

IN THE HIGH COURT OF SINDH, KARACHI

Constitutional Petition No.D-8265 of 2017

Present:

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

Majid Akhtar

Petitioner, through:

Mr. Ali Asadullah Bullo, Advocate

Province of Sindh & others,
Respondents No.1 to 3 through:

Mr. Abdul Jalil Zubedi,
Assistant Advocate General

Ali Bux Shaikh
Respondent No.4:

M/s Malik Naeem Iqbal and Faizan
Hussain Memon, Advocates

Date of hearing:

21.12.2017

JUDGMENT

Adnan-ul-Karim Memon, J.: Through the instant petition, the Petitioner has sought the following relief(s): -

- i. *Declare the impugned notification dated 01.3.2017 issued by Respondent No.2 illegal, against the Sindh Civil Servants (Probation, Confirmation & Seniority) Rules, 1975, judgment of learned Sindh Service Tribunal and Hon'ble Supreme Court of Pakistan, and set aside the same.*
- ii. *Direct the Respondent No.1, 2 & 3 to remove the name of Respondent No.4 from the final seniority list of Deputy Superintendents of Prison BPS-17 and place his name in the seniority list of Assistant Superintendent Prisons BPS-16.*
- iii. *Direct the Respondent No.1 & 2 to act strictly in accordance with the law and drop the name of the Respondent No.4 from considering his case for promotion against the post of Superintendent of Jail BS-18 from the disputed meeting of departmental promotion committee.*

2. Brief facts of the case are that Petitioner is serving as Deputy Superintendent of Prison (BS-17) on regular basis. Petitioner asserts that the Respondent No.4 (Ali Bux Sheikh) was appointed as Assistant Jail Superintendent in BS-11 on adhoc basis on 09.6.1990, subject to conditions mentioned in the appointment letter, which include approval by the Departmental Selection Committee. The Petitioner further contends that services

of the Respondent No. 04 were regularized by the Respondent No. 02/ the home Department vide their order dated 29.10.2008 retrospectively w.e.f. 09.6.1990 on the basis of opinion rendered by the Services & General Administration Department vide their letter dated 25.7.2006. He continued that upon issuance of the Impugned Order dated 29.10.2008 issued by the Respondent No.2, some of the colleagues of the Respondent No.4 filed Departmental Appeals before the Respondent No. 2 against the Impugned Order, who dismissed the same vide letter dated 07.12.2009.

3. Petitioner further added that after confirmation by the Respondent No.2 with regard to illegal protection of back dated regularization to the Respondent No.4 he was further blessed with another promotion against the post of Deputy Superintendent of Prison (BPS-17) vide Notification dated 31.12.2009 issued by the Respondent No.2. The aggrieved Petitioner further asserted that against impugned action of Respondent No.2 an Appeal was filed by the colleagues of the Respondent No.4 bearing Service Appeal No. 375 of 2015 before the Sindh Service Tribunal, which was allowed by the Sindh Service Tribunal vide Judgment dated 30.10.2015; thus, the Order dated 29.10.2008 issued by the Respondent No.2, whereby retrospective regularization w.e.f. 09.6.2009 was allowed to the Respondent No.4, was set aside, and his seniority and regularization were ordered to take effect from 15.7.2008. Petitioner further averred that the Respondent No.4 preferred Appeal before the Honorable Supreme Court vide CPLA No.598-K of 2015 against Judgment of Learned Sindh Service Tribunal, which was dismissed vide Order dated 22.12.2015, thus, the Judgment of the Sindh Service Tribunal was maintained and the Respondent No.4 was reverted to the post of Assistant Jail Superintendent (BS-16) vide Notification dated 15.6.2016 issued by the Respondent No.2.

4. The Petitioner has averred that thereafter the Respondent No.2 vide their Notification dated 1st March, 2017 withdrew Notification dated 15.6.2016, whereby retrospective regularization of the Respondent No.4 was withdrawn and

his promotion as Deputy Superintendent Prison (BS 17) cancelled in compliance with Judgment dated 30.10.2015 passed by the learned Sindh Service Tribunal upheld by the Honorable Supreme Court. Thus, the Respondent No.2 restored retrospective regularization of the Respondent No.4 and his promotion as Deputy Superintendent of Prison (BS.17); thus, disobeyed the orders of the learned Sindh Service Tribunal. The Notification No. HD/SO/ (PRS)/11-60/2005 dated 1st March, 2017 is reproduced below:

NOTIFICATION

NO.HD/SO/(PRS-I)/II-60/2005: In pursuance of approval of the appellate authority i.e. (Chief Secretary, Sindh), vide U.O. Letter No.SOIII (S&GAD) 13-4/2017 dated 20.02.2017, this department's Notification No.HD/SO/(PRS-1)/11-60/2005, dated: 15.06.2016, is hereby cancelled and regular promotion as Deputy Superintendent (BS-17) of Mr. Ali Bux Shaikh, is hereby restored with all consequential benefits.

