

IN THE HIGH COURT OF SINDH, KARACHI

C.P. NO. D-1945 OF 2013

PRESENT:**MR. JUSTICE MUHAMMAD ALI MAZHAR.****MR. JUSTICE ARSHAD HUSSAIN KHAN.***Ehsanullah Khan**Versus**Federation of Pakistan and others*

Petitioner: Ehsanullah Khan through Ms. Naila Tabassum
Advocate

Respondents: Through Mr. Shaikh Liaquat Hussain,
Standing Counsel.

Date of Hg: 13.10.2016

JUDGMENT

ARSHAD HUSSAIN KHAN, J. The petitioner through the instant constitutional petition has sought relief as follow:-

“That this Hon’ble Court may be pleased to call the relevant record of the petitioner and proceeding of the meeting of CSB from the Respondents and after hearing set-aside the impugned recommendation/decision dated 13.02.2013 of CSB regarding recommendation of supersession of the petitioner’s promotion by declaring the same as illegal, unlawful and contrary to the mandatory provisions of law, and to pass order of the petitioner’s promotion w.e.f. 26.01.2010 when his two juniors were promoted and he being kept away from the promotion for one reason and other.

Any other relief(s) which this Hon’ble Court deems fit and proper in the circumstances of the case may also be granted to the petitioner.

The prayer is made in the interest of Justice & Equity.”

2. Brief facts arising out of the present petition as averred therein are that the petitioner was appointed by the Government of Pakistan as Inspector FIA on 15.7.1976 and having good service record subsequently promoted to the following ranks on different dates; (i) Assistant Director (BS-17) w.e.f. 02.10.1986, (ii) Deputy Director (BS-18) w.e.f. 16.05.1994 and (iii) Additional Director (BS-19) w.e.f. 11.09.2006. It is also averred that case of the petitioner for promotion from the post of additional Director to the post of Director (BS-20) was first time considered by the Central

Selection Board [CSB] in its meeting held during the 3rd week of December 2009, however he was deferred only for want of Senior Management Course [SMC] for which the petitioner was not nominated earlier. However, in the said meeting two junior Officers of the petitioner namely (i) Mr. Muhammad Saleem (ii) Mr. Ahmad Riaz Shaikh were promoted as Director. It is also averred that in the month of January 2010 after promotion of his two juniors the petitioner was nominated to attend the SMC, a mandatory course for promotion, later on his nomination was withdrawn without assigning any reason before two days of commencement of the course, as such petitioner filed CP No. D-274 of 2010, however, upon receiving the notice of the said petition the Establishment Division immediately contacted the petitioner and restored his nomination for the SMC. Thereafter the petitioner proceeded to attend the course at National Management College Lahore, on 10.02.2010. It is further alleged in the month of April 2010 when the petitioner was undergoing the above course, the Sindh Police, at the behest of some politician having important position in the government at that time, falsely implicated him in an old case of murder of 2007. Further averred that due to the alleged involvement the petitioner was placed under suspension on 15.06.2010, which remained continued for nine (9) months without initiating any show cause notice and or departmental proceedings against him. Petitioner facing such a situation filed C.P.No.D-889 of 2011 before this Court on 24.03.2011. Upon notice of the said petition, respondent No.3 issued notification of reinstatement of the petitioner. The said petition was subsequently disposed on 15.04.2011 by this Court with direction to the respondents to prepare the folder for promotion of the petitioner in accordance with law. It is also averred that in compliance with the above order respondent No.3 got prepared the promotion case/folder of the petitioner and kept pending till 23.05.2011 and did not forward it to CSB/ Establishment Division, whereas the meeting the CSB/DPC was scheduled to be held on 28.05.2011. Consequently, on 23.04.2011 petitioner filed application under Section 151 CPC before this Court in the same petition. On 27.5.2011 the said application was disposed of with the direction to respondents to place the folder promotion of the petitioner before the DPC on

