

IN THE HIGH COURT OF SINDH, AT KARACHI

Present:

Mr. Justice Irfan Saadat Khan
Mr. Justice Adnan-ul-Karim Memon

C.P No.D-3954 of 2015

Syed Ishtiaque Ahmed Hashmi Petitioner

Versus

Federation of Pakistan and 02 others Respondents

Dates of hearing: 19.04.2018 & 02.05.2018

Mr. Muhammad Nishat Warsi, Advocate for the Petitioner.
Mr. Shaikh Liaquat Hussain, Assistant Attorney General a/w
Mr. Ateeq-ur-Rehman, Assistant Director (Law) &
Mr. Misbahuddin, Assistant Director (Staff & Est.) for the
Respondents.

J U D G M E N T

ADNAN-UL-KARIM MEMON -J. Through the instant petition,
the Petitioner has sought the following relief(s):-

- i) Call Comments from respondents.*
- ii) Direct the respondents to produce the Gradation List of HSG-11 up to the date of retirement of petitioner.*
- iii) Declare that the petitioner, being the senior most officer in HSG-11, entitled for promotion to BPS-16 and as he was retired, he is now entitled for proforma promotion;*
- iv) Direct the respondents to re-fix and re-assess the salary of petitioner according to the Gradation List in pursuance of judgment of the Federal Service Tribunal and make payment to the petitioner accordingly;*

v) Direct the respondents to re-assess and re-calculate his pensionary benefits in pursuance of the above re-assessment / re-fixing of salary and direct the respondents to make difference of payment to the petitioner;

2. Brief facts of the case as per averment of the parties are that Petitioner was initially appointed in the year 1970 as Clerk in BPS-7 in the Respondent-Department and was promoted as Supervisor Lower Selection Grade (LSG) in B-9 vide Memo No. Estt.10-1/94 dated 30.3.1995. Petitioner has submitted that the aforesaid posts of BPS-9 were upgraded into BPS-11 and the petitioner was promoted from LSG (BPS-9) to Higher Selection Grade (HSG) BPS-11 accordingly by express Post Circle with effect from 01.07.1994. The petitioner has submitted that after merger of Express Post (South) Karachi into Pakistan Post Office, the petitioner was ordered to be transferred and appointed on acting charge basis in BPS-16 vide letter issued by the Respondent-Department. Subsequently the post was reverted to BPS-9 vide letter dated 8.3.1999 and the petitioner was reverted from HSG BPS-11 to LSG BPS-9 without any show cause. Petitioner being aggrieved by and dissatisfied with the impugned reversion order dated 08.3.1999 challenged the same by filing Departmental Representation which was decided against the petitioner on 24.05.2000. Petitioner being aggrieved by and dissatisfied with the decision of departmental authority impugned the same before the learned the Federal Service Tribunal (FST) in Appeal No. 203(K) CS/2000 which was allowed vide judgment dated 31.8.2010 and respondents being aggrieved by and dissatisfied with the aforesaid Judgment filed

Civil Petition for Leave to Appeal (CPLA) bearing No.663 of 2011 before the Honorable Supreme Court of Pakistan, which was subsequently dismissed vide order dated 22.11.2011. Petitioner has submitted that after dismissal of CPLA No.663 of 2011, he requested the Respondent-department for implementation of the order/judgment of the learned FST and in response, the Deputy Postmaster General (Admn) had issued two letters dated 26.03.2012 and 12.11.2013 and his seniority was ordered to be fixed in HSG- cadre with effect from 1.7.1994, however it was made clear that the petitioner may be treated in HSG cadre till his retirement on 11.7.2004 but in subsequent letter dated 12.11.2013 the petitioner was ordered to be treated in HSG cadre in BS-11 which amounts to reversion from the post of BS-16 to BS-11. Petitioner has submitted that before his transfer and reversion the Petitioner was posted as Assistant Liaison Officer (ALO) Second Class Gazetted Officer in BPS-16 in officiating capacity vide letter dated 13.2.1999 but he was wrongly reverted and transferred vide letter dated 08.03.1999, therefore, he suffered monetary losses, as his salary was re-fixed and recovery was made from his salary in 2002. Petitioner has submitted that the purported adjustment was made in 2001 and recovery was made in 2002. According to petitioner, his basic salary was Rs.3, 780/- and after reduction, it came to Rs.3060/-. Petitioner has submitted that he was granted move over from HSG BPS-11 to BPS-12 w.e.f. 01.12.1995 and further move over from HSG BPS-12 to BPS-13 w.e.f. 01.12.1998. The Petitioner claims that he is entitled to the salaries of the move-over, pay scales which were not paid to him,

