

IN THE HIGH COURT OF SINDH, AT KARACHI

Present:

Mr. Justice Adnan-ul-Karim Memon

Mrs. Justice Kausar Sultana Hussain

C.P No. D- 7995 of 2017

Petitioner: Through M/s. Malik Naeem Iqbal,
Muhammad Nasir and Khuram Memon,
Advocates.

Respondents: Through Sheikh Liaquat Husain,
Assistant Attorney General.

Date of hearing: 02.11.2018

J U D G M E N T

ADNAN-UL-KARIM MEMON, J: - Through the captioned Constitution Petition, Petitioner has asked for grant of proforma promotion in BPS-22.

2. The case of the Petitioner, in nutshell, is that she had served Pakistan Customs department for about 33 years and stood retired in BPS-21, on attaining the age of superannuation on 21.01.2013. Petitioner has submitted that during her service tenure, she was promoted to BPS-21 with effect from 05.10.2005 and her further promotion in BS-22 was due in the year 2012 as per law, however, the same was denied by the Respondents, compelling the Petitioner to file Service Appeal No.515(R) (CS)/2013 before the learned Federal Service Tribunal (FST) Islamabad, which was allowed with certain directions to the Respondents vide Judgment dated 02.07.2015. Relevant portion of the judgment is reproduced as under:-

“11. In view of ratio decidendi of the cases, the respondents are directed to consider the claim of the appellant specifically after taking into consideration the observations made in the latest judgment of the Tribunal dated 02.03.2012 passed in identical Appeal No.253(L)CS/2012 (i.e. Syed Muhammad

Hamid Vs Establishment Division). For the sake of ready reference, the operative para 6 of the said judgment is being reproduced hereunder:

“6. In the above circumstances, we set aside the order of the Establishment Division dated 12.03.2011 and remand the case to the Establishment Division for reconsideration of the claim of the appellant for promotion to BS-22 from the date of his juniors were promoted. The consideration shall be meaningful and purposeful. Once the appellant is allowed promotion, he shall be entitled to all the back benefits. The process maybe completed, preferably within a period of two months from the date a copy of the judgment is received in the office of the respondents.”

In the above perspective, the respondents shall also pass an appropriate order in the present case within a period two months from the date a copy of the judgment is received in the office of respondents. The appeal stands decided in terms of observations, contained in Paras Nos.6, 7, 8,9,10 and the direction, recorded above”

The Respondents being aggrieved by and dissatisfied with the aforesaid decision of the learned FST, assailed the same before the Hon’ble Supreme Court of Pakistan in Civil Petition No.3081/2015 and the same was disposed of vide Order dated 18.12.2015. An excerpt of the Order is reproduced as under:-

“The learned counsel for the petitioner states that in a similar matter, the case of Syed Muhammad Hamid filed appeal No.253 (L) (CS/12 which was remanded back by the Service Tribunal to the Establishment Division for reconsideration. It has been further averred that the Establishment Division has constituted a high level Committee under FR-17(1) to reconsider the matter therefore; he will have no cavil if the instant matter is also referred to the above referred Committee for reconsideration as well.

2. Order accordingly. Disposed of in the above terms”

3. We have noticed that in compliance of the aforesaid order passed by the Hon’ble Supreme Court of Pakistan a meeting of High Level Committee on FR-17(1) was held on 31.08.2017, which decided the matter of the Petitioner and the Committee endorsed the recommendations made by the Junior Level Committee on 13-06-2017 to place the case of the Petitioner before High Power Selection Board (HPSB).

4. Record reflects that the Petitioner filed CMA No.2415 of 2016 in CRP No. Nil of 2016, in Civil Petition No.3081/2015 before

the Hon'ble Supreme Court, for review of its Order dated 18.12.2015. The Hon'ble Supreme Court vide order dated 25.10.2017 disposed of the Review Petition with the following observations:-

“Pursuant to an order dated 06.1.2017 of this Court, a letter containing Minutes of Meeting of a High Level Committee on FR-17(1) held on 31.08.2017 has been filed in the Court by the learned DAG, which is taken on record. If the Petitioner has any grievance against the said Minutes of Meeting, she may seek her remedy before an appropriate forum available to her under the law.

2. Disposed of accordingly”

5. Basically, the Petitioner has approached this Court for proforma promotion in BS-22 on the basis of Order dated 27.4.2015 passed by the Hon'ble Supreme Court of Pakistan in Civil Petition No.472/2014 (re-Umer Farooq v. Government of Pakistan), with the assertion that the case of the Petitioner is on the similar footing as decided by the Hon'ble Supreme Court. Petitioner has taken the plea that her immediate junior Mr. Munir Qureshi was promoted to BS-22, whereas she was left out by the Respondents without assigning justiciable reason.

