

SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

Mr. Justice Gulzar Ahmed, CJ
Mr. Justice Ijaz ul Ahsan

Civil Appeal No.1167 of 2020

[Against the judgment dated 22.09.2020, passed by the Sindh Service Tribunal, Karachi in Appeal No.1009 of 2019]

Abdul Sattar Jatoi son of Saadullah Jatoi, Muslim, Adult, Director (Administration, Accounts & Development) (BPS-20), resident of House No.29-A, Jatoi Haveli, Samanabad, Near Marvi Town, Qasimabad Hyderabad.

...Appellant(s)

Versus

Chief Minister Sindh through Principal Secretary, Chief Minister Secretariat, Karachi and others.

...Respondent(s)

For the Appellant(s) : Mr. M.M. Aqil Awan, Sr.ASC

For Respondents No.1-4 : Syed M. Saulat Rizvi,
(Govt of Sindh) Addl. Advocate General, Sindh
(via video link from Karachi)

Respondent No.5 : In person

Date of Hearing : 20.04.2021

JUDGMENT

Gulzar Ahmed, CJ.- This civil appeal is by leave of the Court vide order dated 03.12.2020.

2. Facts of the matter are that Respondent No.5-Ali Abbas (**the respondent**) and appellant Abdul Sattar Jatoi were appointed on 16.03.1992 as Planning Officers (BPS-17) in the Health Department, Government of Sindh on the recommendation of the Sindh Public Service Commission, which contained the merit list, where the name of Respondent No.5 was mentioned at Serial No.5, while the name of the appellant was mentioned at

Serial No.9. Both the respondent and the appellant were promoted as Deputy District Officer (P&D) (BPS-18) vide Notification dated 11.10.2004, wherein the name of the respondent was mentioned at Serial No.3, while that of the appellant at Serial No.5. Seven Deputy District Officers (P&D) (BPS-18) were promoted as District Officer (Administration, Accounts & Development) (BPS-19) and one as Additional Director Development by the Provincial Selection Board No.II held on 27.01.2010, wherein name of respondent is mentioned at Serial No.2, while the appellant at Serial No.5.

3. It seems that the post of District Officer (Administration, Accounts & Development) (BPS-19) was abolished. Vide Notification dated 07.11.2012, the appellant, an officer in BPS-19 in the Health Department, was declared surplus with immediate effect and under Rule 9-A of the Sindh Civil Servants (Appointment, Promotion & Transfer) Rules, 1974 (**the Rule of 1974**), his service was placed at the disposal of the surplus-pool of Services, General Administration and Coordination Department (**SGA&CD**), Government of Sindh. Through a further Notification dated 10.01.2013, the appellant was absorbed/inducted in the Provincial Secretariat Service cadre against an equivalent post of BPS-19 with immediate effect. Through further Notification dated 02.07.2013, the absorption of the appellant in the Provincial Secretariat Service was withdrawn. The appellant made an application dated 25.07.2013 addressed to the Chief Secretary, Government of Sindh requesting that he may be posted/absorbed back against non-cadre position at Liaquat University Hospital Hyderabad/Jamshoro by re-designating post

of BPS-19, as Director (Administration, Accounts and Development). The summary dated 12.12.2013 for the approval of the Chief Minister, Sindh was initiated recommending re-designation of one post on non-clinical side as Director (Administration, Accounts & Development) (BPS-19) for absorption of the appellant. Vide Notification dated 09.01.2014, the appellant was posted as a Project Director, Project Management & Implementation Unit (PMIU), Education & Literacy Department. Through the order of the Health Department, Government of Sindh dated 09.11.2016, one post of Additional Medical Superintendent (BPS-19), Liaquat University Hospital, Hyderabad was sanctioned and re-designated as Director (Administration, Accounts & Development) (BPS-19) on non-clinical side for absorption of the appellant. Through Notification dated 25.11.2016, the appellant was absorbed as Director (Administration, Accounts & Development) (BPS-19), Liaquat University Hospital, Hyderabad. Through further Notification dated 06.03.2018, rules for appointment were amended and a person specific post of Director (Administration, Accounts and Development) in BPS-20 was created for the appellant in the Health Department, Government of Sindh. Through further Notification dated 01.06.2018, the appellant was promoted to the post of Director (Administration, Accounts & Development) in BPS-20 on regular basis with immediate effect. The respondent was aggrieved of this last mentioned Notification and thus, submitted a departmental appeal. The respondent did not receive response to the departmental appeal, therefore, he filed Service

