

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.No.2010 of 2019
Dr. Anwar Hussain Alizai and another

Versus

Federation of Pakistan through Secretary, Establishment Division and
others

Date of Hearing: 21.01.2020
Petitioner by: Hafiz Arfat Ahmad Ch. and Ms. Kashifa
Niaz Awan, Advocates
Respondents by: Mr. Muhammad Nadeem Khan Khakwani,
learned Assistant Attorney-General.

MIANGUL HASSAN AURANGZEB, J:- Through the instant writ petition, the petitioners, who are qualified for promotion to BPS-20, seek a direction to the respondents to place their cases before the Central Selection Board (“C.S.B.”) so that they are considered for promotion by the C.S.B. in its forthcoming meeting.

2. The petitioners are serving in the Geological Survey of Pakistan (“G.S.P.”) which is an attached department of the Ministry of Energy (Petroleum Division).

3. On 17.03.1996, petitioner No.1 (Dr. Anwar Hussain Alizai) was appointed in the G.S.P. as Assistant Director (Geology) (BPS-17) on ad-hoc basis. On 13.01.2015, he was appointed to the said post on regular basis through the Federal Public Service Commission (“F.P.S.C.”). On 25.05.2015, petitioner No.1 was promoted to the post of Deputy Director (Geology) (BPS-18). On 29.07.2016, petitioner No.1 was appointed (not promoted) as Director (Geology) (BPS-19) through the F.P.S.C.

4. As regards petitioner No.2 (Muhammad Saeed), on 18.10.2001, he was appointed as Assistant Geophysicist (BPS-17) in G.S.P. through the F.P.S.C. On 04.12.2009, he was appointed as Geophysicist (BPS-18) through the F.P.S.C. On 23.08.2017, he was promoted as Superintending Geophysicist (BPS-19).

5. The method, qualifications and other conditions for appointment to posts in the G.S.P. are set out in notification (S.R.O.258(KE)/91), dated 04.06.1991. Petitioner No.1 is desirous of being promoted as Deputy Director General (BPS-20), whereas petitioner No.2 as Chief

Geophysicist (BPS-20). Under the said notification, the criteria to be promoted against the said posts in BPS-20, is as follows:-

“(i) 17 years service in B-17 and above or 12 years service in B-18 and above in case of initial appointment in B-18 or 5 years service in B-19 in case of initial appointment in B-19.”

6. Additionally, for promotion to the post of Deputy Director General (BPS-20), the officer must have published seven research papers in the field of Earth Sciences, whereas for promotion to the post of Chief Geophysicist (BPS-20), the officer must have published seven research papers in the field of Geophysics.

7. The said notification also provides that a person holding the post of a Director (BPS-19) can be promoted as Deputy Director General (BPS-20) by selection, whereas a person holding the post of Superintending Geophysicist (BPS-19) can be promoted as Chief Geophysicist (BPS-20).

8. Learned counsel for the petitioners, after drawing the attention to the relevant provisions of the notification dated 04.06.1991, and after narrating the facts leading to the filing of the instant petition, submitted that the petitioners seek their consideration for promotion to BPS-20; that the G.S.P. had sent the petitioners' names to the Ministry of Energy (Petroleum Division) for the consideration of their names for promotion to BPS-20; that the said Ministry did not forward the petitioners' cases to the Establishment Division; that the reasons given for not forwarding the petitioners' cases to the Establishment Division are that petitioner No.1 did not have the required five years of service in BPS-19, whereas petitioner No.2 did not have the required twelve years of service in BPS-18 and above; that the Ministry of Energy (Petroleum Division) ought to have taken into consideration the petitioners' service in the G.S.P. prior to petitioner No.1's initial appointment in BPS-19 on 29.07.2016 and petitioner No.2's initial appointment in BPS-18 on 04.12.2009; that in the past, an officer's service in the G.S.P. prior to his initial appointment against a higher post in the G.S.P. was taken into consideration while counting the required years of service for promotion; that Mr. Nazar-ul-Islam was promoted to BPS-20 after about three years of service in BPS-19 after counting his service in G.S.P. prior to his initial appointment in BPS-19; that similarly Mr. Abdul

Razzaq was promoted to BPS-19 without having completed seven years of service in BPS-18; that the Ministry of Energy (Petroleum Division) had misinterpreted the provisions of the notification dated 04.06.1991 by not forwarding the petitioners' names to the Establishment Division for the consideration of their promotion to BPS-20; and that the provisions of the said notification ought to be beneficiary interpreted in the petitioners' favour. Learned counsel for the petitioners prayed for the writ petition to be allowed in terms of the relief sought therein.

