

# IN THE HIGH COURT OF SINDH AT KARACHI

**Present:**

**Mr. Justice Aziz-ur-Rehman**

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

**C.P. No.D-513 of 2019**

Muhammad Rashid Bhatti .....Petitioner

Vs.

The Federation of Pakistan & 03 others .....Respondents

**Dates of hearing: 26.04.2019**

**Date of Decision: 26.04.2019**

Mr. Malik Naeem Iqbal, Advocate for the Petitioner.

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## **ORDER**

**ADNAN-UL-KARIM MEMON, J:-** By this Writ Petition, the Petitioner is seeking declaration to the effect that his twice recommendation for supersession is in violation of the Judgments passed by the Hon'ble Supreme Court of Pakistan and the same may be treated as deferment, with further assertion that, such supersession may be declared to be of no legal consequence. Petitioner further seeks direction to the respondents for consideration of his promotion, when he was superseded with effect from 02.03.2009.

2. Brief facts of the case, in nutshell are that the Petitioner was appointed as Sub Inspector [BPS-14] in Federal Investigation Agency (FIA). Per petitioner, on 2<sup>nd</sup> March 2009, he was superseded on account of certain allegations. The first supersession was not challenged by the Petitioner before any forum, which attained finality. Again for the second time, the promotion of the Petitioner was declined on 08.08.2009 on the same allegations by the competent authority and his second

supersession was also not assailed before any appellate forum. Petitioner however, instead of assailing the supersession, he opted to file Service Appeal No.151 [K] CS/2010 before the learned Federal Service Tribunal (FST) viz-a-viz assignment of seniority but the said Appeal was dismissed by the learned (FST) vide judgment dated 14.07.2016. Petitioner being aggrieved by and dissatisfied with the aforesaid judgment, filed Civil Petition No.631-K of 2016 before the Honorable Supreme Court of Pakistan, however, the same was dismissed by the Hon'ble Supreme Court of Pakistan vide order dated 21.12.2017. He in the meanwhile, again approached the learned Federal Service Tribunal by filing another Service Appeal No.136(K) CS/2016, which was too dismissed vide order dated 19.11.2018. Petitioner being aggrieved by and dissatisfied with his second time supersession has filed the instant petition on 23.01.2019.

3. We queried from the learned counsel for the petitioner as to how this petition is maintainable, after Judgment passed by the Hon'ble Supreme Court of Pakistan vide order dated 21.12.2017, in Civil Petition No.631-K of 2016. He in reply to the query has submitted that as per seniority list dated 2.3.2009 (available at page 31 of Memo of petition) his immediate juniors were promoted as Inspectors in BPS-16 vide office order dated 2.3.2009, the reasons assigned by the competent authority for denial of his promotion in the next rank were as follows:-

- “2. Your case for promotion as Inspector was considered by DPC on 27.02.2009 and was superseded due to the following reasons:-**
- i. During service you were awarded 02 minor penalties.**
  - ii. PERs for the following periods awaited:- 2003, 2005, 2006 and w.e.f. 01.01.2007 to 23.08.2007.**
  - iii. Adverse remarks “controversial’ made vide letter dated 14.06.2006. No representation received against adverse remarks.**
  - iv. Departmental proceedings are pending against you.”**

As per learned counsel, on account of the aforesaid allegations, petitioner ought not to have been superseded and his supersession, is illegal and not sustainable in law; that no opportunity of hearing was afforded to the petitioner and, therefore, no adverse order could have been passed against him, without disclosing the allegations, as it would be in violation of the well-entrenched principles of the law of natural justice. He next added that the petitioner was second time superseded vide office order dated 25.5.2010, therefore, his seniority could not be fixed on account of purported supersession, which is in violation of various pronouncements of the Hon'ble Supreme Court of Pakistan on the aforesaid issue, therefore, this petition is maintainable before this Court as the petitioner has no other efficacious and alternate remedy under the law. We posted another question to him as to how he can justify his case for consideration of promotion in next rank in presence of twice recommendation for supersession; he replied that when the basic supersession is illegal then the case of the petitioner can be placed before the competent authority for consideration of his promotion. He further added that the case of the petitioner does not fall within the ambit of section 4 of the Federal Service Tribunal Act 1973, therefore, he cannot approach the learned FST. We again asked as to how this Court can entertain this petition, when he had already approached the learned Federal Service Tribunal by filing Service Appeal No.136(K) CS/2016, which was dismissed vide order dated 19.11.2018, as the same order is appealable before the Hon'ble Supreme Court under Article 212(3) of the Constitution. He in reply submitted that this Appeal was filed in 2016 and was decided on 19.11.2018 on the issue of assignment of seniority and not supersession; therefore, this petition can be heard and decided on merits. We having been not satisfied with the replies of our queries, we posted

