

IN THE HIGH COURT OF SINDH, AT KARACHI

Present:

Mr. Justice Muhammad Shafi Siddiqui
Mr. Justice Adnan-ul-Karim Memon

C.P. No. D- 4677 of 2013

Dr. Naeem Memon,
Petitioner through: Chaudhry Atif Rafiq and Mr. Nadeem Ahmed
advocates

Respondent No.1
Through: Mr. Muhammad Nishat Warsi, DAG

Respondents No.2 &3
Through: Mr. Fayyaz Aslam, advocate

Dates of hearing: 22.8.2019, 26.8.2019 & 12.09.2019

Date of Judgment: 18.09.2019

J U D G M E N T

ADNAN-UL-KARIM MEMON, J: - Through the captioned petition, the Petitioner
is seeking following relief(s):-

- A. Declare that the Chapter II of the NCA Employees Service Rules 2011 is ultra vires Section 9, 11 of the National Command Authority Act 2010 and Articles 4,9,10-A of the Constitution of Pakistan, 1973.
In the alternative:
Declare that Rule 10 of Chapter II of the NCA Employees Service Rules 2011 is ultra vires Section 9, 11 of the National Command Authority Act 2010 and Articles 4,9,10-A of the Constitution of Pakistan, 1973.
- B. Declare that the show-cause proceedings purportedly taken under Rule 10 of the Chapter II of the NCA Employees Service Rules 2011 are arbitrary, malafide, unlawful, void ab initio and without jurisdiction.
- C. Set-aside the Order dated 12.7.2013 being unlawful and contrary to the Sections 9,11 of National Command Authority Act and Articles 4,9,10-A of the Constitution of Pakistan, 1973.
- D. Direct the Respondents to restore the Petitioner to his post i.e. Senior Medical Officer (SPS-9) with all back benefits as he is entitled to under law.

2. At the outset, we queried from the learned counsel for the Petitioner as to how this Petition is maintainable in its form against the National Command Authority (NCA) by virtue of the National Command Authority (Amendment) Act, 2016, envisaging 'Master-Servant relationship' for the employees of organizations under NCA and ousting the jurisdiction of this court from entertaining petitions of employees.

3. Chaudhry Atif Rafiq learned Counsel for the petitioner attempted to give brief history of the case and contended that initially the Petitioner was appointed as Medical Officer (BPS-17) in Pakistan Atomic Energy Commission (PAEC) vide appointment letter dated 16.4.1992 and his service was confirmed vide letter dated 15.4.1993, he was promoted as Senior Medical Officer (SPS-9 equivalent to BPS-18) vide letter dated 1.12.1996. Learned counsel pointed out that in the year 2010, National Command Authority Act 2010 was promulgated and the service of all the employees of PAEC were merged in National Command Authority, however their terms and conditions of service were protected.

4. He referred to the section 13 of the Pakistan Atomic Energy Commission Ordinance 1965 as well as section 2 (C) of the NCA Act, 2010 and robustly argued that all employees of (PAEC), now in (NCA) are entitled to be treated in accordance with the law and the Authority was under an obligation to frame Rules in consonance with the Act, 2010 and the rights and benefits of the employees including Petitioner were protected under the proviso of section 9 of Act 2010. He also referred to the provision of sub-section 3 and 4 of section 19 of the Act of 2010 and contended that all orders passed prior to the promulgation of the aforesaid Act were saved including the Employees' service rights and that the Respondent-authority had assumed the liability, therefore their terms and conditions of service were protected, hence, the same could not be altered; that National Command Authority Employees Service Rules, 2011 (NCAES Rules, 2011) had been kept in secret and were not provided to any of the employees of the Authority, however, the Petitioner had managed to obtain a copy of the NCAES Rules, 2011; that the Petitioner has been victim of discrimination and nepotism since 2000 when certain elements within PAEC started campaigning against him and his Annual Confidential Reports (ACR's) were deliberately manipulated due to political reasons. The Petitioner was served with a show-cause notice dated 24.4.2013, under Rule 10 of Chapter-II of NCAES Rules, 2011, with the following allegations:-

- i. that you have been superseded for promotion 08 times in same grade to the next higher grade post of Pr. Medical Officer (SPS-10) from 2004 to 2011.
- ii. your PERs for the year 2006, 2007 (1.1.2007 to 22.5.2007), 2009 and 2010 contain adverse remarks which were duly conveyed to you.