Appeal No.993 of 2018 in the Sindh Service Tribunal, Karachi (**the Tribunal**). He made the appellant as Respondent No.4 in the said service appeal and prayed that the promotion of the appellant as Director (Administration, Accounts & Development) in BPS-20 be cancelled and withdrawn, and the said post be filled up amongst the most senior officers on the basis of seniority-cum-fitness and in accordance with law. This service appeal of the respondent was dismissed as premature vide order dated 30.08.2019 and he was allowed to file departmental appeal and then to file service appeal within 90 days of filing of the departmental appeal. The respondent seems to have filed departmental review appeal/petition and getting no response on the same, again filed a service appeal in the Sindh Service Tribunal. The appellant was impleaded as Respondent No.5 in this service appeal. After hearing the learned counsel for the parties, the Tribunal through its impugned judgment dated 22.09.2020, disposed of the appeal by noting, *inter alia*, as follows:-

“17. It was told to us that currently the respondent No.05 has been relieved of the charge of the post of BS-20 Liaquat University Hospital, Hyderabad/Jamshoro and he has reported to Health Department. He is therefore to stay there and be treated and posted in BS-19 like his batch-mates obeying the judgment of the Hon'ble Supreme Court in letter and spirit. His promotion to BS-20 is set aside.”

As noted above, the Tribunal has set aside the promotion of the appellant as an Officer of BPS-20.

4. Learned counsel for the appellant has contended that the very service appeal filed by the respondent before the Tribunal

was not maintainable and in this regard made reference to Section 4(b) of the Sindh Service Tribunals Act, 1973. He further contended that the officers of the Health Department were considered for promotion by the Provincial Selection Board No.II held on 27.1.2010 and the appellant so also the respondent and other five officials were granted promotion from the post of Deputy District Officer (Planning & Development) (BPS-18) to the post of District Officer (Administration, Accounts and Development) (BPS-19) and one as Additional Director Development. He further contended that through the Sindh (Repeal of the Sindh Local Government Ordinance, 2001 and Revival of the Sindh Local Government Ordinance, 1979) Act, 2011 (**the Act of 2011**), the Sindh Local Government Ordinance, 2001 was repealed and the Sindh Local Government Ordinance, 1979 was revived, and further on promulgation of the Act of 2011, the posts held by the appellant and the respondent were abolished and while the appellant was placed in the surplus-pool, the respondent continued to work in the Health Department in BPS-19. He contended that under Rule 9-A of the Sindh Civil Servants (Appointment, Promotion and Transfer) Rules, 1974, the SGA&CD being parent Department was competent to post the appellant in any other department and could also be re-designated. He further contended that having been posted as Additional Medical Superintendent (BPS-19) in Liaquat University Hospital, Hyderabad and re-designated as Director (Administration, Accounts and Development) (BPS-19) on non-clinical side, and the said Hospital being attached department of the Health

Department, in terms of the recruitment rules, the post of Director (Administration, Accounts and Development) (BPS-20) was created and the appellant was promoted to the said post. He contended that there was no illegality in the promotion of the appellant and in this respect relied upon the cases of Shafi Muhammad Mughal v. Secretary, Establishment Division and others (2001 SCMR 1446), Zafar Iqbal v. M.G.O., M.G.O. Branch, GHQ Rawalpindi and 3 others (1995 SCMR 881), Miss Zubaida Khatoon v. Mrs. Tehmina Sajid Sheikh and others (2011 PLC (C.S.) 596), Messrs Associated Cement Companies Ltd v. Pakistan through the Commissioner of Income-Tax, Lahore Range, Lahore and 7 others (PLD 1978 SC 151), Dr. Ehsan-ul-Haq v. The Province of Punjab and others (1980 SCMR 972), Abdul Sattar v. Federation of Pakistan and others (2013 SCMR 911), Anwarul Haq v. Federation of Pakistan through Secretary, Establishment Division, Islamabad and 13 others (1995 SCMR 1505), The Chairman, P.I.A.C. and others v. Nasim Malik (PLD 1990 SC 951), M.A. Ghafoor, Senior Mechanical Officer, Headquarters Office, Pakistan Railways, Lahore v. Islamic Republic of Pakistan through Secretary Establishment Division, Government of Pakistan, Islamabad and 24 others (2002 PLC (C.S.) 1641) and Government of Balochistan through Secretary, Services and General Administration Department and another v. Khawaja Muhammad Naseer (2009 PLC (C.S.) 513).

