

IN THE HIGH COURT OF SINDH KARACHI

Before:

Mr. Justice Naimatullah Phulpoto
Mr. Justice Adnan-ul-Karim Memon

C.P. No. D-5663 of 2021

Mir Karam Ali Khan &
28 others
Petitioners through : Mr. Ahmed Ali Ghumro, advocate

Respondent Nos.1 & 2
Through : Mr. Ali Safdar Depar, AAG

Respondents 4,5,12,13,14,16, & 17
Through : Mr. Ali Asadullah Bullo, advocate

Respondents 03, 06,07,08,09,
10, 11, 15, 18 & 19
Through : Nemo

Date of hearing : **17.05.2022**
Date of announcement : **23.05.2022**

J U D G M E N T

Adnan-ul-Karim Memon, J. Through this petition, the petitioners have assailed the minutes of the meeting dated 31.08.2021 of the Departmental Promotion Committee (DPC) of the Irrigation Department, whereby the petitioners have been deferred on account of the requisite length of service of five (05) years in BPS-17. It is, *inter-alia*, contended that their case falls within the ambit of Rule 8-A of the Sindh Civil Servants (Appointment, Promotion, and Transfer) Rules, 1974 for promotion as Executive Engineer (BPS-18).

2. Mr. Ahmed Ali Ghumro, learned counsel for the petitioners, has briefed us on the issue of promotion of the petitioners and private respondents with the assertion that as per the seniority list of the Assistant Engineers (Civil) stood on 02.06.2020, wherein the petitioners from 1 to 8 rank are seniors to all the respondents from 3 to 19, however, the petitioners from Sr. No. 9 to 29 stood senior to the respondents from Sr. No. 7 to 19. Per learned counsel, the private respondents 3 to 19 were considered for promotion in BPS-18 vide DPC meeting dated 31.08.2021, ignoring the seniority of the petitioners, thus causing loss to the service of the petitioners. Per learned counsel, the appointment to BPS-17 is prescribed to be made by two mediums i.e. initial recruitment and promotion, however, to maintain equality, and proportionality, the quota of 43% has been prescribed through initial recruitment, whereas 30% of the appointments are meant to be made through the promotion of the graduate engineers, diploma holders, and B.Tech holders. Per learned counsel, the private respondents 3 to 19 when promoted to BPS-17 were actually adjusted against the quota reserved for direct recruits, thus they were occupying the post in BPS-17 beyond their fixed proportion, thus the initially recruited batches of 2015-2018 were

ranked seniors to the promotees/respondents in the Seniority List up-to-date. He prayed for the annulment of the minutes of the meeting of DPC.

3. The instant petition has been opposed by Mr. Ali Safdar Depar, learned AAG on the ground that the matter falls within the ambit of terms and conditions of service which is out of the jurisdiction of this Court as provided under Article 212 of the Constitution of the Islamic Republic of Pakistan, 1973. Per learned AAG in terms of the ratio of the decision rendered by the Honorable Supreme Court in the case of *Khalilullah Kakar v. Provincial Police Officer*, **2021 §CMR 1171**, and *Chief Secretary Government of Punjab Lahore, etc v. Ms. Shamim Usman*, **2021 §CMR 1390**, this petition is not maintainable. On merits he submitted that the petitioners were appointed in the year 2018 and are short of the length of service to claim promotion in BS-18 as they have not completed the required length of service of 05 years, therefore, their case cannot be placed at par with those civil servants on the premise that they fulfilled the required criteria as outlined in the recruitment rules and were rightly given promotion under the law. On merits, he has submitted that private respondents were initially appointed as Sub Engineer (BPS-11) and after completion of five years' service, they were awarded BS-16 based on qualifying for graduation degree i.e. B.E in Civil. He further submitted that as per the existing ratio provided in the recruitment rules, they had rightly been promoted to the post of Assistant Executive Engineer (Civil) (BPS-17) on regular basis in the year 2012-2014 before the appointment of the petitioners.