However, the statement of allegations were not provided to the Petitioner; that the Personal Evolution Report's(PER's) on which basis the proceedings were being undertaken against the petitioner were three years old therefore, he assailed the aforesaid Show Cause Notice before this Court, Circuit Bench, Hyderabad in CP No.935 of 2013 and the said Petition is still pending; that no personal hearing was called nor any notice was received by the Petitioner and on 12.7.2013 he was served with major penalty of compulsory retirement; that the order dated 12.7.2013 had been passed under NCAES Rules, 2011 of which Appeal was filed on 31.7.2013 before the Chairman PAEC; that the Respondent No.2 on 08.10.2013 replied to the Petitioner's appeal with the assertion that in terms of NCAES Rules, 2011 no Appeal lies to any decision of the Authority; that the NCAES Rules, 2011 are contrary to the Act, 2010 and the Authority is mandated to prescribe Rules in this regard. Petitioner, being aggrieved by and dissatisfied with the impugned order dated 12.7.2013, approached this Court on 8.11.2013.

5. Mr. Fayyaz Aslam, learned Counsel for the Respondents No.2 and 3 has argued that the PAEC employees are legally deemed to be NCA Employees under section 9 of the NCA Act 2010; that this Court lacks jurisdiction under Section 22 of NCA, Act 2010 to try the instant case; that the relationship of Respondents No.2 and 3 with the Petitioner is that of Master and Servant; that in exercise of powers conferred under section 7, Sec 9(2) read with Section 15 of the NCA, Act 2010, the Authority has framed the NCA, Employees Services Rules-2011, quite in accordance with the NCA, Act 2010; that during the tenure of Petitioner, he kept under the supervision of different officers in accordance with the rules for the purpose of evaluation of performance and retention, but he could not improve his performance and successively received marks below qualifying marks for promotion, and also obtained adverse remarks time and again, and was consequently superseded time and

again; that the Show Cause Notice was issued to the petitioner in accordance with the rules and supersession for promotion several times in the same grade or three adverse annual PERs from two or three different supervisors was sufficient, under Rule 10 of the NCAES Rules, 2011, to initiate the case for compulsory retirement of an employee, whereas the petitioner, after having been superseded for promotion eight times in the same scale and obtaining adverse remarks from more than two different supervisors in more than three annual PERs, squarely falls within the domain of said rule; that NCAES Rules, 2011 are intra vires and in consonance with the NCA Act 2010 and the Petitioner's interpretation of Section 11 is misconceived; that by issuing Show Cause Notice, the Petitioner was not only provided ample opportunity to defend himself but was also offered to be heard in person. Consequently, not only his reply dated 03.05.2013 to the Show Cause Notice was duly considered but he was also given personal hearing by Chairman PAEC on 20.06.2013. However, after observing all necessary codal formalities to meet the ends of justice, the Petitioner was retired from service on 12.7.2013. Learned Counsel for the Respondents has also filed statement dated 12.9.2019 along with annexures i.e. Office Memorandum dated 3.3.1992 regarding appointment of Petitioner, Office Order No.727/2007 dated 11.05.2007 regarding disciplinary action against him, letters dated 26.8.2009, 17.9.2010, 14.6.2011 and 7.7.2011 regarding communication of Marks and letter dated 16.3.2010 regarding representation against marks, have been placed on record.