28.05.2011 for consideration in accordance with law. It is also averred that due to some administrative reason the meeting of the CSB/DPC could not be held on 28.05.2011 and postponed. However, on receipt of information that the department has prepared case of petitioner by suppressing good service record of the petitioner, with irrelevant and unwarranted remarks and recommended deferment of the promotion the petitioner quoting reason of his alleged involvement in a criminal case, he filed an application under Section 151 CPC on 08.09.2011 in the same petition, however, the said application was dismissed. It is further averred that the petitioner also submitted representation to the Chairman, CSB against the unjustified remarks/ recommendations of respondent No.3 in promotion folder besides personal hearing was also requested through another application but the petitioner was not provided opportunity of personal hearing by the Chairman CSB. It is further averred that in the meeting of CSB/DPC held on 24.09.2011, the case of petitioner for promotion was taken up and recommended for deferment due to the alleged involvement of petitioner in criminal case, which was pending trial in the Court. The petitioner challenged the said decision in C.P.No.D-3157 of 2011. On 14.05.2012, the said petition was disposed of with the directions that the meeting of Central Selection Board be convened at the earliest, preferably within 45 days from the date of order, as the petitioner's retirement age was approaching. The respondents failed to comply with the order, resulting which the petitioner filed contempt application against the respondents on 07.07.2012, which application was disposed of on 07.12.2012 with the direction that in case, there has been a practice to take decision through circulation then let the promotion of the petitioner be considered by Central Selection Board by adopting such mode preferably before 14.1.2013. It is also averred that in the 3rd week of February, 2013, it came in the knowledge of the petitioner that his promotion's case once again deferred for the same reasons, as such petitioner once again submitted miscellaneous application before this Court in the month of February 2013, with the request to call the record related with the petitioner's promotion case as the respondents have not complied with the orders of this Court with its letter and spirit. The said

application was disposed of on 30.04.2013 with the observation that the directions to consider the petitioner for promotion were complied, however, the petitioner may approach the appropriate forum for redressal of his grievances, in case he has been wrongly superseded. It is averred in the instant petition that on the same service record of petitioner, which was considered by CSB in September 2011 he was deferred merely for the reason “he was facing trial of murder”. Now after about one year his one and same service record has been referred as “Chequered” and not up to the mark. It is pertinent to mention here that the ACRs / PERs pertaining to last 15 years of the petitioner produced by the respondent No.2 before this Court on 30.04.2013 does not contain any adverse entry / remarks rather all the ACRs / PERs of last 15 years are outstanding, very good and good. It is also averred in the instant petition that from the facts and circumstances stated above it is established that the petitioner is being victimized for no fault of him. He is being deprived from his legitimate right of promotion to BS-20 despite having excellent service record and decorated with Tamgha-e-Imtiaz in the year 1996, therefore, the petitioner having no alternate remedy filed this constitutional petition.

3. Upon service of notice of this petition, respondents No.1 and 2 jointly filed their para-wise comments in the present petition wherein the preliminary objection was taken that since the matter is relating to terms and conditions of civil servants fall in the exclusive jurisdiction of Service Tribunal in terms of Article 212(2) of the Constitution of Islamic Republic of Pakistan, 1973, read with Section 3(2) of Service Tribunal Act, 1973, therefore, the petitioner cannot invoke jurisdiction of this Court as also held by the Supreme Court of Pakistan in case of Mr. Khalid Mahmood Wattoo Vs. Government of Punjab and others (1998 SCMR 2280). It is also stated that in terms of Section 9(3) of the Civil Servants Act, 1973, promotion to posts in basic pay scales 20 and 21 and equivalent are made on the recommendations of Selection Board. It is also stated that in terms of the Guidelines for DPC/CSB, annexed with Promotion Policy 1982/1985, the DPC/CSB consider the cases of eligible Civil Servants in order of seniority and recommend them

either for promotion or supersession or deferment. In addition to the circulation values and variety of experience, the incumbent must possess proven analytical competence, breadth of vision, emotional maturity and such other qualities, the determinants of secure potential for successfully holding posts in top management. The potential cannot be judged just by quantifiable and measurable mathematical formula. The Selection Board applies its collective and pooled wisdom to determine the same. Field offices are generally headed by the officers in this scale. It is, therefore, essential that in addition to the relevant experience, these officers must also have a sufficient variety and width of experience so that they acquire an overview of the functions performed by these organizations within broader framework of the Government's overall objectives and activities to ensure smooth and effective management at the field level. Selection Board also gives due consideration and diligence to the nature of duties, duration and location of posts previously held by the officer. Depending on the post to be filled, an officer possessing well rounded experience is normally preferred, particularly if he/she has served with distinction in unattractive areas. It is further stated that as per Revised Promotion Policy, 2007, an officer for promotion to BS-20 is evaluated against 100 marks (70 PERs, 15 Training Evaluation Reports and 15 for Evaluation by CSB). It is also stated that in pursuance of the order passed on 07.12.2012 by this court in Constitution Petition No.D-3157 of 2011, the proposal for promotion of petitioner-Mr. Ehsanullah Khan along with others was considered by CSB in its meeting held on 13.02.2013. The recommendations of the Central Selection Board are as under:-

“The Board noted that the officer had chequered service record during the last 15 years. His pen picture doesn't reflect much on the light of restructured criteria for award of marks focusing on the six parameters/attributes as contained in the Objective Assessment Form. While keeping in view the overall assessment of the officer as reflected in his PERs and the opinion of the DR, the Board placed him in Category-B and awarded him 11 marks out of 30. The total score of the officer thus came up to 65.62; below the required threshold, the Board, therefore recommended him for supersession.

