

IN THE HIGH COURT OF SINDH KARACHI

Before:

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

Constitutional Petition No.D-3981 of 2018

(Saeed Babar and Muhammad Shahid Rauf v. Federation of Pakistan and 04 others)

Mr. S.M. Shuja Abbas Rizvi and Ms. Humaira Aftab, advocate along with petitioners.

Mr. Muhammad Nishat Warsi, DAG

Mr. Pervaiz Ahmed Memon, advocate for respondent No.2

Mr. Muhammad Khalil Dogar, advocate for respondents No.03 to 05.

Date of hearing &
Order : **11.04.2022**

ORDER

Adnan-ul-Karim Memon, J. Through the captioned Constitutional Petition, the petitioners are seeking promotion to the post of Lower Division Clerk (LDC) in Model Customs Collectorate (Appraisalment-West) Custom House, Karachi, on the premise that junior officers in service in Class IV have been promoted to LDC on regular basis.

2. Petitioners have averred that they were initially appointed as Record Suppliers, in class IV in the service of the respondent- Model Customs Collectorate (Appraisalment-West) Custom House, Karachi, in the year 1980; that during their service, the Petitioners have also improved their academic qualifications to seek promotion to the post of LDC; however, the respondents instead of promoting them, issued different office orders whereby they were posted as L.D.C on looking after charge basis in the year 2001. Petitioners further averred that the posts of L.D.Cs to which the Petitioners were initially promoted temporarily were regular and permanent; in the years 2006 to 2009, the Directorate of Training and Research (Customs, Federal Excise, and Sales Tax) conducted typing test/training of the Class IV staff holding the post of L.D.C. on acting charge basis; and, the Petitioners duly participated in the typing test and qualified; that they had also undergone various training courses and skill development programs for ministerial staff; and, in due course of time, the Respondents started processing the cases of temporarily promoted L.D.C.s for regular promotion under the law. Petitioners pleaded that they were senior-most amongst the staff in the lower grade / Class IV as well as appointed by promotion to the post of L.D.C.s earlier in time to others, however, Respondent No. 1 acted in a manifestly arbitrary and discriminatory manner, ignored them vide office order dated 20.04.2008. Petitioners emphasized that Respondent No. 3 examined their case; and, vide letter dated 28.04.2010, addressed to the Respondent No. 1 pointed out the background of the case and recommended that the Class IV staff who had qualified for the typing test held in the year 2007 as well as working as LDC on acting charge basis could be allowed to be promoted as LDC regularly as they have been

officiating the charge since last many years. However, nothing has been done to date, compelling them to approach this Court for the redressal of their grievances.

3. Mr. S.M. Shuja Abbas Rizvi, learned counsel for the petitioners, argued that the respondents have violated the vested rights of the petitioners by treating them as officiating or temporary L.D.Cs even though their promotions have acquired a permanent character with the time spanning over a decade; that the respondents cannot pass the order, affecting the vested rights of the petitioners and giving them retrospective effect thereby damaging the careers and lives of the petitioners, as, under the law, the petitioners could not be permanently deprived of the prospects of promotion in service; that the petitioners were duly promoted to the vacant posts of L.D.Cs by the respondents as the respondents have made the appointment of petitioners through promotions, cannot treat them as temporary or on acting charge after a lapse of a period of more than 10 years; that the respondents lawfully appointed and promoted the petitioners as L.D.Cs; and over 10 years are now estopped from questioning the appointments made by them by way of promotion. On the aforesaid proposition, learned counsel placed reliance on the judgment rendered by the Hon'ble Supreme Court in the case of Secretary, Government of N.W.E.P v. Sadullah Khan, 1996 3CMR 413. Learned counsel further submitted that although the Respondent Collectorate is the competent authority, the respondent No. 1 is now usurping the power and interfering in matters meant for the Collectorate; that without prejudice to the foregoing, it is settled law that even where posts meant for direct recruitment are filled through promotion, the latter appointments are not illegal and cannot be reversed or nullified particularly so after the lapse of time, as the petitioner having been promoted as L.D.Cs and having qualified in the subsequent typing test conducted by the Directorate of Training are to be treated as a regular promotion by the respondents, and they cannot adopt a position treating them temporary or on an acting charge basis; that by treating the petitioners as other than regular promotees, the respondents have violated the vested legal and constitutional rights of the petitioners including fundamental rights guaranteed under Articles 2A, 4, 18 and 25 of the Constitution of Islamic Republic of Pakistan, 1973; that even if the Appointment, Promotion and Transfer Rules for Ministerial Staff applied to the petitioners, these are inconsistent with and are ultra vires to the provisions of law including Section 9 of the Civil Servants Act, 1973.

