

HIGH COURT OF SINDH CIRCUIT COURT, HYDERABAD

C.P. No.D-1768 of 2023

Before:-

Justice Mrs. Kausar Sultana Hussain
Mr. Justice Khadim Hussain Soomro

Date of hearing & Order:

17.01.2024

Mr. Zain-ul-Abdin Sahito, Advocate for the Petitioner.

ORDER

Khadim Hussain Soomro, J:- Through this captioned petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (**The Constitution**), the petitioner has sought the following reliefs:-

- a. This Honourable Court may be pleased to declare that the order dated 22.10.2020 to the extent of promotion of Respondent No.3 as Director Finance (BS-19) is illegal, mala fide, unconstitutional, contrary to the principles of Natural Justice and to set aside same.
- b. That this Honorable Court may suspend the operation of the order dated 22.10.2020 to the extent of Respondent No.3 till final adjudication of the captioned petition.
- c. This Honourable Court may be pleased to direct Respondents Nos. 1 and 2 to consider the case of petitioner for promotion from BS-18 to BS-19 forthwith w.e.f. 22.10.2020 when Respondent No.3, a non-cadre, was illegally promoted against the post meant for the petitioner.
- d. That this Honorable Court may kindly be pleased to direct the official Respondents not to take any coercive action against the petitioner and to conduct themselves strictly in accordance with the law.
- e. Any other relief this Honourable Court may deem fit and proper in the interest of justice."

2. Brief facts of the case, as enunciated in the memo of the petition, are that the petitioner is an employee of the Finance Cadre within the Population Welfare Department in Karachi, Sindh, and is seeking redress for the prolonged delay in his promotion to the position of Director Finance (BS-19). The petitioner claimed he is the most senior, qualified, and eligible candidate; his promotion right has been halted since 2017. The petitioner has challenged the appointment of Mr Mehmood-ul-Hassan (Respondent No. 3), an Admin Department employee, to the position of Director Finance (BS-19) in October 2020. This alleged violation of the petitioner's rightful claim is deemed unlawful, mala fide, unconstitutional, and contrary to the principles of Natural

Justice. Despite the existence of Departmental Promotion Committees (D.P.C.s), the petitioner's promotion case has not been considered. Hence, the captioned petition.

3. Learned counsel for the petitioner contends that the promotion of respondent No.3 as Director Finance vide order dated 22.10.2020 is illegal, malafide, and unconstitutional. He further submits that the petitioner is entitled to the promotion from BS-18 to BS-19 based on seniority, interalia, and the grounds raised in the memo of the petition.

4. We have heard learned counsel for the petitioner for a considerable time, scrutinized the material available on record and the case laws cited at the bar.

5. The petitioner admittedly is a civil servant and an employee of the Population Welfare Department, Government of Sindh and falls within the ambit of section S.2(1)(b) Civil Servants Act, 1973 (The Act). The definition of "Civil Servant" under the Civil Servants Act 1973 excludes specific categories explicitly. This exclusion includes persons on deputation to the Federation from any Province or other authority, those employed on a contract or work-charge basis funded from contingencies, and individuals designated as "worker" or "workman" under the Factories Act, 1934, or the Workmen's Compensation Act, 1923. The petitioner, being a civil servant, sought promotion from grade 18 to 19; now, the question is whether the promotion is the terms and conditions of the service. The expression 'Terms and Conditions' includes transfer, posting, absorption, seniority, and eligibility to promotion but excludes fitness or otherwise of a person to be appointed to or hold a particular post or to be promoted to a higher post or grade as provided under section 4(b) of the Service Tribunals Act, 1973. Section 3(2) of the Service Tribunals Act, 1973, provides that the Tribunal shall have exclusive jurisdiction in matters related to civil service terms and conditions, particularly in the context of jurisdiction. The term "exclusive jurisdiction" indicates that the Service Tribunals have sole authority to adjudicate and resolve legal matters related to civil servants' service terms and conditions. In other words, other forums, such as civil courts or high courts, are precluded from hearing or deciding on cases falling within the ambit of this provision. This provision reflects a deliberate legislative choice to establish a particular forum for resolving the problems of civil servants relating to their service.

