

IN THE HIGH COURT OF SINDH, KARACHI

C.P No.D-4389 of 2016

Present

Mr. Justice Irfan Saadat Khan

Mr. Justice Adnan-ul-Karim Memon

Lutfullah Kalhor and another Petitioners

V E R S U S

Federation of Pakistan and others Respondents

Date of hearing: 29.10.2018

Mr. Ali Asadullah Bullo Advocate for the Petitioner.

Mr. Abdul Razzak Advocate for Respondent No.2 & 3.

Mr. Shaikh Liaquat, Standing Counsel for Respondent No.1.

J U D G M E N T

ADNAN-UL-KARIM MEMON-J: Petitioners have called into question the action of the Respondent-KPT, who had declared the private Respondents, as regular employees from the date of their ad-hoc appointments and not from the date of their respective regularization in service. Petitioners have submitted due to the aforesaid act of the Respondent-KPT, Petitioners have now been shown as junior to them in the seniority list prepared by the Respondent-KPT. Petitioners have averred that the Respondent-KPT had wrongly granted retrospective seniority to the private Respondents, which is in violation of the decisions rendered by the Hon'ble Supreme Court of Pakistan.

2. Conversely, Mr. Abdul Razzak, learned counsel for Respondents No. 2 & 3 has refuted the claim of the Petitioners and pleaded that the instant petition is not maintainable under the law and argued that the Respondent No.4 was appointed on 20.6.1991 to the

post of Traffic Supervisor in Grade-1 against the vacant post as per Rules and Regulations of KPT; that the Respondent No. 5, 6 and 7 were appointed on 7.6.1995 against son quota on the existing posts and later on were confirmed from the date of their initial appointment; that Respondent No. 7 to 14 were posted in the sports department for sports activities. Learned counsel added that the case law relied upon by the Petitioners viz Khalid Mehmood Vs. S.M. Ilyas zaidi (1993 SCMR 1199) is not applicable to the case of private Respondents and is fully applicable to the case of the Petitioners as their appointments were made on ad hoc basis and not to the private Respondents, whose appointments were made on regular basis; that the Respondents No. 4 to 7 were promoted in accordance with the Judgment passed by this Court and the Hon'ble Supreme Court of Pakistan; that the Respondent No. 4 & 7's seniority is maintained not with retrospective effect; that KPT is strictly following Rules and Regulations and not violating any principles as set-forth by the Hon'ble Supreme Court. He lastly submitted that KPT has acted through the Board Resolution No.131 (Item-VI) dated 12.10.1995, which act is within the parameters of law.

3. Mr. Shaikh Liaquat Hussain, learned Assistant Attorney General representing Respondent No.1 has adopted the arguments of the learned counsel for the Respondent No.2 & 3.

4. We have noticed that this Court vide order dated 12.08.2016 issued notice to the Respondents as well as DAG and thereafter Mr. Abdul Razzak Advocate filed vakalatnama on behalf of the Respondents No. 2 & 3, who filed para-wise comments, whereas Respondents No. 4 to 7 are represented by Mr. Abdul Ghaffar Advocate,

who is called absent without any intimation. None present for Respondent Nos. 8 to 14 and this Court vide order dated 20.03.2018 directed that the Respondents No. 8 to 14 to be served through Respondent No.3. Today learned counsel representing Respondent No. 2 & 3 stated at the bar that the aforesaid Respondents has been served and relied upon the Bailiff report dated 29.10.2018, which is available on record, however they are called absent in spite of service.

5. Mr. Ali Asadullah Bullo, learned counsel for the Petitioners contended that the award of retrospective seniority to the Private Respondents is discriminatory and is clear violation of the directions of this Court in various Judgments and pronouncements of the Hon'ble Supreme Court of Pakistan; that the Respondent No.2 decided the matter of seniority with respect to ad-hoc service, in favour of the Private Respondents in violation of KPT Service Regulations. He further argued that the Respondent No.2 has attempted to justify regularization of the private Respondents with effect from the date of their induction in service and not from the date of their regularization in service, which is later on; that the decision of the Respondent No.2 is arbitrary, contrary to the Rules and Regulations of KPT and that it has adversely affected the case of the Petitioners, who are senior to the private Respondents; that retrospective effect in seniority cannot be given under the applicable Rules and the Respondent KPT is not justified to award retrospective seniority to the private Respondents through Board Resolution. He additionally argued that ad-hoc employees cannot claim seniority over regular employees and the seniority of the Private Respondents will be counted from the date of their regularization and

not otherwise; that there is no rule to antedate or to give retrospective promotion by counting the period of work done while holding the post on adhoc; that the promotion can only be claimed from the date of regularization of the private Respondents and not from the date of his adhoc appointment. He in support of his contention relied upon the decisions rendered by the Hon'ble Supreme Court of Pakistan in the case of Khalid Mahmood vs. S.M. Ilyas Zaidi (1993 SCMR 1109), Judgments of the Honorable Supreme Court, reported as Contempt proceedings against the Chief Secretary, Sindh (2013 SCMR 1752), Ali Azhar Khan Baloch vs. Province of Sindh (2015 SCMR 456) and order dated 11.03.2016 passed by the Hon'ble Supreme Court of Pakistan in Civil Appeals No. 247-K and 275-K of 2013 (re-Nazir Ahmed Soomro and others Vs. Federation of Pakistan and others).

