ORDER SHEET
IN THE ISLAMABAD HIGH COURT, SLAMABAD.
JUDICIAL DEPARTMENT.

W.P. No.341 of 2014

Rafaqat Ali

Versus.

Federation of Pakistan, etc.

Date ofhearing	:	27.04.2022
Petitioner by	:	Dr. Attique Tahir & CH. Asghar, Advocates.
Respondent by	:	Ms. Misbah Gulnar Sharif, Advocate.
State by	:	Syed Nazar Hussain Shah, AAG.

ARBAB MUHAMMAD TAHIR J:-Through the instant writ-petition, petitioner has prayed for the following relief:-

> ***"to direct the respondents to consider the petitioner for promotion to the next higher grade of BS-19 w.e.f the date of vacancy and his eligibility as per policy in vogue and calculate the said benefits towards pension and pensionary benefits accordingly with all consequential benefits."***

2- The petitioner's case is that the Capital Development Authority ('**respondent No. 2'**) is a statutory body duly owned and controlled by the Cabinet Division, Government of Pakistan, Islamabad ('**respondent No. 1'**). It was established under the Capital Development Authority Ordinance, 1960. As per Section 4 of the Ordinance, 1960, it has been declared a body corporate which can sue and be sued under the law. Hence performing functions in connection with the affairs of the Federation in terms of Article 199 (5) of the Constitution of Islamic Republic of Pakistan, 1973; that he joined the service of respondent No. 2 on 10.04.1973 and remained serving in different capacities till superannuation, i.e. 31.10.2013;

that lastly he was promoted as Deputy Director vide order dated 15.06.2010; that ever since his initial appointment, he had been performing duties diligently, to the best of his abilities and entire satisfaction of his superiors, without earning any adverse entries in his ACRs; that he was amongst the senior most officers of the cadre having seniority position No.1, in the seniority list of the Deputy Directors and had been legitimately expecting for promotion to the next higher grade on the availability of the vacancy; that the criteria prescribed for promotion as Director (BS-19) is 12 years' service in Grade-17 & above with 03 years' service in BS-18 alongwith passing the requisite Mid-Career Management Course (MCMC) as prescribed by the Establishment Division vide OM dated 01.12.2011, however the officers, having attained 50 years age, are exempted from the said MCMC as per para-2 (v) of the said OM; that prior to his retirement, there were three vacancies in the next higher grade of BS-19; that he, being senior most and eligible was also assigned current charge of one of the said three posts vide Office Order dated 29.01.2013, subsequently, the respondent No. 2 moved to hold meeting of the Departmental Promotion Committee ('DPC') vide Circular dated 23.07.2013, and working paper was prepared, but the same could not be materialized due to non-holding of the meeting of the DPC on the date fixed; that the petitioner had been requesting the respondent No.2 for his consideration, but no heed was paid to his requrests till the date of his retirement, hence instant writ peititon.

3- In response to notice, respondents 1 & 2 filed separate parawise comments. The respondent No.1-Cabinet Division in its comments maintained that the Chairman CDA is competent to deal with the service matters of CDA employees from BS-1 to BS-19 without involving the Cabinet Division, which is only a proforma respondent and had nothing to comment.

4- The respondent No.2 in its seperate response submitted that petitioner served the respondent No. 2 with effect from 10.04.1973, promoted as Deputy Director (BS-18) on 15.06.2010 and stood retired on 31.10.2013 as Deputy Director on attaining the age of superannuation. In addition, it was also recognized that the

petitioner had been holding current charge of the post of Director; that he was at serial No. 1 in the seniority list of the Deputy Directors with effect from 27.07.2013 to be considered for promotion as Director (BS-19). In-addtion, it has also been apprised that a case is also pending against the petitioner in the FIA and that a notice of DPC meeting to consider the case of Deputy Director (BS-18) for promotion to the post of Director (BS-19), Executive Cadre was circulated by the Deputy Director (HRD-I) dated 23.07.2013, which could not be held and in the meantime, petitioner stood retired on attaining the age of superannuation with effect from 31.10.2013, as Deputy Director (BS-18).

