

IN THE HIGH COURT OF SINDH,
BENCH AT SUKKUR

Const. Petition No. D – 747 of 2020

(Syed Sibte-e-Hussain Shah V/s Federation of Pakistan & others)

Hearing of Case

- 1.For orders on office objection.
- 2.For hearing of Main Case.

Before:

Mr. Justice Muhammad Junaid Ghaffar

Mr. Justice Zulfiqar Ali Sangi

Date of Hearing: **16.02.2022**

Date of Announcement: **27.04.2022**

Mr. Muhammad Qayyum Arain, Advocate for the Petitioner.
Mr. Muhammad Hamzo Buriro, Deputy Attorney General.

ORDER

Muhammad Junaid Ghaffar, J. – Through this Petition, the Petitioner has sought the following relief(s):

“(a). Set aside the impugned supersession orders passed on 24.4.2019 and 1.4.2019 on account of being the same illegal, unconstitutional, without lawful authority and devoid of merits.

(b). Issue a writ of MANDAMUS to the respondent No.1 & 2 to consider the case of the Petitioner for promotion on merits, seniority, suitability and under the guidelines as provided by the relevant promotion rules and policy.

(c). Grant any other appropriate equitable relief to the Petitioner under the described supra facts and grounds”.

2. Learned Counsel for the Petitioner has contended that time and again the Petitioner has been superseded in promotion without any lawful justification inasmuch as not only the Petitioner has been acquitted in the criminal case, but so also in the departmental proceedings up to the level of the Hon’ble Supreme Court and honorably stands reinstated into service. According to him, despite such Orders in favour, the Petitioner on the same grounds has been denied promotion, hence this Petition.

3. Learned Deputy Attorney General has opposed this Petition on the ground that firstly the Petition is not maintainable and the Petitioner has to approach the Federal Service Tribunal; whereas, he has been involved in criminal cases and departmental proceedings were also initiated, hence no case for promotion is made out.

4. We have heard learned Counsel for the Petitioner as well as learned D.A.G and perused the record.

5. It appears that though the Petitioner was nominated as an accused in FIR No.331 of 2012, registered at Police Station City Bhalwal-Sargodha, however, vide Judgment dated 13.02.2013, he stands acquitted by the Judicial Magistrate Bhalwal-Sargodha. Similarly, insofar as departmental proceedings are concerned, it appears that pursuant to show-cause notice, the Petitioner was awarded major punishment of dismissal from service vide Order dated 08.04.2013, against which an Appeal was preferred within the department, but the same was also dismissed vide Order dated 27.10.2014 and being aggrieved the Petitioner filed further Appeal before the Ministry of Communications, Government of Pakistan and vide Order dated 23.12.2016, the major penalty of dismissal from service was modified into compulsory retirement under E&D Rules, 1973. Thereafter, the Petitioner approached the Federal Service Tribunal by way of Appeal No.23(L) of 2017 and vide Judgment dated 16.08.2017, the Appeal was allowed and the impugned Orders including last order dated 23.12.2016 were set aside and he was reinstated into service; whereas, the intervening period was to be treated as leave of the kind due. The Respondents being aggrieved preferred Civil Petition No. 4388 of 2017 before Hon'ble Supreme Court by impugning such Judgment of the Federal Service Tribunal; however, vide Order dated 13.11.2018, the leave Petition was dismissed by maintaining the Judgment of the Federal Service Tribunal.

6. Therefore, insofar as cases as initiated against the Petitioner are concerned, both criminal as well as civil, they stand decided in favour of the Petitioner. However, as per the petitioner's case he has not been promoted, whereas, despite such favorable orders; twice adverse remarks have been recorded against the Petitioner at the time of his promotion by the Departmental Promotion Committee (DPC) dated 24.04.2019 and

01.04.2020. The relevant observations as against the Petitioner read as under:-

S #	Name, No. & Father's Name	Present Posting	Reason for Supersession
1	Syed Sibt-E-Husain, S-140	N-5 (South) Zone	Recommended for supersession under para-8,(i),(c) of the Promotion Policy. Integrity of the officer is questionable as he remained involved in criminal activities, i.e. illegal seizure of narcotics and vehicles, <i>proved during the departmental inquiries.</i>

S #	Name of Officer	Present Posting Zone	Reason for Supersession
1	Syed Sibt-e-Husnain, S-140	N-5 South	Superseded as integrity of the officer is questionable under para-8(i)(c) of NHMP Promotion Policy as he remained involved in illegal activities regarding illegal confiscation of vehicles loaded narcotics, he tarnished the image of the department in the eyes of general public and also set a bad example for other members of this disciplined force.