last question to him as to how he explains the latches in approaching this Court in the year 2019, seeking declaration of his twice recommendation for supersessions, which took place in the month of February 2009 and in the year 2010, he replied, by relying upon the Judgment passed by the Hon'ble Supreme Court in the case of S.A Jameel v. Secretary to the Government of Punjab and others (2005 SCMR 126) and argued that the delay in filing of legal proceedings within the period specified under the law and undue time consumed in other judicial proceedings, such delay can be condoned. He next relied upon in the case of Mirpurkhas Sugar Mills and others v. Federation of Pakistan and others (2013 MLD 433) and argued that the matter can be decided on merits rather than dismissal on technical basis i.e. on the ground of latches. He next relied upon the case of Muhammad Rafi v. Federation of Pakistan and others (2016 PLC CS 328) and argued that the rule position in the case of latches is that an aggrieved person was normally expected to approach this Court within three months was only a rule of convenience and 90 days period served merely as a referential point, which was not to be applied as mandatory rules such a period of limitation prescribed under the law. He lastly prayed for allowing the instant petition.

4. We have heard learned counsel for the petitioner at some length and considered his submissions and have perused the material available on record and case law cited at the bar.

5. The pivotal questions which need to be addressed in order to reach a just decision are that when a civil servant is twice recommended for supersession by the Departmental Promotion Committee (DPC) and the recommendation of the DPC is approved by the competent authority, what is its effect, and whether supersession is punishment?

6. To elaborate on the issue of “supersession”, the word “supersession” can denote only the selection of a junior in preference to a senior according to their rank in the civil service; A supersession is only involved if there takes place a comparative examination of service records of two or more individuals by an authority competent to appoint and determine whether the senior of the two should be ignored from promotion. This necessarily involves an examination of and a decision on the comparative merits of service records of each individual and without such comparison and ignoring of a senior man, there can be no supersession. Such supersession would always imply punishment on account of allegations against civil servant; our view is supported by the decision rendered by the learned Division Bench of Peshawar High Court in the case of Saeed Muhammad Zai v. Secretary Government of Khaibar Pakhtunkhwa (2017 P L C (C.S.) 738). The competent authority can take disciplinary action against the civil servant under sub-section (2) of Section 13 of the Civil Servants Act, 1973, in the following cases:--

(a) Where two or more penalties under the Government Servants (Efficiency & Discipline) Rules, 1973, have been imposed on a civil servant.

(b) Where overall grading of the ACRs is Average, and/or where adverse remarks in regard to acceptance of responsibility, integrity, reliability, output of work and behavior with the public were recorded in the ACRs (duly conveyed to the concerned civil servant and his representation against it finalized, as per rules).

**(c) Where a civil servant is twice recommended for supersession by the Selection Board/DPC and the recommendation of the Selection Board/DPC is approved by the competent authority.**

(d) Where other specific and cogent grounds, including the following, may warrant retirement of a civil servant:--

- (i) persistent reputation of being corrupt;
- (ii) possessing pecuniary resources and/or property etc. disproportionate to his known sources of income; and
- (iii) frequent unauthorized absence from duty.

7. We are cognizant of the fact that the recommendations, as contained in the Establishment Division’s OM No. 1/3/2007/CP/II dated 24th October, 2007 “Promotion Policy” (available at page 101 of MoP), also prescribed conditions for deferment and also

required that the officers superseded/deferred by the DPC be informed about the reason for his supersession/deferment to enable him to improve his performance and to complete his records or to make up any other deficiency, as the case may be. Record reflects that petitioner was well aware of his twice recommendation of supersession, vide DPC meeting held on 27.02.2009 on the ground that during his service he was awarded two minor penalties, his performance evaluation reports w.e.f. 2003, 2005, 2006 and w.e.f. 01.01.2007 to 23.08.2007 were not brought on record, no representation was filed against adverse remarks and departmental proceedings were pending against him. He was again superseded by the DPC meeting held on 06.08.2009 on account of imposition of three minor penalties and his request for inter-se seniority was declined vide letter dated 21.10.2010. Petitioner opted to assail the aforesaid seniority by filing service appeal No.151 (K) CS / 2010 before the learned Federal Service Tribunal, which was dismissed vide judgment dated 14.07.2016. Petitioner feeling aggrieved by approached the Hon'ble Supreme Court in Civil Petition No.631-K of 2016, which too was dismissed vide order dated 21.12.2017 reported as Muhammad Rashid Bhatti v. Director General FIA (2018 SCMR 1995). An excerpt of the order is reproduced as under:-