5- Learned counsel for the petitioner argued that petitioner cannot be deprived of vested right due to fault of the employer; that petitioner under the right to have equal treatement is entitled to be considred for promotion at par with the Federal Government Employees in terms of FR-17, which is meant to cater the miseries of retired government employees, who stood retired without legitimate promotion; that the discretionary power is to be exercised judicially and that petitioner, for all practical purposes, is entitled to be considered for promotion even after retirement in order to avail pensioanry benefits. Learned counsel relied upon case laws reported as ***1993 SCMR 609, 2006 SCMR 1938,***and***2009 SCMR 25.***

6- On the other hand, learned counsel for respondent No.2 while reiterating the stance contained in written comments further contended that the service rules of the respondent No. 2 are silent with respect to the consideration for proforma promotion; that the revised guidelines on FR-17(1) are limited to cases of civil servants, while the respondent No. 2 is an autonomous body having its own service rules/regulations and that even otherwise, promotion cannot be claimed as a matter of right, therefore, petition is liable to be dismsised.

7- Heard, record persued.

8- The admitted facts of the case are that the petitioner after rendering service for more than forty-years got retired on 31.10.2013, as Deputy Director on attaining the age of superannuation. At the relevant time, he had been at Sr No.1 of the Seniorty List of the Deputy Directors and had to be considered for promotion to the post of Director BS-19 and for the purpose, a meeting of the DPC was scheduled for 23-07-2013, but the same could not be held and on 31.10.2013, petitioner stood retired.

9- According to the petitioner, he cannot be deprived of his legitimate right of consideration of promotion due to having fault of the respondent No. 2 while, otherwise, he was eligible on all counts to be promoted in the next rank.

10- It has to be seen, as to whether the rules of the respondent dearprtment are statutory or non-statutory in nature? The Capital Development Authority was established under the Capital Development Authority Ordinance, 1960. In terms of Section 4 of the Ordinance 1960, it is a body corporate which can sue and be sued under the law. The CDA Employees (Service) Regulations, 1992 **"Regulations 1992"** have been framed by the Authority itself under Section 51 of the Ordinance, 1960 read with Section 37 and 38 thereof. There is also no requirement of prior permission of the Government to promulgate the regulations. The relevant provisions i.e. Section 50, 51, 37 & 38 of the Ordinance 1960 are reproduced hereunder:-

> ***50. Power to make rules.***
> *The Federal Government may, by notification in the official Gazette, make rules to carry out the purposes of this Ordinance.*
>
> *Provided that no rules shall be made on any of the matters specified in section 38.*
>
> ***51. Power to make regulations:***
> *The Authority may make regulations, not inconsistent with the rules, if any, on all matters for which regulations are necessary or expedient; and such regulations shall be published in the official Gazette.*

> ***37. Appointment of officers and servants etc.***
> *1) The Authority may from time to time, appoint such officers, servants, experts or consultants as it may consider necessary for the performance of its functions, on such terms and conditions as it may deem fit:*
>
> *Provided that salaried officers and servants whose remuneration exceeds two thousand and five hundred rupees per mensem shall not be appointed except with he previous approval in writing of the (Federal Government).*
>
> *(2) Subject to the proviso to sub-section (1), the Chairman may, in cases of urgency, appoint such officers, servants, experts or consultants and on such terms and conditions as he deems fit:*
>
> *Provided that every appointment made under this sub section shall be reported to the Authority without unreasonable delay.*
>
> ***38. Recruitment conditions of service and disciplinary powers:-***
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> *The Authority shall lay down the procedure for the appointment of its officers, servants, experts and consultants, and the terms and conditions of their services including the constitution and management of provident fund for them, and shall be competent to take disciplinary action against them."*

11- It is clear from perusal of the above provisions, that in terms of Section 51 of the Ordinance, 1960 the power is vested in the "Authority" to make regulations, consistent with the rules on all matters while in terms of Section 37, the power of appointment of officers, servants, experts or consultants was also delegated to the Authority. In addition, the rule making power is also vested in the Authority in terms of Section 38 of the Ordinance, 1960.