5. The learned Additional Advocate General, Sindh appearing for the official respondents did not oppose the contentions of the learned counsel for the appellant.

6. The respondent appeared in person and argued his case himself. He has supported the impugned judgment and contended that the appellant was junior to him since the initial appointment and at no point of time the appellant was ever made senior to him. He contended that a person specific post of Director (Administration, Accounts and Development) in BPS-20 was created for the appellant and on the desire of the appellant, he was also promoted to such post. He further contended that all along special rules have been made for the appellant and he has been favoured by the official respondents and in doing so, the official respondents committed grave illegality, for that, he being senior to the appellant in BPS-19 in the Health Department, his case for promotion was not considered for the post of BPS-20.

7. The learned counsel for the appellant in the end has contended that the very service appeal filed by the respondent before the Tribunal was time barred.

8. We have considered the submissions made by the learned counsel for the appellant as well as the learned Additional Advocate General, Sindh and the respondent who appeared in person, and have also gone through the record of the case.

9. We will take up the question of limitation of filing of service appeal by the respondent before the Tribunal in the first place. From the impugned judgment, we note that there is no discussion by the Tribunal on the point of limitation of the service appeal filed by the respondent before it but as the question of limitation being also a question of law, we would like to address the same. The appellant in the very memo of his service appeal

before the Tribunal has raised grievance against the order dated 01.06.2018 of promotion of his junior/batch-mate i.e. the appellant from BPS-19 to BPS-20 and has alleged that he has filed appeal in the Office of the Secretary Health through proper channel with an advance copy in the Office of the Worthy Chief Minister and Secretary, SGA&CD but as no response was received, he filed Service Appeal No.993 of 2018, in the Tribunal, which was decided by the Tribunal vide its order dated 30.08.2019, which is as follows:-

"Learned Additional Advocate General present for the respondents. He files statement whereby the respondent No.1 & 3 have adopted the written statement filed by the respondent No.02. The same is taken on record, copy supplied to the appellant. When pointed out to the appellant that the preliminary objections have been raised by the respondents that his departmental appeal has been filed before wrong forum and also the appellant did not file the service appeal immediately within the period of 30 days after the lapse of 90 days of his departmental appeal. Therefore he is supposed to wait for the final decision in the departmental appeal.

After getting apprised of those objections, the appellant request for passing any appropriate order. The appeal being premature is dismissed. The appellant shall be at liberty to correct his steps under law and file appeal/review before the competent authority to decide it. He shall be at liberty to file appeal before this Tribunal in case his proper petition/review/appeal is not disposed of within 90 days of the institution thereof. Appellant has expressed his apprehension that his fresh review/petition may not be received by

the competent authority on that the learned Additional Advocate General, Sindh assures that when the petition/review/appeal is ready for the presentation he shall get it received by the concerned authority."

10. Pursuant to the order of the Tribunal, the respondent appears to have filed a review appeal/petition for cancellation of promotion order of the appellant and having received no response, again filed the service appeal before the Tribunal with the prayer seeking, *inter alia*, that promotion of the appellant as Director (Administration, Accounts and Development) (BPS-20) vide Notification dated 01.06.2018 may be cancelled/withdrawn and promotion be made amongst the senior most officers, including the respondent on seniority-cum-fitness basis. The contention of the learned counsel for the appellant is that the limitation has to be counted from 01.06.2018, on which date the Notification of promotion to the post of BPS-20 of the appellant was issued. He has contended that review appeal was filed by the respondent on 13.09.2019, was barred by one year, three months and 12 days. Though such a submission has been made by the learned counsel for the appellant but has not taken into consideration that earlier too the respondent had filed Service Appeal No.993 of 2018 and the Tribunal vide its order dated 30.08.2019 dismissed the same as premature and allowed the respondent to file appeal/review before the competent authority and then he was at liberty to file the appeal before the Tribunal within 90 days of filing of the appeal/review. It is apparent from the document available at page-91 of the paper book that the respondent has submitted the