but after judgment of Hon'ble Supreme Court some adjustment had been made by the Respondent-Department. Petitioner has submitted that during the pendency of proceedings before the learned FST and Honorable Supreme Court he was compulsorily retired from service under Removal from Service (Special Powers) Ordinance, 2000 vide office order dated 30.7.2004. The petitioner being aggrieved by and dissatisfied with the impugned order dated 3.7.2004 and order dated 18.1.2005 passed by the competent authority on his Departmental Appeal, before the learned FST. Petitioner has submitted that his Service Appeal was heard and decided vide order dated 06.03.2007 by the learned FST Islamabad and dismissed the same being time barred, however petitioner did not impugn the same before the Appellate forum. Petitioner being aggrieved by and dissatisfied with the impugned actions of Respondent-Department has filed the instant Petition on 01.07.2015.

3. Upon notice, Respondent-Pakistan Post Office filed para-wise comments and denied the allegations.

4. Mr. Muhammad Nishat Warsi, learned counsel for the petitioner has contended that petitioner was holding the post of Assistant Liaison Officer (ALO) in BS-16 before his transfer to the original grade BPS-11; that the Respondent-Post Office wrongly reverted him to the post of BPS-11 instead of BPS-16; that as per the judgment passed by the learned Federal Service Tribunal, reversion of the petitioner from BPS-11 to BPS-09 was set aside and the same was maintained by the Hon'ble Supreme Court of

Pakistan; that petitioner was required to be restored to the position of Assistant Liaison Officer (Officiating) BPS-16 instead in BPS-11 or BPS-9; that the Petitioner was appointed from HSG (BPS-11) to 2nd Class Gazetted Officer BPS-16 w.e.f. the date of his joining as ALO in BPS-16 as per order dated 13.2.1999; that junior officers to the petitioner were promoted in BPS-16 earlier to him, therefore, he is entitled for similar treatment along with such benefits from the dates on which his juniors were promoted; that during pendency of the Service Appeal of the Petitioner, he stood retired on 11.2.2004, therefore, after filing of his appeal he is no more a Civil Servant; that the aforesaid impugned letter had been issued without considering the fact that other similarly placed Assistant Superintendents of Post Office, Speed UMS without observing departmental quota i.e. 40/60 but cadres are considered to be different as Petitioner was considered to be of General Line Cadre and, whereas, other Assistant Superintendents Post Office Special Line were considered to be from Special Line Cadre and the respondents were used to issue Gradation List after frequent intervals, but no Gradation/Seniority List has been issued in respect of HSG (General Line Cadre) since 1994 as the Petitioner was the only person in the General Line Cadre in such circle of Karachi and was allowed to officiate the post as Assistant Liaison Officer; that petitioner was entitled to be promoted in time, but not promoted; that according to the judgment of the learned Federal Service Tribunal, reversion of the Petitioner from BPS-11 to BPS-9 is set aside, meaning thereby he has been restored to the position of Assistant Liaison Officer (officiating) in BPS-16 and as no other

person was available in his general cadre, therefore, the Petitioner was entitled for promotion from HSG BPS-11 to 2nd Class Gazetted Officer BPS-16 w.e.f. 13.02.1999; that Petitioner is entitled for all consequential benefits i.e. promotion from HSG BPS-11 2nd Class Gazetted Officer BPS-16 and recovery of the deducted amount as made by the respondents in 2001 and 2002; that during pendency of the above referred Appeal bearing No.203(K)CS/2000, the Petitioner stood retired on 11.02.2004; that Petitioner is entitled for profarma promotion and financial benefits in respect of his past service in the light of the judgment passed by the learned Federal Service Tribunal and maintained by the Hon'ble Supreme Court of Pakistan, he is entitled to the relief as prayed. He lastly prayed for allowing the instant petition.