12- The leading judgment, being consistently followed is the case of ***"M.H. Mirza v. Federation of Pakistan through Secretary, Cabinet Division, Government of Pakistan, Islamabad and two others (1994 SCMR 1024)***, wherein it was held that "***Sections 37, 38, 50 and 51 of the C.DA. Ordinance, 1960 (Ordinance XXIII of 1960) are relevant. An examination of these provisions shows that the CDA was itself to determine the terms and conditions of its employees and that the Government had no say in the matter. None of its Regulations whether framed by itself or***

adopted by reference had a statutory basis in law. This view is supported by the view taken in Ch. Abdul Rashid v. Capital Development Authority, Islamabad and another (PLD 1979 Lahore 803) and the Principal, Cadet College, Kohat and another v. Muhammad Shoab Qureshi (PLD 1984 SC 170). The adoption of the rules of the Government or their application by reference will not lend a statutory cover or content to these rules, as held in Lahore Central Co-Operative Bank Limited v. Saif Ullah Shah (PLD 1959 SC (Pak.) 210) and finally very recently in Chairman, Pakistan Council of Scientific and Industrial Research, Islamabad and 3 others v. Dr. Mrs. Khalida Razi (Civil Appeal No. 270 of 1993). There being no statutory Rules in the field, a Constitution petition was not at all competent on the subject. Reliance is also paced upon The principle ***Cadet College Kohat & other v. Muhamamd Shoaib Qureshi, (PLD 1984 SC 170), Sindh Road Transport Corporation through its chairman v. Muhammad Ali G. Khokhar, (1994 SCMR 1404), Riaz ud Din v. Chairman Pakistan Internationla Airline Corporation & 2 others (PLD 1992 SC 531), Muhammad Umar Malik v. The Muslim Commerical Bank through its President Karachi & 2 other (1995 SCMR 453), Pakistan Red Cresent Society & other v. Syed Nazir Gillani, (PLD 2005 SC 806), Chairmna Wapda and 2 others v. Syed jamil Ahmed (1993 SCMR 346), Anwar Hussain v. Agriculture Development Bank of Pakistan (PLD 1984 SC 194), GOhar Ali & other v. M/s Hoechst Pakistan Ltd. (2009 PLC (CS) 464).***

13- It was specifically held that none of the regulations whether framed by itself or adopted by reference had a statutory basis in law. The judgment had been consistently followed by this Court as well in numerous cases like ***W.P. No.3378/2021, titled Qaiser Aslam Khan v C.D.A, W.P. No. 2722/2020 titled M/S Javeria Maqbool v. C.D.A, W.P. No.3377/2021, titled Rao Muhammad Adil Khan v. C.D.A.***

14- In the recent pronouncement by the Hon'ble apex Court in the case of ***"Capital Development Authority through Chairman Islamabad & others v. Sabir Hussain and others" (2022 SCMR 627)*** the powers of the Authority to promulgate the Regulations 1992 was held consistent in following terms:-

> ***"4. Heard the arguments. Consistent with section 51 of the Capital Development Authority Ordinance, 1960, the Authority may make Regulations and publish it in the Official Gazette. Section 37 of the aforesaid Ordinance germane to powers of the Authority to appoint officers, experts or consultants on such terms and conditions as it may deem fit, whereas under section 38, it is the responsibility of the Authority to lay down the procedure for the appointment of its officers, servants, experts and consultants and terms and conditions of their services. In exercise of aforesaid powers conferred on the Authority, the Capital Development Authority Employees (Service) Regulations, 1992 were enacted."***

15- Having examined the provisions and by following the wisdom laid down by the Hon'ble Apex Court, being consistently followed by this Court, it is held that the Regulations 1992 retains non-statutory character which, bars a petition in terms of Article 199 of the Constitution, in the matter relating to terms and condition of service emanating from the Regulations 1992.