"4. Be that as it may on 25.05.2010, the petitioner was promoted as Inspector (Investigation) (BPS-16) and on assumption of such promoted office, the petitioner made representation to the department, which as noted above was, declined by the department. The Service Tribunal in the impugned judgment has dealt with the reasons on the basis of which petitioner was superseded and in paras 6 and 7 of the impugned judgment, the Tribunal has made the following observation:-

"6. It is an admitted position that appellant was considered twice for promotion by the Department Promotion Committee, but superseded on each occasion by the committee on account of many factors contributory to including the reason as enumerated ad-seriatim in para-4(i-iv) supra, resultantly his juniors became senior to him. It is pertinent in the context of the appellant's contention that this Tribunal vide judgment dated 09.05.2016 expunged the adverse remarks recorded in the Performance Evaluation Report for the year 2004. Be that as it may, the supersession was approved by the Department Promotion Committee in its successive meetings held on 02.03.2009 and 08.08.2009 resultantly the appellant could not regain his inter se seniority. In this context, Section 3(c) of the Civil Servants (Seniority)

Rules, 1993, being relevant, is reproduced hereunder as:-

(c) Civil servants eligible for promotion who could not be considered for promotion in the original reference in circumstances beyond their control or whose case was deferred while their juniors were promoted to the higher post, shall, on promotion, **without supersession**, take their seniority with the original batch."

**Underlining is ours.**

7. In the presence of express provision of Rule 3(c) *ibid*, the appeal for regaining inter se seniority merits no consideration and is hereby dismissed with no order as to costs."

5. We have gone through the provision of FR-17 and are unable to agree with the counsel for the petitioner for that the provision of FR-17 deals with the case of drawing pay and allowances attached to tenure of a post with effect from the date when the duties are assumed of that post and shall cease to draw them as soon as he ceases to discharge those duties. The proviso to this Rule provides for a situation where the civil servant who was entitled to be promoted from a particular date but for no fault of his own wrongfully prevented from rendering services in the higher post shall be paid the arrears of pay and allowances of such higher post through proforma promotion or up-gradation by ante-dated fixation of seniority. The case before us is neither of a tenure post nor is a deferment case or that of petitioner being not promoted from a particular date for no fault of his own. The petitioner was deliberately superseded and such supersession was also endorsed by the Departmental Promotion Committee. The Rule FR-17 as relied upon by the counsel for the petitioner therefore, is not applicable to the facts and circumstances of the present case.

5(sic.) As regard the second contention of the learned ASC for the petitioner that Rule 3(c) is ultra vires the provision of the Act, we are afraid that such submission was not canvassed by the petitioner before the Service Tribunal and same cannot be allowed to be raised before this Court for the first time. No point of public importance in terms of Article 212 of the Constitution is raised. The petition is therefore, dismissed and leave refused."

8. The petitioner did not stop here and filed another service Appeal No. 136 (K) CS / 2016, which was too dismissed vide order dated 19.11.2018 and the same was not impugned before appellate forum, he opted to remain silent, therefore, the principle enunciated by the Honorable Supreme Court in the case of Director-General Intelligence Bureau Islamabad and others v. Ameer Mujahid Khan and others (2011 SCMR 389) is fully attracted in the present case. Relevant portion of the order dated 19.11.2018 is reproduced as under:-

"The counsel for the appellant submits that the judgment of the FST regarding the issue which is subject matter of this appeal has been upheld by the Hon'ble Supreme Court, he further contends that the matter in fact has become infructuous as some directions were already given in the judgment passed by the Hon'ble Supreme Court for the respondent-department. The counsel submitted the judgment of the Hon'ble Supreme Court reported in PLJ 1996 SC 660. In view of the above, appeal is dismissed having become infructuous as the issue has been decided/addressed by the Hon'ble Supreme Court."

9. In the light of forgoing position of the case in hand, in our view, the supersession / inter-se seniority and other ancillary

service issues of the petitioner, has been finally adjudicated up to the level of Hon'ble Supreme Court, thus this Court cannot reopen his further service grievances on the aforesaid issues, in writ petition. Therefore, similar relief cannot be claimed by filing subsequent legal proceedings, as it would fall within the ambit of res-judicata. Reliance is placed on the case of State Bank of Pakistan through Governor and others vs. Imtiaz Ali Khan and others (2012 SCMR 280). Besides above, we do not concur with the assertion of the learned counsel for the Petitioner with his explanation of laches and we are of the considered view that the instant Petition clearly falls within the doctrine of laches as the Petitioner filed the instant Petition in the month of January 2019, whereas, the alleged cause of action accrued to him in the month of February 2009, i.e. approximately 10 years prior to the filing of the instant Petition. Even, it is an admitted position that the petitioner was considered twice for promotion by DPC but superseded on each occasion on account of many factors contributory to including the reason as discussed supra. The case law cited by the learned counsel for the petitioner on the aforesaid proposition is quite distinguishable from the facts of the case in hand.