5. Shaikh Liaquat Hussain, Assistant Attorney General, has argued that the instant petition is not maintainable in law and contended that the petitioner while working as Clerk (BPS-7) was promoted as LSG Supervisor (Lower Selection Grade) (B-9) and his promotion to the post of LSG took effect on the basis of seniority-cum-fitness. Later vide Memo No. Estt.10-1/94 dated 30.3.1995 the posts of BPS-9 were upgraded to BPS-11. The competent authority of Express Post Circle mistakenly promoted all 11 LSG (BPS-9) officials of Express Post (South) Karachi into BPS-11 (HSG) with effect from 01.07.1994 instead of placing them on upgraded posts; that the petitioner who had been promoted to LSG (B-9) only a year ago was ordered to be promoted on acting charge basis as according to procedure, he was due to render at least 03 years'

prescribed length of service in LSG; that after merger of Express Post (South) Karachi into Pakistan Post Office the petitioner was ordered to be transferred and promoted on his turn and the petitioner was promoted into HSG Cadre (BPS-11) vide Memo dated 28.06.2002. Learned AAG further contended that the FST seriously erred in para-7 of the judgment, held that "*Admittedly the appellant was promoted from BPS-09 to BPS-11 on regular basis*", but the present petitioner has himself written in his Appeal filed before the learned FST that he was promoted w.e.f 01.07.1994 on acting charge basis because he was lacking required length of service. He also referred Rule 163 of Post Office Manual Volume-IV and argued that the conclusion of the learned FST was not correct, therefore, the Pakistan Post Office invoked the Appellate jurisdiction of Honorable Supreme Court, but due to some procedural hindrances, could not succeed in the CPLA in time; that the Honorable Supreme Court of Pakistan dismissed the Miscellaneous Application for condonation of delay and also dismissed the CPLA of Respondent-department on the point of limitation without going into the merits of the case. He further submitted that the petitioner was transferred and directed to join as officiating Assistant Liaison Officer (Officiating) BPS-16 vide memo dated 13.2.1999 and it is an admitted procedure that an official of lower scale, if capable, can be posted to a higher scale post in the interest of Government work, therefore, this arrangement was on temporary basis to pull the Government work smoothly, which does not confer any right for permanent absorption to the higher post; that the Petitioner worked as

Assistant Liaison Officer (Officiating) BPS-16 for less than a month when he was transferred to work as Assistant Senior Postmaster Clifton. He argued that it is incorrect that petitioner was reverted, in fact he was transferred to his substantive post of LSG on 08.03.1999; that no discrimination was meted out with the petitioner and he was promoted to HSG cadre on his turn in the year 2002; that no junior of the petitioner was allowed promotion to a higher post on officiating basis and the petitioner cannot claim it as his permanent absorption in the higher scale. The learned AAG submitted that the difference of move over and revision of basic pay is under process and arrears will be paid after due process. He further submitted that in compliance of the judgment of learned FST the petitioner was allowed move-over without discrimination. As far as his promotion is concerned, he was ordered to officiate as Assistant Liaison Officer BPS-16 for an intermediate period. He worked for less than a month when he was ordered to work on his substantive post of LSG. He did not appear in the competitive examination of Assistant Superintendent Post Offices (BPS-11) and official who qualify the said exam is called official of Special Line while the officials who are promoted as LSG and subsequently HSG (BPS-11) are called officials of General Line, so the petitioner was rightly considered as official of General Line. For next promotion of BPS-16 the officers of General Line and Special Line are considered on the basis of seniority-cum-fitness. The officials who were promoted in BPS-11 in the year 1994 were subsequently promoted to BPS-16 in the year 2007 while the petitioner had been compulsorily retired in the year 2004,