7. From perusal of the aforesaid observations recorded in the DPC, it reflects that insofar as the meeting held on 24.04.2019 is concerned, there is mention of allegations as well as proving of the same during departmental inquiry. How this has come on record is not understandable as we have not been assisted with any findings against the petitioner to that effect. It is a matter of record that the departmental proceedings had finally ended in the Hon'ble Supreme Court in favor of the petitioner in 2018, whereas, the DPC was held in 2019. As to DPC of 2020 is concerned, though there is no specific reference to any of the cases initiated against the Petitioner for superseding him, however, the reasons so assigned therein apparently are the same for which the proceedings were initiated against the Petitioner. There is no discussion as to any basis for such adverse observations by the DPC. While confronted, learned DAG has argued that in terms of Rule 8(i)(c) of the National Highways & Motorways Police Uniformed Officers Promotion Policy, 2017, the DPC has recorded such remarks. The said Rule 8(i)(c) reads as under:

"8. Causes of Supersession

(i) The DPC may recommend an officer for supersession on the basis of any one or more of the following reasons:-

- (a)
- (a)

(b)

(c) The officer has been awarded major penalty on serious reasons within one year from the date of meeting of DPC or has blemished service record or the integrity of the officer is questionable”.

8. From perusal of aforesaid Rule, it reflects that an officer can be superseded if he has been awarded major penalty on serious reasons within one year from the date of meeting of DPC or has blemished service record or the integrity of the officer is questionable. In the entire comments, this Court has not been assisted as to how and in what manner, Rule 8(i)(c) has been invoked as apparently the major penalty so awarded to the Petitioner has been set aside and he stands reinstated. As to any blemished service record or his integrity, as of today, nothing has been brought before this Court to justify such adverse remarks and then passing an Order of supersession. The reasoning assigned by the DPC depict that they may be an outcome of the same cause of action, for which the criminal as well as civil and departmental proceedings were initiated against the Petitioner; whereas, in all such cases he has been acquitted and Orders have been set aside. Therefore, apparently no justifiable cause has been shown for passing an Order of suppression against the Petitioner time and again in the given facts and circumstances as noted above.

9. As to objection regarding maintainability of this Petition in view of alternate remedy before Service Tribunal is concerned, it would suffice to observe that this is not a case of *eligibility* of the petitioner before us; rather it is in respect of *fitness* of the petitioner, and therefore, in view of Clause (b) of subsection (1) of Section 4 of the Service Tribunal Act, 1973, the petition is maintainable before this Court, and the objection is misconceived in view of the dicta laid down by the Hon’ble Supreme Court in case reported as *Secretary, Establishment Division v. Aftab Maneka (2015 SCMR 1006)* in the following terms:

13..... Article 212(1)(a) is an enabling provisions empowering the legislature to establish Tribunals exercising exclusive jurisdiction in matters relating to the terms and conditions of service of persons who are or have been in the Service of Pakistan. It is in view of this Constitutional provision that the Federal Service Tribunal Act, 1973 was enacted. Clause (2) of Article 212 of the Constitution excludes the jurisdiction of all Courts in matters falling within the exclusive jurisdiction of Tribunal set up under Clause (1) of Article 212 of the Constitution.....Section 4 of the Federal Service Tribunal Act, 1973 provides for appeals to the Tribunal by a civil servant aggrieved of any order regarding terms and conditions of his service. Clause (b) of

subsection (1) of section 4 of the Federal Service Tribunal Act expressly bars the Tribunal from entertaining appeal against the decision of a departmental Authority determining the fitness or otherwise of a person to be promoted to a higher grade. The Tribunal has thus no jurisdiction to examine whether or not a civil servant is fit for promotion to a higher grade. Under Clause (2) of Article 212 of the Constitution the jurisdiction of the Court is ousted only over matters falling within the exclusive jurisdiction of the Tribunal established under Clause (1) of Article 212. As the determination of fitness of a civil servant for promotion has been excluded from jurisdiction of the Tribunal, the ouster Clause (2) of Article 212 therefore does not extend to such matters. It has been consistently held by this Court that the Constitutional Jurisdiction of the High Court is not ousted in matters pertaining to appointment of a civil servant to a particular post or to be promoted to a higher grade”.