6. In our view, once the Hon'ble Supreme Court has passed orders dated 18.12.2015 and 25.10.2017, in the terms as discussed supra, this court has no justification to take contrary view of the same.

7. At this stage, Mr. Malik Naeem Iqbal, learned counsel for the Petitioner has called in question the lethargic attitude of the Respondents and argued that the Order dated 18.12.2015 passed by the Hon'ble Supreme Court of Pakistan has not yet been complied with in its letter and spirit. At this stage, we posted a question to him that the Respondents had taken the decision on 31.08.2017 in a meeting of High Level Committee on FR-17(1) and Committee endorsed the recommendations made on 13.06.2017 by the Junior Level Committee, which recommended the case of the

Petitioner to be placed before the HPSB, in the light of decision of the Hon'ble Supreme Court dated 18.12.2015. He in reply to the query submitted that till today, no report of FR-17(1) committee has been placed before the HPSB by the Respondents. He, at this juncture stressed that the Respondents may be directed to submit report of FR-17(1) committee before the HPSB, in compliance with the order dated 18.12.2015 passed by Hon'ble Supreme Court. Learned counsel continued to say that the HPSB wrongly deferred the case of Petitioner for promotion on wrong plea that since the Petitioner had never enjoyed posting outside her department thus not entitled for promotion in BS-22. He next argued that the learned FST did not agree with the findings of HPSB and directed the Respondents to pass an appropriate order in the case of the Petitioner within a period two months and the Hon'ble Supreme Court also referred the matter to FR-17(1) committee but nothing has been done by the Respondents; that in an identical case and on the same enology, the Hon'ble Supreme Court vide order dated 27.4.2015 set aside the observations of the HPSB and directed for promotion of the colleague of the Petitioner namely Mr. Umer Farooq and he claims that the case of the Petitioner is at par with Mr. Umer Farooq and Mr. Munir Qureshi colleagues of the Petitioner, who had been granted proforma promotion in BS-22 after their retirement. Learned counsel pleaded that discriminatory treatment has been meted out with the Petitioner, which is violative of Article 25 of the Constitution. He lastly prayed for allowing the instant petition.

8. Conversely learned AAG has refuted the claim of the Petitioner and argued that the matter of the Petitioner was ended up to the level of the Hon'ble Supreme Court of Pakistan in CRP No. Nil vide Order dated 25.10.2017, therefore, Petitioner is not entitled for proforma promotion in BS-22. He further

contended that a meeting of high level committee on FR-17(1) was convened on 31.08.2017, which decided the matter with the observation that “they cannot review the recommendations made by High Powered Selection Board” He next added that promotion in BS-22 can only be made after fulfilling the eligibility conditions such as seniority and length of service, therefore, Petitioner cannot claim for proforma promotion as a matter of right and nor Selection Board made recommendations in favour of the Petitioner. He added that the Board assessed suitability of the Petitioner for the aforesaid promotion in BS-22 after careful examination of the service record rendered by the Petitioner i.e. assessing/countersigning officers, evaluation reports of Training Institutions, record of disciplinary proceedings and active service postings. At this stage, we asked from the learned AAG that the case of Mr. Munir Qureshi junior to the Petitioner was recommended by HPSB to the post of BS-22 in Secretariat Group. He in reply to the query stated that Mr. Munir Qureshi held position of responsibility both his own service and outside, he served as Acting Secretary Ministry of Commerce and Board of Investment (BOI), therefore he was recommended for proforma promotion to BS-22. He next argued that the promotion on the post of Secretary in BS-22 and equivalent can be made under Civil Servants Rules, 2010. He then added that Petitioner’s case was considered in accordance with law by High Powered Selection Board in its meeting held on 22nd and 26th December, 2012 and by High Level Committee on FR-17(1) in its meeting held on 31.08.2017, by appreciating the facts and law. He lastly prayed for dismissal of the instant petition.

9. We have considered the submissions of the parties and perused the entire material available on record. Prima-facie the case of the Petitioner is for enforcement of the orders dated

18.12.2015 and order dated 25.10.2017 passed by the Hon'ble Supreme Court of Pakistan in the case of the Petitioner.