16- It is an admitted position that the services of the petitioner were governed by the **Regulations 1992**. The procedure for appointment by promotion is contained in Chapter 04, Part-III. The lis-at-hand is with regard to promotion to the post of BPS-19, therefore, the Regulations 1992 to that extent have been perused.

17- As per Rule 4.16, posts in basic pay scale 19 and above are selection posts promotion to which will be made on the basis of selection on merit.

> "4.16. **Selection or non-selection posts for promotion.-**
> ***Posts in basic pay scale 19 and above are selection posts promotion to which will be made on the basis of selection on merit.****Posts in basic pay scale 18 and*

below are non-selection posts promotion to which will be made on the basis of seniority-cum-fitness."

18- Rule 4.17(2) provides procedure for promotion in terms that the promotion to posts in basic pay scale 18 and 19 shall be made by the appointing authority on the recommendations of the Departmental Promotion Committee.

> ***"4.17 Procedure for Promotion.-***
> *1. Promotion to posts in basic scale 20 shall be made by the appointing authority. The Authority shall submit a Panel of eligible officers to the Division administratively concerned with the Authority.*
> **2.Promotion to posts in basic pay scale 18 and 19 shall be made by the appointing authority on the recommendations of the Departmental Promotion Committee."**

19- Rule 4.18 stipulates that an employee possessing such minimum qualifications and length of service and fulfilling other conditions specified for promotion in appendix 4 shall be eligible for promotion to a higher post for the time-being reserved for departmental promotion in the cadre to which he belongs and as per Rule 4.18(2) promotion to a post shall be subject to passing of an examination or training, if so prescribed by the Board or is so specified in appendix 4.

> ***"4.18 Conditions of Promotion***
> *1. An employee possessing such minimum qualifications and length of service and fulfilling other conditions specified for promotion in appendix 4 shall be eligible for promotion to a higher post for the time-being reserved for departmental promotion in the cadre to which he belongs.*
> ***2. Promotion to a post shall be subject to passing of an examination or training, if so prescribed by the Board or is so specified in appendix 4."***

20- As per Rule 4.19 promotion quota to be filled first and the posts reserved for initial appointment filled later.

> ***4.19*** *Promotion quota to be filled first.*-Where a cadre has a definite quota reserved for departmental promotion and initial appointment, promotion against the departmental quota may, as far as possible, be made first and the posts reserved for initial

> appointment filled later. However, this provision shall not be construed to confer any vested right to any promotion against departmental quota being made first.

21- However, this provision shall not be construed to confer any vested right to any promotion against departmental quota being made first. Rule 4.20 stipulates requisite length of service for promotion to BS-19 as 12 years' service in basic pay scale 17 while according to Rule 4.21, promotion cannot be claimed on seniority alone.

> ***"4.20.*** *Promotion to posts in basic pay scale 18 and above subject to length of service.-***No promotion shall be made to posts in basic pay scale 18 and above unless the employee has completed the minimum length of service for such promotion as is specified below:- 19 For promotion to posts in basic pay scale 18 5 years service in basic pay scale 17 For promotion to posts in basic pay scale 19 12 years service in basic pay scale 17 From promotion to posts in basic pay scale 20 17 years service in basic pay scale 17 and above."**

22- Rule 4.21 specifically provides that promotion cannot be claimed on seniority alone. It is also noteworthy that the rules on the subject did not contain any specific clause to cater for the situation like the one in hand i.e. consideration for promotion after retirmenet for the purpose of pensionary benefits as perovided under FR-17(1) meant for Federal Government employees. Rules 4.21 reads as under:-

> *"4.21. Promotion cannot be claimed on seniority alone.-* ***No employee shall have a claim to be promoted to any particular posts or scale by virtue of seniority alone."***

23- The length of sevice and the other conditions do form part of pre-requisites, but these alone would not be sufficient to claim promotion due to specific bar contained in Rule 4.21. The promotion is not exclusively based upon seniority rather fitness had to be determined by the competent authrotiy, therefore, it cannot be said

that petitioner, had acquired the requisite threshold i.e. qualified for promotion on the basis of 'seniority-cum-fitness' The performance of the petitioner was yet to be assessed by the DPC and it is the DPC who had to forward its recommendations to the appointing authority in terms of Rule 4.17(2).

