HCJD/C-121

JUDGMENT SHEET

ISLAMABAD HIGH COURT
ISLAMABAD

W.P. No.178/2013

MUHAMMAD AZRAM

VERSUS

NATIONAL INSTITUTE OF HEALTH, ETC.

Petitioner by	:	**Mr Muhammad Bashir Khan Advocate**
Respondents by	:	**Mian Arshad Javed Advocate & Muhammad Zaka Ullah representative NIH**
Date of Hearing	:	**22-09-2014.**

ATHAR MINALLAH J.- Brief facts, are that the petitioner was appointed as "Chowkidar" (Watchman) in Grade-1 in the National Institute of Health, Islamabad (hereinafter referred to as the 'Institute'). He joined the Institute on 30-07-1981 and was later re-designated as a Security Guard. A criminal case was registered against the petitioner and as a consequence, vide order dated 12-12-1995, his services were placed under suspension. On cancellation of bail in 2002 he was dismissed from service vide order dated 15-10-2002, with effect from 22-04-2002 (hereinafter referred to as the 'impugned order'). The impugned order was passed without giving notice to the petitioner, nor were any proceedings undertaken. The petitioner was convicted by the trial court, and on appeal his sentence was converted from death to life imprisonment. Following a compromise, the learned Sessions Judge, Islamabad, acquitted the petitioner vide judgment dated 05-06-2010. On his release from jail, he made a representation to the Executive Director of the Institute for his reinstatement and release of pension. The representation was

decided and his request was regretted vide order dated 16-09-2010, without giving him an opportunity of a hearing. The petitioner assailed the order dated 16-09-2010 by preferring an appeal to the Federal Services Tribunal, which was dismissed vide order dated 07-05-2011, on the sole ground that the Tribunal had no jurisdiction as the petitioner was not a Civil Servant. The petitioner, having no other remedy, invoked the jurisdiction of this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan 1973 (hereinafter referred to as the 'Constitution').

2. The learned counsel for the petitioner contends that the impugned order of dismissal dated 18-10-2002 is without lawful authority and jurisdiction; it is contended that in exercise of the powers conferred under Section 24 of the National Institute of Health Ordinance 1980, the Board of Governors of the National Institute of Health, with the previous approval of the Federal Government, has made regulations titled the "National Institute of Health Employees (Service) Regulations, 1989" (hereinafter referred to as the 'Regulations'); it is contended that Chapter-VII of the Regulations provides for disciplinary action and procedure thereof. Regulation-62 provides for an inquiry procedure, which was not followed in the case of the petitioner. Regulation 63 makes the Regulations inapplicable to all such employees who are sentenced to fine or imprisonment. It is further contended that even otherwise, the petitioner's dismissal through the impugned order was against the cardinal principles of natural justice, as neither was any show cause notice issued nor was he given a reasonable opportunity of hearing. It is stated that subsequently the petitioner was acquitted and, therefore, the impugned order, besides being illegal and without lawful authority, is a stigma. The learned counsel has referred to the case of another employee who was in a similar situation, but was reinstated. The latter was also convicted in a criminal case

and later acquitted following a compromise. It is, therefore, stressed that the petitioner has been treated differently.

3. On the other hand, the learned counsel for the respondent contends that the petition is hit by laches and the respondents had the jurisdiction and power to dismiss the petitioner without giving him an opportunity of hearing or a show cause notice, since he was convicted. It is argued that in the case of the other employee, Mohammad Bashir, he was suspended, but before his dismissal he was acquitted by a competent court of law on the basis of a compromise, therefore, his case is distinguishable. However, it is admitted that the case is similar to the extent that both were convicted but later acquitted following a compromise.

4. After hearing the learned counsels, and giving careful consideration to their arguments, and perusal of the record with their able assistance, this Court holds as follows:

5. The Institute is established under section 3 of the National Institute of Health Ordinance 1980 (hereinafter referred to as the "Ordinance"). In exercise of powers vested under Section 24 of the Ordinance, the Board has made the Regulations. Regulation 63, inter-alia, provides that nothing in the Regulations shall apply to a case "where the accused is dismissed or removed from service or reduced in rank, on the grounds of conduct which has led to a sentence of a fine or of imprisonment". Regulation 69 provides for an appeal, inter-alia, to the Board of Governors, if the penalty was imposed by the Executive Director. It is noted that Regulation 63 cannot be construed and interpreted as giving unfettered and unbridled power for imposing a penalty without observing the cardinal principles of natural justice. On the contrary, the language makes it mandatory to follow the principles of natural justice, so