6. Article 212 of the constitution provides the establishment of Administrative Tribunals with exclusive jurisdiction solely pertaining to disputes concerning the terms and conditions of service of a 'Civil Servant' as

defined in the Civil Servants Act, 1973. Consequently, the jurisdiction of the Tribunal cannot be expanded to encompass any other category of disputes. In order to promote conciseness and precision, the relevant articles are herein reproduced:-

"212. (1) notwithstanding anything hereinbefore contained the appropriate Legislature may by Act provide for the establishment of one or more Administrative Courts or Tribunals to exercise exclusive jurisdiction in respect of:

(a) Matters relating to the terms and conditions of persons [who are or have been] in the service of Pakistan, including disciplinary matters;"

7. The Honorable Supreme Court of Pakistan has resolved that regardless of the presence of fundamental rights matters, including claims of discrimination, challenges against statutory rules unsympathetically affecting civil servants, orders issued by an incompetent authority, orders based on malice and bad faith, or instances where an authority lacking jurisdiction under the governing law issues an order affecting the terms and conditions of a civil servant, the exclusive forum for redressal in all aforementioned circumstances, as well as others, the remedy lies with Service Tribunal established under Article 212 of the Constitution. Reliance is placed on the cases of "Iqan Ahmed Khurram v. Government of Pakistan and others" (PLD 1980 SC 153), "Khalid Mahmood Wattoo v. Government of Punjab" (1998 SCMR 2280), "Muzaffar Hussain v. The Superintendent of Police, District Sialkot" (2002 P.L.C. (C.S.) 442) and "Ali Azhar Khan Baloch and others v. Province of Sindh and others" (2015 SCMR 456).

8. It is a well settled principle of law that when a statute grants a right and a comprehensive mechanism for its enforcement, the invocation of fundamental rights becomes considerably unnecessary. The jurisdiction of the High Court, as per Article 212 of the Constitution, is unequivocally precluded, given the existence of a specific forum designated for addressing the grievances of the petitioner. This remains valid regardless of whether the order in question was issued due to malice aforethought, coram non-judice, lack of jurisdiction, or any other reason. In this context, the Hon'ble Supreme Court of Pakistan in "Syed Arshad Ali and others v. Pakistan Telecommunication Company Ltd. and others" (2008 SCMR 314) has observed as under:-

"It is well-recognized that if a right has been conferred by a statute and a complete mechanism has been provided for enforcement thereof, there could hardly be any occasion to invoke the applicability of fundamental rights. The jurisdiction of the High Court will be patently barred under Article 212 of the Constitution of Islamic Republic of Pakistan, in view of

the specific forum provided for redressal of the grievances of the petitioners, even if the order proposed to be challenged may have been passed in whatsoever circumstances viz. mala fide, coram non iudice or without jurisdiction. This principle has been laid down in the case of I.A. Sharwani and others v. Government of Pakistan through Secretary, Finance Division, Islamabad and others 1991 SCMR 1041. Besides it is also well-settled proposition of law that writ jurisdiction could not be exercised where equally efficacious remedy is available."

9. Similarly in the case of "I.A. Sharwani and others v. Government of Pakistan through Secretary, Finance Division, Islamabad and others" (1991 SCMR 1041) was decided by a five-judge members bench of Pakistan's Supreme Court with the following paragraph 6 of Article 212, as follow :-

"A perusal of the above-quoted Article 212 of the Constitution indicates that under clause (1), the appropriate Legislature has been empowered to enact for the establishment of one or more Administrative Courts or Tribunals for exercising exclusive jurisdiction in respect of the matters referred to in sub-clauses (a), (b) and (c) of the above clause, which inter alia include the matters relating to the terms and conditions of persons (who are or have been) in the service of Pakistan including in respect of disciplinary matters. It may further be notices that clause (2) of the above Article provides that notwithstanding anything hereinbefore contained, where any Administrative Court or Tribunal is established in terms of clause (1), no other Court shall grant an injunction, make any order or entertain any proceedings in respect of any matter to which the jurisdiction of such Administrative Court or Tribunal extends. It also provides the abatement of the pending proceedings in respect of such matters except those appeals, which were then pending in this Court."