review appeal/petition and the same was forwarded by the Medical Superintendent, Peoples Medical College Hospital, Nawabshah (Shaheen Benazir Abad) under his covering letter dated 13.09.2019 to the Secretary, Government of Sindh, Health Department, Karachi. Going through the order of the Tribunal dated 30.08.2019, in which the appellant was duly represented but he did not challenge the same, the respondent having submitted the review appeal/petition in terms of the order of the Tribunal and then filed the service appeal before the Tribunal on 24.12.2019, we are unable to find the service appeal to be time barred as claimed by the learned counsel for the appellant.

11. The submission of the learned counsel for the appellant that the Tribunal had no jurisdiction to entertain the service appeal filed by the respondent revolves around Section 4(b) of the Sindh Service Tribunals At, 1973 (**the Act of 1973**), which provides that no appeal shall lie to a Tribunal against an order or a decision of a departmental authority determining the 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. The respondent in his service appeal before the Tribunal has made the following prayer:

“Under the circumstances it is humbly prayed in the interest of justice.

- i. The promotion of Mr. Abdul Sattar Jatui as Director Administration Accounts & Development BPS-20 be cancelled immediately from 01.6-2018 and the same may be filled by the way of promotion from amongst the seniors including appellant on the basis of fitness cum seniority in accordance with law by modification of rules of promotion.

ii. The post of Director Administration Accounts & Development/Director Development & Evaluation BPS-20 may be created in any of similar institution viz Civil Hospital Karachi/PMC Hospital Nawabshah/CMC Hospital Larkana/Directorate General Health Services Sindh, Hyderabad as created at LMC Hyderabad for promotion of Seniors with financial benefits of same date (01.06.2018) including appellant based on fitness cum seniority in accordance with law.

iii. Any other relief may be awarded as deemed just and proper.”

The above prayer shows that the respondent has challenged the promotion of the appellant as Director (Administration, Accounts & Development) (BPS-20) and has sought cancellation of notification dated 01.06.2018 by which the appellant was promoted. The respondent has also prayed that the post of Director (Administration, Accounts & Development) (BPS-20) be filled up by way of promotion from amongst the seniors including the respondent on the basis of seniority-cum-fitness and in accordance with law by modification of rules for promotion. The respondent has also prayed that the post of Director (Administration, Accounts & Development/Director Development & Evaluation (BPS-20) may be created in any of the similar institutions viz Civil Hospital Karachi/PMC Hospital Nawabshah/CMC Hospital, Larkana/Directorate General Health Services Sindh, Hyderabad, as is created in LMC Hyderabad.

12. It is to be noted that proviso (b) of Section 4 of the Act of 1973, as noted above, bars filing of a service appeal before the Tribunal against an order or a decision of a departmental authority determining the 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. This provision deals with a situation that the departmental authority has dealt with the matter of promotions of all the employees eligible for promotion to a post and having found a certain employee to be fit for promotion, promoted him the remaining civil servants whose case for promotion was considered but found not fit to be promoted, such civil servants' service appeals before the Tribunal were not lie. In the present case, no such order or decision, determining the fitness or otherwise of a person to be appointed, has either been made by the departmental authority nor the question of fitness of the appellant to be promoted has at all been raised. The grievance in the service appeal filed by the respondent before the Tribunal was that the departmental authority did not at all consider the case of the appellant's own batch-mates including the respondent who were working in the post of BPS-19 in the Health Department for promotion to the post of BPS-20, in that, only the appellant was picked up by the departmental authority for grant of promotion to him in BPS-20 and the senior batch-mates of the appellant have altogether not been considered for granting of promotion to the post of BPS-20. Had the departmental authority considered the case of promotion of all the batch-mates of the appellant working in BPS-19 in the Health Department and the respondent having been found not fit for promotion to the post of BPS-20 by the departmental authority, the service appeal on such question would have been barred before the Tribunal, such is not the case in hand before the Court.

13. The next submission of the learned counsel for the appellant is that on repeal of the Act of 2011, the post of District Officer Planning and Development (BPS-19) in the Health Department was abolished and the appellant was justifiably placed in surplus-pool and being available in the surplus-pool, SGA&CD was competent to post the appellant in any other department and on any other post.

