

IN THE HIGH COURT OF SINDH KARACHI

Before:

Mr. Justice Adnan-ul-Karim Memon
Justice Mrs. Kausar Sultana Hussain

Constitutional Petition No.D-6583 of 2018

(Azhar Ali Farooqi v. Federation of Pakistan and another)

Mr. Ehsanullah Khan, advocate for the petitioner
Mr. Muhammad Nishat Warsi, DAG

Date of hearing &
Order : **18.04.2022**

ORDER

Adnan-ul-Karim Memon, J. Through the captioned Constitutional Petition, Petitioner seeks proforma promotion from BPS-21 to BPS-22 with effect from 4.9.2009, in terms of the ratio of the judgment dated 10.10.2012 in Civil Petition No.2114/2011 passed by the Honorable Supreme Court in the case of Nazar Hussain Mahar v. Federation of Pakistan through Secretary Establishment and others. It is, inter alia, contended by the petitioner that by the time of the judgment pronounced by the Hon'ble Supreme Court of Pakistan in the case of Tariq Azizuddin and others (2010 SCMR 1301), he stood retired from service on 26.01.2010 in BPS-21; that his promotion in BPS-22 was erroneously withdrawn by the respondent Establishment Division vide notification dated 29th April 2010. Petitioner further averred that he preferred representation/appeal against the aforesaid notification in 2012, however the same was declined vide office memorandum dated 15.8.2018 on the premise that a civil servant could not ask for promotion as a right and granting or refusal of promotion was a matter which was/is the exclusive domain of the Government / Executive Authority. The petitioner further averred that under similar circumstances the colleagues of the petitioner were given a proforma promotion to BS-22 on the recommendation of the High-Level FR-17(1) Committee vide notification dated 19.09.2012 and the case of the petitioner is akin in terms of High-Level FR-17(1) Rule.

2. Mr. Ehsanullah Khan, learned counsel for the petitioner, has submitted that the petitioner was inducted into the Civil Service of Pakistan in 1971, and during his tenure of service, he earned a promotion from BS-21 to BS-22 in 2009 in Police Service of Pakistan Cadre (PSP); and, stood retired on attaining the age of superannuation in BS-22 on 26.01.2010, however, the promotion of the petitioner was withdrawn vide notification dated 29.04.2010 in terms of the judgment dated 28.4.2010 passed by the Hon'ble Supreme Court of Pakistan in Tariq Azizuddin's case (supra). Per learned counsel, after the pronouncement of the judgment of the Hon'ble Supreme Court of Pakistan in the aforesaid case, the competent authority considered all the officers, affected by the aforesaid judgment, were promoted to BS-22; and, the case of the petitioner is similar to the cases of his colleagues i.e. Muhammad Zafeer Abbasi, Mrs. Neelum S.Ali, and Nazar Hussain Mahar. He prayed for allowing the instant petition in terms of the FR-17(1) rule as

well as judgment passed by the Hon'ble Supreme Court of Pakistan in Nazar Hussain Mahar's case as discussed supra.

3. Mr. Muhammad Nishat Warsi, learned DAG, has objected to the maintainability of the instant petition on the plea that the case of the petitioner squarely falls with the ambit of the doctrine of laches as the alleged cause of action accrued to the petitioner in 2010, whereas he has filed the instant petition in September 2018, thus not entitled to the requisite relief. Learned DAG attempted to distinguish the cases of colleagues of the petitioner by referring to para-wise comments of the respondents. Learned DAG also referred to the office memorandum dated 15.08.2018 whereby the request of the petitioner for grant of proforma promotion to BS-22 with effect from 04.09.2009 was declined on the plea that a retired civil servant could not be promoted retrospectively. He prayed for dismissal of the instant petition.

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

5. In our view, the appointing Authority could have approved the proforma promotion of the Petitioner in terms of the ratio of the judgment passed by the Hon'ble Supreme Court of Pakistan in the case of Nazar Hussain Mahar (*supra*) on the analogy that the petitioner was already promoted to BS-22 on 04.09.2009 much before the announcement of the judgment of the Hon'ble Supreme Court of Pakistan in Tariq Azizuddin's case (*supra*). Besides that, the competent authority of the respondents could have looked into the matter to the extent whether the judgment of the Hon'ble Supreme Court of Pakistan in the aforesaid case was applicable in the case of retired civil servants, however, they were not bothered to see this aspect of the case and recalled the promotion of the petitioner in BS-22 vide impugned notification. It is settled law that where the law requires an act to be done in a particular manner, it ought to be done in that manner alone, and such a dictate of law cannot be termed as a technicality. Reliance has been placed on *Muhammad Anwar and others v. Mst. Ilyas Begum and others* (PLD 2013 SC 255). On the subject issue, the Honorable Supreme Court of Pakistan in the case of *Secretary Schools of Education and others v. Rana Arshad Khan and others* (2012 SCMR 126) while granting Proforma promotion to retired public servant held as under:-

"Much before the retirement of the respondents, a working paper was prepared by the department with regard to their promotion but the matter was delayed without any justifiable reason and in the meanwhile, respondents attained the age of superannuation. They cannot be made to suffer on account of the departmental lapse."