4. On the issue of the ratio of direct appointees and promotees, learned AAG has submitted that the same has already been set at naught as per recruitment rules. Learned AAG referred to the orders passed by the learned Sindh Service Tribunal against the seniority of Assistant Executive Engineer (Civil) (BPS-17) the same has attained finality vide order dated 31.08.2021 passed by learned SST. Learned AAG pointed out that DPC in its meeting held on 31.08.2021 promoted Assistant Executive Engineer to the post of Executive Engineer Civil (BPS-18) and the case of petitioners was deferred due to lack of requisite length of service. He prayed for the dismissal of the instant petition.

5. Mr. Ali Asadullah Bullo, learned counsel for the private respondents 4,5,12,13,14,16, & 17, has strongly objected to the maintainability of the instant petition because of the specific bar contained in Article 212(2) of the Constitution of the Islamic Republic of Pakistan, 1973. He emphasized that the petitioners and respondents being employees of the Irrigation Department are civil servants and the matter of promotion of the private respondents relates to their terms and conditions of service, which particularly rests within the jurisdiction of the Sindh Service Tribunal. Therefore, the very institution of the captioned Constitutional petition was/is against the Constitutional mandate. He asserted that it is an established principle of law that the Courts assume their jurisdiction through particular law conferring a particular jurisdiction and Article 212(2) of the Constitution specifically places an embargo on all other Courts except the Service Tribunal to pass any order, or entertain any proceedings in respect of any matter relating to the terms and conditions of service of civil servants, even if there is mala fide on the part of respondents,

this means that any constitutional petition ought not to be entertained by this Court in its constitutional jurisdiction under Article 199 of the Constitution, and entertaining and then proceeding with the constitutional petition amounts to defeating the express Constitutional mandate under which the Tribunal is vested with jurisdiction to deal with the matters of civil servants. Learned counsel next contended that the Honorable Supreme Court has held that Article 212 of the Constitution ousts the jurisdiction of High Courts and Civil Courts in respect of the matters about terms and conditions of civil servants. In other words, the provisions of Article 212 do not confer a concurrent jurisdiction to civil Courts, High Courts, and Tribunals. The ouster contemplated under the said Article is a Constitutional command and restricts the jurisdiction of this Court on the subject, which squarely falls within the exclusive domain of Tribunals. He further averred that when the law has provided an adequate remedy, constitutional jurisdiction under Article 199 of the Constitution cannot be exercised as the same has to be exercised in exceptional circumstances, which could justify invoking the said jurisdiction. He submitted that the Petition is based on disputed questions of facts; besides that, the Petitioners have not come before this Court with clean hands. He affirmed that by filing a writ of Mandamus under Article 199 of the Constitution, a question relating to terms and conditions of service can only be determined by the concerned Tribunal and not this Court.

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

7. To address the question of maintainability of the instant petition, in terms of the ratio of the judgment dated 01.07.2021 passed by the Hon'ble Supreme Court of Pakistan in the case of Chief Secretary Government of Punjab Lahore, etc v. Ms. Shamim Usman 2021 SCMR 1390, whereby the Hon'ble Supreme Court was pleased to hold in paragraph 5 that High Court has no jurisdiction to entertain any proceedings relatable to the terms and conditions of service of a civil servant and can only be adjudicated upon by the Services Tribunal under the Act. There is no cavil to the proposition set forth by the Honorable Supreme Court as discussed supra. Besides that the Hon'ble Supreme Court has observed that the only exception provided under section 4(i) (b) of the Services Tribunal Act wherein appeal does not lie before Services Tribunal against an order or decision of the department, determining the fitness of a person to be appointed.