14. We note that although the Act of 2011 was repealed but the Health Department continued to operate, in that, as contended by the learned counsel for the appellant himself, the respondent continued to serve the said department. It seems that out of all the District Officers (Administration, Accounts & Development) (BPS-19) only the appellant's name appears to have been put in surplus-pool, upon which the wish list of the appellant started and through notification dated 02.07.2013, the competent authority eagerly complied with such wish of the appellant by inducting him in the Provincial Secretariat Service cadre in the equivalent post of BPS-19 by notification dated 10.01.2013. Such absorption/induction of the appellant was withdrawn on 02.07.2013, upon which the appellant himself made an application dated 25.07.2013 to the Chief Secretary, Government of Sindh requesting that he may be posted/absorbed back against non-cadre position at Liaquat University Hospital, Hyderabad/Jamshoro by re-designating his existing post of BPS-19 as Director (Administration, Accounts and Development). On this request of the appellant, summary dated 12.12.2013 was floated for the approval of the Chief Minister, Sindh,

recommending that one post of Additional Medical Superintendent (BPS-19) in Liaquat University Hospital, Hyderabad may be re-designated on non-clinical side as Director (Administration, Accounts & Development) (BPS-19) and the appellant be absorbed against such post. Vide notification dated 09.01.2014, the appellant was posted as Project Director, Project Management & Implementation Unit (PMIU), Education & Literacy Department. This notification was cancelled/withdrawn vide notification dated 20.08.2014 and the appellant was asked to report to his parent department as District Officer (Administration, Accounts & Development) (BPS-19). Through an order dated 09.11.2016, one post of Additional Medical Superintendent (BPS-19), Liaquat University Hospital, Hyderabad was sanctioned and re-designated as Director (Administration, Accounts & Development) (BPS-19) on non-clinical side for specific absorption of the appellant. Through notification dated 25.11.2016, the appellant was absorbed as Director (Administration, Accounts & Development) (BPS-19) in the Liaquat University Hospital, Hyderabad. The wish list of the appellant did not end there and the departmental authority continued to be too eager to accommodate him to the post of appellant's own desire. For doing so, through notification dated 06.03.2018, the rules were amended, so that the appellant could be appointed to the post of Director (Administration, Accounts & Development) in BPS-20 in the Health Department. This amendment in the rules was made person specific to accommodate the appellant alone and the appellant, out of so many other batch-mates in BPS-19 in the Health Department,

was granted promotion vide notification dated 01.06.2018 from BPS-19 to BPS-20 and the post of Director (Administration, Accounts & Development) was shown to be the post of BPS-20.

15. The law regarding grant of promotion by the competent authority is well settled that the competent authority while considering grant of promotion is duty bound and obliged under the law to consider merit of all the eligible candidates and after due deliberations, to grant promotion to such eligible candidates who are found to be most meritorious among them. The law does not permit to the competent authority to just pick one specific person and amend the rules for him and then create a post and oblige and grant promotion to that one person. The rule is that the competent authority is bound to consider all eligible candidates for promotion on merit. This is the requirement of Article 4 of the Constitution of the Islamic Republic of Pakistan, 1973, which lays down as a command that to enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, whoever he may be. Further Article 25 of the Constitution as a Fundamental Right, prohibits discrimination and requires that all citizens are equal before law and are entitled to equal protection of law.

16. As noted above, the respondent and the appellant were appointed on 16.03.1992 as Planning Officers (BPS-17) in the Health Department, Government of Sindh on the recommendation of the Sindh Public Service Commission, which contain the merit list where the name of the respondent was mentioned at Serial No.5, while the name of the appellant was mentioned at Serial

No.9. They were promoted together as Deputy District Officers (P&D) (BPS-18) vide notification dated 11.10.2004, in which the name of the respondent was at Serial No.3, while that of the appellant was at Serial No.5. The respondent and the appellant were again promoted together as District Officers (Administration, Accounts & Development) (BPS-19) by the Provincial Selection Board No.II on 27.10.2010, wherein the name of the respondent was at Serial No.2, while the appellant was at Serial No.5. They continued to remain in BPS-19 while through the impugned notification dated 01.06.2018, only the appellant was granted promotion to the post of BPS-20 and that too by making specific amendment in the rules and creating a post of Director (Administration, Accounts & Development) in BPS-20.

