

# IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Irfan Saadat Khan

Mr. Justice Adnan-ul-Karim Memon

## C.P No.D-6057 of 2018

Abdul Rasheed Malah ..... Petitioner

Versus

Federation of Pakistan & others ..... Respondents

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**Date of hearing: 24.09.2018**

Mr. Abdul Salam Memon, Advocate for Petitioner.

Mr. Shaikh Liaquat Hussain, Assistant Attorney General.

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## **ORDER**

**ADNAN-UL-KARIM MEMON,J:-** Through the instant Petition, the Petitioner has prayed for the following relief(s).

- a. **a. Declare that the impugned order dated 27. 02. 2018 is not only illegal but also completely oblivious of the order dated 30.03.2012, passed in C.P. No. 1464 of 2011 and order dated 02.04.2010, passed in C.P. No.1759 of 2008, hence void ab-initio and of no legal consequence.**
- b. **Direction may also be given to the respondents to give effect to the beneficial Judgments/orders of the learned Service tribunal in Appeal No. 571 ( R ) CS / 2004 and Appeal No. 149 (P) CS / 2003 and Appeal No. 142 ( R ) CS / 2007 and Constitution Petition Bearing No. 1759/2008 to the petitioner as well as restore his position as Assistant Accounts Officer, w.e.f. 01.08.2005, with all consequential reliefs/ benefits by coming to the aid of the Hon'ble Supreme Court of Pakistan and act upon its orders under Article 189 and 190 of the Constitution of Pakistan, 1973.**
- c. **Declare that the petitioner has been grossly discriminated and further respondents be also directed for removal of discrimination with the petitioner and reinforcement of fundamental right of equality of petitioner as in the case of Sultan Mehmood, so that the interest of justice may be secured.**

2. Brief facts of the case as per averments of the parties are that in pursuance of the recommendations made by the Federal Public Service Commission (FPSC), Petitioner was offered the post of Assistant Audit Officer in BPS-16 vide offer letter dated 07.04.2001. Petitioner has submitted that the Respondent department terminated the service of the Petitioner vide letter dated 20.07.2005 on the premise that Petitioner could not qualify SAS examination i.e. 01.08.2005, however he was offered the post of Senior Auditor in BPS-11 as a fresh appointment but the same offer was declined by the Petitioner and contested the matter by filing Service Appeal No. 395(K) CS / 2005 before the learned Federal Service Tribunal, Karachi, which was dismissed vide common judgment dated 08.03.2010 passed by FST. Petitioner being aggrieved by and dissatisfied with the aforesaid Judgment preferred Civil Petition No. 248-K / 2010 before the Hon'ble Supreme Court of Pakistan, which was too dismissed vide common order dated 20.09.2010. Petitioner has submitted that on the basis of order dated 02.04.2010 passed by this Court in C.P. No. D-1759 of 2008, he filed another C.P. No. D-1464 / 2011 before this Court, which was allowed, vide order dated 30.03.2012 in the following terms:-

***“It is jointly stated that this petition may be disposed of in terms of order dated 02.04.2010 passed by a Division Bench of this Court in C.P. No. D-1759 of 2008, being Annexure A to the petition. The petition along with listed application stands disposed of in the forgoing terms.”***

Petitioner has submitted that he did not file contempt application for non-compliance of the aforesaid order passed by this Court,

however the colleague of the Petitioner namely Atiq-ur-Rehman filed CMA No. 1693 of 2012 in C.P. No. D-1463 of 2011 for initiating contempt proceeding against the alleged contemnors for violating the order dated 30.03.2012 passed by this Court, which Misc. application was dismissed by this Court vide order dated 19.04.2017 and the same was affirmed by the Hon'ble Supreme Court of Pakistan vide order dated 30.06.2017 passed in Civil Petition No. 331-K of 2017 in the following terms:-

**“The petitioner’s service confirmation was subject to qualifying SAS examination which he failed which matter was agitated right up to this Court and review was withdrawn. Thereafter he initiated another round of obligation on the ground of discrimination. A person whose service was conditional on qualifying examination, having failed cannot claim equity and the jurisdiction of the Court. Accordingly, no case for leave is made out. The petition is dismissed and leave is declined.”**

Petitioner has submitted that in the meanwhile he started another round of litigation and made representation dated 04.10.2017 to the Respondent department for restoration of his service as Assistant Audit Officer in BPS-16 which representation was declined by office of the Director General Audit Sindh vide impugned letter dated 27.02.2018 in the following terms:-

**“Subject: RESTORATION OF SERVICES ON THE POST OF ASSISTANT AUDIT OFFICER WITH ALL CONSEQUENTIAL BENEFITS.**

Please refer to your representation dated 04.10.2017 on the subject noted above.