Total (PER + Training	Award of CSB	Total Marks
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	Category	Marks	
54.62	B	11/30	65.62

It is further stated that in compliance of another order 22.02.2013 of this court, the proposal for promotion of Mr. Ehsanullah Khan was again considered by Central Selection Board in its meeting held on 27.02.2013 and the recommendations of the Central Selection Board are as under:-

“The Board took note of the aforesaid order dated 22.02.2013 of High Court of Sindh and observed that the officer had already been considered by the CSB on 11th – 14th February, 2013 and was recommended for supersession for the reasons indicated above.”

It is also stated that in accordance with the proviso to Section 22(2) of Civil Servants Act 1973, which stipulates that no representation shall lie on matter relating to the determination of fitness of a person to hold a particular post or to be promoted to a higher post or grade, the petitioner`s petition is not maintainable and is liable to be rejected.

4. We have heard the petitioner appeared in person as well as his counsel, learned counsel for the respondents and with their assistance perused the record and relevant law on the point.

5. The case of the petitioner precisely is that despite his excellent service record, he was deprived from his legitimate right of promotion for no fault of him since 2009 while his juniors were promoted from time to time. It is also the case of the petitioner that the relevant service record of the petitioner has not been considered fairly and justly by the CSB and thus assessment of the petitioner was based on biased manner.

6. Learned counsel for the petitioner while reiterating the facts mentioned in the petition has contended that the criminal case which was initiated falsely, inter alia, against the petitioner has been dismissed and the petitioner has been acquitted vide judgment dated 07.08.2015, passed by the learned court of IIIrd Additional Sessions judge Karachi (South) in Sessions Case No. 160 of 2010. The learned counsel for the petitioner in support of his case has also relied upon the following case law:

- (i) 2010 SCMR 1301 Tariq Aziz-uddin in Human Rights Cases Nos. 8340, 9504-G, 13936-G, 13635-P & 14306-G to 143309-G of 2009
- (ii) 2006 PLC (C.S) 564 Khan M. Muttiur Rahman and others v. Government through Secretary, Ministry of Finance (Revenue Division), Government of Pakistan, Islamabad and others

7. Learned counsel for the petitioner has also drawn our attention to the revised guidelines issued by Finance Division (Regulation Wing), Government of Pakistan vide its Office Memorandum No. F.No.4(6)imp/FR-17/2013-277 dated 18.09.2015, for FR-17(1) Committees to consider the cases of proforma promotion, whereby, inter alia, the mandate was given to the committee to consider cases of retired civil servants who could not be considered for promotion for no fault of their own and retired on attaining the age of superannuation. For the sake of ready reference the same is reproduced as under:

**“GOVERNMENT OF PAKISTAN
Cabinet Secretariat
ESTABLISHMENT DIVISION**

* * *

Subject: **REVISED GUIDELINES FOR THE FR-17(1)
COMMITTEES TO CONSIDER THE CASES
OF PROFORMA PROMOTION.**

Part-I rule provisions.

The FR-17(1) reads 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 servants shall be paid the arrears of pay and allowances of such higher post through proforma promotion or up-gradation arising from the ante-dated fixation of his seniority].

[underlining is to add emphasis]

Part-II Relevant Committees/ToRs.

2. A Committee was constituted vide Finance Division's (Regulations Wing) O.M. No.F.3(1)R-2/94 dated 28.05.2001 to

examine the claim under proviso to FR-17(1) and to advise the Appointing Authority(s) in decision making. **The revised composition of the Junior Level Committee on FR-17(1) is as follows:**

Joint Secretary (Regs), Finance Division	Chairman
Joint Secretary (Regs), Establishment Division	Member
A BS-20 officer of Law, Justice and Human Rights Division to be nominated by the Law Secretary	Member
Joint Secretary of the Ministry/Division concerned. [also for the organizations under its administrative control].	Co-opted Member
Deputy Secretary (Reg-II), Finance Division.	Secretary

3. A High Level Committee was also constituted vide Finance Division (Regulation Wing) O.M. No.3(1)R-2/94-1029(Pt) dated 10-12-2010 to make recommendations for cases in respect of civil servants in BS-20 and above under proviso to FR-17(1). The revised composition of the High Level FR-17(1) Committee is as under:-