that the authority which has to take the decision is able to conclude whether the employee should be dismissed or removed from service, reduced in rank, or whether to absolve him from the charge of misconduct. Moreover, Regulation 63 declares the Regulations as inapplicable to such an employee who has been sentenced to a fine or imprisonment. As a corollary, Regulation 63 does not exclude or expressly oust the principles of natural justice in the case of disciplinary proceedings against an employee sentenced to a fine or imprisonment, rather the language makes the observance of the principles mandatory in order to decide which penalty mentioned in the said regulation may be imposed. An authority can make a choice after the employee has been informed of the allegations which he has to explain, affording him/her an opportunity of hearing and thereafter passing a speaking order. Moreover, the right of appeal under section 69 is not available to an employee falling within the category specified in Regulation 63. It is, therefore, obvious that according to the facts and circumstances of the present case, the services of the petitioner could not have been terminated without observing the principles of natural justice.

6. Next, would a conviction in a criminal case be enough to terminate the employee without giving him a notice or an opportunity of putting his case before the authority which is required to take a decision? In other words are criminal and disciplinary proceedings synonymous?

7. By now it is a settled law that disciplinary proceedings and criminal proceedings are distinguishable. They are independent of each other and cannot be termed as synonymous and interchangeable. They have altogether different characteristics. The forums for adjudication, principles of evidence and procedure are also separate and distinct. The decision of one

forum cannot have bearing on the decision of the other. Whether a person is convicted or acquitted in a criminal trial cannot influence the disciplinary proceedings. The outcome of a criminal trial can, therefore, not influence the disciplinary proceedings. Reliance is placed on the cases of *'Arif Ghafoor Vs. Managing Director, H.M.C., Taxila and others'* (PLD 2002 SC 13), '*Muhammad Iqbal Vs. District Police Officer, Sahiwal and another*' (2011 SCMR 534), '*Executive Engineer and others Vs. Zahid Sharif'* (2005 PLC (CS) 701), '*Falak Sher Vs. Inspector General of Police, Punjab and 2 others*' (2005 SCMR 1020), '*Rab Nawaz Hingoro Vs. Government of Sindh and others'* (2008 PLC (CS) 229), '*Nazir Ahmed Vs. Capital City Police Officer, Lahore and another*' (2011 SCMR 484), '*Syed Muhammad Iqbal Jafri Vs. Registrar, Lahore High Court, Lahore*' (2004 SCMR 540), '*Khaliq Dad Vs. Inspector General of Police and 2 others'* (2004 SCMR 192), '*Muhammad Ayub Vs. The Chairman Electricity Board, WAPDA, Peshawar and another'* (PLD 1987 SC 195).

8. As explained above, the principles of natural justice are mandatory for the purposes of proceedings under Regulation 63. The authority has to make a choice between different penalties provided in the said Regulation or discharge the employee. Any decision taken without observing the principles of natural justice i.e. serving a show cause notice, informing the employee regarding the precise allegations, and affording a reasonable opportunity of hearing, would be arbitrary, whimsical, without lawful authority, and therefore, illegal. The violation of the *audi alteram partem* rule renders an order or decision a nullity in law. The edifice of the rules of natural justice is to prevent miscarriage of justice and ensure fair play in actions. Infliction of any penalty, deprivation or curtailment of a right, or any other action which may prejudice the rights of a person, if passed in violation of the

rules of natural justice, is not sustainable. It would result in endorsing the giving of untrammelled and unfettered powers to the authorities who adjudicate upon the rights of citizens. After the insertion of Article 10-A of the Constitution, due process has been acknowledged as a fundamental right. The observance of the rules of natural justice while adjudicating the rights of citizens were equally important even before insertion of Article 10-A as a fundamental right guaranteed under the Constitution.

9. As a universal rule, public authorities while performing their functions and exercising powers conferred by law are required to act fairly and justly. Fair and just exercise of powers can only be ensured by strictly observing the principles of natural justice. The august Supreme Court has consistently held that in cases where the giving of notice is a necessary condition, the failure to do so renders the order void. Reference may be made to *"Collector, Sahiwal and 2 others vs Mohammad Akhtar",* 1971 SCMR 681, *"Commissioner of Income-Taz, East Pakistan vs Fazlur Rahman",* PLD 1964 SC 410, *"Abdul Latif Niazi vs Government of West Pakistan",* PLD 1967 SC 62, *"Mansab Ali vs Amir and 3 others",* PLD 1971 SC 124.