therefore, the question of his promotion for the post of BPS-16 did not arise; that the learned FST did not direct Pakistan Post to consider the case of petitioner for promotion to BPS-16. The demand of promotion by the petitioner, whose ouster from Postal department was owing to award of a major penalty, is not tenable. He further argued that Pakistan Post has already implemented the judgment of the learned FST Karachi by promoting the petitioner in HSG cadre (BPS-11) w.e.f. 01.07.1994 instead of 28.06.2002. However, his claim for promotion to BPS-16 cannot be entertained as the officials who were promoted to BPS-11 in 1994, were further promoted to BPS-16 in the year 2007, while the petitioner had already been compulsorily retired on 11.7.2004. He finally prayed for dismissal of the petition in hand.

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

7. The important aspect of the case is that the petitioner was aggrieved by the impugned order dated 24.5.2000 whereby his request for reversion of his transfer order from LSG (BS-9) to HSG (BS-11) was turned down. Petitioner filed Service Appeal No.203 (k) (CS)/2000 which was allowed vide judgment dated 31.8.2010. The relevant portion of the judgment is reproduced as under:-

7. Admittedly the appellant was promoted from BPS-9 to BPS-11 on regular basis. He worked on the same post for some years but was later on reverted to BPS-9 without any reason which is contrary to law and against the principles of natural justice. It is held in 2003 SCMR 1128 rel.1130 that "Authority having power to

make an order has also power to undo the same---Exception--- Order once having taken legal effect and created certain rights in favour of any individual cannot be withdrawn or rescinded to the detriment of those rights---General Clauses Act (X of 1897).S21". We also rely on PLD 1969 SC 407, 2001SCMR 1771; 2000 SCMR 2883; 1992 SCMR 1420; 1992 SCMR 2293; 1999 SCMR 2089; 1999 SCMR 2883; PLD 1992 SC 207 and PLD 1990 SC 629.

8. *For the above reasons, we allow the appeal, set aside the impugned order dated 24.05.2000 and direct the respondents to restore the appellant to his original position to H.S.G (BPS-11) with all pecuniary benefits. No order as to costs.*

9. *Parties be informed accordingly.*

The Respondent–Department impugned the judgment dated 31.8.2010 in the Hon'ble Supreme Court of Pakistan by filing CPLA No.663/2011 and the same was dismissed by the Honorable Supreme Court, being time barred vide order dated 22.11.2011 with the following observation:-

"The main petition is barred by 178 days. This application has been filed seeking condonation of delay. The sole ground for such condonation is the following:-

"3. That the nomination of the AOR was made on 24th December, 2010 and the Vakalatnama signed by the petitioner dated 14.04.2011 and after that it was sent to the AOR for filing the CPLA before the Supreme Court of Pakistan therefore the delay has been caused due to circumstances explained as above."

2. *The above does not constitute a ground for delay. The learned DAG kept asking for adjournment in this case. When, however, he was pressed to state if any sufficient cause is apparent from the above noted extract which would justify condonation of delay, he was unable to give any satisfactory respondents. He again, however, sought an adjournment. This request has been noted but in view of the above is declined.*

3. *In view of the foregoing, this application is dismissed because it does not disclose any ground recognized by law to condone the delay.*

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In view of the foregoing order, the petition being time barred is dismissed.”

8. From the perusal of above facts, it is clear that judgment dated 31.8.2010 passed by the learned Federal Service Tribunal Karachi Bench has attained finality and the Respondent-Department was directed to restore the petitioner to his original position to HSG (BPS-11) with all pecuniary benefits. As per parties, this issue has already been resolved once for all but the only grievance of the petitioner is that he ought to have been restored on the post in BPS-16 rather than in BPS-11. We have perused the aforesaid judgment of learned FST and we are of the considered view that this Court cannot re-open the case of the petitioner on the aforesaid issue as it has attained finality by the order of Honorable Supreme Court of Pakistan.