24- The ground of having right of promotion on the basis of holding charge of the post of BS-19 was also appreciated. It was noticed that the petitioner was granted look after charge/current charge to the post of (BPS-19). Relevant rule i.e. Rule 4.33 reads as under:-

> ***"4.33. Current charge of a higher posts:-*** *Where a temporary vacancy occurs for not more than two months or when a regular vacancy occurs and no arrangement for carrying out the day-today routine work of the post is possible, the charge of the vacant post may, with the approval of the appointing authority, be given temporarily, in addition to the duties of his own post, to the most senior officer in the cadre present at the place if he is otherwise fit and qualified to hold that post irrespective of the length of service, if any, required for promotion to that post if it is reserved for promotion or, as the case may be, the prescribed experience required for initial appointment to that post if it is reserved for initial appointment only. This arrangement shall be further subject to the following conditions:-*
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> ***26 (a)."The arrangement should not be made for a period of less than one month and should not exceed three months. However, it may be extended by another three months with the approval of the next higher authority. Any extension beyond six months shall require previous approval of the Chairman."***
>
> ***(b). "As soon as the current charge is given, a proposal for regular appointment should be initiated and processed."***
>
> ***(c). "In making current charge arrangement, the most senior officer available in the cadre and present at the place where the vacancy may have occurred, if he is otherwise fit and qualified to hold the post, should be considered."***

25- The above provision provides that the grant of charge of a higher post is a stop-gap arrangement for a period not less than one month and should not exceed three months, extendable for further

three months with approval of the next higher authority. In making current charge arrangement, the most senior officer available in the cadre and present at the place where the vacancy may have occurred, if he is otherwise fit and qualified to hold the post, is to be considered. Thus, to hold a current charge, *ipso facto*, is no ground to claim promotion as a right for which a separate mechanism has been stipulated under Chapter-04, Part-III of the Regulations 1992.

26- Now, it is to be seen whether in absence of any express provision in the Regulations 1992, a direction can be issued to the respondent No.2 to consider the peititoner for promotion to next higher grade i.e. BS-19 as prayed for.

27- The question of applicability of FR-17 to the employees of respondent No.2 has been clairified by the Finance Division (Regulations Wing) vide its letter dated 09.06.2019 in following terms:-

> *"The undersigned is directed to refer to M/o Interior O.M No.3-1/2018/CDA-II (misc) dated 31-12-2018 on the subject cited above, and to clarify that the applicability of the revised guidelines on* ***FR-17(1) is only limited to cases of proforma promotion of civil servants as defined under Section 2(b) of the Civil Servants Act 1973. Therefore, the cases of employees of CDA do not fall under the purview of FR-17(1) Committees.****"*

28- The above clarification leaves no ambugity that the employees of respondent No.2 do not fall within the purview of FR-17(1) Committees which are limited to the cases of civil servants. On this aspect, reference is made to case of **"*Muhammad Israr Minto v. Capital Development Authority and others*"** (**WP No.3154 of 2019**).

29- As mentioned above, no specific provision regarding consideration for proforma promotion has been provided in Chapter-IV, Part-II of the Regulations, 1992, therefore, there is no room for application of the **doctrine of Casus Omissus** or of pressing into service external aid in like situation. Relince can be palced upon case

of ***Abdul Haq Khan & others vs. Haji Ameerzada& others*** **(PLD 2017 SC 105, at page 117):**

> ***"As a matter of statutory interpretation, Courts generally abstain from providing casus omisus or omissions in a statute, through construction or interpretation****. An exception to this rule is, when there is a self-evident omission in a provision and the purpose of the law as intended by the legislature cannot otherwise be achieved, or if the literal construction of a particular provision leads to manifestly absurd or anomalous results, which could not have been intended by the legislature. However, this power is to be exercised cautiously, rarely and only in exceptional circumstances." [**Emphasis added**]*