4. Mr. Muhammad Khalil Dogar, learned counsel representing the respondents, has stated that the respondents have not violated any right of the Petitioners as they have no right to be promoted on the vacancies reserved for direct recruits. However, to cope with the shortage of LDCs at that relevant time, petitioners were given officiating charge of LDC in their pay scale without any seniority in the cadre of LDC due to the ban on fresh recruitment. Learned counsel further submitted that the Respondents have not yet passed any order affecting vested rights of the petitioners nor is there any proposal to such orders, as such, the contention of the petitioners is based upon presumption; that the Petitioners are not being deprived of their promotion but in fact, they have been promoted more than their promotion quota fixed @ only 10% in pursuance of SRO

248(1)/88 dated 10.04.1988; that the Petitioners were never promoted regularly to the post of LDC but, they were only given officiating charge of LDC in their pay scale, and no reversion process was initiated by the Respondent No. 5.; that the only authority for allowing promotion to Class-IV staff to the post of LDC is SRO 248(I)/88 dated 10.04.1988 whereby only 10% quota is reserved for this cadre; that the Petitioners were never promoted regularly to the post of LDC. Learned counsel next submitted that posts of direct recruitment are filled through promotion in terms of SRO 248(T)/88 dated 10.04.1988 only 10% quota is fixed for Class-IV staff and 90% for direct recruitment. The Petitioners cannot be treated permanently until & unless a departmental promotion committee cleared them as LDC. The Petitioners without going into the legal procedure of DPC cannot be treated as permanent LDC; Respondent No. 1 has not promoted any official of Class-1 on regular basis merely based on typing tests conducted by the Directorate General of Training & Research, Karachi; that no violation of the law has ever been made by the Respondents; the Petitioners cannot be promoted as regular LDC merely on passing the typing test conducted by the Directorate General of Training & Research (Customs), Karachi; the Petitioners have not been subjected to any discriminatory treatment but actually, they were given chance to work as LDC even though there was no promotional quota but they were allowed to continue as officiating LDC for a long time; that Section 9 of Civil Servants Act, 1973 pertains to the promotion of BS-20 & 21 officers and does not affect the promotional issue of Petitioners. He lastly prayed for the dismissal of the instant petition.

5. Mr. Pervaiz Ahmed Memon, learned counsel representing respondent No.2 has adopted the arguments of learned counsel for respondents 3 to 5.

6. Mr. Muhammad Nishat Warsi, learned DAG has also supported the stance of respondents No.2 to 5.

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

8. It is an established principle that in service-related cases there exist two-pronged criteria. One is eligibility for promotion and the other is fitness for promotion, while the former relates to the terms and conditions of service, the latter is a subjective evaluation made based on objective criteria. No doubt in service matters, the promotion depends upon eligibility, fitness, and availability of vacancy, and no one including the Petitioners can claim promotion as a matter of right. It is for the Competent Authority, who could make appointments, determine seniority, eligibility, fitness and promotion, and other ancillary matters relating to the terms and conditions of the employees as prescribed under the Act and Rules framed thereunder. Besides 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. This view is cemented by the judgment delivered by the Honorable Supreme Court in the case of Province of Sindh and others v. Ghulam Farid

and others (2014 SCMR 1189) and Secretary to Government of Punjab and others v. Muhammad Khalid Usmani and others (2016 SCMR 2125).

9. The controversy involved in the present case could be resolved on the premise that for a long time no direct recruitment for the vacant posts of LDCs could be made by the respondent department; and, the petitioners have been working as Record Supplier in the office of Model Customs Collectorate Karachi, Federal Board of Revenue with effect from 1980, and one of the petitioners has reached the age of superannuation during the litigation.

10. Rule 8-B of the Civil Servants (Appointment, Promotion, and Transfer) Rules, 1973, provides for promotion on an acting charge basis. According to the existing instructions set out in ESTACODE, all appointments by promotion against higher posts are to be made through a regular selection process i.e. with the approval of the Central Selection Board/Departmental Promotion Committee and the authority competent to make appointments to the grade in which the vacancy exists. However, in those cases where a vacancy in a higher post occurs for less than two months and it is considered impossible for good reasons to make arrangements for day to day work of that post to be carried on otherwise, the current charge of the duties of that post may be given temporarily with approval of the competent authority to the most senior officer in the cadre present at the place or in the organization where the vacancy occurs if he is otherwise fit and eligible for the promotion. On the aforesaid proposition, guidance in this respect can be sought from the decisions of the Honorable Supreme Court in the cases of Muhammad Asif Chatha and others v. Chief Secretary, Government of Punjab, Lahore, and others (2015 SCMR 165), Tariq Aziz-Ud-Din and others: in re Human Rights Nos.8340, 9504-G, 13936-G, 13635-P and 14306-G to 143309-G of 2009 (2010 SCMR 1301) and Khan Muhammad v. Chief Secretary Baluchistan and others (2018 SCMR 1411).