Similar view has been recorded by leaned Divisional Bench of this Court in case reported as *Muhammad Ayaz Khan v. Government of Sindh and others* **(2007 PLC (C.S.) 716)** in the following terms:-

“We are satisfied that as the matter concerns the fitness of the petitioner for promotion etc., hence the jurisdiction of the Service Tribunal would not be attracted in terms of the cited cases. Insofar as the Department’s view that the petitioner’s case is to be deferred till such time the enquiry is finalized, in our opinion this cannot be substantiated because it is settled law that a person is presumed innocent until found guilty. Hence the petitioner cannot be punished departmentally for a crime which, ultimately, he may not be found guilty of. Consequently, we would allow this petition to the extent that the matter is remanded back to the department with direction to decide the petitioner’s case of promotion etc., solely on merit and the Rules without taking into consideration the pendency of the NAB case against him”.

10. In the case reported as *Mumtaz Ali Shah v Chairman Pakistan Telecommunication Company Limited* (PLD 2002 SC 1060), it has been held by the Hon’ble Supreme Court, that even if a prosecution’s case has withdrawn against an employee, it would amount to an honorable acquittal and the said employee cannot be denied promotion on this ground that he has not been acquitted; but case against him has been withdrawn. The relevant finding of the Hon’ble Supreme Court is as under;

4. Both, the departmental authority as well as the Federal Service Tribunal, in brief, were of the view that withdrawal of case was not tantamount to honourable acquittal and hence the promotion could not be granted with effect from 18-12-1993 when his colleagues were given promotion. The question to be determined is, as to, whether the promotion could be denied on the ground that the appellant was not honourably acquitted and., as to, whether it was a case of discrimination.

5. The consequential conviction or acquittal (whether honourable or otherwise) of an accused in a criminal trial is always with regard and reference to the charge levelled against him. But once, when the very charge is withdrawn by the competent Authority or by the Public Prosecutor under section 494, Cr.P.C, it would be presumed that the acquittal was without any benefit of doubt. Thus the honourableness or otherwise of acquittal is totally immaterial and out of place.

6. Honourable acquittal is a phenomenon totally alien to 'the Criminal Procedure Code. It seems to be a self-coined terminology least supported by the Code. The effect of withdrawal under section 494, Cr.P.C. is only to the effect that if the withdrawal occurs

before the framing of charge, it entails upon the discharge of accused and if it occurs after the framing of charge, it entails upon acquittal. It is as good an acquittal as it would have been under any other circumstances. Rather, an acquittal due to withdrawal of prosecution is placed on a better footing because the prosecution is of the view that there are no chances of conviction and the charge is groundless. In the circumstances, to coin and import a term like "honourable acquittal" is not at all justified and is nowhere provided in the entire Code.

7. In the circumstances, the appellant, though promoted later on, was wrongly denied his promotion with effect from 18-12-1993 when admittedly juniors to him like respondents 5 to 7 got promoted. It also amounts to a glaring discrimination because without there being any evidence on record of the criminal case, nobody can presume, as to, whether it was a clean acquittal or an acquittal through benefit of doubt. We believe that the differentiation of clean acquittal and acquittal through benefit of doubt amounting to honourable acquittal is a self-coined proposition having no nexus with the provisions of Code of Criminal Procedure. An acquittal is an acquittal simpliciter and must entail upon all the consequences of a pure acquittal.

11. In view of hereinabove facts and circumstances of this case, it appears that insofar as the supersession of the Petitioner is concerned, if it is based on the cases, both criminal as well as civil initiated against the Petitioner then perhaps the Respondents are not justified in passing an Order of supersession time and again. Since it is settled law that this Court cannot pass an order or direct promotion of an employee on its own, as it is to be considered by the concerned Departmental Promotion Committee, therefore, while allowing / disposing of this Petition, we direct that in the next meeting of the Departmental Promotion Committee, the Petitioner's case may be considered in accordance with law and without being influenced or prejudiced as to the said cases as noted hereinabove and no adverse inference may be drawn against the Petitioner. At the same time, it is clarified that the promotion of the petitioner has to be considered if he is otherwise found fit for promotion by the DPC.

12. With these observations, this Petition is **allowed** to this extent.

Dated: 27.04.2022

J U D G E

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Ahmad