10. Reverting to the main contention of the petitioner that, no representation shall lie on matters relating to the determination of fitness of a Civil Servant to hold a particular post or to be promoted to a higher post. in our view, the petitioner has been twice recommended for supersession, which is a penalty under the service law, therefore, falls within the ambit of expression terms and conditions of service of civil servants fall in the exclusive jurisdiction of learned FST in terms of Article 212(2) of the Constitution of Islamic Republic of Pakistan, 1973 read with



Section 3(2) of Federal Service Tribunal Act, 1973, therefore, the Petitioner cannot invoke the jurisdiction of this Court under Article 199 of the Constitution, our view is supported by the decision rendered by the learned Division Bench of Baluchistan High Court in the case of Muhammad Iqbal v. Federation of Pakistan and others **(2014 P L C (C.S.) 467)**. However, it may be observed that as per Section 4(1) (b) of the Federal Service Tribunal Act, 1973, the Federal Service Tribunal has no jurisdiction on the controversy of the determination of fitness and suitability of a Civil Servant for a job and for promotion, our view is supported by the decision of the Honorable Supreme Court in the case of Muhammad Zahir Raja v. Federation of Pakistan and others **(2012 SCMR 971)**. But in the present proceedings, penalty has been imposed upon the petitioner; therefore, his case does not fall within the exception as provided under Section 4(b) of the Federal Service Tribunals Act, 1973. The relevant portion is reproduced as under:-

**“4(b) no appeal shall lie to a Tribunal against an order or a decision of a departmental authority determining the fitness or otherwise of a person, to be appointed to or hold a particular post or, to be promoted to a higher post or grade; and”**

11. As is evident from the above provisions, no remedy by way of filing appeal etc. is provided to the Civil Servants against determination of fitness; Our view is supported by the decision rendered by the Hon’ble Supreme Court of Pakistan in the case of Ali Azhar Khan Baloch vs. Province of Sindh **[2015 SCMR 456]**. The Hon’ble Supreme Court has held at Paragraph No.150 as under:-

“150. The High Court of Sindh has completely overlooked the intent and spirit of the Constitutional provisions relating to the terms and conditions of service, while entertaining Civil Suits and constitution petitions filed by the civil servants, which are explicitly barred by Article 212. The expression 'Terms and Conditions' includes transfer, posting, absorption, seniority and eligibility to promotion **but excludes fitness or otherwise of a person, to be appointed to or hold a particular post or to be promoted to a higher post or grade as provided under section 4(b) of the Sindh Service Tribunals Act, 1973.** Surprisingly, it has been ignored that it is, by now, a settled principle of law that the civil and writ jurisdictions would not lie in respect of the suits or petitions filed with regard to the terms and conditions of Civil Servants, and yet some of the learned Judges of High Court of Sindh have erroneously

exercised both civil and writ jurisdictions with regard to the terms and conditions of civil servants.” [Emphasis Added]

12. Further reliance is made in the case of *Tariq Aziz-uddin in Human Rights Cases Nos. 8340, 9504-G, 13936-G, 13635-P & 14306-G to 143309-G of 2009* [2010 SCMR 1301].

13. We may observe here that, indeed the writ jurisdiction of this Court is not meant to be exercised to compel the competent authority to promote a Civil Servant against whom *prima facie* evidence showing his involvement in the serious charges of misconduct was available, for the reason that any such direction would be disharmonious to the principle of good governance and canon of service discipline. Rather causing undue interference to hamper smooth functioning of the departmental authorities. On the aforesaid issue, we are fortified with the decision rendered by the Hon’ble Supreme Court of Pakistan in the case of *Mst. Iffat Nazir vs. Government of Punjab and others* [2009 SCMR 703].

