

[Supreme Court of Pakistan]

Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah and Yahya Afridi, JJ
GOVERNMENT OF THE PUNJAB, EDUCATION DEPARTMENT through Secretary Higher
Education, Punjab Civil Secretariat Lahore and others--Petitioners

Versus

MUHAMMAD IMRAN and others---Respondents

Civil Petitions Nos. 1696-L to 1706-L of 2018 and Civil Petition No.3569-L of 2016, decided on 28th February, 2019.

(On appeal against the judgment/order dated 24.04.2016 of the Lahore High Court, Lahore passed in W.P. No. 39728 of 2016, W.P. No. 19283 of 2011, W.Ps. Nos. 1766, 3896, 4017, 4221, 5056, 8325, 1917, 15483, 28506 of 2017 and 178251 of 2018)

(a) General Clauses Act (X of 1897)---

---S. 21---Order---Power to amend, add to or rescind---Scope---Authority which could pass an order was entitled to vary, amend, add to or rescind the same under S. 21 of the General Clauses Act, 1897.

(b) General Clauses Act (X of 1897)---

---S. 21---Recalling of an order---Locus poenitentiae, principle of---Scope---Jurisdiction/power vested in an authority to recall an earlier order was based on the principle of locus poenitentiae---Exception to such principle was where in pursuance of the order passed by the authority, an aggrieved person took decisive steps, and changed his position---No one could retain the benefits of a withdrawn order, claiming the protection of having taken a decisive step, when the very order passed by the authority was illegal, void or without lawful authority---In such circumstances, it would not matter, even if decisive steps had been taken by the person in pursuance of the illegal order passed by the authority---However, the pecuniary benefit accrued and already received by a person in pursuance of an illegal order passed by the competent authority could not be recovered from him unless the benefiting order was obtained by the person through fraud, misrepresentation or concealment of material facts.

Pakistan through the Secretary, Ministry of Finance v. Muhammad Himayatullah Farukhi PLD 1969 SC 407; Engineer-in-Chief Branch v. Jalaluddin PLD 1992 SC 207; Shahid Masood Nadeem v. Dy. C.A.A.F., Lahore Cantt. 2003 PLC (C.S.) 1262; Shaukat Ali v. District Government through Nazim/Chairman Selection Committee and 4 others 2005 PLC (C.S.) 790 and Mst. Sajida Javed v. Director of Secondary Education, Lahore Division and others 2007 PLC (C.S.) 364 ref.

Imtiaz Ahmed Kaif, Additional A.-G., Punjab along with Ahmed Khan, S.O. Estt. Higher Education, Punjab for Petitioners.

Nemo for Respondents.

Date of hearing: 28th February, 2019.

JUDGMENT

YAHYA AFRIDI, J.---Education Department, Government of Punjab, Lahore ("the Petitioners") seeks leave of this Court challenging the judgment of the Lahore High Court, Lahore in the case titled: Hafeez Ahmed v. The Government of the Punjab and others (W.P. No.19283 of 2011) decided on 18.10.2016, which has been subsequently followed by the Lahore High Court in all the above-mentioned petitions vide common judgment dated 24.04.2018.

2. The essential facts leading to the present petitions have been aptly recapitulated by the High Court in its impugned judgment in Hafeez Ahmed's case (supra), in terms that:

"Unnecessary details apart, the facts, relevant for the disposal of the instant petition, are that petitioners Nos.1 to 95 were appointed as Lecturers in Education Department on contract basis in the year 2002 whereas petitioners Nos.96 to 145 joined the department as such in the year 2005. Later on Government of Punjab, through Notifications issued in the years, 2009 and 2010 regularized the services of the petitioners and they were held entitled for the protection of the pay drawn by them at the relevant time excluding the amount of social security benefit. After regularization of their services the petitioners started drawing their salary, however, later on, the District Accounts Officer on account of some clarification issued by the Accountant General Punjab started recovery of the amount already received by them on account of various Ad hoc Relief Allowance; hence this petition".

3. At the very outset of the proceeding, Mr. Imtiaz Ahmad Kaif, learned Additional Advocate General, Punjab was confronted as to whether the impugned allowance was paid to the Private-respondents by sanction of the competent authority, his response was in the negative, and he explained that the payment thereof to the private respondents lacked the requisite approval of the finance department under the applicable rules. He further explained that, the provincial government has constituted an Anomaly Committee to decide, whether the regularized civil servants were entitled to the impugned allowance or otherwise, and thus the private respondents had the alternate remedy to seek redressal of their said grievance. He was then confronted as to whether the private respondents had misrepresented, committed any fraud or concealment of facts in obtaining the impugned allowance, his response was in negative. He was further confronted, as to whether any proceedings were initiated against any government official responsible for allowing the inadmissible allowance to be paid to the private-respondents, his response was again in the negative.