10. Upon perusal of the pleadings of the parties and arguments extended thereon a pivotal question involved in the present proceedings is whether the matter of the Petitioner for her proforma promotion in BS-22 is required to be placed before the HPSB for appropriate orders, in the light of recommendation of High Level Committee on FR-17(1)?

11. To appreciate and elaborate on the aforesaid issue it is expedient to have a glance on Fundamental Rule 17(1). An excerpt of the same is as under: -

“FR-17(1) subject to any exceptions specifically made in these rules and to the provisions of sub-rule (2), an officer shall begin to draw the pay and allowances attached to his tenure of a post with effect from the date when he assumes the duties of that post and shall cease to draw them as soon as he ceases to discharge those duties: Provided that the appointing authority may, if satisfied that a civil servant who was entitled to be promoted from a particular date was, for no fault of his own, wrongfully prevented from rendering service to the Federation in the higher post, direct that such civil servant shall be paid the arrears of pay and allowances of such higher post through proforma promotion or up-gradation arising from the antedated fixation of his seniority.”

12. We have noticed that the Respondent No.1 has resisted the claim of the Petitioner and relied upon the report of FR-17(1) Committee. At this stage, we deem it appropriate to have a look at the aforesaid report to assess as to whether the orders passed by the Hon'ble Supreme Court as discussed supra have been complied with or not. An excerpt of the report is as under:-

“7. The case was discussed in detail in the meeting of Junior Level Committee held on 13.06.2017 and it was observed that FR-17(1) Committees are not empowered to review the recommendations made by the HPSB. Therefore, the Committee recommended that the matter may be placed before the HPSB in the light of Supreme Court of Pakistan's order dated 18-12-2015 and 18-05-2017.

8. The High Level Committee considered the case on 31-08-2017 and observed that FR-17(1) Committees are not empowered to review the recommendations made by HPSB and recommend promotion to higher posts. The Committee endorsed the recommendations made by Junior Level Committee on 13-06-2017.”

13. We have also gone through the recommendation of the High Power Selection Board in its meeting held on 26.12.2012, who had decided the matter against the Petitioner.

14. Perusal of recommendation of HPSB, prima facie show the following factual position:-

“The Board noted that the officer had very good PERs and earned 69.01% in Pakistan Administrative Staff College’s report. The Board observed that a cursory look of her postings in BS-20 and BS-21 shows that she has never been posted outside Karachi and had been confined to Pakistan Customs only. She has not got the exposure of policy making at the Federal Secretariat. It was observed that she would not be suitable for the job of a Federal Secretary as she lacks diversity and versatility required for the slot. The Board did not recommend her for elevation in the Secretariat Group.

Not recommended for promotion to the post of Federal Secretary (BS-22) in the Secretariat Group. However this would not prevent the consideration of the officer in her own Service/Group, if and when a vacancy arises.”

15. To appreciate and elaborate on the issue involved in the present matter, we seek guidance from the order dated 27.4.2015 passed by the Hon’ble Supreme Court of Pakistan in Civil Petition No.472/2014, as the Petitioner is heavily relying upon the aforesaid order and claiming similar treatment. For the sake of ready reference, the operative para of the said order is being reproduced hereunder:

“The petitioner impugns the judgment of the High Court whereby his writ petition No.30 of 2013 was dismissed. As a consequence, the opinion expressed by the High Powered Selection Board (HPSB) was upheld.

2. We have heard learned counsel for the petitioner and the learned Law Officer at some length. The parawise comments which have been filed by the government in the High Court show that the petitioner was a very qualified officer and there appears to be no valid reason for deferring him particularly in view of the fact that he was to attain the age of superannuation only five days after he was deferred. For ease of reference we may reproduce below the relevant extracts of the parawise comments of the government relating in the petitioner Mr. Umar Farooq.

“The petitioner’s case for promotion to BS-22 was put before High Powered Selection Board (HPSB) on 28.12.2012, when it was deferred. The point to note is that the petitioner attained the age of superannuation on 03.01.2013 i.e. within five days of the deferment. It is alleged that there was no basis for deferment and in any event respondent No.2 Mr. Munir Qureshi, who was junior to the petitioner was promoted allegedly on the recommendation of the Advisor on Petroleum to the Prime Minister of Pakistan.

2. Learned counsel submits that the petitioner had a right which had come to vest in him prior to the date of his superannuation; therefore, he is entitled to promotion from 28.12.2012 and as a consequence is also entitled to the pensionary benefits of BS-22.