6. In exercising the right of rebuttal, on the point of maintainability, the learned counsel for the petitioner argued that Rules framed under Section 15 of the National Command Authority Act, 2010 are statutory, the controversy has been set at rest in the case of Shafique Ahmed Khan and others v. NESCOM through Chairman Islamabad and others (PLD 2016 SC 377), therefore, another exercise to determine the status of Petitioner is not called for. The learned counsel by referring to Section 3 of the Act 2010 contended that where the Chairman of the Authority is the Prime Minister and its other Members include, besides Minister for Foreign Affairs, Minister for Defence,

Minister for Finance, Minister for Interior, Chairman Joint Chiefs of Staff Committee, Chief of Army Staff, Chief of Naval Staff and Chief of Air Staff, approval of the Rules by any other Ministry is hardly called for; that when the provision of this Act by virtue of its provision contained in Section 21 has been given overriding effect over any other law for the time being in force in general and the Civil Servants Act, 1973, Pakistan Atomic Energy Commission Ordinance, 1965, Pakistan Space and Upper Administration Commission Ordinance, 1981, or any other law or Rules made thereunder in particular, it has to reign supreme. He then contended that when the very purpose of making Rules is to carry out the purposes of the Act it would be a contradiction in terms to shear them of statutory status; that publication of a statutory instrument or a notification in the official gazette is not mandatory in every case, therefore, its non-compliance cannot rob the instrument or the notification of its statutory force. The learned counsel lastly contended that where the Rules prescribe the terms and conditions of service and provide safeguards against their violation, they are statutory by all means and have to be treated as such.

7. On merits, he contended that the impugned major penalty of compulsory retirement from service imposed upon the petitioner in the year 2013 was in gross violation of Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973. Further that the action on the part of Respondent-Authority was arbitrary and capricious thus untenable in law; that Section 24-A of the General Clauses Act, 1897, obliges every person exercising powers conferred by a statute, to act "reasonably, fairly, justly and for the advancement of the purpose of the enactment". It also stipulates that the person making any order under the power conferred by any enactment shall, so far as necessary or appropriate, "give reasons for making the order". Therefore, unreasoned orders of compulsory retirement, without providing Appellate forum as provided under section 11 of the Act, 2010 is violative of various provisions of the Constitution and law; that impugned action was much prior to amendment brought into the Act, 2010, therefore for all

practicable purposes the case of Shafique Ahmed Khan (supra) is fully applicable in the case of petitioner; that there is no other efficacious and adequate remedy available with the Petitioner but to invoke the Constitutional Jurisdiction of this Court for the relief(s) as prayed in the Memo of Petition.

8. We have heard learned counsel for the parties and perused the entire material available on record and case law cited by them

9. In the first place, we would like to examine the issue of maintainability of the instant Petition under Article 199 of the Constitution, 1973.

10. The issue of maintainability of the captioned Constitutional Petition has been raised. The Honorable Supreme Court in the case of Shafique Ahmed Khan and others v. NESCOM through Chairman Islamabad and others (PLD 2016 SC 377) has settled the aforesaid proposition and held that “the rules framed under Sections 7, 9 and 15 of the Act are statutory on all accounts and by every attribute. They are thus declared as such.”

11. Progressing further, we have noticed that the impugned office order dated 12.07.2013 was much prior to the (Amendment) Act, 2016, and decision of Honorable Supreme Court in the case of Shafique Ahmed Khan and others supra came on 21st January, 2016, which clarified the status of NCAES Rules, 2011 of National Command Authority. Therefore, there is no further discussion on the aforesaid proposition is required on our part. Our view is supported by the various decisions rendered by the Honorable Supreme Court. First decision of a five Member Bench of the Honorable Supreme Court in the case of Pakistan Defence Officers' Housing Authority v. Lt. Col. Syed Jawaid Ahmed [2013 SCMR 1707] after examining the statute through which the Respondent-Authority and other statutory bodies were established and functioning, in Para-27 of its judgment held them to be statutory bodies performing some of the functions of the Federation/State and, therefore, "person" within the meaning of Article 199(1)(a)(ii) read with Article 199 (5) of the Constitution and if their actions or orders are violative of the statute creating those bodies or of rules/regulations framed under a statute, the

