

KHYBER PAKHTUNKHWA SERVICE TRIBUNAL PESHAWAR

CM 12(2) CPC Petition No.221/2023 in S.A No.148/2019

BEFORE: MRS. RASHIDA BANO ... MEMBER (J)
MR. MUHAMMAD AKBAR KHAN ... MEMBER (B)

Babar Hayat, Senior Scale Stenographer, Office of the Deputy Commissioner,
Swabi.

... (*Appellant*)

VERSUS

1. Ihsanullah, Senior Scale Stenographer (ACB), O/o Commissioner Office, Mardan.
2. Muhammad Ibrahim, Private Secretary (A.C.B), O/o Commissioner Office Mardan.
3. The Commissioner, Mardan, Division Mardan.
4. The Senior Member Board of Revenue, Khyber Pakhtunkhwa, Civil Secretariat, Peshawar.

... (*Respondents*)

Mr. Muhammad Asif Yousafzai
Advocate ... For Petitioner

Mr. Khalid Rehman,
Advocate For Respondent No.1 & 2

Mr. Muhammad Jan
District Attorney ... For Respondent No.3 & 4

Date of Institution..... 21.03.2023

Date of Hearing..... 28.02.2024

Date of Decision..... 28.02.2024

JUDGMENT

Rashida Bano, Member (J): The instant petition instituted under section 12(2) of the Code of Civil Procedure 1908 with the prayer copied as below.

“That on acceptance of this petition the judgment dated 14.4.2022 passed in service appeal No.148/2019 may be set aside under 12(2) CPC being obtained on the basis of fraud and



misrepresentation and affected the service rights of the petitioner in his absence as he was not arrayed as respondent in the service appeal. Any other remedy deems appropriate that may also be awarded in favour of petitioner.”

1. Perusal of record reveals that petitioner filed instant petition under 12(2) civil procedure code 1908 challenging the validity of Judgment and order dated 14.04.2022 delivered in service appeal No.148/2019 being obtained on the basis of misrepresentation & concealment of facts by practicing fraud due to which appellant's valuable rights were affected without impleading him and without providing chance of hearing. Main ground taken by the petitioner is that respondent No.1 despite knowing that petitioner is at the top of seniority list of Senior Scale Stenographer had not arrayed him as party and fraudulently obtained impugned judgment in his favor of the relief which was not claim by him in his appeal.

2. Brief facts leading to file instant petition under section 12(2) is, respondents No.1 filed service appeal bearing No.148/2019 on 31/01/2019 against SMBR and the Commissioner in official capacity while one private respondent No.3 namely Mr. Ibrahim with the prayer to set aside appellate order dated 21.12.2018 passed by SMBR. Record further reveals that present respondent No.1 the then appellant along with one Ibrahim was appointed on 29.06.2009 as Junior Scale Stenographers in the Office of Commissioner Mardan, when respondent/department issued seniority list in year 2014 for the first time wherein Muhammad Ibrahim was placed senior to the appellant on the ground that he is older in age then Ihsan Ullah present respondent No.1. In the meanwhile service rules were framed in accordance with which promotion to post of Senior Scale Stenographer was from amongst the Junior Scale



Stenographer BPS-14 & from amongst Computer Operators with the ratio of 60% and 40% respectively. Accordingly Muhammad Ibrahim was promoted as Senior Scale Stenographer BPS-16 vide order dated 22.12.2015, post of private secretary was laying vacant which was filled upon request of Ihsan Ullah present Respondent No.1 by appointing Muhammad Ibrahim and respondent No.1 was promoted on acting charge basis to the post of Senior Scale Stenographer vide order dated 19.04.2018. Present petitioner at the time of preparing of seniority list of Junior Scale Stenographer of District Swabi, was placed Senior to Sajjad Ahmad on the ground that he was holding higher position in the merit list issued by Departmental Selection Committee. Appeal filed by said Sajjad Ahmad was also dismissed by Commissioner Mardan Division on 31.10.2018.