30- The principle has been reiterated by the Hon'ble Apex Court in the case of ***Umaid Ali v. The Election Commission of Pakistan through Secretary Election Commission of Pakistan Islamabad & others*** **(CA No.1400 OF 2019).**

31- Latest view rendered by the Hon'ble Apex Court in the case reported as "***Deputy Director Finance and Administration FATA, through Additional Chief Secretary FATA, Peshawar and others v. Dr. Lal Marjan and others (2022 SCMR 566),*** wherein it was held that;-

> *"Casus Omissus. The said principle categorically provided that,**where the legislature has not provided something in the language of the law, the Court cannot travel beyond its jurisdiction and read something into the law as the same would be ultra vires the powers available to the court under the constitution and would constitue an order without jurisdiction."***

32- The same view has also been taken by the Hon'ble Sindh High Court, at Karachi in its judgment reported as ***Messrs GETZ PHARMA (Pvt.) LIMITED through Authorized person and others v. FEDERATIONN OF PAKISTAN through Secretary and others. (2019 PTD 2009)***, wherein it was also held that;-

> ***"****The principle of "Casus Omissus" is squarely applicable here,****that a matter which should have been, but has not been provided for in a statue cannot be supplied by Courts, as to do so will be legislation and not construction."***

Maxwell on interpretation of statutes;-

> ***"Maxwell in his book on the Interpretation of Statutes, 11th Edition at page 122, has pointed out "so strong a leaning now exists against construing a statute so as to oust or restrict the jurisdiction of the superior Courts" that unless very explicit words are used in the statute itself in that behalf such an intention would not normally be imputed to the Legislature. It is no doubt true that in construing a statute the Courts are normally reluctant to attribute to the Legislature an intention of introducing a radical or sudden change of policy unless they are compelled to do so by the express and unequivocal manifestation of the intention of the Legislature, but at the same time it has to be pointed out that there is always a strong presumption that the Legislature does not make mistakes. "If blunders are found in legislation, they must be corrected by the Legislature, and it is not the function of the Court to repair them"***
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> ***[Halsbury's Laws of England, 3rd Edition, Volume 36, page 390]. "As a general rule a Court of law is not authorised to supply a cassus omissus, or to alter the language of a statute for the purpose of supplying a meaning, if the language used in the statute is incapable of one, even though they may be of opinion that a mistake has been made in drawing the Act"***

33- Reliance is also placed upon case law reported as ***Zain Yar Khan v. The chief Engineer C.R.B.C Wapda D.I.Khan and another*** **(1998 SCMR 2419),** wherein it was held that;-

> **Mode of interpretation**---*Courts have to interpret law as they find it* ---***Casus omissus ought not to be created by interpretation alone, save in a case of strong or unavoidable necessity--- Legislation in that context must be closely examined and its intendment to be explored before arriving at conclusion that matter had given rise to casus omissus.***

34- If the request of the petitioner is allowed, it would amount to adde a new clause in the CDA Employees (Service) Regulations,

1992, which deals with the appointment in respondent dearptment and on the subject of '*proforma promotion'* no such clasue exists in the regualtions. However, as the rule making authority is vested in respondent No.2, therefore, in order to bring harmony amongst the employees, to eliminate element of discrimation and to recognize the vested right i.e. **"*consideration for promotion*"** of its former employees, it is excepted that the respondent No.2 shall make necessary addition or amendment, as the case may be, in the Service Regualtions, 1992.

35- With the above observations and findings and having examined the case from every angle no case for exercise of discretion in terms of Article 199 of the Constitution as prayed for by the petitioner is made out. Consequently, instant writ petition fails and is accordingly **dismissed.**

(ARBAB MUHAMMAD TAHIR)
JUDGE

ANNOUNCED IN OPEN COUT ON THIS 19TH MAY, 2022:

JUDGE

ISLAMABAD| 19.05.2022
APPROVED FOR REPORTING

//Kamran//*