10. Article 212 of the Constitution operates to eliminate the jurisdiction of High Courts and civil courts regarding issues interrelated to the terms and conditions of civil servants. The conditions within Article 212 do not establish simultaneous jurisdiction for civil courts, High Courts, and Tribunals. The ouster of jurisdiction as envisaged by Article 212 of the Constitution is mandated constitutionally and, consequently, necessarily confines the jurisdiction of civil courts and High Courts in matters that come distinctly within the exclusive purview of Service Tribunals. Article 212 of the Constitution has established a comprehensive remedy process before a venue, the Tribunal, which functions as a court for all purposes. Reliance can be placed on "Sh. Riaz-ul-Haq and another v. Federation of Pakistan through Ministry of Law and others" (PLD 2013 SC 501)]. An appellate tribunal with judicial powers is established under this Article. Furthermore, Article 212 of the Constitution, which begins with a non-obstante phrase, starts with the phrase "notwithstanding anything hereinbefore contained" suggests that the provision prevails over preceding provisions or regulations. There are a plethora of judgments on this point, including "Abdul Bari v. Government of Pakistan and

2 others" (PLD 1981 Karachi 290) and "Mian Amanul Mulk v. N.W.F.P. through Chief Secretary" (PLD 1981 Peshawar 1). Moreover, in "Muhammad Aslam Bajwa v. Federation of Pakistan" (PLD 1974 Lahore 545),. It has been noted that all provisions of the Constitution preceding Article 212, including Article 199, are encompassed by its exclusionary clauses. Indeed, by giving Article 212 precedence, the Legislature made its intention clear.

11. Another aspect of the instant petition was filed on 07.11.2023, wherein the petitioner sought the declaration of the order dated 22.10.2020, through which the respondent no 03 was promoted from BS-18 to 19, after lapse of 3 years, regarding which the counsel has given no reasonable explanation. Hence, the laches also hits this petition. The concept of laches is distinct from that of ordinary litigation when it comes to court cases involving service matters. In the case of M.H. Mirza V/S Federation of Pakistan through Secretary, Cabinet Division, Government of Pakistan, Islamabad and 2 others 1994 S C M R 1024 the Apex Court of Pakistan has observed as under:-

"7. As regards laches, it is to be noticed that though the appellant had been diligently agitating in all the other forums, he invoked the Constitutional jurisdiction after about twelve years. In service matters the concept of laches is different from that of ordinary litigation. This difference has been fully brought out in the Chairman, District Screening Committee, Lahore and another v. Sharif Ahmad Hashmi (PLD 1976 SC 258) and S. Sharif Ahmad Hashmi v. Chairman, Screening Committee, Lahore and another (1978 SCMR 367)."

12. The petitioner asserted that he engaged in correspondence with various government officials in pursuit of his claim does not absolve the petitioner from the repercussions of the doctrine of laches, which postulates that a party may possess an otherwise enforceable right but forfeits its entitlement to enforcement when affected by laches. Similarly, if the constitutional petition remedy is not invoked within a reasonable timeframe, interference may be declined on the grounds of laches. It is inherent in the doctrine that procrastination undermines equity, a principle favouring vigilant and not indolent. Laches, in its elementary sense, signifies a failure to undertake actions that ought to have been performed within a reasonable temporal framework. The assessment of laches in a constitutional petition is invariably contingent upon the conduct exhibited by the individual seeking constitutional recourse, but in the instant case, the counsel for the petitioner could not justify the delay in filing the petitions. The reliance can be placed on case laws such as PLD 2013 SC 268 (Umar Baz Khan v. Syed Jehanzeb and others), 2004 SCMR 400 (Farzand Raza Naqvi and others v. Muhammad Din through Legal Heirs and others), 2012 SCMR 280, 2012 P.L.C. (C.S.) 218 (State Bank of

Pakistan v. Imtiaz Ali Khan and others) and 2014 P.L.C. (C.S.) 1292 (Asghar Khan and others v. Province of Sindh and others).

13. The concept of laches is not an abstract or technical rule. It applies when it would be unfair to grant a remedy because one party's actions could be seen as a waiver of that remedy or because one party's actions and indifference put the other party in an unreasonable position to assert that remedy later on. Two crucial factors in these cases are the duration of the delay and the nature of the acts done during that time, which can impact both parties and create a balance of justice or injustice regarding the remedy. The reliance can be placed on Lindsay Petroleum Company v. Hurd ((1874) L.R. 5 PC 221), which was observed on pages 239 & 240:

"The doctrine of laches in Courts of Equity is not an arbitrary or technical doctrine where it would be practically unjust to give a remedy either because the party has, by his conduct done that which fairly be regarded as equivalent to the waiver of it or where by his conduct and neglect he had, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, Two circumstances, always important in such cases are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course of the other, so far as relates to the remedy."

14. We are of the considered opinion, under the circumstances of the case, that the petitioner has failed to establish grounds warranting indulgence of this Court under Article 199 of the Constitution; resultantly, the present petition is dismissed in limine along with the listed applications. However, the petitioner is at liberty to avail himself of the appropriate legal remedy.

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