same could be interfered with by the High Court under Article 199 of the Constitution. References are being made to the other decisions rendered by the Honorable Supreme Court in cases of Ramna Pipe and General Mills (Pvt.) Ltd. v. Sui Northern Gas Pipe Lines (Pvt.) [2004 SCMR 1274], Abdul Wahab and others Vs. HBL and others [2013 SCMR 1383], Pakistan Defence Officers' Housing Authority and others v. Lt. Col. & other connected Petitions Syed Jawaid Ahmed and other connected appeals [2013 SCMR 1707], Khawaja Muhammad Asif v. Federation of Pakistan [PLD 2014 SC 206], Pir Imran Sajid and others Vs. Managing Director/General Manager Telephone Industries of Pakistan and others [2015 SCMR 1257], Pakistan Telecommunication Employees Trust vs. Muhammad Arif and others [2015 SCMR 1472], Shafique Ahmed Khan and others versus NESCOM through Chairman Islamabad and others [PLD 2016 SC 377], P.T.C.L. and others vs. Masood Ahmed Bhatti and others [2016 SCMR 1362], Muhammad Rafi and others Vs. Federation of Pakistan and others [2016 SCMR 2146], Muhammad Zaman etc. versus Government of Pakistan through Secretary, Finance Division (Regulation Wing), Islamabad [2017 SCMR 571], Pakistan Defence Housing Authority Vs. Mrs. Itrat Sajjad Khan and others [2017 SCMR 2010], Airline Pilots Association and others Vs. Pakistan International Airline Corporation and others [2019 SCMR 278].

12. Having dilated upon on the aforesaid proposition, the instant Petition relates to the service of the Petitioner, whereby Respondent-Authority awarded major penalty of compulsory retirement from service, on certain allegations and during the inquiry proceedings was found guilty of the charges of Misconduct, which he is asking for setting aside, through the instant Petition. An excerpt of the Office Order dated 12.7.2013 is reproduced as under:-

No. Estt-I-21(1458)/2012

Dated 12.07.2013

OFFICE ORDER NO.1260/2013

Subject:- **COMPULSORY RETIREMENT OF DR. NAEEM MEMON, SR. MEDICAL OFFICER NIA-TANDOJAM**

Rule-10 of Chapter-II of National Command Authority, Employees Service Rules (NCA ESR-2011) provides that an employee may be compulsorily retired from service in accordance with the decision of Standing Service

Review Board (SRB) subject to any of the condition contained in the said rules. On the recommendation of SRB constituted vide SPD letter No.996/COPD/Estb/ESR-2011 dated 08.01.2013 to review the cases of officers of the Strategic Organization /PAEC duly ratified by SPD, a show cause notice was served upon Dr. Naeem Memon (PIN:12143), SMO, NIA vide PAEC HQ letter of even number dated 24.04.2013 on the grounds of eight times supersession in promotion to the next higher post of PMO (SPS-10) from 2004 to 2011.

2. His defence reply dated 03.05.2013 to the show cause notice dated 24.04.2013 has been considered in the light of his performance/supersession in promotion to next higher post of Pr. Medical Officer but not found satisfactory. Therefore, the competent authority i.e. Chairman, PAEC has decided to retire him from PAEC service in public interest.

3. Accordingly, Dr. Naeem Memon (PIN12143), SMO, NIA is compulsorily retired form service of PAEC with immediate effect. He will be eligible for pension and other fringe benefits as per rules.

Sd/-
(Muhammad Umar)
Pr. Establishment Officer-I

13. Record further reflects that Petitioner preferred Departmental Appeal against the aforesaid order dated 12.7.2013 which was declined by the Competent Authority vide order dated 08.10.2013, with the following reasoning:-

No. Estt-I-21(1458)/2012

Dated 08.10.2013

OFFICE MEMORANDUM

Subject:- DEPARTMENTAL APPEAL

The undersigned is directed to refer to appeal dated 31.07.2013 of Dr. Naeem Memon, Sr. Medical Officer (Retd) NIA on the above subject and to say that as per Rule-10(4) of Chapter-II of ESR-2011, no appeal shall lie against the decision of the SRB as ratified by SPD/Commission as the case may be.