This department's Notification of even number dated: 25.01.2017, regarding enquiry into case FIR No.GO-10/2016 of ACE, Shikarpur, is hereby withdrawn/cancelled and service of Mr. Ali Bux Shaikh (under suspension) is hereby reinstated in Government service with immediate effect.

The Notification No.SO/(PRS-I)/11-60/2005 dated 15.6.2016 issued in compliance with judgment dated 30.10.2015, upheld by the Supreme Court, which was cancelled vide above cited notification is also reproduced below:

NOTIFICATION

No.SO/(PRS-I)/11-60/2005: Reference letter from Inspector General Prisons Sindh No.EB-1/9647 dated 18.05.2016 and Judgment passed by Sindh Service Tribunal in Appeal No.375/2015 dated 30.10.2015 filed by Mr. Muhammad Aslam Malik, Deputy Superintendent Prison against Mr. Ali Bux Shaikh, Deputy Superintendent Prison (BS-17), and the Order upheld by the Honorable Supreme Court of Pakistan in CPLA 598-K/2015, dated 22.12.2015 whereby the appeal of Mr. Ali Bux Shaikh has been dismissed. Since the judgment of Sindh Service Tribunal held the retrospective regularization of Mr. Ali Bux Shaikh, dated 09.06.1990 as violative of Section 5 of Sindh Civil Servants Act-1973 read with Rule 10 of Sindh Civil Servant (Probation / Confirmation & Seniority) Rules 1975 and regularization by Departmental Promotion and Selection Committee w.e.f. 15.07.2008 as Assistant Superintendent Prison (BS-16) has been allowed, therefore, after the approval Competent Authority i.e. Minister for Home & Prisons Sindh, the promotion of Mr. Ali Bux Shaikh vide Notification No.SO (PRS-I)11-28/09 (Pt-IV) dated 31.12.2009 is hereby cancelled. The date of regularization shall be treated from 15.07.2008; the seniority list will be corrected accordingly."

5. The Petitioner next contended that not only this, but name of the Respondent No.4 in the seniority list issued in 2017 was placed over and above the Deputy Superintendents senior to him/the Respondent No.4 on the basis of which the Respondent No.2 held meeting of the Departmental Promotion Committee on 27.11.2017 and recommended promotion of the Respondent No.4 as Superintendent Prison (BS-18). The Petitioner has averred that Notification regarding retirement of the Respondent No.4 on 31.12.2017 on attaining superannuation was also issued on 27.10.2017 and his promotion to BS-18 was considered thereafter despite of the fact that when the Respondent No.3/ Inspector General Prison sent an objection letter dated 29.11.2017 to the Respondent No.2 with regard to holding of unlawful meeting of Departmental Promotion Committee without his participation as a head of the Prison Department, who is member of the Departmental Promotion Committee also.

6. Upon notice to the Respondents, the Respondent No. 4 filed counter affidavit/comments.

7. Mr. Ali Asadullah Bullo, learned counsel for the Petitioner argued that Respondent No.2 in connivance with the Respondent No.1 did not allow the Respondent No.3 to participate in Departmental Promotion Committee meeting held on 27.11.2017 as they knew that the facts and law were against the Respondent No.4, who was striving for illegal promotion in disregard of the Judgment of Service Tribunal and upheld by the Hon'ble Supreme Court and in violation of section of Sindh Civil Servants Act, 1973 read with rule 10 of Sindh Civil Servants (Probation, Confirmation & Seniority) Rules, 1975 and that his retirement on 31.12.2017 on attaining the age of superannuation was notified on 27.10.2017. He concluded that the Notification dated 1st March, 2017, whereby the Notification dated 15.6.2016 issued in compliance with Judgment of the learned Sindh Service Tribunal upheld by the Hon'ble Supreme Court was cancelled and subsequent actions of the Respondents No.1 and 2 are nullity in

law and of no legal effect. Having explained legal aspects of the case, the Counsel for the Petitioner prayed that the petition may be allowed as prayed.