6. We have heard the arguments of learned counsel for the parties at length and with their assistance perused the entire material available on record and the decisions relied upon by them.

7. Prima-facie the resolution passed on 12.10.1995 by the Board of Trustees does not confer powers to the Board that the service of the employees of KPT can be regularized retrospectively.

8. On the aforesaid issue, this Court vide Judgment dated 03.02.2017 passed in C.P. No.D-6234 of 2014 has already decided the matter of retrospective seniority, which reads as under:-

“31. We have also gone through the Order of the Respondent No.2, who has decided the matter as per the directions of this Court and an excerpt of the same is reproduced here for the sake of convenience:

“Regularization w.e.f the date of induction: The officer was appointed as Trainee Officer on Adhoc basis in Traffic Department w.e.f 28.11.1989, his services regularized w.e.f 01.06.1991 vide BR No. 131 (Item-VI) dated 12.10.1995. Regularization of service from the date of induction (Adhoc basis) is not counted as regular service as per Digest of Service Laws.

Promotion of the petitioner and his eligibility: Posting letter dt. 22.06.2004 issued by Traffic Manager was a stop gap arrangement and there is no rule to consider promotion from retrospective effect, further the said order was issued without following the procedure prescribed in Section 23 and 24 of KPT Act and as per KPT Officers Recruitment/Appointment, Seniority and Promotion Regulations, 2011. "Acting charge appointment shall not confer any right for regular promotion to the post held on acting charge basis."

32. Admittedly, the Petitioner was appointed as Trainee Officer on adhoc basis on 28.11.1989 and his services were regularized through Resolution No. 131 dated 12.10.1995, with effect from 1.6.1991. We are mindful of the fact that ad-hoc appointments are always made without adopting due process of law and these are virtually made as a stopgap arrangement where selection is made in deviation from the normal course. It is also an established principle that an ad-hoc employee does not carry any vested right to be regularized in service from the date of his induction.

33. Further, there is no ambiguity in our mind that the period of ad-hoc appointment cannot be counted towards service, the seniority in grade is to be taken effect from the date of regular appointment to a post and it cannot be conferred retrospectively. This reduces to the dictum that an ad-hoc appointee would only be entitled to seniority from the date of his regularization and not from the date of initial appointment. Reference is made to the case of Nadir Shah, S.D.O Minor Canal Cell Irrigation Sub-Division, Dera Murad Jamali and 2 others vs. Secretary, Irrigation and Power Department Baluchistan, Quetta and 7 others (2003 PLC (C.S) 961).

34. We have also noted that the Petitioner on 16.08.2008 was promoted as Assistant Traffic Manager (BPS-18) in Traffic Department and that on 22.06.2004 the Petitioner was given the charge to look after other duties as well. No employee could claim fundamental or vested right with regard to promotion. This view finds support from the case of Secretary, Govt. of Punjab and other vs. Dr. Abida Iqbal and others [2009 PLC C.S. 431] and Government of Khyber Pakhtunkhwa and others vs. Hayat Hussain and others (2016 SCMR 1021).

35. The case law cited by the Petitioner are distinguishable from the facts of the present case.

36. Resultantly, an acting or looking after charge could neither be construed to be an appointment by promotion on regular basis for any purpose including seniority, nor did it confer any vested right for regular promotion from the date of such an appointment. Appointment on current charge basis is held to be purely temporary in nature and a stopgap arrangement, which remains operative for a short duration till regular appointment is made against the post. The Petitioner accordingly is neither entitled for retrospective seniority nor promotion. This view is cemented by the judgment delivered in the case of Province of Sindh and others vs. Ghulam Farid and others (2014 SCMR 1189) and Secretary to Government of Punjab and others vs. Muhammad Khalid Usmani and others (2016 SCMR 2125).

37. So far as the contention of the Petitioner with respect to being eligible for promotion from the date when the vacancy initially occurred is concerned, this contention also in our considered view, cannot be accepted for the reason that in service jurisprudence a direct recruit can claim seniority only from the date of his regular appointment and not from the date when he was borne in the service. This principle has already been settled by the Honourable Apex Court through a plethora of judgments.

