

**IN THE HIGH COURT OF SINDH, KARACHI**

**C.PNo.D-6234 of 2014**

**Present**

**Mr. Justice Irfan Saadat Khan**

**Mr. Justice Adnan-ul-Karim Memon**

Mehar Iqbal Siddiqui ..... Petitioner

V E R S U S

Federation of Pakistan and others ..... Respondents

**Dates of hearing: 17.01.2017 and 24.01.2017**

M/s. Haider Waheed and Ahmed Masood, advocates for the Petitioner.

M/s. Moiz Ahmed and Muhammad Azam Khan, advocates for Respondent No.2.

Mr. Ch. Muhammad Ashraf, advocate for Respondent No.3.

Mr. Sh. Liaquat, Standing Counsel for Respondent No.1.

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**JUDGMENT**

**ADNAN-UL-KARIM MEMON-J:** The Petitioner has invoked the Constitutional Jurisdiction of this Court, praying therein for the following reliefs:-

- I. Declare that the impugned order dated 29.10.2014 issued by the Respondent No.2 is unconstitutional, arbitrary and illegal and, therefore, may be set aside.
- II. Direct the Respondent No.2 to regularize the Petitioner's service with effect from the date of his induction at the Respondent No.2 i.e. 28.11.1989.
- III. Direct that the Respondent No.2 assign the date of the Petitioner's promotion into BS-18 to the date he took charge of the vacancy i.e. 22.06.2004, and/or from the date the vacancy was available i.e. 01.02.2003.
- IV. Direct the Respondent No.2 to consider the Petitioner for promotion in BPS-19 according to the seniority

accorded to the Petitioner from the date he took charge of the vacancy in BPS-18.

- V. Direct the Respondent No.2 to make promotion in accordance with the relevant rules of the Respondent No.2 and requirements set by the Superior Court of Pakistan.
- VI. Restrain the Respondent No.2 from relaxing any requirements set for promotions and/or appointments at the Respondent No.2.
- VII. Restrain the Respondents No.2 and 3 from promoting into the post of Deputy Traffic Manager BS-19 and/or to reserve a post of the same till the instant Petition is pending.
- VIII. Any other relief this Honourable Court may deem appropriate and proper in the circumstances of the case.
- IX. Grant the costs of this Petition.

**In the alternative:-**

- i. Direct the Respondent No.2 to regularize the services of the Petitioner, and all other officers (for whom the posts were created by way of the said board meeting) from the date of Meeting of the Respondent No.2 i.e. 28.03.1990.
- ii. Direct the Respondent No.2 to regularize the services of the Petitioner from the date when six (6) months from induction were completed i.e. 28.05.1990.

2. The gist of the case of the Petitioner is that on 28.11.1989, the Petitioner was appointed as Trainee Officer (ad hoc basis), in Traffic Department of Karachi Port Trust ("Respondent No.2"). His services were regularized as Traffic Officer with effect from 01.06.1991 vide Board Resolution No.131 (Item-VI) dated 12.10.1995.

3. The Petitioner claimed that the Respondent No.3 is junior to the Petitioner as he was inducted in service only on 28.12.1989, after the

joining of the Petitioner but yet, he had been shown senior to the Petitioner in the seniority list and subsequently promoted in BPS 18 with effect from 1.2.2003 and thereafter, promoted to BPS 19 on 15.8.2013. However, the Petitioner had been promoted with effect from 12.8.2008. The Petitioner also raised the grievance that the Respondent No.3 did not have the prescribed qualification (M.B.A) for the post of Traffic Officer and had been regularized from the date of his induction, whereas, discriminatory treatment had been meted out with the Petitioner because his regularization was not considered with effect from date of his induction into the service.

4. Being aggrieved and dissatisfied with the inaction on the part of the Respondent No.2, the Petitioner in the year 2013 filed a Constitutional Petition (bearing C.P No.D-2442 of 2013) before this Court and sought the following relief:

- a) To direct the respondents to reconsider the case of the petitioner with respect to granting absorption to the petitioner immediately after 02 years from the date of induction and calculate his date of confirmation for the post of Assistant Traffic Manager from there, and further calculate/consider the date of next promotion of the petitioner likewise on merit and according to prescribed length of service;
- b) To direct respondents to consider and decide the representation of the petitioner strictly in accordance with law and on merit as well as in the light of dicta laid down by the Hon'ble Supreme Court of Pakistan in certain pronouncements of law on this subject and after passing speaking order communicate its result within 15-days to the petitioner positively.