14. We are also cognizant of the fact that, promotions to such post could not be made in a mechanical manner and a variety of factors, such as examination of service records, evaluation reports of training institutions, record of disciplinary proceedings, reputation of integrity and efficiency, suitability for handling particular assignment, etc. had to be taken into consideration. It is also a fact that a substantial amount of subjective evaluation of an officer's capabilities is involved. Therefore, normally questions of determination of fitness of a person to be promoted are not capable of being scrutinized on the basis of judicially manageable standards. Nevertheless, such subjective evaluation is to be premised on an objective criteria with the object of evolving such objective criterion, the Government itself has been issuing promotion policy guidelines and developed methods of quantifying confidential reports; which have been treated at par with statutory

rules. It may be clarified that the assessment of an officer's performance during a year may completely depend on the subjective opinion of his Reporting Officer. The weightage required to be accorded to it for the purpose of determining fitness for promotion entails, an objective assessment. Indeed, the Courts will not sit in judgment over subjective evaluation but would indeed be competent to examine whether the required objective criterion was followed. In our view, in the seniority/promotions cases no vested right/fundamental right can be claimed. 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], *Government of Khyber Pakhtunkhawa and others vs. Hayat Hussain and others* [2016 SCMR 1021] & *Khan M. Muti Rahman and others* [2006 PLC (C.S) 564]. The Hon'ble Supreme Court has already settled the similar issue in the case of *Mst. Iffat Nazir* as discussed supra at paragraph-7 as under:-

“Indeed the writ jurisdiction was not meant to be exercised to compel the competent authority to promote a civil servant against whom prima facie evidence showing her involvement in the serious charges of misconduct was available, for the reason that any such direction would be disharmonious to the principle of good governance and canon of service discipline. Rather causing undue interference ' to hamper smooth functioning of the departmental authorities.”

15. The Hon'ble Supreme Court in the case of *Hayat Husain and others* as discussed *supra* has settled the issue in promotion cases of Civil Servants, which is guiding principle on the subject and held at paragraph-8 as under:-

“8. It is a settled proposition of law that the Government is entitled to make rules in the interest of expediency of service and to remove anomalies in Service Rules. It is the Service Rules Committee which has to determine the eligibility criteria of promotion and it is essentially an administrative matter falling within the exclusive domain and policy decision making of the Government and the interference with such matters by the Courts is not warranted and that no vested right of a Government employee is involved in the matter of promotion or the rules determining their eligibility or fitness, and the High Court has no jurisdiction by means of writ to strike it down as held by this Court in the case of The Central Board of Revenue, Government of Pakistan v. Asad Ahmad Khan (PLD 1960 SC 81), the relevant portion therefrom is reproduced herein below:-

"In our opinion the High Court made the above order without taking into consideration all the factors relevant to the case, namely, in the first place the taking out of the post of Deputy Superintendent of the category of class III, to which the petitioners belong amounted to abolition of the post and its

upgrading on a higher scale of pay to a creation of the new post; appointment to which required a stricter test of efficiency by a competitive examination. Besides, all the Inspectors were given the right to sit in the examination for any number of times to qualify themselves for promotion. At the same time the pay scale of those, who could not succeed, was raised to the limit of Rs. 350, namely, the same pay as that of a Deputy Superintendent when it was a class III post. In the circumstances it cannot be said that any rights of the petitioners were infringed, which they could enforce by a writ petition. The Government has every right to make rules to raise the efficiency of the services, and if no vested right is denied to a party, the High Court had no jurisdiction to interfere by means of a writ." (Emphasis supplied)

As far as the contention of the respondents that the rules could not be changed to affect them adversely is concerned, the said proposition has also been settled by this Court in the case of Muhammad Umar Malik and others v. Federal Service Tribunal and others (PLD 1987 SC 172), wherein the proposition that the rules of promotion could not have been changed so as to affect adversely those already on the eligibility list i.e., combined list of U.D.Cs and S.G.Cs, was repelled by observing that, "No such vested right in promotion or rules determining eligibility for promotion exists", and held as under:-

"Mr. Abid Hasan Minto, Advocate, when called upon to address arguments on merits, urged that the rules of promotion should not have been changed so as to affect adversely those already on the eligibilities list i.e. the combined list of the U.D.Cs. and S.G.Cs. In other words he was claiming a vested right in promotion for all the U.D.Cs. borne on the joint cadre on the date of its separation. The position of law on the subject is clear in view of numerous decisions of this Court, e.g. Government of West Pakistan v. Fida Muhammad Khan (1) Central Board of Revenue, Government of Pakistan v. Asad Ahmad Khan (2), Province of West Pakistan v. Muhammad Akhtar (3), Manzur Ahmad v. Muhammad Ishaq (4). No such vested right in promotion or rules determining eligibility for promotion exists."(Emphasis Added)

16. Resultantly, the instant petition is found to be not maintainable, which is dismissed in limine along with pending Application[s].

**JUDGE**

**JUDGE**

S.Soomro/PA