Secretary, Finance Division	Chairman
Secretary, Establishment Division	Member
Secretary, Cabinet Division	Member
Secretary, Law, Justice and Human Rights Division	Member
Additional Secretary-I, Establishment Division	Member
Secretary of the Ministry/Division concerned.	Co-opted Member
Additional Secretary (Regulations), Finance Division.	Member/Secretary

The mandate of the Committee is under:

- i. The **Junior Level Committee on FR-17(1)** headed by Joint Secretary (Regs) Finance Division shall also make initial scrutiny in cases of civil employees in BS-20 and above and submit its report to the High Level Committee on FR-17(1) for firming up of its recommendations.
- ii. The recommendations of High Level Committee shall be submitted to the appointing authority i.e. Prime Minister for approval.

- iii. The **Junior Level Committee on FR-17(1)** headed by Joint Secretary (Regs) Finance shall continue to consider/recommend cases in respect of civil servants in BS-19 and below.

Part-III

TYPES OF CASES NOT TO BE CONSIDERED BY THE FR-17(1) COMMITTEE(S).

5. The Committee(s) shall refer the following types of cases to the respective DPC/Selection Board for consultation before consideration by the Committee:

- a) A civil servant who has not yet been recommended for promotion to higher post by respective Selection Board/Committee **except the cases of retired civil servants who could not be considered for promotion for no fault of their own and retired on attaining the age of superannuation.**
- b) A civil servant requesting for proforma promotion in Service/Cadre to which he/she does not belong.
- c) A civil servant who had been superseded on the recommendation of respective DPC/Selection Board and approved by Competent Authority and the said supersession is still intact.
- d) A civil servant requesting for proforma promotion on the excuse that he/she was not nominated for mandatory training but his/her junior was nominated at the relevant point of time and such nominations for training pertain to period beyond one year.
- e) The civil servants who were superseded on the recommendations of respective Selection Board/Committee for the recorded reasons having been approved by the Competent Authority.

Part-IV.

TYPE OF CASES TO BE CONSIDERED BY THE FR-17(1) COMMITTEE(S).

6. The respective Committee shall consider the cases of Civil Servants for proforma promotion to the next higher post in their own cadre or service/group who have been granted antedated seniority within the meaning of proviso below FR-17(1).

- a) A civil servant who was deferred for any of the reason indicated in the promotion policy but subsequently it is found that the said reason was wrongly mentioned. For instance M. `A` was deferred for the reasons that he had not undergone the prescribed training or passed departmental examination. Subsequently, it came to the notice that he had undergone the mandatory training or passed the departmental examination but the training evaluation report or result of examination could not be submitted to the

respective Selection Board/Committee at the relevant point of time.

(a)(i) **Cases of retired civil servants who could not be considered for promotion for no fault of their own and retired on attaining the age of superannuation.**

[underlining is to add emphasis]

- b) A civil servant who was not superseded previously on the recommendations of the respective DPC/Selection Board duly approved by Competent Authority but his/her claim had arisen for any other reason.
- c) A civil servant recommended by respective Selection Board/Committee for supersession and the recommendations were approved by Competent Authority provided that the said supersession has been converted into deferment for reasons, what so ever, either by Court of Law or Competent Authority.
- d) A civil servant who was not recommended initially for promotion to higher post by the respective DPC/Selection Board as his/her score was below the minimum threshold for various reasons including:
- i. non-inclusion of additional marks for serving in training institutions.
 - ii. non-inclusion of marks for any PER in the PER score.
 - iii. non-inclusion of marks of the Selection Board.
 - iv. wrong deletion of marks on account of Panelty/adverse remarks etc.
 - v. any other reason deemed by the Committee to be a reason for wrongful prevention to hold higher post.
- e) The cases at (d) above to be considered if the respective DPC/Selection Board subsequently took note of said omission(s) and had recommended such Civil Servant for promotion to higher post.
- f) **FR-17 Committees shall not consider the cases beyond the scope of FR-17.”**

Underling is to add emphasis

8. Learned counsel for the respondents during the course of arguments while reiterating the facts mentioned in the parawise comments also relied on the documents placed on record through statement dated 13.12.2015 as well as documents and case law relied upon placed on record through statement dated 27.04.2016.