5. In the above referred Constitutional Petition, this Court vide Order dated 12.2.2014, directed the Respondent No.2 to decide afresh the representation of the Petitioner and directed the Respondent No.2 to pass a speaking order after providing ample opportunity of hearing to the

Petitioner. The Respondent No.2 was further directed to decide the following points:

- (i) Regularization with effect from the date of induction; and
- (ii) The case of promotion of Petitioner and his eligibility for the same.

6. Consequently, the Respondent No.2 decided the matter afresh and vide Order dated 29.10.2014 (“the Order”) rejected the claim of the Petitioner.

7. The Petitioner being aggrieved and dissatisfied with the Order passed by the Respondent No.2 filed the present Constitutional Petition challenging the same.

8. The Respondent No.2 and 3 have filed their comments in the Petition.

9. It is, inter-alia, contended by the learned counsel for the Petitioner that the Order is discriminatory and in clear violation of the directions of this Court.

10. The learned counsel next contended that the Respondent No.2 decided the matter without considering the facts and circumstances of the Petitioner’s case on the premise that the officers inducted in one bench, on induction retain their inter-se seniority. It is also contended that the Respondent No.2 in ignorance of the relevant Rules and Regulations of the KPT (which govern the policies of promotion and seniority) has rejected the claim of the Petitioner.

11. Per learned counsel, the Petitioner was not given full and fair opportunity of hearing as directed by this Court in the earlier round of litigation, and that it completely ignored the fact that the Respondent No.3 was junior to the Petitioner in service and the Respondent No.2 decided the matter with respect to ad-hoc service, which was not the issue before him, rather the issue was that whether who amongst the Petitioner and Respondent No.3 should be regularized first.

12. Learned counsel for the Petitioner further argued that it is a settled principle of law that an officer who is otherwise eligible for promotion is entitled to be promoted from the date when the regular vacancy occurred, which legal proposition was totally ignored by the Respondent No.2 in deciding the matter of the Petitioner.

13. He further argued that the Respondent No.2 has attempted to justify regularization of the Respondent No.3, with effect from the date of his induction in service for the reason that he was appointed on regular basis but he failed to take cognizance of the fact that the Respondent No.3 did not have the requisite qualification (M.B.A) to hold the post. He submitted that the Petitioner was eligible for regular promotion from the date when the regular post occurred in the year 2003. Additionally, it was also alleged that the decision of the Respondent No.2 is arbitrary, contrary to the Rules and Regulations of KPT and that it has adversely affected the case of the Petitioner, who is senior to the Respondent No.3 and the Petitioner had first right of regularization in service and hence, he ought to have been considered for promotion ahead of the Respondent No.3.

14. The learned counsel further argued that the Petitioner was ignored for promotion in 2003 when vacancy occurred but the Respondent No.3 was promoted whereas the Petitioner was allowed officiating acting charge of the post of Assistant Traffic Manager [BPS 18] w.e.f 22.6.2004. Ultimately, the Petitioner was given promotion on 12.8.2008 in BPS 18 rather than in 2003 or 2004. This action was discriminatory and in violation of the fundamental rights of the Petitioner.

15. The learned counsel for Petitioner has referred to the order dated 27.5.2013, passed by this Court in C.P No.1126/2011 and argued that in that case the Respondents were regularized in service with retrospective effect from the date of induction in service. Learned counsel for the Petitioner has also made statement that no prejudice will be caused to any other employee of KPT if decision on this petition is given in favour of the Petitioner.

16. The learned counsel for the Petitioner lastly argued that Petitioner's regularization should have been counted from 28.3.1990 and he should have been promoted in either 2003 or 2004.

17. The learned counsel for the Petitioner has relied upon the case of Government of N.W.F.P and others vs. Buner Khan and others (1985 SCMR 1158) and Khalid Mehmood vs. Chief Secretary, Government of Punjab and others (2013 PLC CS 786).