S/d
(Muhammad Umar)
Pr. Establishment Officer-I

14. The pivotal questions which need to be addressed in order to reach a just decision are that when a civil/public servant is twice recommended for supersession by the Departmental Promotion Committee (DPC) and the recommendation of the DPC is approved by the competent authority, what is its effect, and whether supersession is punishment?

15. To elaborate on the issue of “supersession”, the word “supersession” can denote only the selection of a junior in preference to a senior according to their rank in the civil service; a supersession is only involved if there takes place a comparative examination of service records of two or more individuals by an authority competent to appoint and determine whether the senior of the two should be ignored from promotion. This necessarily involves an

examination of and a decision on the comparative merits of service records of each individual and without such comparison and ignoring of a senior man, there can be no supersession. Such supersession would always imply punishment on account of allegations against civil servant. On the aforesaid proposition, the decision rendered by the learned Division Bench of Peshawar High Court in the case of Saeed Muhammad Zai v. Secretary Government of Khaibar Pakhtunkhwa (2017 P L C (C.S.) 738) is clear in its terms.

16. We have noticed that in service jurisprudence, the competent authority can take disciplinary action against the civil servant under sub-section (2) of Section 13 of the Civil Servants Act, 1973, in the following cases:-

(a) Where two or more penalties under the Government Servants (Efficiency & Discipline) Rules, 1973, have been imposed on a civil servant. (b) Where overall grading of the ACRs is Average, and/or where adverse remarks in regard to acceptance of responsibility, integrity, reliability, output of work and behavior with the public were recorded in the ACRs (duly conveyed to the concerned civil servant and his representation against it finalized, as per rules). (c) Where a civil servant is twice recommended for supersession by the Selection Board/DPC and the recommendation of the Selection Board/DPC is approved by the competent authority. (d) Where other specific and cogent grounds, including the following, may warrant retirement of a civil servant:-- (i) persistent reputation of being corrupt; (ii) possessing pecuniary resources and/or property etc. disproportionate to his known sources of income; and (iii) frequent unauthorized absence from duty.

17. We are cognizant of the fact that the recommendations, as contained in the Establishment Division's OM No. 1/3/2007/CP/ II dated 24th October, 2007 "Promotion Policy", also prescribed conditions for deferment and also required that the officers superseded/deferred by the competent authority be informed about the reason for his supersession/deferment to enable him to improve his performance and to complete his records or to make up any other deficiency, as the case may be. Record reflects that petitioner was well aware of his recommendation of supersession, vide letter dated 11.5.2007 on the ground that during his service he was awarded minor penalties, his performance evaluation reports with effect from 01-1-2008 to 5.6.2008 and w.e.f. 06.06.2008 to 31.12.2008 were not up to the mark and below average for qualifying for promotion, however, against his evaluation report for the year 2009 he made representation vide letter dated 13.9.2009, but the same was declined vide letter dated 16.3.2010 with the following observations:-

“With reference to his representation dated 13-9-2009 against marks below qualifying for promotion/below average and adverse remarks recorded in his PER for the period from 01.01.2008 to 05.06.2008 Dr. Naeem Memon, SMO is informed that his representation has duly been considered by the competent authority but decided that the marks and adverse remarks will stay.”

Record further reflects that his evaluation reports for the year 2010 and 11 again remained below average, he was advised to make representation vide letters dated 17.9.2010, 14.6.2011 and 7.7.2011 but he failed to do so. The record further reveals that disciplinary proceedings were initiated against the Petitioner and finally culminated in the major penalty of compulsory retirement from service. In our view, the disciplinary matters fall within the expression "Terms and Conditions of Service" on the issue of supersession the decision of the Honorable Supreme Court in the case of Muhammad Rashid Bhatti v. Director General FIA (2018 SCMR 1995) provides guiding principles. An excerpt of the order is reproduced as under:-

“4. Be that as it may on 25.05.2010, the petitioner was promoted as Inspector (Investigation) (BPS-16) and on assumption of such promoted office, the petitioner made representation to the department, which as noted above was, declined by the department. The Service Tribunal in the impugned judgment has dealt with the reasons on the basis of which petitioner was superseded and in paras 6 and 7 of the impugned judgment, the Tribunal has made the following observation:-

