

IN THE HIGH COURT OF SINDH, ATKARACHI

Present:

Mr. Justice Syed Hassan Azhar Rizvi
Mr. Justice Adnan-ul-Karim Memon

C.P. No. D-8306 of 2017

Petitioner Mushtaq Ahmed Shaikh through
Mr. Abdul Salam Memon, Advocate.

Respondents No.1 to 3 Through Shaikh Liaquat Hussain
Assistant Attorney General a/w Mumtaz-
ul-Hassan, Deputy Director Law, FIA

C.P. No. D-8254 of 2017

Petitioner Badaruddin Baloch
Through Mr. Abdul Salam Memon,
Advocate.

Respondents No.1 to 3 Through Shaikh Liaquat Hussain
Assistant Attorney General.

Date of hearing 22.12.2017

J U D G M E N T

ADNAN-UL-KARIM MEMON, J:- The Petitioners, through the
captioned Constitutional Petitions seek the following reliefs:-

- a) *An appropriate writ may kindly be issued and impugned O.M. dated 30.12.2015 to the extent of its application against the petitioner with retrospective effect may graciously be declared illegal, unlawful, without lawful authority and consequently of no legal effect on the rights of exemption from mandatory training of Mid-Career*

Management Course (MCMC) already accrued in favour of the petitioner or alternatively respondents may be directed that since in the case of petitioner application of policy of MCMC is impracticable and undoable, therefore cannot be applied, hence petitioner be exempted from MCMC, so that Petitioner be considered for promotion in the upcoming Meeting of Selection Board.

- b) *That the respondents/Ministry of Interior may graciously be directed to consider the promotion case of the petitioner and others against the vacant posts of Addl. Director FIA (BS-19) which already accrued prior to promulgation and taking effect of O.M No. F.10/01/2012 C.P-II, dated 30.12.2015 as the nine (12) posts of Addl. Directors FIA (BS-19) were already vacant and working paper were already prepared and sent to the Ministry of Interior for consideration in the meeting of Departmental Selection Board (DSB) which were scheduled to be held on 11.04.2016 and 14.07.2016 but were cancelled postponed illegally, arbitrarily, capriciously, without lawful justification.*
- c) *That the Respondents may graciously be directed to consider the petitioners for promotion to the next grade/scale without MCMC in pursuance to the O.M. No. 01.07.2006- C.P-II, dated 31.05.2008 as well as in view of the promotion policy in vogue when the post of Addl. Director FIA (BS-19) were vacant.*

2. Brief facts of the case are that the Petitioners are serving as Deputy Director (BS-18) in Federal Investigation Agency (FIA)/Respondent No. 02. Petitioners have averred that as a part of promotion policy they were exempted from Mid-Career Management Course (MCMC) under Office Memorandum dated 31.05.2008 by virtue of their age that is, 59 years and their case for promotion to the post of Additional Director (BS-19) was

processed and sent to the Ministry of Interior, Islamabad. Petitioners next contended that in the meanwhile the Cabinet Secretariat, Establishment Division vide Office Memorandum dated 15.05.2015 circulated the decision of the Government of Pakistan to withdraw age based exemption from mandatory training for promotion; however, such withdrawal was effective from 31.07.2016. Petitioners have further averred that they are eligible and qualified to be considered for promotion as Additional Director FIA in BPS-19, but due to reaching age of superannuation in the month of March and June, 2018 respectively, their case is not being processed for further consideration on account of hitch created by the Respondents by withdrawing the age based exemption from mandatory training for promotion in next rank, which is illegal and does not apply to the case of the Petitioners. Petitioners being aggrieved by and dissatisfied with inaction of Respondents have approached this Court 06.12.2017.

3. Para-wise comments on behalf of the Respondents No.1 to 3 have been filed.

4. Mr. Abdul Salam Memon, learned counsel for the Petitioners has contended that the case of the Petitioners needs to be considered for promotion by granting waiver/exemption from mandatory MCMC as their cases had been sent for promotion prior to cutoff date i.e. 31.07.2016 provided in Office Memorandum dated 15.05.2015. He next contended that the Respondent/

Establishment Division vide Office Memorandum dated 31.05.2008 exempted the officials of BS-18 from mandatory course MCMC, who are 50 years old and above and Petitioner's case falls within the ambit of said Office Memorandum. He next added that after change in policy for MCMC on 30.12.2015, the Petitioners made correspondence with Respondents that since they are reaching age of superannuation in the month of March and June 2018 respectively thus, cannot undertake the mandatory course MCMC, therefore, waiver/exemption from such course may be granted; that applications of the Petitioners were processed with strong recommendations by the parent department but, Respondent/Establishment Division declined request of the Petitioners vide letter dated 22.8.2017. He has further contended that if policy of undergoing MCMC in the case of the Petitioners is allowed to subset the same will be highly unreasonable, illegal, discriminatory and unjustified; that Petitioners again and again approached the Respondents and dispatched applications and appeals for promotion as mentioned herein above but, their request was ignored every time by the Respondents for the lame excuses made by them; that the Petitioners are required to be dealt with in accordance with law and not on the basis of whims of the executive authorities/ Respondents. He has further contended that the action of Respondents is in blatant violation of the mandate of the fundamental rights of the Petitioners enshrined in the Constitution; Learned counsel in support of his contention has placed reliance on the case of Khalid Mehmood v. Chief Secretary, Government of Punjab (**2013 SCMR 544**) and argued that the