10. The learned counsel for the petitioner has also raised the argument relating to discrimination i.e. that a similarly placed employee was treated differently. In support of this specific plea, the learned counsel has made reference to the case of another employee, namely, Mohammad Bashir, employed as a "Mali" (Gardener) who was reinstated after he was acquitted from a criminal conviction following a compromise. The only difference being that he was acquitted following a compromise and reinstated before his dismissal order was passed. The respondents candidly admit that the petitioner was similarly situated, except that the other employee was yet to be dismissed, but failed to give any persuasive explanation as to why the present petitioner

was treated differently. The right against discrimination is a fundamental right guaranteed under Article 25 of the Constitution. Similarly situated persons cannot be treated differently, and it renders any action or order as void, arbitrary and illegal. It has been consistently held by the Supreme Court that though a reasonable classification of persons is permissible, who may be treated differently, "provided there is legitimate basis for such classification. But the classification should not be arbitrary and capricious and must rest on reasonableness and there must exist a fair nexus and a just relationship with the need for such classification". Similarly situated or placed persons cannot be treated differently. Reference in this regard may be made to the cases of *"Dr. Shahnaz Wajid vs Federation of Pakistan through Secretary Establishment Division, Government of Pakistan, Islamabad",* 2012 PLC (C.S) 1052, *"Fauji Foundation and another vs Shamimur Rehman",* PLD 1983 SC 457, *"I.A. Sharwani and others vs Government of Pakistan through Secretary, Finance Division, Islamabad and others",* 1991 SCMR 1041, *"Mst. Aziz Begum and others vs Federation of Pakistan and others",* PLD 1990 SC 899, *"Dhirendra Kumar vs Superintendent and Remembrancer of Legal Affairs to the Government of West Bengal",* AIR 1954 SC 424, *Javed Jabbar and 14 others vs Federation of Pakistan and others",* PLD 2003 SC 955, and *"Muhammad Shabbir Ahmed Nasir vs Secretary, Finance Division, Islamabad",* 1997 SCMR 1026. This court is not impressed with the argument raised by the learned counsel for the petitioner that the case of the other employee was distinguishable, as he had been reinstated before his dismissal. Both were convicted in respective criminal cases and later acquitted following a compromise. The fact that the petitioner had been dismissed while the other produced an acquittal order before such an order could be passed against him has no relevance for the purposes of determining whether they were similarly situated. This argument makes it imperative that the petitioner ought to have

been reinstated in response to his representation to the Executive Director so that he could be treated at par with the other similarly situated employee. In the opinion of this Court the petitioner has made out a case of being treated differently from a similarly situated employee, and, therefore, results in the impugned order being in violation of the fundamental right guaranteed by the Constitution.

11. Lastly, the question of laches raised by the learned counsel for the respondent needs to be adverted to. The jurisdiction of this Court under Article 199 is discretionary and vests on the foundation of equity. The law of limitation is not attracted and no time is prescribed for invoking the extraordinary jurisdiction. However, as an equitable relief, jurisdiction under Article 199 is subject to the bar known as laches. The Court, nevertheless. weighs various factors in deciding, on the facts and circumstances of the case, particularly on the touchstone of equitable principles, whether to exercise the powers and jurisdiction when there is a delay, and whether the discretionary relief will be granted or refused. In case it is a continuous wrong, laches will not be a bar in granting the relief. In so far as the question of pay and pension is concerned, this Court is guided by the principles followed in the case of *"Chief Executive Progressive Paper Limited/The Chairman National Press Trust, Islamabad vs. Sh. Abdul Majeed and another",* 2005 PLC(CS) 1439. This Court is, therefore, of the opinion that, on the facts and circumstances of the present case, the petitioner is entitled to the grant of discretionary relief under Article 199 of the Constitution and laches will not operate as a bar.

12. In the light of the above, the impugned order dated 15-10-2002 is declared to be in violation of the Regulations, the rules of *audi alteram partem*, and the fundamental right guaranteed under Article 25 of the Constitution. It is thereby arbitrary, illegal and as a consequence is set aside.

This petition is allowed in the terms of the prayer sought therein. The respondent shall be at liberty to treat the period from the date of the impugned order till the date of reaching the age of superannuation as any kind of leave, including, leave without pay, while the salary for the period when the petitioner remained under suspension and his pension after his retirement shall be paid strictly in accordance with the relevant rules, instructions etc. The Respondent shall complete all formalities, calculate the pension and other dues in accordance with law and finalise the payments within thirty days from the date of this judgment.

(ATHAR MINALLAH)
JUDGE

Announced in open Court on_____October, 2014.

JUDGE

Approved for reporting

*Asif M/

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