9. On the other hand, the learned Assistant Attorney-General raised an objection to the maintainability of the instant petition on the ground that since the petitioners were civil servants and had agitated a matter regarding their eligibility for promotion to BPS-20, they ought to have invoked the jurisdiction of the Federal Service Tribunal; and that the jurisdiction of this Court was barred under Article 212 of the Constitution. He further submitted that the petitioners' cases for promotion forwarded by the G.S.P. to the Ministry of Energy (Petroleum Division) did not contain correct information; that the Deputy Secretary (Administration), Petroleum Division afforded an opportunity of personal hearing to the petitioners and found that as per the G.S.P.'s Promotion Rules, they were not eligible for promotion to BPS-20 on account of not having the required length of service; that petitioner No.1 was required to have five years of service in BPS-19 to become eligible for promotion to BPS-20, whereas petitioner No.2 was required to have twelve years of service in BPS-18 and above for promotion to BPS-20; that petitioner No.1 had been initially appointed in BPS-19, whereas petitioner No.2 had been initially appointed in BPS-18; that since petitioner No.1 had not been promoted to BPS-19, and petitioner No.2 had not been promoted to BPS-18, their services prior to their initial appointments could not be counted for their promotion to BPS-20; and that since the petitioners did not have the required length of service, they could not be considered for promotion to BPS-20. Learned Assistant Attorney-General prayed for the writ petition to be dismissed.

10. I have heard the contentions of the learned counsel for the petitioners as well as the learned Assistant Attorney-General and have perused the record with their able assistance.

11. The facts leading to the filing of the instant petition have been set out in sufficient detail in paragraphs 2 to 7 above and need not be recapitulated.

12. In the cases of Aamir Khurshid Mirza Vs. The State (2006 CLD 568) and Shabbir Jan Sarhandi Vs. Province of Sindh through Chief Secretary and three others (2006 PLC (C.S) 955), it has been *inter alia* held that it was the duty of the Court to first decide the question pertaining to its own jurisdiction and then consider the merits of the case. I propose, therefore, to first decide the learned Assistant Attorney-General's objection to the maintainability of this petition.

13. Article 212(1)(a) of the Constitution empowers the legislature to make a law providing for establishment of Tribunals to exercise exclusive jurisdiction in respect of matters relating to terms and conditions of persons who are or have been in the service of Pakistan including disciplinary matters. Under Article 212(2) of the Constitution, the jurisdiction of this Court is barred in respect of any matter to which the jurisdiction of such a Tribunal extends. Section 4 of the Federal Service Tribunal Act, 1973, provides for appeals to the Service Tribunal by a civil servant aggrieved of any order regarding the terms and conditions of his service. Section 4(1)(b) of the Federal Service Tribunal Act, 1973, expressly bars the Service Tribunal from entertaining appeals against the decisions of departmental authorities determining the fitness or otherwise of a person to be appointed or to hold a particular post or to be promoted to a higher grade. In Section 9 of the Civil Servants Act, 1973, a right has been conferred on the civil servant to be considered for promotion to a higher post if he is eligible on account of the fact that he possesses the prescribed minimum qualifications provided under the rules.

14. The scope of Section 4 of the Service Tribunals Act, 1973 was examined by the Hon'ble Supreme Court in the case of Mian Abdul Malik Vs. Dr. Sabir Zameer Siddiqui (1991 SCMR 1129), and following observations were made:-

"2. What is barred from the jurisdiction of the Tribunal is the question of fitness of a civil servant for promotion. The determination of his eligibility is a question on which jurisdiction of the Tribunal has not been barred. The question of eligibility relates primarily to the terms and conditions of service and their applicability to the civil servant concerned. Fitness introduces an element of subjective

evaluation on the basis of objective criteria where substitution for an opinion of the competent authority is not possible by that of a Tribunal or a Court. It is in this background that the question of fitness or suitability for promotion has always been considered to be exclusively within the jurisdiction of the competent authority not shared by the Court or Tribunal exercising supervisory jurisdiction in respect of eligibility and qualification. On the question of eligibility and qualification no such bar exists either on express words of section 4 of the Service Tribunal Act or even by implication. The petitioner had approached the Civil Court for determination of his eligibility and also for being declared as the only one eligible to be promoted. Such an exercise could not be undertaken by the Civil Court with the limited number of parties arrayed before it nor could it have jurisdiction as the matter related to the terms and conditions of the service."

(Emphasis added)

15. In the case at hand, whether the petitioners had the required length of service prescribed in the notification dated 04.06.1991 for their promotion to BPS-20 is a matter not concerning their fitness but their eligibility for promotion. The Ministry of Energy (Petroleum Division) disputes the petitioners' interpretation of the notification dated 04.06.1991 regarding the eligibility (i.e. the required length of service) of an employee of G.S.P. in BPS-19 to be promoted to BPS-20. Having the requisite length of service in a particular pay scale for promotion to a higher scale has nothing to do with the fitness of the officer in question. The question of eligibility for promotion relates to the terms and conditions of service and falls within the jurisdictional domain of the Service Tribunal. Therefore, I am of the view that there is considerable substance in the objection to the maintainability of this petition raised by the learned Assistant Attorney-General. Consequently, it is held that this petition is not maintainable. In holding so, reliance is placed on the following case law:-