- (i) 2003 PLC (CS) 212
- (ii) PLD 2008 SC 769
- (iii) 2008 SCMR 260

- (iv) Un reported Order dated 27.06.2012 passed by Hon'ble Supreme Court in Civil Petition No. 1178 of 2011
- (v) Un reported order dated 19.11.2012 passed in CP No. 3211 of 2011

9. As regards the preliminary objection raised by the learned counsel for the respondents regarding maintainability of the present petition as according to him that since the matter is relating to terms and conditions of civil servants fall in the exclusive jurisdiction of Service Tribunal in terms of Article 212(2) of the Constitution of Islamic Republic of Pakistan, 1973 read with Section 3(2) of Service Tribunal Act, 1973, therefore, the petitioner cannot invoke jurisdiction of this Court, it may be observed that as per Section 4(1)(b) of the Service Tribunal Act, 1973, the Federal Service Tribunal has no jurisdiction on the controversy of the determination of fitness and suitability of a person for a job and for promotion. For the sake of convenience, Section 4(1)(b) of the Service Tribunal Act 1973 is reproduced as under:-

“Section 4 (1) (b) of the Service Tribunal Act, 1973:

“4(1)(b).....no appeal shall lie to a Tribunal against an order or 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 grade”

Similarly proviso to sub section 2 of section 22 of Civil Servants Act, 1973, provides as under:-

“Provided that no representation shall lie on matters relating to the determination of fitness of a person to hold a particular post or to be promoted to a higher post or grade”

Moreover second proviso to Rule 4 (1) of Civil Servants Appeal Rules, 1977, states as herein below:-

“Provided further that no appeal or review shall lie on matters relating to determination of a fitness of a person to hold a particular post or to be promoted to a higher post or grade”

As is evident from above provisions, no remedy by way of filing appeal etc. is provided to Civil Servant against determination of fitness, therefore, this aspect itself is a ground to invoke the constitutional jurisdiction of this court.

10. Indeed, posts of senior management (BS-20 and 21) positions

require selection on the basis of merit and promotions to such posts 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 is 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. Reliance is placed on the case of *Khan M. Muti Rahman and others* [2006 PLC (C.S) 564]

11. The record of the present case reveals that various panel proforma reports for CSB for promotion to BS-20 of the petitioner available on record are transpired as follows:

(i) Panel Proforma (As on 15.04.2011)

Efficiency Index column:

Required Threshold	Score of PER+Training Reports	Marks awarded by CSB	Total
70	52.73+11.29 = 61.02		

(ii) Penel Proforma (As on 25.06.2012)

Efficiency Index column:

Required	Score of PER+Training	Marks	Total
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Threshold	Reports	awarded by CSB	
70	54.29+11.63 = 65.92		

(iii) Panel Proforma (As on 25.06.2012)

Efficiency Index column:

Required Threshold	Score of PER+Training Reports	Marks awarded by CSB	Total
70	54.62 + 8.19 = 62.81		

(iv) Panel Proforma (As on 25.06.2012)

Efficiency Index column:

Required Threshold	Score of PER+Training Reports	Marks awarded by CSB	Total
70	54.62		

The record also shows that the petitioner has been awarded eleven (11) marks by CSB vide its objective assessment. However, the said 11 marks are not reflecting in any of the panel proforma reports, which, had it been added, the petitioner would have been crossed the eligibility threshold mark, i.e. 70 (seventy). Furthermore, in every Panel Proforma the PER and Training marks are different. The above said discrepancies render the impugned recommendations/decision of CSB dated 11.14.2013 nullity in the eyes of law, hence untenable in law.

12. It is well-established that Article 199 of the Constitution casts an obligation on the High Court to act in the aid of law and protects the rights within the frame work of Constitution. This extra ordinary jurisdiction of High Court may be invoked to encounter and collide with extraordinary situation. The jurisdiction conferred under Article 199 of the Constitution is discretionary with the objects to foster justice in aid of justice and not to perpetuate injustice. Reliance is placed on the case of *Muslim Commercial Bank Ltd. through Attorney v. Abdul Waheed Abro and 2 others (2015 PLC 259)*.

13. Since the petitioner has already been retired from service, therefore, at this stage the case may not be sent to CSB for

reconsideration; hence in our view, he is entitled to get the benefit of Office Memorandum No. F.No.4(6)imp/FR-17/2013-277 dated 18.09.2015. The respondents are directed to consider his case of promotion in the light of revised guidelines issued by Finance Division (Regulation Wing), Government of Pakistan vide its Office Memorandum No. F.No.4(6)imp/FR-17/2013-277 dated 18.09.2015, without being influenced by the decision by CSB, strictly in accordance with law.

Accordingly, this constitutional petition is disposed of along with listed application.

Karachi;
Dated:

Judge

Judge