17. It is an admitted fact that both the respondent and the appellant belong to one and the same cadre in the Health Department, Government of Sindh and at the time when the appellant was promoted to the post of BPS-20, the other batch-mates of the appellant in BPS-19 in the Health Department who were even senior to him from the very beginning of their service career, were ignored, in that, their cases of promotion were not put up before the competent authority for determination of their merit for promotion to the post in BPS-20. It was not at all argued before us that the respondent was not eligible to be considered for promotion to the post of BPS-20 when the appellant was granted promotion to the post of BPS-20. Right to promotion is not an illusory nor a perfunctory right which could be ignored casually. Non-considering of an officer being equally eligible for

promotion is a serious matter and not only undermines discipline but creates serious bad blood and heart burning among the rank and file of civil service. In the matter of civil service, there should not at all be any instance where the competent authority is found to be accommodating any one civil servant for grant of promotion and availing of better service benefits leaving all other equals and even seniors abandoned.

18. This Court in the case of Secretary Agriculture, Government of the Punjab, Lahore vs. Muhammad Akram (2018 SCMR 349) has specifically held that the creation of a specific post for the benefit of one specific civil servant was illegal. In the matter of Contempt of Court Proceedings against Chief Sectary, Sindh and other (2013 SCMR 1752) this Court has held that "the impugned legislation on absorption is persons/class specific as it extends favours to specific persons infringing the rights guaranteed to all the civil servants under the service structure provided under Articles 240 and 242 of the Constitution. ... In the case in hand the impugned legislation, prima facie, has been made to protect, promote and select specific persons who are close to centre of power, and has altered the terms and conditions of service of the civil servants to their disadvantage in violation of Article 25 of the Constitution". It was also held that "no civil servant of a non-cadre post can be transferred out of cadre to be absorbed to a cadre post which is meant for recruitment through competitive process". In the case of Baz Muhammad Kakar and others vs. Federation of Pakistan and others (PLD 2012 SC 870) this Court observed as follows:

“The legislature cannot promulgate laws which are persons/class specific as such legislation instead of promoting the administration of justice caused injustice in the society amongst the citizens, who were being governed under the Constitution.”

19. In the famous case of Tariq Aziz-ud-Din and others (2010 SCMR 1301) leading with the question of promotion to civil servants, this Court has observed as follows:

“27. ... It is a settled principle of law that object of good governance cannot be achieved by exercising discretionary powers unreasonably or arbitrarily and without application of mind but objective can be achieved by following the rules of justness, fairness and openness in consonance with the command of the Constitution enshrined in different articles including Articles 4 and 25. Once it is accepted that the Constitution is the supreme law of the country, no room is left to allow any authority to make departure from any of its provisions or the law and the rules made thereunder.”

It was further observed as under:

“It is the duty and obligation of the competent authority to consider the merit of all the eligible candidates while putting them in juxtaposition to find out the meritorious amongst them otherwise is one of the organs of the State i.e. Executive could not survive as an independent organ which is the command of the Constitution. Expression ‘merit’ includes limitations prescribed under the law. Discretion is to be exercised according to rational reasons which means that; (a) there be finding of primary facts based on good evidence; and (b) decisions about facts be made, for reasons which serve the purposes of statute in an

intelligible and reasonable manner. Actions which do not meet these threshold requirements are considered arbitrary and misuse of power ... ”.

20. We have also gone through the case law cited by the learned counsel for the appellant and note that in Shafi Muhammad Mughal's case (*supra*) the DPC has considered the case of promotion of the petitioner therein along with respondent No.6 therein and while he was superseded, respondent No.6 was granted promotion to the rank of Superintendent of Police (BPS-18), and while referring to the case of Muhammad Anis and others vs. Abdul Haseeb (PLD 1994 SC 539), the Court held as follows:

“13. Thus, it would seem that the expression “eligibility” and “fitness” are distinct and are for different purposes. The Legislature in its wisdom has left the issue of fitness at the discretion of the competent authority for the obvious reason that the authority looking background and the performance would be in a better position to determine the issue of fitness than the Tribunal or the Court. In this particular case, as is evident from the report, referred to earlier, it is clear that general reputation of the petitioner in the past was not satisfactory, rather it was poor. Nothing material has also been brought on record to substantiate the plea that said Vigilance Report was false.”