8. Malik Naeem Iqbal learned counsel for Respondent No.4 has referred to Counter Affidavit filed by the Respondent No.4 and argued that the captioned petition is not maintainable in view of the bar contained under Article 212 of the Constitution. He next contended that the Petitioner has concealed the material facts from this Court inasmuch as the name of Petitioner was also included in the Departmental Promotion Committee under challenge, yet he was not promoted on account of pendency of disciplinary proceedings against him; that Petitioner has also concealed Notification dated 12.4.2016 and final seniority list dated 15.4.2016 whereby the seniority position of the Respondent No.4 was relegated below the Petitioner in pursuance of the Judgment dated 30.10.2015 passed by the learned Sindh Service Tribunal at Karachi; that the Petitioner has in substance challenged his deferment by the Departmental Promotion Committee by concealing material facts from this Court and relying upon certain documents which are no more in field as such he has approached this Court with unclean hands and not entitled for any relief. Learned counsel for the Petitioner on instructions argued that the captioned petition is classic example of abuse of process of Court by a civil servant and no relief could be extended owing to conduct of the Petitioner. Learned counsel denied the allegations leveled by the Petitioner against the Respondent No.4 in verbatim. Learned counsel for the Respondent No.4 has relied upon the order dated 19.1.2017 passed by the learned Sindh Service Tribunal at Karachi and argued that the Respondent No.4 was allowed with directions to the Respondent No.1 to decide the Departmental Appeal of the Respondent No.4 within a period of 30 days. He next added that in pursuance of the directions of the learned Sindh Service Tribunal, the Departmental Appeal of Respondent No.4 was decided and his promotion was restored and suspension was withdrawn. He next added that Notification dated 01.3.2017 by no stretch of imagination, restored retrospective regularization of

Respondent No.4 nor he was placed in the seniority list above any officer appointed prior to 15.7.2008. He further added that no any illegality has been committed by the Respondent No.2 by issuing the Notification dated 01.3.2017. Learned counsel during the course of arguments, referred to minutes of the meeting of Departmental Promotion Committee held on 27.11.2017 and argued that pursuant to the short order dated 29.9.2017 passed by the Circuit Court Hyderabad in C.P. No.D-3093 of 2017, whereby Petitioner and Respondent No.4 were considered for promotion to the rank of Superintendent Prison (BPS-18) whereby Respondent No.4 was cleared for promotion whereas the Petitioner was deferred due to the pendency of disciplinary proceedings against him. In support of his contentions he relied upon the case of Muhammad Yasin Saqib Vs. Chairman, Pakistan Telecommunication Corporation Islamabad and others (2003 PLC CS 1105).

9. Mr. Abdul Jalil Zubaidi learned AAG has supported the stance taken by the learned Counsel for the Respondent No.4

10. 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.

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

12. We have noted that the impugned Notification bearing No. HD/SO/ (PRS)/11-60/2005, dated 1st March, 2017 issued by the Respondent No.2 is in direct conflict with decision dated 30.10.2015 rendered by the learned Sindh Service Tribunal, whereby retrospective regularization of Respondent No.4 was set aside and consequently his promotion as Deputy Superintendent, Prison was annulled. In pursuance of said Judgment of learned Sindh Service Tribunal, Respondent No.2 cancelled the promotion of Respondent No. 4 vide Notification

dated 15.6.2016 and gave effect of regularization of service of Respondent No.4 with effect from 15.7.2008 and not from the date of his initial ad-hoc appointment. The Respondent No.2 in disregard of the Judgment of learned Sindh Service Tribunal circumvented the law by issuing Impugned Notification dated 01.3.2017.

13. In view of such circumstances this Court is left with no option but to take cognizance of the matter on the issue involved in the matter. Accordingly, we have formed the view that this Petition could be heard and decided on merits by this Court in its Constitutional jurisdiction. Therefore the aforesaid objection is overruled.

