

Order Sheet
**IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD**

CP No. D- 730 of 2011

Present:

Mr. Justice Muhammad Iqbal Kalhoro

Mr. Justice Adnan-ul-Karim Memon

Syed Hashmat Ali Shah

Petitioner

Versus

Province of Sindh and others

Respondents

Date of Hearing : 13.02.2019

Date of Announcement : 21.02.2019

Mr. Syed Tariq Ahmed Shah, Advocate for petitioner

Mr. Allah Bachayo Soomro, Addl.A.G.

ORDER

ADNAN-UL-KARIM MEMON, J. - Through instant petition, the petitioner is asking for declaration to the effect that the order dated 19.04.2010 passed by Senior Member Board of Revenue, Sindh whereby his basic appointment as Assistant (PBS-14) in Revenue Department was canceled is illegal, void, ab-initio and without lawful authority.

2. Brief facts of the case are that the posts of Assistant (BPS-14), Junior Clerks and other posts of different cadres in Revenue Department fell vacant and the Government of Sindh advertised the same in Daily Kawish Newspaper dated 26.7.2007 for appointment. As per petitioner, he appeared in the written test/interview for the post of Assistant BPS-14 and was declared successful candidate, thereafter, an offer letter dated 22.01.2010 was issued to him by the Board of Revenue Sindh and was appointed vide order dated 13.03.2010. He joined his duty and was posted in the office of Secretary (Revenue) Goth-Abad, Board of Revenue Sindh Hyderabad. Subsequently after joining, the petitioner received an order dated 19.04.2010 whereby his appointment order was withdrawn, without issuing show cause notice or personal hearing on the ground

that his name did not appear in the final recommendation/merit list provided by the Departmental Selection Committee. Petitioner has submitted that he was issued an offer order for the post of Junior Clerk BS-07, which he accepted at the place of aforesaid post and joined the post of Junior Clerk on 9.9.2010. Subsequently one Naveed Nisar filed CP No. D-613 of 2010 before this Court against such withdrawal of his appointment on the post of Assistant. Thereafter his service was restored and his petition was disposed of having served its purpose. It is further submitted that on the same analogy, the service of another candidate namely Mr. Faisal Qayoom was also restored. Petitioner being aggrieved by and dissatisfied with the discriminatory treatment meted out to him, approached to Senior Member Board of Revenue Karachi vide application dated 14.02.2011 wherein he apprised all the facts and requested for his restoration of service on the above post but his request was turned down without assigning any reason compelling the petitioner to approach this court on 18.4.2011.

3. Upon notice respondents No. 3 filed para-wise comments, controverting the stance taken by the Petitioner.

4. We have asked from learned counsel for the petitioner that how this petition is maintainable, when he was not recommended by the Departmental Selection Committee for the post of Assistant in BPS-14, in Board of Revenue Sindh.

5. Syed Tariq Ahmed Shah, learned counsel for the petitioner on the aforesaid proposition has argued that that the appointment of the petitioner was made in accordance with law, upon fulfillment of all the codal formalities; that termination of services of the petitioner without providing him an opportunity of hearing is illegal and against the basic spirit of law. He next argued that the petitioner cannot be held responsible for the illegal acts committed by the official respondents; therefore the instant petition is maintainable. We put another query to learned counsel that since the appointment order had not been acted upon and within short span of time it was withdrawn, then how vested right has accrued in favour of the