“6. It is an admitted position that appellant was considered twice for promotion by the Department Promotion Committee, but superseded on each occasion by the committee on account of many factors contributory to including the reason as enumerated ad-seriatim in para-4(i-iv) supra, resultantly his juniors became senior to him. It is pertinent in the context of the appellant's contention that this Tribunal vide judgment dated 09.05.2016 expunged the adverse remarks recorded in the Performance Evaluation Report for the year 2004. Be that as it may, the supersession was approved by the Department Promotion Committee in its successive meetings held on 02.03.2009 and 08.08.2009 resultantly the appellant could not regain his inter se seniority. In this context, Section 3(c) of the Civil Servants (Seniority) 7 Rules, 1993, being relevant, is reproduced hereunder as:-

(c) Civil servants eligible for promotion who could not be considered for promotion in the original reference in circumstances beyond their control or whose case was deferred while their juniors were promoted to the higher post, shall, on promotion, without supersession, take their seniority with the original batch.” Underlining is ours. 7. In the presence of express provision of Rule 3(c) *ibid*, the appeal for regaining inter se seniority merits no consideration and is hereby dismissed with no order as to costs.”

5. We have gone through the provision of FR-17 and are unable to agree with the counsel for the petitioner for that the provision of FR-17 deals with the case of drawing pay and allowances attached to tenure of a post with effect from the date when the duties are assumed of that post and shall cease to draw them as soon as he ceases to discharge those duties. The proviso to this Rule provides for a situation where the civil servant who was entitled to be promoted from a particular date but for no fault of his own wrongfully prevented from rendering services in the higher post shall be paid the arrears of pay and allowances of such higher post through proforma promotion or up-gradation by ante-dated fixation of seniority. The case before us is neither of a tenure post nor is a deferment case or that of petitioner being not promoted from a particular date for no fault of his own. The petitioner was deliberately superseded and such supersession was also endorsed by the Departmental Promotion Committee. The Rule FR-17 as relied upon by the counsel for the petitioner therefore is not applicable to the facts and circumstances of the present case. 5(sic.) As regard the second contention of the learned ASC for the petitioner that Rule 3(c) is ultra vires the provision of the Act, we are afraid that such submission was not canvassed by the

petitioner before the Service Tribunal and same cannot be allowed to be raised before this Court for the first time. No point of public importance in terms of Article 212 of the Constitution is raised. The petition is therefore, dismissed and leave refused.”

18. Prima-facie the entire claim of the petitioner, as brought through this petition is based on factual controversy that requires through probe, which cannot be resolved under Constitutional Jurisdiction as this Court cannot substitute the findings of the Competent Authority until and unless it is show that the fundamental rights of the Petitioner are violated which factum is lacking in the present matter.

19. In the light of forgoing position of the case in hand, in our view, the supersession / major penalty, and other ancillary service issues of the petitioner, has been finally adjudicated up to the level of Chairman/Competent Authority of National Command Authority, thus this Court cannot reopen his further service grievances on the aforesaid issues, in writ petition. Besides above, we do not concur with the assertion of the learned counsel for the Petitioner with his explanation of appellate forum as per record his appeal was considered and rejected, however, on the issue of appellate forum the employee of Respondent-Authority can only be retained in service, if he meets the parameters set forth in Rule 10 of NCAES Rules, 2011. An excerpt of the aforesaid Rule is reproduced as under:-

10. Retention, Resignation, Termination and Retirement

a. Retention

i. Officers and staff may normally continue to serve upto superannuation. However, their retention in service needs careful monitoring on annual basis for assessing their usefulness for the organization based on their performance. Standing Service Review Board (SRB) for officers will be constituted by SPD and for staff upto SPS-7 will be constituted at the respective Commission's level.

ii. Cases of officers and staff in various grades can be referred to the respective SRB subject to any of the following conditions:-