9. Record further reveals that the disciplinary proceedings were initiated against the petitioner during his service tenure on the charges of misconduct, inefficiency, abatement and connivance to corruption and in consequence a departmental enquiry was conducted and the petitioner was found guilty and was compulsorily retired from service under the Removal from Service (Special Powers) Ordinance, 2000 vide order dated 30.7.2004. The Petitioner's Service Appeal No.65 (K) CS/2005 was heard and

decided vide order dated 06.03.2007 by the learned Federal Service Tribunal Islamabad with the following observations:-

“2. Since the Appellant was compulsorily retired under the Removal from Service (Special Powers) Ordinance, 2000, he was required to file the departmental appeal within a period of fifteen (15) days, but he filed such appeal on 22.12.2004 with a delay of about five months. The appeal was, therefore, time-barred, as such; preadmission notice was issued to the Respondents. The Respondents filed their pre-admission comments wherein it has been stated that the appeal, being hopelessly time-barred, is liable to be dismissed in limine.

3. The Appellant has not filed any application for condonation of delay in filing the departmental appeal and his advocate has not been able to give any plausible reason for delay in filing the departmental appeal. Even-other-wise, as per recent authority of the Hon’ble Supreme Court reported in 2006 PLC (CS) 1261 (Chairman, Evacuee Trust Property Board and others vs. Khawaja Shahid Nazir), there is no provision in the Removal from Service (Special Powers) Ordinance, 2000 for condonation of the delay in departmental appeal. Relevant portion of such authority is reproduced as under:-

“(e) Removal from Service (Special Powers) Ordinance (XVII) of 2000)---S.3---Service Tribunals Act [LXX of 1973], S.4---Appeal---Condonation of delay---Scope---Departmental appeal filed by civil servant was barred by limitation but Service Tribunal allowed the appeal---Contention by civil servant was that delay in filing the departmental appeal was deemed to have been condoned by Service Tribunal---Validity---As there was no provision in Removal from Service (Special Powers) Ordinance 2000 for condonation of delay in filing departmental appeal/representation /review, therefore, contention of civil servant was without any force.”

4. Relying on the above authority, the appeal is dismissed in limine for being hopelessly time barred with no order to costs.

5. Copies of this order be sent to the parties under registered cover and to the relevant quarters as per Rule-21 of the Service Tribunals (Procedure) Rules, 1974.

10. The record does not reflect that the order dated 06.03.2007 passed by learned Federal Service Tribunal Islamabad was impugned before the Hon'ble Supreme Court of Pakistan. In the light of order 06.03.2007 passed by the learned FST, we have no option but to discard the assertion of the petitioner as agitated by him through the instant petition for the simple reason that compulsorily retirement under section 13 of the Civil Servants Act, 1973 is punishment, the same is also provided under Section 3 of Removal of Service (Special Powers) Ordinance 2000, which provides as under:-

“3. [Dismissal, removal and compulsory retirement, etc.] of certain persons in Government or corporation service, etc.- (1) Where, in the opinion of the competent authority, a person in Government or corporation service, is,---

(a) inefficient, or has ceased to be efficient for any reason; or [is guilty of being habitually absent from duty without prior approval of leave, or]

(b) guilty of misconduct; or

(c) corrupt, or may reasonably be considered as corrupt, because-

(i) he, or any of his dependents or any other person, through him or his behalf, is in possession of pecuniary sources or of property, for which he cannot reasonably account for, and which are disproportionate to his known sources of income; or

(ii) he has assumed a style of living beyond his known sources of income; or

(iii) he has a persistent reputation of being corrupt; or

(iv) he has entered into plea bargain under any law for the time being in force and has returned the assets or gains acquired through corruption or corrupt practices voluntarily; or]

(d) engaged, or is reasonably believed to be engaged, in subversive activities, and his retention in service is prejudicial to

national security or he is guilty of disclosure of official secrets to any unauthorized person; or

(e) found to have been appointed or promoted on extraneous grounds in violation of law and the relevant rules, the competent authority, after inquiry by the Committee constituted under section 5, may, notwithstanding anything contained in any law or the terms and conditions of service of such person, by order in writing dismiss or remove such person from service, compulsorily retire from service or reduce him to lower post or pay scale, or impose one or more minor penalties as prescribed in the Government Servants (Efficiency & Discipline) Rules, 1973, made under Section 25 of Civil Servants Act, 1973:

(2) Before passing an order under sub-section (1) the competent authority shall: (a) by order in writing, inform the accused of the action proposed to be taken with regards to him and the grounds of the action; and (b) give him a reasonable opportunity of showing cause against that action within seven days or within such extended period as the competent authority may determine.