18. On the other hand, learned counsel appearing on behalf of the Respondent No.2 has firstly opposed the instant Petition on the ground of maintainability. The learned counsel has further argued that the Respondent No.2 has complied with the direction of this Court in C.P

No.D-2442/2013 in letter and spirit and decided the matter of the Petitioner through a speaking order after giving the Petitioner opportunity of hearing. However, the Respondent No.2 found the Petitioner to be ineligible for the claim of seniority in BPS-17 from 1989 and promotion to BPS-18. He further argued that retrospective effect cannot be given under the applicable Rules. He additionally argued that ad-hoc employees cannot claim seniority over regular employees and the seniority of the Petitioner will be counted from the date of his regularization and not otherwise.

19. The learned counsel further stated that the Petitioner was initially appointed on ad-hoc basis whereas, Mr. Asadullah Baloch and Respondent No.3 were appointed on regular basis. The Petitioner's services were regularized on 01.6.1991. He further contended that acting charge appointment does not confer any right for regular promotion as the Petitioner was promoted in BPS 18 on 12.8.2008 and as per law, there is no rule to antedate or to give retrospective promotion by counting the period of work done while holding an acting charge.

20. The learned counsel next contended that no discrimination has been meted out with the Petitioner and no fundamental right has been violated. He stated that the promotion can only be claimed from the date of regularization of the Petitioner and not from the date of his adhoc appointment. The learned counsel further argued that the Petition is hit by the doctrine of laches as such on this score also, this Petition is liable to be dismissed. Learned counsel for the Respondent No.2 relied upon the cases of Province of Sindh and others vs. Ghulam Fareed and others (2014 SCMR 1189), Dr. Riffat Kamal and others vs. Federation of

Pakistan and others (2015 SCMR 847), Wajahat Hussain, Assistant Director, Social Welfare and others vs. Province of Punjab and others (PLD 1991 Supreme Court 82) and Tahir Humayun and others vs. High Court of Balouchistan and others (PLD 2016 Quetta 56).

21. Learned counsel appearing on behalf of Respondent No.3 submitted that the Petition is not maintainable as it is hit by the principle of res-judicata. He further added that the Respondent No.3 was initially appointed on regular basis on 28.12.1989. Per counsel, on 14.10.2001, vacancies of two posts of Assistant Traffic Manager (BPS-18) were advertised, upon which 17 Departmental Candidates and 165 outsiders applied but in view of the poor performance in the test, the Competent Authority decided to fill up the said posts from the Departmental Candidates on general group. The Competent Authority by constituting a Sub-Committee, called 46 Departmental Candidates, who were interviewed and only 5 candidates were recommended for the said post, which did not include the Petitioner. Out of shortlisted candidates, beside the Respondent No.3, two other candidates were selected to be promoted as Assistant Traffic Manager (ATM) in BPS-18. Per learned counsel, the Respondent No.3 was promoted on account of his seniority as per law and in adherence to the applicable procedure. The learned counsel further contended that the Respondent No.3 was eligible for the post when he was inducted, as the competent authority had relaxed the recruitment rules at that juncture. The learned counsel produced a copy of letter dated 7.12.2012 along with a copy of MBA Degree dated 13.10.2012 of the Respondent No.3, issued by the Preston Institute of Management, Science and Technology. The learned counsel further



argued that the Petitioner cannot approach this Court while agitating the same issue repeatedly and cannot approbate and reprobate simultaneously. He lastly argued that the Petitioner has approached this Court with unclean hands as he does not qualify for the appointment and stated that the case of Petitioner falls within the ambit of doctrine of laches. He further stated that the case law relied upon by the Petitioner are distinguishable and finally prayed for the dismissal of the instant Constitutional Petition.

22. In support of his contentions, the learned counsel for the Respondent No.3 relied upon the cases of Muhammad Tariq Badar and another vs. National Bank of Pakistan and others (2013 SCMR 314), Government of N.W.F.P and others vs. Buner Khan and others (1985 SCMR 1158), Akhtar Khan Khattak vs. Province of Sindh and others (2013 PLC CS 440), Irfan Ali Bhatti. Chairman, Lahore Development Authority/Chief Minister, Punjab(2002 AC 153), Messrs. Haji Dossa Limited vs. Federation of Pakistan etc (2004 UC 310) and Allied Bank of Pakistan Limited etc vs. Rafique Ahmed Soomro (NLR 2004 Service 43).