3. Learned counsel contends that the learned Single Judge in the High Court has not taken into account that respondent No.2 was actually facing an enquiry by the NAB and being much junior to the petitioner had been promoted early because of his connections.”

3. Having considered the above circumstances and also having heard learned counsel for both sides we are clear that there was no good reason for not recommending the promotion of the petitioner Umar Farooq. It is to be noted that the High Court has not taken the above circumstances into account but has proceeded on the premise that "the promotion to a selection post is not a right, but a civil servant can be considered for the post." This point of view was also advanced before us on behalf of the government but in our view it is not valid because the decision of the HPSB cannot be arbitrary or without reason. In the present case the HPSB not only acted arbitrarily but also unfairly and contrary to the merit, earned by the petitioner in his service. The petitioner was only seeking promotion to BS-22 and was not asking for posting to any specific government office. There was no justification for deferring the petitioner.

4. In the foregoing circumstances, the impugned judgment rendered by the High Court is set aside and so is the order of the HPSB deferring the petitioner. Since the petitioner quite evidently was fit and qualified for promotion and since he has already retired after attaining the age of superannuation, the issue remains one of pensionary benefits only. We are not in any doubt that he was entitled to promotion in BS-22. We, therefore, order that he shall stand promoted w.e.f. 28.12.2012 i.e. the date on which the respondent Mr. Munir Qureshi 11 years' the petitioner's junior, was promoted to BS-22. The petition is converted into appeal and is allowed accordingly."

16. Prima-facie the case of Petitioner is identical in nature as decided by the Honorable Supreme Court as discussed in the preceding paragraph. Learned AAG at this stage objected that since the case of the Petitioner for promotion was deferred, therefore, she cannot be considered for proforma promotion in BS-22 after her retirement from service. In support of his contention, he relied upon the Civil Servants (Promotion to the post of Secretary, BS-22 & Equivalent) Rules, 2010. This objection would be of no legal effect as it would be hit by the prohibition contained in Article 25 of the Constitution.

17. Under Article 5 of the Constitution it is the imperative obligation of the functionaries of the State to abide by the Constitution and the law, because it has been held inviolable obligation of every citizen wherever he may be and of every other person for the time being within Pakistan. In this regard while placing reliance on the dicta laid down by the Honorable Supreme Court in the case of I.A. Sharwani and others v. Government of Pakistan through Secretary Finance Division, Islamabad and others (1991 SCMR 1041). The larger Bench of learned five members Bench of Honorable Supreme Court made exhaustive scrutiny of with respect to granting of the Pensioner benefits to a

class of retired employees of Executive Branch, who had retired within a particular period, while the same was denied to another class of employees similarly placed, who had retired in another period.

18. Apparently, the Petitioner has been given highly discriminatory treatment for no plausible reason whatsoever by not giving the benefit of order dated 27.4.2015 passed by the Hon'ble Supreme Court of Pakistan in Civil Petition No.472/2014 to the Petitioner.

19. We, therefore, under the circumstances of the case are of the considered view that the matter of the Petitioner went up to the level of the Hon'ble Supreme Court of Pakistan and the Hon'ble Apex Court directed that the case of the Petitioner be referred to FR-17(1) Committee for reconsideration, such report of the committee was placed on record before the Hon'ble Supreme Court in CRP No-Nil of 2017 and the Hon'ble Supreme Court observed that if the Petitioner has any grievance against minutes of the meeting, she may seek her remedy before an appropriate forum available to her under the law.

20. Looking through the above perspective and keeping in view the factual position of the case, we hereby infer that the Petitioner's case ought to have been placed before the HPSB for appropriate orders in the light of the orders dated 18.12.2015 and order dated 25.10.2017 passed by the Honorable Supreme Court.

21. In view of the facts and circumstances of the case and for the reasons alluded as above, we are of the considered view that the issue in hand is fully covered by the decision dated 27.4.2015 rendered by Hon'ble Supreme Court in Civil Petition

No.472/2014. Prima-facie the claim of the Petitioner for her proforma promotion in BS-22 is tenable under the law.

22. In the wake of above discussion, the matter is remanded to the Competent Authority of the Respondents for afresh decision, without discrimination, on the issue of proforma promotion of the Petitioner in BS-22 along with allied benefits in accordance with law, more particularly in the terms of the aforesaid orders, passed by the Honorable Supreme Court of Pakistan, within a period of two [2] months' from the date of receipt of this Judgment.

JUDGE

Karachi

Dated: - 07.11.2018.

JUDGE

Nadir/PA.