11. The record reflects that on the recommendation of the Departmental Promotion Committee (DPC) and with the approval of the Director-General, the competent authority promoted the petitioners as LDC on an acting charge basis. It appears that the respondents are not adhering to the mandate of Article 27 of the Constitution by not considering the case of petitioners for promotion to the post of LDC, on a regular basis and by keeping them on an acting charge basis, for a longer period against the post specifically reserved for direct recruitment; even they failed and neglected to make appointments on regular basis. The petitioners for almost 10 years served on the post of LDC and when he asked for regularization/confirmation, it was/is refused them. The vacancy of LDC did exist but was meant for direct recruitment. The respondents for their convenience promoted the petitioner to the post of LDC on an acting/look after charge basis and thus, they could not be refused confirmation to the petitioners to the post of LDC. The recruitment rules also provide that the post of LDC could also be filled by way of promotion (10%), the said post is required to be filled amongst N/Qasid, Daftari, Record Sorter, DMO, and other

employees holding the lower post, having Matriculation degree, with typing speed 30 w.p.m. Prima facie, the petitioners meet the requirement of the subject post, thus they cannot be deprived of such promotion on a 10% quota for the reason that they have been holding the subject post on the officiating basis for a long time.

12. The Honorable Supreme Court in similar circumstances in the case of Director General Intelligence and Investigation, F.B.R., Islamabad, and others Vs. Muhammad Aslam Khan 2020 SCMR 1846 has held that the respondents are running the department not only on ad-hocism but are also apparently illegally conducting themselves. An excerpt of the order is reproduced as under:-

“... such factum is also supported by the letter dated 24.12.2004, by which the appellants ordered the promotion of ministerial staff to next higher posts against available vacancies of direct quota on acting charge basis. Further, by letter dated 30.03.2007, the appellants again ordered the promotion of ministerial staff to the post of Intelligence Officer against the post falling to the share of direct recruitment quota on the acting charge basis. Though the Rule provides for promotion on the acting charge basis, such Rule has been made bona fide, to be used in bona fide situations and for bona fide purposes, and not to exploit the employees, who in the present case, is a ministerial employees and further, to perpetuate the maladministration of the department, which in the present case, is what the appellants are doing. No such acts of the appellants can be countenanced nor can the appellants be allowed to make their ministerial staff hostage to appellants' own arbitrary, whimsical and capricious conduct and play with the employment of its ministerial staff. This will amount to allowing premium to the appellants for their apparent bad conduct and conduct, which is not mandated by law.”

13. The record further reflects that this Court vide judgment dated 21.05.2013 passed in CP No.D-2603/2010 allowed the petition to the extent of similar relief which had been granted in CP No.D-2716/2009 and finally the matter landed in the Hon'ble Supreme Court of Pakistan in Civil Appeal No.2-K/2015, whereby the Hon'ble Supreme Court of Pakistan vide order dated 20.04.2017 dismissed Civil Appeal of the Model Customs Collectorate and others. An excerpt of the order dated 20.04.2017 is reproduced as under:

“The petitioners' grievance was that they were given officiating charge and have not been regularized despite having worked on such post for the last decade. Their constitution petition has been allowed through the impugned judgment, based on certain earlier judgments of the High Court of Sindh (extensively quoted in the impugned judgment) whereby in similar circumstances some other employees of the petitioner department who earlier approached the High Court were granted regularization, which judgments were not shown to have ever been challenged. Though leave in this case was granted to examine the question as to whether the writ petition filed by the respondent was competent and not barred under Article 212 of the Constitution of the Islamic Republic of Pakistan, 1973, we considered the argument of the learned counsel and find that in the facts and circumstances where the petitioners were enforcing their right to seek regularization on the basis of earlier decisions of the Court and seemingly on the principle of equality; stricto sensu it was not a case of terms and conditions of the respondents thus the bar of Article 212 (supra) would not be attracted ipso jure. Resultantly, no case for interference is made out. Dismissed accordingly.”

14. The objection raised by learned counsel for the respondents about the maintainability of the instant petition in terms of Article 212 of the Constitution of the

Islamic Republic of Pakistan, 1973 has already been answered by the Hon'ble Supreme Court in the aforesaid decision, thus no further deliberation is required on our part.

15. The result of the above discussion is that captioned constitutional petition is allowed in the terms of the ratio of the order dated 20.04.2017 as well as a judgment passed by the Hon'ble Supreme Court of Pakistan in the case of *Director General Intelligence and Investigation, F.B.R., Islamabad, and others Vs. Muhammad Aslam Khan* **2020 SCMR 1846**. The competent authority of respondents is directed to consider the serving petitioner (including the petitioner who stood retired from service) as LDC with effect from the date, when they were holding the post of LDC on an acting/ look after/officiating charge basis; and the benefits accrued thereon shall also be given to the petitioners, if not already paid to them. The aforesaid exercise shall be undertaken within two weeks and a compliance report be submitted through MIT-II of this Court.

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