4. In essence, the grievance of the private respondents in their writ petitions before the High Court was not the stoppage of payment of the impugned allowance, but the recovery thereof by the provincial government. This being so, the High Court was correct in holding that approaching the Anomaly Committee would not be of any avail to the private respondents, as far as the recovery of the already received impugned allowances.

5. The jurisdictional contours of an authority to recall its orders was considered in detail in Pakistan through the Secretary, Ministry of Finance v. Muhammad Himayatullah Farukhi (PLD 1969 SC 407), wherein an earlier order of the President of Pakistan made in favour of a government servant fixing his basic salary at a certain rate was withdrawn. This Court by a majority decision declared the withdrawal of the order to be without lawful authority in terms that:

"The authority that has the power to make an order has also the power to undo it. But this is subject to the exception that where the order has taken legal effect, and in pursuance, thereof certain rights have been created in favour of any individual, such an order cannot be withdrawn or rescinded to the detriment of those rights."

6. The ratio of the decision in the aforementioned case evolved with time. It was in *Engineer-in-Chief Branch v. Jalaluddin* (PLD 1992 SC 207) that this Court further refined the scope of the jurisdictional limits of the authority to withdraw its decisions, observing that:

"Locus poenitentiae is the power of receding till a decisive step is taken. But it is not a principle of law that orders once passed becomes irrevocable and it is past and closed transaction. If the order is illegal then perpetual rights cannot be gained on the basis of an illegal order... However, as the respondent had received the amount on the bona fide belief, the appellant is not entitled to recover the amount drawn by the respondent during the period when the latter remained in the field... We consider that as far as the recovery of the amount in question is concerned, the principle of locus poenitentiae would be applicable and the appellants are not entitled to recover the amount."

7. The principle laid down in the above-stated case was echoed in *Shahid Masood Nadeem v. DY. C.A.A.F., Lahore Cantt.* (2003 PLC (C.S.) 1262), wherein the Court reiterated that:

"It is settled proposition of law that no right can be claimed on the basis of an illegal order and such an order despite having taken effect, neither would change its status nor create any right enforceable in law and in the light of principle that the authority which possesses the power of passing an order is also empowered to vary, amend or rescind, the said order can be undone with no legal bar."

8. Following the above principle, this Court in the case of *Shaukat Ali v. District Government through Nazim/Chairman Selection Committee and 4 others* (2005 PLC (C.S.) 790) dilated upon the jurisdictional mandate of the authority to order the recovery the amount wrongly received by a government servant by observing that:

"It appears that the respondents did not send an officer/official to verify the documents of the petitioner from the concerned University and did not even use the modern technology of Computer E-Mail, U.M.S. This fact brings the case in the year that the petitioner had performed the duties of the respondents as a teacher on account of contributory negligence of the respondents... the action of the respondents is without lawful authority."

9. In a similar matter, regarding recovery of the received amount by a government servant, this Court in *Mst. Sajida Javed v. Director of Secondary Education, Lahore Division and others* (2007 PLC (C.S.) 364), after dilating upon the precedent cases, concluded that:

"This Court has consistently declared in a large number of cases that the payment made to a civil servant in the course of employment, due to inadvertence on the part of the employer, cannot be allowed to be recovered as arrears of salary wrongly paid. In our view, petitioner cannot be legally asked to refund the differential of salary drawn by her of the post against which she had been serving under a valid order. Reservation/allocation of vacancies for a particular District and utilization in another District has no nexus with the case of the petitioner."

10. Keeping in view the above deliberation, it is noted that there is a judicial consensus on the issues in hand in terms that;

I) The Authority which can pass order is entitled to vary, amend, add to or to rescind the same under section 21 of the General Clauses Act, 1897.

II) The jurisdiction to recall an earlier order is based on the principle of *locus poenitentiae*.

III) There is an exception to the principle of *locus poenitentiae* vesting power in an authority to recall its earlier order: if in pursuance of the order passed by the authority, an aggrieved person takes decisive steps, and changes his position.

IV) None can retain the benefits of a withdrawn order, claiming the protection of having taken a decisive step, when the very order passed by the authority is illegal, void or without lawful authority. In such circumstances, it would not matter, even if decisive steps have been taken by the person in pursuance of the illegal order passed by the authority. However, the pecuniary benefit accrued and already received by a person in pursuance of an illegal order passed by the competent authority cannot be recovered from him unless the benefiting order was obtained by the person through fraud, misrepresentation or concealment of material facts.

11. In the present case, it is an admitted position that the private respondents performed their duties during the interregnum period, and that the impugned allowances were not allowed or disbursed to them on their overt act of fraud, misrepresentation or even any concealment of fact. As the conditions precedent for recovery of an unauthorized payment is wanting in the present cases, the impugned recovery of allowances is thus not in accord with the law, and any amount so recovered from the private respondents warrants to be returned.

12. Accordingly, for the reasons stated hereinabove, the impugned decision of the High Court being in accord with the settled principle of safe administration of justice.

The instant petitions being bereft of merit are dismissed, and the leave so sought is refused.

MWA/G-4/SC Petitions dismissed.