38. It is an established principle that in service cases there exists a two pronged criteria. One being eligibility for promotion and the other being fitness for promotion, while the former relates to the terms and conditions of service, the latter is a subjective evaluation made on the basis of objective criteria. No doubt in

service matters, the promotion depends upon eligibility, fitness and availability of vacancy and no one including the Petitioner can claim promotion as 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 there under.

39. The next contention of the Petitioner with respect to the eligibility of the Respondent No.3, we observe that no specific prayer has been made by the Petitioner in this regard. If the intent was to challenge the very appointment of the Respondent No.3, which restricts us from giving any findings on this aspect of the case.

40. To conclude, we are of the considered view 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. Thus, the Petitioner's claim was rightly rejected by the Respondent No.2.

41. With regard to the promotion from the date of taking over of acting charge by the Petitioner, as discussed above the acting charge appointments cannot confer any right for regular promotion thus the Petitioner cannot claim promotion from the date when he assumed the acting charge (on 22.06.2004) or from the date when the vacancy occurred, as he was not entitled for the said post and that too with retrospective effect. Therefore, no case of interference in the impugned order is made out.

42. This Petition is accordingly dismissed alongwith all the listed applications."

9. The aforesaid Judgment of this Court was assailed before the Hon'ble Supreme Court of Pakistan in Civil Petition No. 86-K of 2016 and the Hon'ble Supreme Court vide order dated 24.03.2017 maintained the Judgment passed by this Court, with following observations:-

"on 28.11.1989, the petitioner was inducted in Karachi Port Trust as Trainee Officer in BPS-17 on ad hoc basis. His services were then regularized with effect from 01.06.1991. Then on 22.06.2004 he was given officiating charge of Assistant Traffic Manager, which is a BPS-18 post. However, he was promoted to BPS-18 in the year 2008. On the other hand, the Respondent No.3 was inducted in KPT on 28.12.1989 as Trainee Officer in BPS-17 on ad hoc basis and his services were regularized on 28.03.1990. He was then promoted to BPS-18 with effect from 01.02.2003 and thereafter promoted to BPS-19 on 15.08.2013 whereas the petitioner is still holding the post in BPS18. The grievance of the petitioner is that when he was inducted on ad hoc basis, a month prior to the respondent No.3, then his services ought to have been regularized along with respondent No.3. As in the departmental proceedings, the petitioner could not succeed in seeking the desired relief, he filed constitution petition before the High court, which was dismissed vide impugned judgment taking into consideration that the seniority is to be reckoned from the date of regular appointment and having been merely inducted as ad hoc prior to respondent No.3 would have no legal effect. Aggrieved by the decision of the High Court, this petition has been filed.

2. learned counsel for the petitioner contended that the inter se seniority of the petitioner and respondent No.3 ought to have been maintained from the date when they were inducted on ad hoc basis and his promotion in BPS-18 ought to have been reckoned from the date when he became eligible for promotion i.e. from 2003 when a vacancy in BPS-18 occurred and not from the date of his actual promotion. The learned counsel has failed to convince us that the seniority is to be reckoned from the date of ad hoc appointment and not from the regular appointment nor that the promotion is to be reckoned when the vacancy occurs. We, therefore, find no legal ground to interfere with the impugned judgment. This petition is dismissed and leave is refused.”

10. On the aforesaid issue, we are further fortified with the decisions rendered by the Hon’ble Supreme Court of Pakistan vide order dated 11.03.2016 in Civil Appeals No. 247-K and 275-K of 2013 (re-Nazir Ahmed Soomro and others Vs. Federation of Pakistan and others) and Khalid Mahmood vs. S.M. Ilyas Zaidi (1993 SCMR 19).

11. It is well settled now that the seniority amongst the employees is to be counted from the date of their regular appointments and not from the date of temporary / ad hoc / contract appointments.

12. To commence, on the maintainability of the instant petition, Undoubtedly, Karachi Port Trust Officers Recruitment, Appointment, Seniority and Promotion Regulations-2011 are statutory rules of service and admittedly the same were framed by the Board of Directors of KPT with the prior approval of the Federal Government, pursuant to Section 22 of the Karachi Port Trust Act, 1886. In the given circumstances, we are fully fortified by the view enunciated by the Hon’ble Supreme Court in para 50 of the Judgment delivered in the case of Pakistan Defence Housing Authority vs. Lt. Col. Javed Ahmed (2013 SCMR 1707) “that an aggrieved person can invoke the Constitutional jurisdiction of this Court against a public authority”. The same principle is also enunciated in the case of Muhammad Rafi and another vs. Federation of Pakistan and others (2016 SCMR 2146).