Provided that no such opportunity shall be given where the competent authority is satisfied that in the interest of security of Pakistan or any part thereof it is not expedient to give such opportunity.

Provided further that no such opportunity shall be given where the accused is dismissed or removed from service or reduced in rank on the ground of conduct, which has led to a sentence of fine or of imprisonment or where the competent authority is satisfied for reasons to be recorded in writing that it is not reasonably practicable to give the accused an opportunity of showing cause.

The dismissal or removal or premature retirement from service or reduction to lower post or pay scale of a person under sub-section (1) shall not absolve such person from liability to any punishment to which he may be liable for an offence under any law committed by him while in service.”

11. In view of the forgoing discussion, we are of the considered view that once punishment is given to a Civil Servant under Section 3 of RSO-2000 (since repealed in 2010) and the same remains intact, no promotion can be awarded to him till the punishment is removed by the competent authority or by the order of the competent court of law. In the present case, petitioner was awarded major penalty of compulsorily retirement from service in 2004, no relief can be granted to the petitioner at this stage.

12. Reverting to the legal issue raised by the petitioner in the present proceedings that the petitioner was appointed in BPS-16 on the acting charge and he cannot be reverted to BPS-11 without assigning the reason. This assertion of the petitioner is misconceived on the premise that 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 by the Departmental Promotion Committee or Selection Board.

13. Upon perusal of the office order dated 13.2.1999 which explicitly shows that the petitioner was transferred and directed to join as officiating Assistant Liaison Officer (Officiating) BPS-16 and this arrangement was on temporary basis which does not confer

any right for permanent absorption to the higher post. As per record the Petitioner worked as Assistant Liaison Officer (Officiating) BPS-16 for less than a month when he was transferred to work as Assistant Senior Postmaster Clifton. This cannot be treated as reversion of the post; in fact the petitioner was transferred to his substantive post of LSG. The Petitioner's reversion in BPS-11 was maintained by the order passed by the learned FST as discussed supra. In the light of forgoing, Petitioner cannot claim restoration of the post which he was holding on acting charge basis in BPS-16 for temporary period of time. As per record the Petitioner was never promoted on acting charge basis in BPS-16, therefore, the question of restoration of the petitioner on the aforesaid post does not arise; consequently, the petitioner is not entitled for the financial benefits for the post held on acting charge basis, even after his compulsorily retirement from service in 2004. We in this regard are fortified by the judgment delivered in the case of Province of Sindh and [14] 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).

14. The Petitioner has not brought his case for implementation of the judgment passed by the learned FST, for which he has the legal remedy to file execution application before the learned FST, if at all he is aggrieved, that the decision of learned FST has not been implemented by the Respondent-Department, as this Court is not an executing Court of learned FST.

15. Petitioner has come before this Court that he being a senior officer in HSG (BS-11) is entitled for profarma promotion and financial benefits of the post. We are of the considered view that the petitioner stood compulsorily retired from service, no profarma promotion can now be given to him at this stage. Law provides that a retired Civil Servant cannot be granted promotion from back date as per dicta laid down by the Hon'ble Supreme Court in the case Government of Pakistan and other Vs. Hameed Akhtar Niazi and other (PLD 2003 SC 110). We are of the considered view that the case of petitioner cannot be reopened and considered for the relief claimed through the instant petition under Article 199 of the Constitution of the Islamic Republic of Pakistan 1973.

16. In view of the above facts and circumstance of the case, the instant Constitution Petition is not maintainable in law as well as on merit, hence is dismissed along with the listed application(s).

Karachi
Dated: 07.05.2018

JUDGE

JUDGE

Nadir P/A