petitioner. He in reply submitted that once appointment on the post is made that cannot be cancelled on the ground that name of petitioner in the list of recommendations / selection list of Assistant BS-14 was not borne out; that the recommendation of selection committee was materialized by the Department and petitioner was appointed on the aforesaid post by fulfilling all codal formalities. He further argued that once the person is appointed as civil servant, then if anything is found against him he will be dealt with under Efficiency & Disciplinary Rules and can only be ousted after completing all the codal formalities and in absence of the above, the withdrawal order is *ipso facto* illegal; that Section 21 of General Clauses Act gives powers to the competent authority to rescind the order but by following the law and not otherwise; that principle of locus poenitentiae comes in favour of the petitioner and it cannot be undone when it has taken effect; that the act of withdrawal of order of the petitioner is malafide, capricious and against the law and rules, therefore, cancelling of such appointment order is illegal, which amounts to depriving the petitioner from his vested right as guaranteed under the Constitution; that Senior Member Board of Revenue Karachi was not justified in cancelling the appointment order of the petitioner. We again confronted the learned counsel for the petitioner that when he was issued an offer order for the post of Junior Clerk BS-07, which he accepted and joined the service without protest and is still holding the aforesaid post which he did not apply for, then how his appointment was justified and now he can claim the post of Assistant in BPS-14 in the same department. The submission proceeds on the premise that he was issued an offer order for the post of Junior Clerk BS-07 instead of Assistant on the understanding that subsequently he will be accommodated on the post of Assistant BS-14 with the condition that if he does not accept the same then he will never get any job therefore, the petitioner under compelling circumstances being lone male member of his whole family accepted the offer and joined the post of Junior Clerk.

6. Mr. Allah Bachayo Soomro, learned Addl.A.G referred to comments filed by the respondent No.3 and argued that the petitioner was issued offer letter for his direct recruitment to the post of Assistant BPS-14 and on review, it transpired that his name was not included in the final recommendation / selection list, given by Departmental Selection Committee as envisaged in Rule-11 of the Sindh Civil Servants (Appointment, Promotion and Transfer) Rules 1974; that the respondents were well within their competence to rectify the irregularity which had taken place by making appointment of the petitioner; that in absence of such recommendations of the Departmental Selection Committee, the initial appointment of the petitioner was made due to bona fide and an inadvertent/ mistake/omission and no perpetual right could be gained on the basis of such void order and principle of locus poenitentiae would not apply to the case of petitioner, as held in more or less identical (to some extent) with the case reported in 2004 PLC (CS) 129; that the department in exercise of powers conferred by Section 15 and 20 of the West Pakistan General Clauses Act, 1956, the offer letter vide No.3/280/2010/ Admin.IV/51, dated 22.02.2010 issued to the petitioner for direct recruitment as Assistant was withdrawn vide order No. 3/281/2010/ Admin.IV/69 dated 19.04.2010. It is further submitted that the petitioner was posted as Junior Clerk as per recommendation of Selection Committee; hence the question of taking him up as Assistant does not arise. He lastly prayed for dismissal of instant petition.

7. We have heard learned counsel for the parties and perused the material available on record.

8. The grievance of the petitioner is that he was not given an opportunity of hearing before the order of termination/cancellation was passed. This amounts to breach of principles of natural justice.

9. On the basis of respective submissions advanced, this Court finds that following issues arise for consideration in the petition:-

- i) Whether a probationer is entitled to a hearing prior to termination of his service?

- ii) Whether the petitioner has acquired any right to continue with the appointment on the post of Assistant in BPS-14 in Revenue Department, Government of Sindh, when it was found that he was not recommended by the Selection Committee?
- iii) Whether the petitioner accepted the post of Junior Clerk BS-07 in the same department and can be reinstated on the post of Assistant in BPS-14?

10. Firstly, we take up the point of legality/sustainability of the order dated 19.04.2010 passed by the Respondents, cancelling the petitioner's service. Basically, it is not seriously disputed by the petitioner that his service was cancelled by the impugned order dated 19.04.2010, when he was on probation. An excerpt of the order of cancellation reads as follows:-

“WHEREAS, Syed Hashmat Ali Shah s/o Syed Sher Ali Shah, was issued offer / appointment letter for his direct recruitment to the post of Assistant.