In Zafar Iqbal's case (*supra*) the petitioner was denied promotion by the Departmental Promotion Committee on the ground that he was not found fit for promotion, against which he filed a service appeal before the Service Tribunal with the prayer of granting him promotion on the basis of seniority. The Service

Tribunal dismissed his service appeal, which order of the Tribunal was maintained and leave was refused by this Court. In Miss Zubaida Khatoon's case (*supra*) the Selection Board considered the case of promotion of the respondent therein and found her unfit for promotion, whereas the Selection Board promoted the appellant therein. The respondent challenged the non-promotion by the Selection Board by filing of a writ petition in the High Court which was allowed and the notification issued by the Selection Board was set aside. Leave to appeal was granted in the matter and after elaborate consideration, this Court observed as follows:

"18. Learned counsel was specifically confronted with the service profile of the respondent, reproduced in paragraph 17 of the impugned judgment and the comparative service record of both the parties as given in paragraph 25 of the impugned judgment. He could neither controvert the factual aspect of the said comparative chart nor could he join issue with the observations made by the court which have been reproduced in the preceding para. He mainly reiterated the argument that the learned High Court could not have embarked upon factual inquiry as the same was neither tenable under Article 199 of the Constitution nor permissible in view of the specific bar contained in Article 212 of the Constitution. The argument of bar of jurisdiction has already been repelled in above paragraphs. So far as the contention that the learned High Court could not undertake a factual inquiry is concerned, the same is misplaced, first because the High Court was not recording any new evidence but was proceeding on the basis of the admitted facts and second, if having examined the admitted facts, it had come to the conclusion that the authority had passed the order in colourable

exercise of powers conferred on it, or an authority having power to promote or appoint to a particular post had done so against the law or without jurisdiction or while doing so as for mala fide reasons had not taken into consideration the relevant record, it could come in aid of person aggrieved to redress the wrong. The impugned judgment on that score is unexceptionable. However, we find that after annulling the notification which had been impugned before the learned High Court, the court could not have directed promotion of respondent No. 1 and instead should have left the matter to be decided by the Promotion Committee afresh as the said authority was competent to pass appropriate order after de novo exercise.

19. For what has been discussed above, this appeal is partly allowed and while upholding the impugned judgment insofar as it annulled the notification dated 13-8-2001, we direct the concerned Promotion Committee to decide the matter afresh within two months of the receipt of this judgment."

The cited cases on the question of jurisdiction of the Tribunal are distinguishable on the sole ground that neither the case of respondent was placed before Departmental Promotion Committee nor did it consider the case of promotion of the respondent, who was eligible for being considered for promotion along with the appellant to the post of BPS-20. No fitness for promotion of the respondent was at all determined.

21. Messrs Associated Cement Companies Ltd's case (*supra*) and Dr. Ehsan-ul-Haq's case (*supra*) have been relied upon by the learned counsel for the appellant to contend that the respondent was not an aggrieved person and his terms and

conditions of service were not adversely effected. We may note that the very non-consideration of the respondent for grant of promotion to the post of BPS-20 along with his batch-mates, which included the appellant, whose case only out of the total number of his batch-mates was considered for promotion and also granted promotion by making amendments in the rules and creating the post specifically for him, did make the respondent an aggrieved person for that his right to be considered for promotion along with his batch-mates was at all not dealt with by the competent authority. The rule laid down in the two cited judgments, therefore, does not apply to the case in hand.

22. Abdul Sattar's case (supra), Anwarul Haq's case (supra), the Chairman, PIAC's case (supra), M.A. Ghafoor's case (supra) and Government of Balochistan's case (supra) are all relied upon on the point of limitation of the service appeal filed by the respondent. Such aspect of the matter has already been dealt with hereinabove and apparently, the cited judgments have no application to the case in hand.

23. For what has been discussed above, we find no illegality in the impugned judgment of the Tribunal and are not persuaded to interfere with the same. The appeal is, therefore, dismissed.

Bench-I
'APPROVED FOR REPORTING'
Mahtab H. Sheikh/*

Announced on 10.01.2022 at Dhaka