6. It is a settled principle of law that if service, benefits have accrued to an employee but for one reason or the other such benefits could not be awarded to such an employee, then, irrespective of the fact of his/her having retired from service, the department concerned shall still have to further consider her/his case for such a promotion and to allow him/her benefits of such a promotion, even after retirement

from service. Promotion is generally an advancement in rank, which is granted based on acquiring extra qualifications or enhancement of skills or awarded in lieu of longstanding services of the employee as a token of satisfaction and appreciation over services rendered by him. The concept of Proforma Promotion is to remedy the loss sustained by an employee/civil servant on account of denial of promotion upon his legitimate turn due to any reason but not a fault of his own and in cases where a temporary embargo was created against his right for such promotion or a legal restraint was posed against his claim owing to any departmental proceedings inquiry etc. against him and the said obstacle is done away with ultimately then in such a situation, his monetary loss and loss of rank is remedied through proforma promotion.

7. The Honorable Supreme Court in the case of Regarding Putting of Two Government Officers Namely Hasan Waseem Afzal and his Wife Farkhanda Waseem Afzal as OSD (2013 §CMR 1150), also held that the public/civil servants who were not promoted for want of required PERs because of their posting as OSD was not an act of their own doing and thus could not be left to suffer for the very reason. It was observed that:

“Their promotion to the next higher, the scale has been denied for want of PERs and PERs have not been complied on account of their posting as OSDs which is not an act of their own doing. “Let them suffer” may be a command of expediency but we cannot approve it when, “give them their due” is a command of justice, which prima facie appears to have been denied to them out of indignation and ill will of the high ups.”

8. No doubt promotion is not the vested right of a civil/public servant but where he is fully qualified for the promotion and there is no tangible clog in his service record, he has a right to expect that his case will be considered for promotion under law, rules, regulations and eligibility criteria/policy formulated for regulating promotion by the Government. Any breach or deviation therefrom for mala fide reasons or due to arbitrary act of his superiors or peers or the competent authority is not warranted in law.

9. In view of the position explained above it is to conclude that a civil servant has a fundamental right to be promoted even after his retirement through awarding proforma promotion provided his right of promotion accrued during his service and his case for promotion could not be considered for promotion for no fault of his own and he is retired on attaining the age of superannuation without any shortcoming on his part pertaining to deficiency in the length of service or in the form of inquiry and departmental action was so taken against his right of promotion.

10. In the light of the above legal position, we are of the considered view that a civil servant is entitled to proforma promotion, once during his service, his promotion is approved by the Competent Authority and in the meanwhile, if he superannuates, he is entitled to all benefits as admissible under the law. On the aforesaid proposition, we are fortified by the decisions rendered by the Hon'ble Supreme Court of Pakistan in the case of Iftikharullah Malih Vs. Chief Secretary and others (1998 §CMR 736) and Askari Hasnain Vs. Secretary Establishment & others (2016 §CMR 871).

11. In our view, the case of the petitioner squarely falls within the ratio of the judgment dated 10.10.2012 passed by the Hon'ble Supreme Court of Pakistan in Civil Petition No.2114/2011. An excerpt of the paragraph No.3 of the judgment is reproduced as under:

“Learned Deputy Attorney General by referring to FR-17 contended that whatever could be given under the said rule has been given to the petitioner, therefore, he cannot ask for more. But it is not the case of the petitioner that he was entitled to be promoted from a particular date, but for no fault of his, was prevented from rendering the service to the Federation in the higher post. His case, precisely, is that he being eligible was found fit and promoted accordingly. Not only that he rendered service in a higher grade after being promoted. It was in the case of Tariq Aziz-ud-Din & others (2010 SCMR 1301) that his promotion together with that of 53 other officers in Grade 22 was set aside. By the time the judgment was pronounced the petitioner had retired in Grade 22. A direction was, however, given in the aforesaid judgment to consider the case of such officers afresh. The case of the petitioner was not considered because according to the competent authority he had then retired. Be all that as it may. Once the petitioner was promoted, he rendered service to the Federation in the higher post, and then for one reason or another, his promotion was set aside he was to be considered afresh in terms of the judgment mentioned above regardless of the fact that he retired. He could not have thus been left without remedy in the circumstances or robbed of a chance to be considered afresh at least for the purposes of retaining the benefits he earned by rendering the service to the Federation in the higher post. We, therefore, convert this petition into appeal set aside the impugned judgment, and send the case back to the respondents with the direction to do the needful in terms of the judgment mentioned above. We would, however, desire that this matter be considered in the next meeting of the Board.”

12. In the light of the above facts and circumstances of the case, this petition is allowed in terms of the ratio of the judgment dated 10.10.2012 passed by the Hon'ble Supreme Court of Pakistan in the case of Nazar Hussain Mahar v. Federation of Pakistan through Secretary Establishment and others (supra). The competent authority of respondents is directed to consider the proforma promotion of the petitioner in BS-22 and other ancillary benefits under the law, without discrimination, within 02 weeks, from the date of receipt of the order of this Court.

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