14. The questions which agitate the controversy at hand could be reduced to the following:-

i. Whether the date of regularization of Respondent No.4 is to be treated with effect from 15.7.2008 which is in line with the judgment dated 30.10.2015 rendered by the learned Sindh Service Tribunal at Karachi and upheld by the Honorable apex Court vide order dated 22.12.2015?

ii. Whether the Respondent No.2 is competent to cancel the Notification dated 15.6.2016 issued in compliance of the judgment dated 30.10.2015 passed by the learned Sindh Service Tribunal at Karachi and allowed the Respondent No.4 to be regularized with effect from the date of his ad-hock appointment i.e. 09.6.1990?

iii. Whether the Respondents No.1 and 2 have violated the terms of judgment dated 30.10.2015 passed by the learned Sindh Service Tribunal at Karachi by restoring the promotion of the Respondent No.4 as Deputy Superintendent (BS-17) and retrospective regularization?

iv. Whether the promotion case of the Respondent No.4 to the rank of Superintendent Prison (BPS-18) could be processed in the light of findings recorded by the learned Sindh Service Tribunal at Karachi?

15. To address the first proposition, admittedly the Petitioner was appointed on 09.06.1990 as Assistant Superintendent Jail in BS-11 on ad-hoc basis subject

to the approval of Departmental Selection Committee and his services were regularized on 29.10.2008 retrospectively with effect from 09.6.1990 on the basis of opinion rendered by the Services, General Administration and Co-ordination Department, Government of Sindh vide Letter dated 25.7.2006.

16. We are mindful of the fact that every appointment BS-3 to 15 is to be made through Departmental Selection Committee as provided under Rule 11 of the Sindh Civil Servants (Appointment, Promotion and Transfer) Rules 1974 after assessment of suitability. Learned AAG has failed to place on record the approval of concerned DSC as discussed (supra). It is well settled law that ad-hoc appointments are stop gap arrangements which are always made without adopting due process of law. It is an established principle that an ad-hoc employee does not carry any vested right of regularization in service from the date of his induction. 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 take effect from the date of regular appointment to a post and cannot be conferred retrospectively. The discussion 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 Baluchistan, Quetta and 7 others (2003 PLC (C.S) 961).

17. We are cognizant of the fact that the learned Sindh Service Tribunal vide Judgment dated 30.10.2015 has decided the issue involved in this Petition. An excerpt of the same is reproduced as follows:

“It is accordingly held that the retrospective regularization of both the private respondents is in violation of section 5 of Sindh Civil Servants Act, 1973 read with rule 10 of the Sindh Civil Servants (Probation, Confirmation and Seniority) Rules, 1975 and therefore respective orders of retrospective regularization dated 29.10.2008 (in respect of respondent No.3) and dated 17.5.2010 (in respect of respondent No.4) are hereby set-aside and having

been regularized by the Departmental Selection Committee with effect from 15.7.2008 and 20.12.1995 respectively, both the private respondents No.3 and 4 are entitled to the benefit of seniority as Assistant Superintendent of Jail with effect from the said dates and respondent No.2 is directed to make the corrections in the seniority position of the appellant as well as the private respondents, according to their regular appointments as Assistant Superintendents of Jail.

The appeal is allowed in the above terms.”

18. The said Judgment is upheld by the Honorable Supreme Court vide order dated 22.12.2015. Therefore, the first proposition is answered in affirmative.

19. To answer the second proposition, we are of the considered view that the Respondent No.1 and 2 are not competent to sit in Appeal against the findings recorded by the learned Sindh Service Tribunal as discussed supra.

20. With regard to third issue of issuance of impugned Notification dated 01.3.2017, we have noticed that pursuant to retrospective regularization of service of Respondent No.4 vide Notification dated 29.10.2008, he was promoted to the post of Deputy Superintendent of Jail (BS-16) vide Notification dated 31.12.2009. The said retrospective regularization of service of Respondent No.4 was declared nullity by the learned Sindh Service Tribunal vide Judgment dated 30.10.2015 as discussed supra. We are of the considered view that no sanctity can be attached by issuance of a Notification, which is unlawful.

21. The Respondent No. 1 and 2 took pains to accommodate Respondent No. 4 by circumventing the law and in complete disregard of the Judgment dated 30.10.2015 rendered by the learned Sindh Service Tribunal.

22. Apart from our observations made hereinabove, we are surprised to note that promotion of Respondent No. 4 was recommended by the Departmental Promotion Committee in its meeting held on 27.11.2017 when retirement of the Respondent No.4 was due on 31.12.2017 and his age of superannuation was already notified on 27.10.2017.

