present in Court, has stated in categorical terms that the department had recovered the amount from the Petitioner's leave encashment bill under the instructions of the Finance Department Government of Sindh and that the department has not acted in this behalf on its own accord. We are of the view that this Court cannot travel into the allegations and counter allegations of the parties in a Constitutional jurisdiction and leave it for the Competent Authority to decide the issue of the Petitioner.

12. In result of the foregoing discussion the instant Petition is disposed of in the terms, whereby the Secretary Finance Department, Government of Sindh is directed to consider the case of the Petitioner, in all respects without prejudice to the findings given in the present matter previously keeping in view the Judgment passed by the Hon'ble Supreme Court of Pakistan in Civil Appeal No. 637 of 1998, as discussed supra and decide the issue afresh in accordance with the relevant law, rules and regulation by providing an opportunity of hearing to the Petitioner, within a period of two months from the date of receipt of this order and submit compliance report through MIT-II of this Court.

JUDGE

JUDGE

Karachi
Dated: .04.2018.
Shafi Muhammad /PA