AND WHEREAS, on review it has been discovered that the name of the candidate is not included in the final recommendations/ selection list made by the Departmental Selection Committee as envisaged in Rule 11 of the Sindh Civil Servants (Appointment, Promotion and Transfer) Rules 1974 and in absence of such recommendations of the Departmental Selection Committee, the initial appointment of Syed Hashmat Ali Shah son of Syed Sher Ali Shah made due to *bona fide* and an inadvertent / oversight mistake/error/omission is deemed to be void and no perpetual rights could be gained on the basis of such void order and principle of locus poenitentiae would not apply to the case of Syed Hashmat Ali Shah son of Syed Sher Ali Shah, as held in more or less identical (to some extent) with the case reported 2004 PLC (CS) 129(a)

AND WHEREAS, the aforesaid void order though issued due to *bona fide* and an inadvertent oversight mistake/error/omission, cannot be allowed to remain intact/ continued.

NOW, THEREFORE, in exercise of powers conferred by section 15 and 20 of the W.P. General Clauses Act 1956 (VI of 1956), the offer / appointment letter No. 3/280/2010/Admn-IV/51, dated 22.02.2010, issued to Syed Hashmat Ali Shah son of Syed Sher Shah, for his direct recruitment as Assistant is hereby withdrawn.”

11. We have read the impugned order dated 19.04.2010 and are clear in our mind that the service of an appointee to a permanent post on probation can be terminated or dispensed with during or at the end of the period of probation because the appointee does not acquire any right to hold or continue to hold such a

post during the period of probation. The services of a probationer could have been terminated without assigning any reason thereof, and could be terminated if he does not successfully complete his period of probation under the Sindh Civil Servants Act, 1973. The services of a temporary employee can either be terminated under Section 11 of the Act or under Sindh Civil Servants (E&D) Rules, 1973, without notice and without assigning any reason, especially in presence of the provision of sub-section (1) thereof regarding termination of service, during the initial or extended period of probation. We are of the view that the period of probation is intended to assess the work of the probationer as to whether it is satisfactory and whether the appointee is suitable for the post; the Competent Authority may come to the conclusion that the probationer is unsuitable for the job and hence must be discharged on account of inadequacy for the job or for any temperamental or other similar grounds.

12. We have noticed that the petitioner has not passed the period of probation as per letter dated 21.12.2010, and action was taken against him during that period, therefore presumption does not go in favour of the petitioner regarding satisfaction of the Competent Authority, therefore the appointment order was cancelled on the premise that he was not recommended for the aforesaid post, thus the question of reinstatement of the service of the petitioner does not arise.

13. To appreciate and elaborate further on the aforesaid issues, let us, at the first instance, shed some light on the point that petitioner was issued an offer order for the post of Junior Clerk BS-07, which he accepted and joined without protest and still holding the aforesaid post. The petitioner cannot be allowed to blow hot and cold with the same breath. We are of the considered view that no candidate can be appointed on two substantive posts simultaneously. In addition, the Government is empowered to cancel the appointment as per law laid down in General Clauses Act 1897. The case of petitioner is not different for the simple reason that he was not selected for the post of Assistant in PBS-14, therefore no premium can be given to the petitioner to claim appointment on the aforesaid post.

14. In the light of above referred Rule-11 of the Sindh Civil Servants (Appointment, Promotion and Transfer) Rules 1974; that initial appointment to the post is required to be made on the recommendation of Departmental Selection Committee (DSC). The petitioner has failed to justify his eligibility for appointment on the aforesaid post. And therefore, he cannot claim appointment under the Rules (supra), which have been framed under the statutory power within the ambit of the relevant statute.

15. Fair and meritorious appointment to public office is requirement of law under Article 18 of the Constitution of Islamic Republic of Pakistan 1973. By impugned order dated 19.4.2014, in our view, the department has taken the right decision. The Petitioner has failed to point out any malice on the part of Respondents or infringement of his right warranting interference of this Court in its Constitutional jurisdiction.

16. In light of above facts and circumstances, we conclude that there is no illegality, infirmity or material irregularity in the impugned order dated 19.4.2014 issued by Senior Member Board of Revenue /Respondent No.2. Consequently, the instant Petition being devoid of merit is dismissed along with listed application(s).

JUDGE

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