- i) In the case of Ali Azhar Khan Baloch Vs. Province of Sindh (2015 SCMR 456), it was held as follows:-

"149. Article 212 of the Constitution ousts the jurisdiction of High Courts and civil Courts in respect of the matters pertaining to terms and conditions of civil servants. In other words, the provisions of Article 212 do not confer a concurrent jurisdiction to civil Courts, High Courts and Tribunals. The ouster contemplated under the said Article is a Constitutional command, and, therefore, of necessity restricts the jurisdiction of civil courts and High Courts on the subject, which squarely falls within the exclusive domain of Tribunals."

Furthermore, it was held that the exercise of jurisdiction by way of suit and Constitution petition filed by a civil servant with

regard to his terms and conditions of service is violative of Articles 175, 212 and 240 of the Constitution and the law. The Hon'ble Supreme Court also observed that the admission of such suits and petitions by the learned Judges concerned *“obviously confront and defy Article 189, if not attract the provisions of Article 209 of the Constitution.”*

- ii) In the case of National Assembly Secretariat Vs. Manzoor Ahmed (2015 SCMR 253), it has been held as follows:-

“8. We have heard the learned counsel for the parties and have perused the record. Admittedly, respondent No.1 is a Civil Servant and, therefore, he could not have approached the High Court under Article 199 of the Constitution for redressal of his grievance, which pertained to the terms and conditions of his Service in view of the Bar created under Article 212(2) of the Constitution. The High Court, therefore, was not competent to adjudicate the issue raised in the Writ Petition. The High Court has fallen in error while proceeding on the erroneous assumption that respondent No.1 had raised the issue of violation of the statutory Rules, therefore, it was competent to decide the issues. This was an incorrect approach of the learned High Court to entertain a Constitution Petition of a Civil Servant on the ground of the statutory violation. Such grievances of a Civil Servant fall within the domain of the Federal Service Tribunal as mandated by the Constitution.”

- iii) In the case of Zafar Ullah Baloch Vs. Government of Balochistan (2002 SCMR 1056), it had been held *inter alia* that eligibility for promotion of the aggrieved civil servant could be subjected to judicial scrutiny before the Service Tribunal because it relates to the terms and conditions of his service.
- iv) In the case of Jalaluddin Vs. Board of Trustees of the Port of Karachi (2000 PLC (C.S.) 1061), it was held *inter alia* that when a person considered himself qualified for promotion and was wrongly ignored, it would be a case of eligibility pertaining to the terms and conditions of service justiciable before the Service Tribunal.
- v) In the case of Syed Badar-ud-Din Vs. Government of N.-W.F.P. (PLD 1994 S.C. 345), it has been held *inter alia* that questions relating to the determination of eligibility of a civil servant for promotion to a post is not outside the jurisdiction of the Service Tribunal constituted under Article 212 of the Constitution.

Law to the said effect has also been laid down in the cases of Engineer Musharaf Shah Vs. Government of Khyber Pakhtunkhwa

(2015 PLC (C.S.) 215), Fazali Rehmani Vs. Chief Minister, N.-W.F.P. (PLD 2008 S.C. 769), Muhammad Iqbal Vs. Executive District Officer (Revenue) (2007 SCMR 682), Peer Muhammad Vs. Government of Balochistan (2007 SCMR 54), Government of the Punjab Vs. Muhammad Zafar Bhatti (PLD 2004 S.C. 317), Khalid Mahmood Wattoo Vs. Government of Punjab (1998 SCMR 2280), Muhammad Anees Vs. Abdul Haseeb (PLD 1994 S.C. 539) and Iqan Ahmad Khurram Vs. Government of Pakistan (PLD 1980 S.C. 153).

16. In view of the above, this petition is dismissed as not maintainable. I refrain from touching the merits of the case, lest it may prejudice to the either party's case before the competent forum. There is a catena of case law in support of the view that where a Court holds a petition not to be maintainable, it ought not to delve into or give findings or even observations on the merits of the case. Reference in this regard may be made to the judgments in the cases of S.M. Waseem Ashraf Vs. Federation of Pakistan through Secretary, Ministry of Housing & Works and others (2013 SCMR 338), Messrs Voyage de Air, General Sales Agent, Shaheen Air International Vs. Shaheen Air International Pvt. Ltd. (2006 CLC 173) and Yousuf A. Haroon Vs. Custodian of the Karachi Hotel Project (2004 CLC 1967). There shall be no order as to costs. The petitioners are at liberty to agitate their grievance before the competent forum.

**(MIANGUL HASSAN AURANGZEB)
JUDGE**

ANNOUNCED IN AN OPEN COURT ON _____/2020

(JUDGE)

APPROVED FOR REPORTING

*Qamar Khan**