23. Mr. Sh. Liaquat, learned Standing Counsel representing Respondent No.1 adopted the arguments of the learned counsel for the Respondent No.2.

24. The learned counsel for the Petitioner, in exercising his right of rebuttal submitted that the Respondent No.3 could not have been regularized, as the Petitioner was inducted in service prior to the appointment of the Respondent No.3 and hence, such act on the part of the Respondent No.2 stands discriminatory. He further argued that the

Petitioner has challenged the order of the Respondent No.2 dated 29.10.2014, hence this petition has been filed within time. The learned counsel further stated that when the clear vacancy for the post of Assistant Traffic Officer (BPS-18) occurred in the year 2003, the Petitioner was ignored for promotion in BPS-18 and in 2004, the Petitioner was given officiating charge of that post, when he should have been considered for regular promotion from the date when the said vacancy was available. He further stated that the Petitioner was not suffering from any disqualification as he met the requisite criteria for the post as prescribed under the Rules and Regulations framed by Karachi Port Trust. Before concluding his arguments the learned counsel for the Petitioner stated that he would confine his submissions to the extent of the promotion of the Petitioner only.

25. We have heard the arguments of learned counsel for the parties at length and with their assistance perused the entire material available on record and decisions relied upon by them.

26. To commence, we would address the question of the jurisdiction of this Court with regard to maintainability of the petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973.

27. Undoubtedly, Karachi Port Trust Officers Recruitment, Appointment, Seniority and Promotion Regulations-2011 are statutory rules of service and admittedly the same were framed by the Board of Directors of Karachi Port Trust with the prior approval of the Federal Government, pursuant to Section 22 of the Karachi Port Trust Act, 1886. In the given circumstances, we are fully fortified by the view enunciated

by the Hon'ble Supreme Court in para 50 of the judgment delivered in the case of Pakistan Defence Housing Authority vs. Lt. Col. Javed Ahmed (2013 SCMR 1707) "that an aggrieved person can invoke constitutional jurisdiction of this Court against a public authority". The same principle is also enunciated in the case of Muhammad Rafi and another vs. Federation of Pakistan and others (2016 SCMR 2146).

28. We have also considered Karachi Port Trust Officers Recruitment, Appointments, Seniority and Promotion Regulations-2011, which shows that the employees of the KPT are not Civil Servants (as defined in Section 2(I)(b) of the Civil Servants Act, 1973) as well as under Section 4 read with Section 2(a) of the Service Tribunals Act, 1973. Therefore, they cannot file service appeal before the Federal Service Tribunal and the only remedy available to them is under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973.

29. Accordingly, we are of the view that this Petition could be heard and decided on merits by this Court, while exercising its Constitutional jurisdiction.

30. Having decided on the maintainability of the instant Petition, questions, which agitate the controversy at hand could be reduced to the following:-

1. Whether the seniority of the Petitioner can be reckoned from the date of his induction in service on 28.11.1989 as an adhoc appointee or from the date of regular appointment i.e.01.06.1991?
2. Whether the promotion of the Petitioner as Assistant Traffic Manager (BPS-18) in the Traffic Department can be considered from the date of his regular promotion (16.08.2008) or from the date when the vacancy initially

occurred in the year 2003 or when he assumed the acting charge on 22.06.2004?

31. We have also gone through the Order of the Respondent No.2, who has decided the matter as per the directions of this Court and an excerpt of the same is reproduced here for the sake of convenience:

**“Regularization w.e.f the date of induction:** The officer was appointed as Trainee Officer on Adhoc basis in Traffic Department w.e.f 28.11.1989, his services regularized w.e.f 01.06.1991 vide BR No. 131 (Item-VI) dated 12.10.1995. Regularization of service from the date of induction (Adhoc basis) is not counted as regular service as per Digest of Service Laws.

**Promotion of the petitioner and his eligibility:** Posting letter dt. 22.06.2004 issued by Traffic Manager was a stop gap arrangement and there is no rule to consider promotion from retrospective effect, further the said order was issued without following the procedure prescribed in Section 23 and 24 of KPT Act and as per KPT Officers Recruitment/Appointment, Seniority and Promotion Regulations, 2011. “Acting charge appointment shall not confer any right for regular promotion to the post held on acting charge basis.”