1. The employee has been superseded for promotion thrice in the same grade.
2. Three adverse Annual Performance Evaluation Reports (APERs) from two or three different supervisors.
3. Persistent reputation of being corrupt.
4. Living beyond means.
5. Frequent unauthorized absence from duty.
6. Imposition of two or more penalties during service under the rules.

iii. Recommendations of the SRB in respect of an officer will require ratification by SPD. In the case of staff recommendations of the SRB will require ratification commission.

iv. Notwithstanding anything contained in any other law in force for the time being, no appeal lie against the decision of the SRB as ratified by SPB/Commission as the case may be.[emphasis supplied]

d. Retirement from service. An employee shall retire from service as follows:-

i. Retirement on Superannuation. On completion of sixty years of age.

ii. voluntary Retirement. An employee may seek voluntary retirement from service after completing 25 years of service qualifying for pension and other fringe benefits as per NCA Pension Rules-2011. The Right given by this paragraph shall not however be available to an employee against whom a departmental enquiry is pending.

iii. Compulsory Retirement. An employee may be compulsorily retired from service in accordance with the decision of Standing SRB or under NCA Efficiency & Discipline Rules-2010. He shall be eligible for pension and other fringe benefits as per rules.

20. Even, it is an admitted position that the petitioner was considered several times for promotion but superseded on each occasion on account of many factors contributory to including the reason as discussed supra.

21. We may observe here that, indeed the writ jurisdiction of this Court is not meant to be exercised to compel the competent authority to promote a Civil/Public Servant against whom prima facie evidence showing his deficiency of achieving the grades / marks and involvement in the serious charges of misconduct i.e. minor penalties was available, for the reason that any such direction would be disharmonious to the principle of good governance and canon of service discipline. Rather causing undue interference to hamper smooth functioning of the departmental authorities. On the aforesaid issue, we are fortified with the decision rendered by the Hon'ble Supreme Court of Pakistan in the case of Mst. Iffat Nazir vs. Government of Punjab and others [2009 SCMR 703].

22. Principally, through these proceedings Petitioner seeks reinstatement and thereafter claims promotion. If this being the position of case, in our view, in promotion matters to such post 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 are 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. In our view, in the seniority/promotions cases no vested right/fundamental right can be claimed. This view finds support from the cases of Secretary, Government of Punjab and others vs. Dr. Abida Iqbal and others [2009 PLC C.S. 431], Government of Khyber Pakhtunkhawa and others vs. Hayat Hussain and others [2016 SCMR 1021] & Khan M. Muti Rahman and others [2006 PLC (C.S) 564]. The Hon'ble Supreme Court has already settled the similar issue in the case of Mst. Iffat Nazir as discussed supra in the preceding paragraph. On the similar point of law, the Hon'ble Supreme Court in the case of Hayat Husain and others as discussed supra has settled the issue in promotion cases of Civil Servants, which is guiding principle on the subject.

23. The case of the Petitioner is governed by the principles set forth in the aforesaid dicta laid down by the Honorable Supreme Court, therefore the Petitioner does not have any vested right to seek reinstatement in service or call in question the disciplinary proceedings initiated against him in pursuance of the charge sheets and supersessions in his tenure of service. Hence, his grievance pertains to the terms and conditions of service which cannot be enforced through a Writ as he has failed to point out any violation of law, for the simple reason that the Respondent-Authority has provided justiciable

reasons for awarding major penalty of compulsory retirement to the Petitioner due to his various supersessions.

24. Adverting to the issue of vires of the NCA Employees Service Rules 2011, on the aforesaid proposition, the matter has been set at rest by the Honorable Supreme Court in the case of Shafique Ahmed Khan and others v. NESCOM through Chairman Islamabad and others (PLD 2016 SC 377)] therefore, question of declaring the Chapter II of the NCA Employees Service Rules 2011 as ultra vires of Section 9, 11 of the National Command Authority Act 2010 and Articles 4,9,10-A of the Constitution of Pakistan, 1973 are not apropos at this stage for the reason discussed in the preceding paragraphs.

25. In the light of above discussion and the case law referred above, the instant Petition is dismissed along with the pending Application[s].

JUDGE

JUDGE

Nadir/*