

2020 S C M R 188**[Supreme Court of Pakistan]****Present: Gulzar Ahmad and Munib Akhtar, JJ****SHAMS UR REHMAN---Petitioner****Versus****MILITARY ACCOUNTANT GENERAL, RAWALPINDI and another---
Respondents**

C.P. No. 4439 of 2017 and C.M.A. No. 8554 of 2017, decided on 18th October, 2019.

(Against the order dated 17.10.2017, passed by the Federal Service Tribunal, Islamabad in R.P. No. 176 of 2017 in Appeal No.394(P)CS/2015)

Civil service---

---Higher selection grade (BPS) granted due to fault of department---Whether salary and benefits paid due to such fault/error could be recovered---Locus poenitentiae, principle of---Estoppel---Petitioner (civil servant) was appointed as senior auditor in BPS-11---Subsequently petitioner was erroneously granted selection grade BPS-15 and started getting pay of such selection grade---Once the department realized its mistake, it reverted the petitioner back to BPS-11 and sought recovery of salary and benefits paid to him on the principle of locus poenitentiae---Held, that for almost 9 years the petitioner served in selection grade BPS-15 and received the emoluments and benefits of such post---Selection grade BPS-15 was granted to the petitioner by the department itself and the petitioner apparently had no role in obtaining such post---When the petitioner performed the work of a higher post of selection grade BPS-15 for almost 9 years, then on the principle of locus poenitentiae the benefits paid to him, could not be recovered as said principle would not apply---Further the principle of estoppel would be applicable in the present case against the department from recovering the emoluments and benefits of BPS-15 from the petitioner---Petition for leave to appeal was converted into appeal and allowed.

Engineering-in-Chief Branch through Ministry of Defence and another v. Jalaluddin PLD 1992 SC 207 and Mst. Sajida Javed v. Director of Secondary Education, Lahore Division and others 2007 PLC (C.S.) 364 ref.

Mrs. Misbah Gulnar Sharif, Advocate Supreme Court and Syed Rifaqat Hussain Shah, Advocate-on-Record for Petitioner.

Sajid Ilyas Bhatti, Additional A.G. and Imran Feroze, D.R. AAO, Litigation for Respondents.

Date of hearing: 18th October, 2019.

ORDER

GULZAR AHMED, J.---The petitioner was appointed as Senior Auditor in BPS-11 and was granted selection grade BPS-15 on the basis of MAG letter dated 15.11.2006. The selection grade was granted to 136 Senior Auditors and the name of the petitioner appeared at Sr. No.109 of the list of said Senior Auditors. Pay was fixed vide letter dated 21.12.2006 pursuant to which the petitioner started getting pay of selection grade BPS-15. Vide letter dated 11.02.2015, the pay of the petitioner was refixed in BPS-11, on cancellation of his selection grade of BPS-15, which was erroneously granted to him w.e.f. 25.03.1996. This letter was challenged by the petitioner before the Federal Service Tribunal, Islamabad (the Tribunal), who vide its judgment dated 18.09.2017 dismissed the service appeal of the petitioner. The petitioner filed review petition that too was dismissed vide impugned order dated 17.10.2017.

2. The only submission of the learned counsel for the petitioner is that the petitioner continued to work in selection grade BPS-15 and was being paid emoluments of the said grade not on account of his own fault but on account of measures taken by the department itself and that for almost 9 years the petitioner had served in the position of BPS-15 and was paid the benefits of such post and now through letter dated 11.02.2015 while cancelling selection grade and reverting the petitioner back to BPS-11, the respondent cannot recover salary and benefits paid to him on the principle of locus poenitentiae and in this regard she has relied upon the judgment of this Court in the case of the Engineering-in-Chief Branch through Ministry of Defence and another v. Jalaluddin (PLD 1992 Supreme Court 207).

3. Learned Additional Attorney General, on the other hand, has contended that the very judgment was not challenged by the petitioner but only the review petition was filed and the Tribunal having found no ground available for review and dismissed the same. He further contended that the petitioner cannot retain benefit of selection grade BPS-15 as it was erroneously granted to him.

4. Be that as it may, we have noted that in the judgment of the Tribunal this very aspect of the matter has been dealt with in para-10, where it was observed that the principle of locus poenitentiae does not mean that the benefit once accrued illegally in favour of any person would stand protected for all times to come. Learned counsel for the petitioner states that this very part of the judgment was sought to be reviewed but the Tribunal incidentally did not appreciate the same. For almost 9 years the petitioner has served in selection grade BPS-15 and has received the emoluments and benefits of such post. It is not in dispute that the selection grade BPS-15 was granted to the petitioner by the department itself and the petitioner apparently had no role in obtaining the post of selection grade BPS-15 for that no such allegation whatsoever is made against him. The respondents have merely pleaded mistake, as only 25% of posts from BPS-11 were required to be filled in the selection grade BPS-15 and it was subsequently realized by the department itself that the petitioner did not fall within the 25% quota and thus was recalled from the post of selection grade BPS-15 and reverted him back to the post of BPS-11. For 9 years the petitioner performed the work of a higher post of selection grade BPS-15 and thus on the principle of locus poenitentiae the benefits paid to him, could not be recovered from him for that such principle would not apply. Further, in

our view the principle of estoppel will also be applicable as against the department from recovering the emoluments and benefits of BPS-15 from the petitioner. In the case cited by the learned counsel for the petitioner, this Court has observed as follows:

"Locus poenitentiae is the power of receding till a decisive step is taken. But it is not a principle of law that order 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. The appellants when came to know that on the basis of incorrect letter, the respondent was granted Grade-11, they withdrew the said letter. The principle of locus poenitentiae would not apply in this case. 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."

Further in a similar case of *Mst. Sajida Javed v. Director of Secondary Education, Lahore Division and others* (2007 PLC (C.S.) 364), this Court held as follows:

"Appointment of the petitioner to the post of Senior School Teacher in BS-16 vide office order dated 11.03.1996 is not disputed. It is also not disputed that she actually served against this post in different Girls Middle Schools wherever posted. The fact that the department realized its mistake after about four years would show that petitioner herself was not at fault in procuring the appointment or her posting in different schools in Sheikhpura District by unfair means. By accepting the offer validly made to her by the Department on the basis of her qualification and training in the relevant field, a valuable right had accrued to the petitioner and she could not be made to suffer for the mistake or error of the officials of respondent-Department. Indeed, the offer had been accepted and actually acted upon for almost four years. The case would, thus, be governed by the principle of locus poenitentiae and, in our view, the Department cannot retrace the steps already taken and lawfully acted upon by the petitioner."

5. Thus, keeping in view the above principles as enunciated by this Court in the two cited judgments, the finding of the Tribunal by which it has allowed recovery of emoluments and benefits from the petitioner that of a selection grade BPS-15, was a blatant mistake apparent on the face of the record of the Tribunal judgment and the Tribunal in exercise of its review jurisdiction ought to have noted the same and also rectified such mistake from its judgment. By not doing so the Tribunal apparently has failed to exercise its review jurisdiction, which was available in the case in hand and by not doing so, there is apparent illegality in the impugned order of the Tribunal. Thus, we are persuaded not to agree with the impugned order of the Tribunal to the extent as noted above. The impugned order of the Tribunal dated 17.10.2017 is, therefore, set aside. The petition is converted into an appeal and is allowed to the extent as noted above.

MWA/S-41/SC Petition allowed.

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