23. We have noted that prima-facie there are serious discrepancies in the service record of Respondent No.4 regarding his appointment, regularization and promotion. Besides, the act of Respondent No.1 and 2 of allowing promotion to Respondent No.4 is in violation of Judgment rendered by the Hon'ble Supreme Court of Pakistan in the case of Ali Azhar Khan Baloch Vs. Province of Sindh and others (2015 SCMR 456).

24. The learned counsel for the Petitioner has placed on record a copy of Notification dated 12.12.2012 issued by Respondent No.2. An excerpt of the same is reproduced as follows:

NOTIFICATION

NO.HD/SO(PRI-I)11-21/2012: In pursuance of provisions contained under Rule-5(I) of the Sindh Civil Servants (Appointments, Promotions & Transfer) Rules 1974 and Services General Administration & Coordination Department, Government of Sindh letter No. SORI(SGA & CD) 11-7/74 (Home/Prs) dated 11.12.2012 and with the approval of competent authority, following Departmental Promotion Committee is constituted in respect of posts in Sindh Prisons, government of Sindh for the posts of BPS-16, 17 & 18 under the administrative control of Special Secretary (In charge Prisons) Home Department, Government of Sindh.

i)	Special Secretary (In charge Prisons), Home Department, Government of Sindh	Chairman
ii)	Inspector General of Prisons, Sindh	Member
iii)	Additional Secretary (Services-I), SGA & CD, Government of Sindh	Member
iv)	Section Officer (Prisons), Home Department	Member/Secretary

**(ALI HASSAN BROHI)
(SPECIAL SECRETARY (INCHARGE PRISONS))**

25. Record reflects that quorum was not complete in the meeting of Departmental Promotion Committee held on 27.12.2015 because the same was convened in the absence of Respondent No. 3 (Member and Head of Department) who was not intimated about the said DPC. It is pertinent to mention here that Respondent No. 3 being Head of the Department is well conversant with service profile of the officials whose promotion was subject of said Departmental

Promotion Committee. Besides, it is mandatory requirement of law that Respondent No. 3/Member of DPC must be in attendance at meeting of DPC as provided under Rule 5(1) of the Sindh Civil Servants (Appointments, Promotion & Transfer) Rules 1974.

26. Perusal of above order dated 30.10.2015 explicitly shows that the learned Sindh Service Tribunal has elaborately dealt with the issue of retrospective regularization and seniority of the Respondent No.4 and concluded that his retrospective regularization is in violation of Section 5 of Sindh Civil Servants Act, 1973 read with Rule 10 of the Sindh Civil Servants (Probation, Confirmation & Seniority) Rules, 1975. Therefore, order dated 29.10.2008 regarding retrospective regularization of Respondent No.4 w.e.f 09.6.1990 vide order dated 29.10.2008 issued by the Respondent No.2/ Home Department on recommendations of the Departmental Promotion Committee meeting held on 15.7.2008, was set aside. All the orders and actions of Respondents No.1 and 2 to grant illegal benefits including Respondent No. 4's ill-conceived promotion recommended by the Departmental Promotion Committee are illegal and in gross violation of law, Rules and Judgment of the learned Sindh Service Tribunal upheld by the Hon'ble Supreme Court.

27. In view of the above aspects of the case, the Respondent No 4 accordingly is neither entitled to retrospective seniority nor promotion. This view is supported by the Judgment of Hon'ble Supreme Court 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).

28. So far as the contention of the Respondent No.4 with respect to being eligible for promotion in BS-18 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 in plethora of Judgments.

29. In the above back ground of the case, we are of the considered view that no employee can claim promotion as a fundamental or vested right. This view finds support from the case of Secretary, Government 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).

30. Learned AAG has failed to justify the impugned action of Respondent No. 1 and 2.

31. The case law cited by the learned counsel for the Respondent No.4 is distinguishable from the facts of the present case.

32. 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 Respondent No.4's claim was wrongly accepted by the Respondents No. 1 and 2.

33. In the light of foregoing, Notification dated 1.3.2017 issued by Respondent No.2 is set aside and promotion of Respondent No. 4 recommended by the Departmental Promotion Committee in its meeting held on 27.11.2017 is without lawful justification. Hence, declared to be of no legal effect.

34. The instant petition is disposed of in the above terms along with listed application(s).

JUDGE

JUDGE