8. Primarily, in this matter, the petitioners have called in question the vires of the minutes of the meeting dated 31.08.2021 of the Departmental Promotion Committee of Irrigation Department, 31.08.2021 whereby the DPC deferred the candidature of the aforesaid private respondents for promotion to the post of Executive Engineer BS-18 for want of length of service and their case was deferred on the ground that they were appointed on 20.11.2018 and did not complete five years requisite length of service in BPS-17 as per recruitment rules. If this is a position the respondent department cannot be allowed to exempt the civil servants from completing the requisite length of service for promotion to the next rank.

9. It is well-settled law that to qualify for the promotion, the least that is expected of an employee must have an unblemished record and have the requisite length of service, and the availability of the vacancy. This is settled law that an employee found not fit for appointment and promotion cannot be placed at par with the other employees, and his / her case has to be treated differently; while considering an employee for promotion his / her entire service profile has to be examined.

10. In the present case, it is an admitted position that the petitioners were appointed in the year 2018 and they have not completed the required five years length of service in BPS-17 as per recruitment rules, besides the post of Executive Engineer (Civil) (BPS-18) deals with the financial matters, procurement tenders, etc., whereas they do not possess the required experience, therefore, their promotion to the post of Executive Engineer (Civil) (BPS-18) would be premature. The promotions of employees/civil servants are generally decided based on recommendations made by the Departmental Promotion Committee which is entrusted with an onerous and arduous task to judge the suitability of officers for promotions to selection and or non-selection posts after assessment of performance, conduct, aptness, and qualification with certain guidelines to standardize and synchronize the assessment benchmarks of all contenders in a fair, unbiased and transparent manner keeping in view the "dossier" (detailed record and information concerning an officer; a collection of documents concerning a particular person or matter) or working paper including ACRs of every individual officer/employee. On the issue of seniority, the Honorable Supreme Court in the case of Director-General Intelligence Bureau, Islamabad and others v. Amir Mujahid Khan and others (2011 SCMR 389), held that the "seniority" in the grade to which a civil servant is promoted is to take effect from the date of regular appointment to a post in the grade.

11. The Honorable Supreme Court has held that eligibility itself is not the benchmark for promotion, rather the most vital yardstick is fitness, which can be judged from the service record which includes ACRs, qualification, length of service in a particular grade/scale, integrity, knowledge, and proficiency in the work/ assignments, all of which are essential dynamics for weighing and appraising the merits for promotion to the selection post which is a quite common procedure and practice articulated under the law for considering the promotions on merit. The Honorable Supreme Court in the case of Muhammad Anis and others v. Abdul Haseeb and others (PLD 1994 SC 539), held that the question of eligibility is different from the question of fitness. Indeed, from the definition of the words "eligible" and "fit" given in the dictionaries, it appears that the meanings of the above two words are interchangeable and at times they carry the same meanings but at the same time they have different meanings.

12. The question is whether a person is legally qualified for appointment or promotion to a particular post and grade is relatable to the factum whether he possesses the requisite qualifications for consideration, whereas the question of fitness pertains to the competency of the person concerned, which is to be decided by the competent authority. The question of fitness of their being appointed is to be determined by the functionaries

mentioned therein. In other words, a person may be eligible for consideration for a particular post, but may not be fit to be appointed. Further, the Honorable Supreme Court in the case of Muhammad Rahim Khan v. The Chief Secretary, N.W.F.P. and 4 others (1999 **SCMR 1605**), held that the concept of eligibility implies a qualification to be appointed or promoted, whereas that of fitness encompasses a person's competence to be chosen or selected for appointment or promotion. The eligibility tests are objective and open to scrutiny by a judicial forum. However, even in the matters involving fitness to be appointed or promoted to a particular post or grade there has to be necessary material based on which an opinion, one way or the other, is to be formed.

13. It is an admitted fact that petitioners were considered for promotion by the DPC in its meeting held on 31.08.2021 who were not promoted as their length of service was less than 5 years which was the condition precedent for their promotion in Grade 18 meaning thereby that they are not eligible for promotion whereas private respondents were promoted by the DPC vide same notification of the said date as their length of service and other conditions/requirements of the criteria were fulfilled. Therefore, the petitioners were deferred. So far as the claim of the petitioners for appointment by way of promotion on an acting charge basis is concerned the same cannot be allowed at this stage for the reason this arrangement could only be made, subject to the availability of vacancies under the ratio of their respective quota.