3. Appellant being on high better merit position also submitted departmental appeal but same was rejected by SMBR vide order dated 21.12.2018 which order was challenged in Service Appeal No.148/2019 by present respondent No.1. When during course of arguments, he filed an application that he would be satisfied, if his promotion as Senior Scale Stenographer BPS-16 is regularized with effect from 19.04.2018 the date on which he was promoted as Senior Scale Stenographer on acting charge basis. This tribunal vide order under attack accepted this plea by holding that;

“The appellant was entitled for the promotion as Senior Scale Stenographer on regular basis on 19.04.2018, therefore respondent are directed to issue corrigendum of notification dated 30.06.2021 considering the appellant as regularly promoted with effect from 19.04.2018 with all consequential benefits.

4. Admitted facts on record is that respondent No.1 was appointed as Junior Scale Stenographer along with one Muhammad Ibrahim on 29.06.2009

in the Office of Commissioner, Mardan Division while present petitioner on 17.07.2014 in the Office of Deputy Commissioner Swabi, which means that respondent No.1 was initially appointed earlier than petitioner. In accordance with the rules for the purpose of promotion to the post of Private Secretary BPS-17, joint seniority list of Senior Scale Stenographer of the office of the Commissioner, Deputy Commissioner and Political Agents of the concerned division will have to be maintained.

5. It is also admitted fact that respondent No.1 was promoted on acting charge basis on 19.04.2018 as Senior Scale Stenographer BPS-16 while petitioner on 03.01.2019 on acting charge basis. It is also admitted fact that at the time of filing appeal No.148/2019 by respondent No.1 present petitioner was Junior Scale Stenographer in BPS-14 and not Senior Scale Stenographer BPS-16. So at that time there is no need to arrayed present petitioner as party (the only question is that at the time of submitting application for considering promotion regular from the date of acting charge basis present petitioner was at seniority list of BPS-16 as he was promoted on regular basis on 13.09.2019 before respondent No.1 on 30.06.2021).

As per verdict of apex court reported in 2006 SCMR 1938:

“S.S---Promotion--- Principle--- Acting charge--- Departmental Promotion Committee issued delayed notification---Effect--- Where a post was available against which a civil servant could be promoted; where such civil servant was qualified to be promoted to such a higher post; where he was put on such higher post on officiating or acting charge basis only because requisite exercise of allowing regular promotion to such post was being delayed by competent authority and where he was subsequently found fit for such promotion and was so promoted on regular basis, then the civil servant was entitled not only to the salary attaching to such



post but also to all consequential benefits from that very date from which he had put on the said post on officiating or acting charge basis.

---S.S---Promotion---Acting charge---Date of promotion---Determination---Civil servants were promoted on 31-8-2000, on acting charge basis but Departmental Promotion Committee issued their notification of promotion on 27-5-2003---Grievance of civil servants was that their promotion was not considered from the date when they were promoted on acting charge basis---Validity---Civil servant who was asked to hold a higher post to which he was subsequently promoted on regular basis, was entitled to the salary etc. attaching to such post for the period that he held the same-Such civil servant was also entitled to any other benefits which might be associated with such post-If a vacancy existed in the higher cadre to which a civil servant was qualified to be promoted on regular basis but was not so promoted without any fault on his part and was instead put on such post on officiating basis, then on his regular promotion to such post, the civil servant would be deemed to have been so promoted to the same from the date from which he was allowed to hold the higher post, unless justifiable reasons existed to hold otherwise- Supreme Court converted petition for leave to appeal into appeal and set aside the judgment passed by Service Tribunal---Supreme Court declared the civil servants to be deemed to be promoted from 31-8-2000 and not from 27-5-2003---Appeal was allowed. When requirement for regular promotion is fulfilled by a civil servant then he must be promoted on regular.

6. When requirement for regular promotion is fulfilled by a civil servant then he must be promoted regularly and not on acting charge basis. When it is held by the apex court, then respondent No.1 will have to be promoted on regular basis on 19.04.2018 and not on acting charge basis and order of this tribunal impugned in this petition is correct. It is also held in above referred



judgment that judgment of a court cannot be set aside on the basis of non impleadment of necessary party when matter pertain to promotion on acting charge basis. The relevant citation is reproduced here:

“Appeals filed by civil servants before Service Tribunal did not seek seniority over directly recruited persons and what they were asking for was vindication of their right to regular promotion from the date in question- --If civil servants were found entitled to the same then they could not be deprived of it only because it could have caused some prejudice to some others nor could those others be heard to deny such benefit deserved by the civil servants--Non-impleading” of the direct appointees to the appeals filed by civil servant in Service Tribunal could be no ground to deny them a right which had lawfully accrued to them.”