Accordingly, your representation was forwarded to office of the Auditor General of Pakistan, Islamabad with necessary comments thereon governing the case.

The competent authority is of the view that case of Mr. Sultan Mahmood, Assistant Audit Officer who was given the benefit of Order of Sindh High Court dated 02.04.2010 in Constitution Petition No. 1759 of 2008 is totally different from your case. The officers who were given the benefit were offered a fresh

**appointment as Senior Auditor and they accepted the offer, remained in service and passed PIPFA/SAS later on. But you did not accept the offer of fresh appointment, therefore your service was terminated. The benefit of Sindh High Court Order dated 02.04.2010 in Constitution Petition No. 1759 of 2008 cannot, therefore, be extended to you.**

(Muhammad Muneer)  
**Audit Officer**

Petitioner being aggrieved by and dissatisfied with the aforesaid office order has filed the instant petition on 18.08.2018.

3. This Court vide order dated 29.08.2018 issued notice to the Respondents subject to maintainability of the instant petition.

4. Mr. Abdul Salam Memon, learned counsel for the Petitioner has contended that the impugned order is bad in law as well as on facts; that the Respondents have not considered the case of the Petitioner in the light of order dated 02.04.2010 passed by this Court in C.P. No. 1759 of 2008 (re-Sultan Mahmood Vs. Federation of Pakistan & others); that petitioner and Sultan Mahmood were terminated through the common order dated 20.07.2005 as both of them could not qualify the SAS examination; that there is no difference between the case of the petitioner and the case of Sultan Mahmood in respect of their appointment, termination and subsequent restoration of his service as Senior Auditor; that Petitioner had successfully passed the competitive examination as such he was not required to undergo SAS examination under Civil Servant Act and Rules framed thereunder. He lastly submitted that the extension in the probationary period of the Petitioner and then termination were totally malafide without lawful authority and abinitio void; that the impugned order declining the request of the

Petitioner is against the norms of justice therefore this Court can direct the Respondents to restore the service of the Petitioner in the line of the case of Sultan Mahmood. Learned counsel in support of his contention has placed reliance on the cases of **Hameed Akhtar Niazi Vs. The Secretary Establishment Division Government of Pakistan and others (1996 SCMR 1185)** and **Tara Chand and others Vs. Karachi Water and Sewerage Board Karachi and others (2005 SCMR 499)** and argued that the case of the Petitioner falls within the principles enunciated in the case of Hameed Akhtar Niazi supra. He lastly prayed for allowing the instant petition.

5. Mr. Shaikh Liaquat Hussain, Assistant Attorney General for Respondents No. 2 & 3 did not file comments and has contended that the captioned petition is not maintainable under the law on the ground that in the earlier round of litigation the case of the Petitioner was considered up to the level of the Hon'ble Supreme Court therefore no fresh petition can be filed on the same cause of action.

6. We have heard the learned counsel for the parties and perused the material available on record and the case law cited at the bar.

7. The pivotal question in the present proceeding is whether, once the service issue of the Petitioner was agitated upto to the Hon'ble Supreme Court, the Petitioner can start fresh round of litigation on the same cause of action?

8. Record reflects that Petitioner impugned his termination order before learned Federal Service Tribunal and he was non-suited by the learned FST vide common judgment dated 08.03.2010 and the same was assailed before the Hon'ble Supreme Court in Civil Petition No. 248-K of 2010 and he met with the same fate vide order dated 20.09.2010. Record further reflects that Petitioner succeeded in obtaining order dated 30.03.2012 passed by this Court in C.P. No. D-1464 of 2011 and other connected petitions. We have appraised the fact that the colleague of the Petitioner in the connected petition No. 1463 of 2011 filed CMA No. 16932 of 2011, for initiating contempt proceeding against the alleged contemnors, which was dismissed vide order dated 19.04.2017, the same was impugned before the Hon'ble supreme Court in Civil Petition No. 331-K of 2017 and the same too was dismissed vide order dated 30.06.2017.

9. In the light of foregoing, we are of the considered view that that similar relief cannot be claimed by filing subsequent legal proceedings as it would fall within the ambit of "constructive res-judicata". Reliance is placed on the case of State Bank of Pakistan through Governor and others vs. Imtiaz Ali Khan and others (2012 SCMR 280).

10. In the light of above facts and circumstances of the case, the instant Petition is not maintainable, being meritless which is dismissed along with the listed application(s).

JUDGE

JUDGE

Karachi  
Dated 26.09.018