13. We have also considered that the Karachi Port Trust Officers Recruitment, Appointments, Seniority and Promotion Regulations-2011, which shows that the employees of the KPT are not Civil Servants (as defined in Section 2(I)(b) of the Civil Servants Act, 1973) as well as under Section 4 read with Section 2(a) of the Service Tribunals Act, 1973. Therefore, they cannot file service appeal before the Federal Service Tribunal and the only remedy available to them is under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973.

14. Accordingly, we are of the view that this Petition could be heard and decided on merits by this Court, while exercising its Constitutional jurisdiction.

15. Having decided on the maintainability of the instant Petition, questions, which agitate the controversy at hand, could be reduced to the following:-

- i) Whether the seniority of the Private Respondents can be reckoned from the date of their induction in service as an adhoc appointee or from the date of regular appointments?**
- ii) Whether the Respondent-KPT has followed the judgments passed by the Honorable Supreme Court of Pakistan in the aforesaid cases or otherwise?**

16. Perusal of record shows that the private Respondents were appointed in Traffic Department as Traffic Supervisor on Adhoc basis and were regularized vide BR No. 131 (Item-VI) dated 12.10.1995. The relevant data of the all the private Respondents is given as follows:-

S.No.	Names	Date of appointment to the present post	Date of confirmation/Regularization to the present post
01.	<i>Nazir Ahmed Soomro (Respondent No.4)</i>	20.06.1991	20.12.1991
02.	<i>Noor ur Rehman(Respondent No.5)</i>	07.06.1995	07.12.1995

03.	<i>Mir Afsar Khan (Respondent No.6)</i>	04.10.1993	04.04.1994
04.	<i>Mian Muhammad Ali (Respondent No.7)</i>	07.06.1995	07.12.1995
05.	<i>Mazharuddin (Respondent No.8)</i>	05.09.1995	05.03.1996
06.	<i>Tariq Mahmood(Respondent No.9)</i>	16.09.1995	16.03.1996
07.	<i>Asadullah Aleem (Respondent No. 10)</i>	13.04.1996	13.10.1996
08.	<i>Farid(Respondent No.11)</i>	29.06.1996	29.12.1996
09.	<i>Mehrullah (Respondent No.12)</i>	01.12.2003	
10.	<i>Mausam Hussain Jafri(Respondent No.13)</i>	12.01.2005	12.07.2005
11.	<i>Iftikhar Hussain(Respondent No.14)</i>	21.03.1994	21.09.1994

17. Prima facie, the aforesaid factual position of the case clearly depicts the position of the private Respondents. In our view the Regularization of service from the date of induction (Adhoc basis) is not counted as regular service as we are mindful of the fact that ad-hoc appointments are always made without adopting due process of law and these are virtually made as a stopgap arrangement where selection is made in deviation from the normal course. It is also an established principle that an ad-hoc employee does not carry any vested right to be regularized in service from the date of his induction.

18. Further, there is no ambiguity in our mind that the period of ad-hoc appointment cannot be counted towards service, the seniority in grade is to be taken effect from the date of regular appointment to a post and it cannot be conferred retrospectively. This reduces to the dictum that an ad-hoc appointee would only be entitled to seniority from the date of his regularization and not from the date of initial appointment. Reference is made to the case of Nadir Shah, S.D.O Minor Canal Cell Irrigation Sub-Division, Dera Murad Jamali and 2 others vs. Secretary, Irrigation and Power Department Baluchistan, Quetta and 7 others (2003 PLC (C.S) 961).

19. In service jurisprudence a direct recruit can claim seniority only from the date of his regular appointment and not from the date

when he was borne in the service. This principle has already been settled by the Honourable Supreme Court through a plethora of judgments.

20. To conclude, we are of the considered view 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. Thus, the Petitioner's claim needs to be looked into by the Respondent No.2.

21. We, on the basis of contentions of the parties with the material produced before us, have reached the conclusion that the entire case is based upon the issue of seniority amongst the Petitioners and private Respondents, which cannot be gone into by this Court in exercising of its constitutional jurisdiction and this petition is disposed of with direction to the Respondent No.2 to decide afresh the matter between the parties, within a period of two months from the date of decision of this Court and pass a speaking order after providing ample opportunity of hearing to the Petitioners and private respondents on the Following points:

(i) Regularization of service of Petitioners and Respondents in accordance with the dicta laid down by the Hon'ble Supreme Court of Pakistan vide order dated 11.03.2016 passed in Civil Appeals No. 247-K and 275-K of 2013 (re-Nazir Ahmed Soomro and others Vs. Federation of Pakistan and others) and Khalid Mahmood vs. S.M. Ilyas Zaidi (1993 SCMR 19); and order dated 24.03.2017 passed by the Hon'ble Supreme Court in Civil Petition No. 86-K of 2016.

22. This Petition is accordingly disposed of along with all the listed application(s).

JUDGE

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