7. Let's for the sake of arguments, if opportunity of hearing was provided to the petitioner by impleading him as party then too decision will be the same keeping in view principle of law that laid down in above referred judgment of apex court. In our humble view, no misrepresentation or fraud as is alleged by the petitioner is played by the respondent No.1 the then appellant. Moreover petitioner had not challenged acting charge basis promotion order dated 19.04.2018 beside he will have to challenge seniority list separately so petitioner has no locus standi to file instant petition as he claim his seniority therefore, he will have to challenge the seniority and in the appeal filed by respondent No.1 he seeks vindication of his right to regular promotion from the date of his acting charge basis.

8. So far as second contention of the petitioner is that respondent No.1 obtained relief which was not claimed by him in his appeal. It is worth mentioning here that this court vide a judgment/order dated 14.04.2022 by



accepting application of the respondent No.1 directed respondent to issue corrigendum of notification dated 30.06.2021 considering appellant as regularly promoted to the concerned post with effect from 19.04.2018 with all consequential benefits. This tribunal for safe administration of justice had power to grant an effective or ancillary relief even not prayed for---Court was not precluded to mold relief in view of the changed facts and circumstances of the case to shorten litigation between the parties reliance is placed on 2016 YLR 233 Peshawar. It is pertinent to mention here that judgment & order of this court dated 14.04.2022 is implemented and promotion of the appellant was regularized from the date of his promotion on acting charge basis i.e. 19.04.2018 vide order dated 02.01.2023.

9. For what has been discussed above, we see no merit in this petition. It lacks all the three ingredients necessary for filing 12 (2) petition i.e. misrepresentation, concealment of facts, fraud and want of jurisdiction, hence dismissed. Costs shall follow the event. Consign.

10. *Pronounced in open court in Peshawar and given under our hands and seal of the Tribunal on this 28th day of February, 2024.*



(MUHAMMAD AKBAR KHAN)
Member (I)





(RASHIDA BANO)
Member (J)

12(2) Petition No. 221/23

16.02.2024 1. Counsel for the petitioner present. Mr. Asif Masood Ali Shah, learned Deputy District Attorney alongwith Abdur Rasheed, Superintendent for the official respondents No. 3 & 4 present. Learned counsel for private respondent No. 1 present.

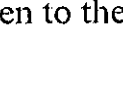
2. During the course of arguments it was found that certain documents necessary for just conclusion of the matter are not available on record. Learned DDA is directed to produce amendment in service rules and seniority lists etc before the next date. To come up for arguments on 26.02.2024 before D.B. P.P given to the parties.



(Fareeha Paul)
Member (E)


(Rashida Bano)
Member (J)

26.02.2024 1. Learned counsel for the petitioner present. Mr. Muhammad Jan, District Attorney alongwith Ghulam Shabir, Assistant Secretary for the official respondents No. 3 & 4 present. Learned counsel for private respondent No.1 present.

2. Arguments heard. To come up for order on 28.02.2024 before D.B. P.P given to the parties.


(Muhammad Akbar Khan)
Member (E)



(Rashida Bano)
Member (J)


ORDER
28.02.2024

1. Learned Counsel for the petitioner present. Learned counsel for the respondents No.1 and 2 present. Mr. Muhammad Jan, District Attorney alongwith Ghulam Shabir, Assistant Secretary for respondent No.3 and 4 present.

2. Vide our detailed judgment of today placed on file, we see no merit in this petition. It lacks all the three ingredients necessary for filing 12(2) petition i.e. misrepresentation, concealment of facts, fraud and want of jurisdiction, hence dismissed. Costs shall follow the event. Consign.

3. Pronounced in open court in Peshawar and given under our hands and seal of the Tribunal on this 28th day of February, 2024.


(MUHAMMAD AKBAR KHAN)
Member (I)


(RASHIDA BANO)
Member (I)

*Kaleemullah