14. According to the seniority principle inter- se-seniority of civil servants appointed in the same calendar year, the Civil servants appointed by promotion, transfer, or initial appointment to service, cadre or post shall take seniority from the date of their regular appointment to that service, cadre or post. It is a settled proposition of law that department promotees would be regarded as senior to direct recruits of the same year as per the rule of Seniority. There are several pronouncements of the Honorable Supreme Court to this effect in the cases of Fasihuddin Siddiqui and 7 others v. Government of Pakistan and others, 1998 **SCMR 637**, Muhammad Yousaf and 4 others v. Abdul Rashid and others, 1996 **SCMR 1297**, and Rustam Khan and another v. Government of NWFP Education Department, 1994 **SCMR 1957**. It is also a settled principle of law that seniority is not a vested right as law laid down by the Honorable Supreme Court in the cases of Muhammad Zakir Khan v. Government of Sindh and others, 2004 **SCMR 497** and Jehangir Mirza, Senior Superintendent of Police, Lahore and another v. Government of Pakistan through Secretary Establishment Division and others, **PLD 1990 SC 1013**. It is also a settled principle of law that "seniority" in the grade to which a civil servant is promoted is to take effect from the date of regular appointment to a post in the grade. It is also a settled principle of law qua the question of conferring seniority with retrospective effect is concerned that cannot be done unless such right was established. There are several pronouncements of the Honorable Supreme Court that regularization of seniority from the retrospective date is not permitted and is beyond the power of the Government. See Wajahat Hussain, Assistant Director, Social Welfare, Lahore and 7 others v. Province of Punjab, through Secretary, Social Welfare & Zakat, Lahore and 81 others, **PLD 1991 SC**

82, Sh. Anwar Hussain, Assistant Director, Labour Welfare, Lahore Region, Lahore v. Government of the Punjab through Secretary, Labour Department and others, 1985 §CMR 1201, Muhammad Yousaf and 4 others v. Abdul Rashid and others, 1996 §CMR 1297, and Nazeer Ahmed v. Government of Sindh through Chief Secretary Sindh, Karachi and 2 other, 2001 §CMR 352 & 2001 PLC(C.S.) 394. It is also a settled principle of law that civil servants who were senior in lower grade would retain inter se seniority in a higher grade in case they were promoted in a batch. It is also settled law that if the promotion of a civil servant is deferred without any fault on his part he can be given a promotion from ante date when their juniors were promoted. See Muhammad Jan Marwat and another v. Nazir Muhammad and 17 others, 1997 PLC (C.S.) 512. It is a settled principle of law that every case is to be decided on its peculiar circumstances and facts as law laid down by the Honorable Supreme Court in the case of Trustees of the Port of Karachi v. Muhammad Saleem, 1994 §CMR 2213. It is also settled law that where the promotees were eligible and the vacancies were available in their quota, in that case, they will be given seniority over the direct recruits on the ground that the necessary exercise for their promotion was not carried out by the department within time and in the meantime, appointments are made in the direct quota. This principle finds support from the judgment of the Honorable Supreme Court in the case of Government of NWFP and others v. Buner Khan and others, 1985 §CMR 1158. It is also settled law that if civil servants are selected for promotion in a "batch¹" or as a "group of persons" then the date of promotion of all the persons in the batch or the group shall be the date when any one of them was first promoted to the post and they shall retain their inter se seniority and therefore as per the above principle will be considered to have been promoted from the date when the first amongst the batch was promoted and will also retain their inter se seniority of the lower post.

15. In view of the above, this petition is devoid of merit for the aforesaid reasons and is dismissed accordingly along with the pending application(s).

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