32. Admittedly, the Petitioner was appointed as Trainee Officer on adhoc basis on 28.11.1989 and his services were regularized through Resolution No. 131 dated 12.10.1995, with effect from 1.6.1991. We are mindful of the fact that ad-hoc appointments are always made without adopting due process of law and these are virtually made as a stopgap arrangement where selection is made in deviation from the normal course. It is also an established principle that an ad-hoc employee does not carry any vested right to be regularized in service from the date of his induction.

33. Further, there is no ambiguity in our mind that the period of ad-hoc appointment cannot be counted towards service, the seniority in grade is to be taken effect from the date of regular appointment to a post and it cannot be conferred retrospectively. This reduces to the dictum

that an ad-hoc appointee would only be entitled to seniority from the date of his regularization and not from the date of initial appointment. Reference is made to the case of Nadir Shah, S.D.O Minor Canal Cell Irrigation Sub-Division, Dera Murad Jamali and 2 others vs. Secretary, Irrigation and Power Department Balouchistan, Quetta and 7 others (2003 PLC (C.S) 961).

34. We have also noted that the Petitioner on 16.08.2008 was promoted as Assistant Traffic Manager (BPS-18) in Traffic Department and that on 22.06.2004 the Petitioner was given the charge to look after other duties as well. No employee could claim fundamental or vested right with regard to promotion. This view finds support from the case of Secretary, Govt. of Punjab and other vs. Dr. Abida Iqbal and others [2009 PLC C.S. 431] and Government of Khyber Pakhtunkhawa and others vs. Hayat Hussain and others (2016 SCMR 1021).

35. The case law cited by the Petitioner are distinguishable from the facts of the present case.

36. Resultantly, an acting or looking after charge could neither be construed to be an appointment by promotion on regular basis for any purpose including seniority, nor did it confer any vested right for regular promotion from the date of such an appointment. Appointment on current charge basis is held to be purely temporary in nature and a stopgap arrangement, which remains operative for a short duration till regular appointment is made against the post. The Petitioner accordingly is neither entitled for retrospective seniority nor promotion. This view is cemented by the judgment delivered in the case of Province of Sindh and

others vs. Ghulam Farid and others (2014 SCMR 1189) and Secretary to Government of Punjab and others vs. Muhammad Khalid Usmani and others (2016 SCMR 2125).

37. So far as the contention of the Petitioner with respect to being eligible for promotion from the date when the vacancy initially occurred is concerned, this contention also in our considered view, cannot be accepted for the reason that in service jurisprudence a direct recruit can claim seniority only from the date of his regular appointment and not from the date when he was borne in the service. This principle has already been settled by the Honourable Apex Court through a plethora of judgments.

38. It is an established principle that in service cases there exists a two pronged criteria. One being eligibility for promotion and the other being fitness for promotion, while the former relates to the terms and conditions of service, the latter is a subjective evaluation made on the basis of objective criteria. No doubt in service matters, the promotion depends upon eligibility, fitness and availability of vacancy and no one including the Petitioner can claim promotion as matter of right. It is for the Competent Authority, who could make appointments, determine seniority, eligibility, fitness and promotion and other ancillary matters relating to the terms and conditions of the employees as prescribed under the Act and Rules framed there under.

39. The next contention of the Petitioner with respect to the eligibility of the Respondent No.3, we observe that no specific prayer has been made by the Petitioner in this regard. If the intent was to challenge the

very appointment of the Respondent No.3, which restricts us from giving any findings on this aspect of the case.

40. To conclude, we are of the considered view that seniority in service, cadre or post to which an official is promoted is to take effect from the date of regular promotion to that service, cadre or post and not from the date of any ad-hoc induction. Thus, the Petitioner's claim was rightly rejected by the Respondent No.2.

41. With regard to the promotion from the date of taking over of acting charge by the Petitioner, as discussed above the acting charge appointments cannot confer any right for regular promotion thus the Petitioner cannot claim promotion from the date when he assumed the acting charge (on 22.06.2004) or from the date when the vacancy occurred, as he was not entitled for the said post and that too with retrospective effect. Therefore, no case of interference in the impugned order is made out.

42. This Petition is accordingly dismissed alongwith all the listed applications.

**JUDGE**

**JUDGE**