Respondents had delayed matter of consideration for promotion of the Petitioners without any justifiable reason for which Petitioners could not be made to suffer as “Working Paper” for promotion of the Petitioners and others was already prepared and sent to Ministry of Interior for placing before the Departmental Selection Board (DSB); that the amendment of rules with retrospective effect is also in violation of law laid down by the Superior Courts. In support of contention he placed reliance in the cases of Raja Shaukat Mehmood v. Azad Jammu and Kashmir Government, **(2003 PLC (CS) 424)**, Muhammad Tariq Sher Khan v. The Secretary, Establishment Division Islamabad, **(2004 PLC (CS) 1453)** and Sohail Khan v. Secretary, Establishment Division, Islamabad **(2004 PLC (CS) 146)** and argued that a legal right had accrued in favour of Petitioners due to reaching age of superannuation which could not be taken away. He has further contended that withholding of promotion is a penalty under the rules, which cannot be resorted to without recourse to the proceedings under the relevant rules; that unfortunately Petitioners’ have been rendered ineligible by issuing an illegal impugned Office Memorandum dated 30.12.2015. He lastly prayed for allowing the instant Petitions.

5. On the other hand, Shaikh Liaquat Hussain, learned Assistant Attorney General, while agitating the issue of maintainability of the instant Petitions has contended that the Competent Authority in order to ensure merit based promotion,

withdrew all kinds of exemptions on the basis of age w.e.f. 31.07.2016, vide Establishment Division's Office Memorandum dated 30.12.2015 and date of implementation was kept as 31.07.2016; that the rationale behind giving grace period of six (6) months was to give opportunity to those civil servants, who had not undergone mandatory training prior to issuance of Office Memorandum dated 30.12.2015. Learned Assistant Attorney General in support of his contention has referred to Section 25(2) of Civil Servants Act, 1973 and argued that the President of Pakistan in this behalf may make such rules as appear to him to be necessary or expedient for carrying out the purposes of the Act, 1973 which is reproduced as under:-

“25. Rules:-

(1) The President or any person authorized by the President in this behalf may make such rules as appear to him to be necessary or expedient for carrying out the purposes of this Act.

2) Any rules, orders or instructions in respect of any terms and conditions of service of civil servants duly made or issued by an authority competent to make them and in force immediately before the commencement of this Act shall in so far as such rules, orders or instructions are not inconsistent with the provisions of this Act be deemed to be rules made under this Act.”

He has further contended that the meeting of Departmental Selection Board (DSB) for consideration of promotion cases of Deputy Directors FIA (BS-18) to the post of Additional Directors (BS-19) was to be held on 14.07.2016, which could not be convened till finalization of Objective Assessment form; that there are 12 sanctioned posts of Additional Directors Investigation (BS-19) out of which 11 seats are vacant presently; that

Petitioner/Mushtaque Ahmed' scase has already been approved for undergoing 25th MCMC to be held at NIMS Karachi from 01.01.2018 to 16.04.2018 who shall be considered for promotion on seniority-cum-fitness on successful completion of the said course; that the Petitioner/Mushtaque Ahmed has sufficient time to complete the said course and he will retire from service on 09th June 2018 on attaining the age of superannuation. So far as the case of Badaruddin Baloch is concerned he argued that he cannot be nominated for MCMC as the next course shall be conducted from 01.01.2018 to 16.04.2018 whereas he will retire from service on 30th March 2018 on attaining the age of superannuation. He lastly prayed for dismissal of the instant petitions.

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

7. As per promotion policy, the Mid Career Management Course (MCMC) is mandatory for promotion to higher rank that is, BS-18 to BS-19. The Petitioner/Badaruddin Baloch has to meet the criteria as laid down in the Office Memorandum dated 01.11.2017 for undergoing 25th MCMC to be held at NIMS, Karachi from 01.01.2018 to 6.04.2018 but before completion of MCMC he will retire from service on 30th March 2018 on attaining the age of superannuation. Petitioner/Mushtaque Ahmed's case is quite distinguishable from the case of Petitioner/Badaruddin Baloch who has already been nominated for undergoing 25th MCMC and has sufficient time to complete MCMC as his date of retirement is 9th June, 2018.

We have noticed that as per Office Memorandum dated 31.5.2008, MCMC is not mandatory for those officers who are 50 years and above in age. However, said exemption has been withdrawn vide Office Memorandum dated 30.12.2015 to be effective from 31st July 2016, which clearly spell out that the exemption already extended to professional and technical cadres will continue as the professional/technocrats undertake their specialized training separately. We have also noticed that the Respondents issued Office Memorandum dated 09.02.2016, whereby cases of both the Petitioners were sent for their promotion much prior to the cutoff date i.e. 31st July 2016; but, on account of non-holding of Departmental Selection Board their cases could not be processed and for which the Petitioners cannot be held responsible.

8. We are cognizant of the fact that Petitioners agitated their claim in the instant Petitions and also raised voice of concern that they are going to retire within a span of few months i.e. on 09th June and 30th March, 2018 respectively. Thus, unable to undergo the said MCMC due to reaching the age of superannuation.

9. *Prima-facie* the assertion of the Petitioners is reasonable. Record reflects that Petitioners working paper for promotion from BS-18 to BS-19 has already been sent to be placed before the Departmental Selection Board prior to the cutoff date as provided in Office

Memorandum dated 30.12.2015, which is scheduled to be held in ensuing month.

10. In the light of above facts and circumstances of the case, the Respondents are directed to consider the case of Petitioners for promotion as Additional Director (BS-19) in next Departmental Selection Board's meeting in accordance with promotion policy and law.

11. The instant Petitions are disposed of in the above terms along with listed applications.

JUDGE

JUDGE

Shafi Muhammad P.A.