JUDGMENT

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

ICA No. 333/2016
Pakistan Telecommunication Authority
Versus
Mian Khaliq-ur-Rehman

Appellant by:	Barrister Faisal Khan Mr. Muhammad Khurram Siddiqui, Director (Law) PTA
Respondent by:	Hafiz Arfat Ahmad Chaudhry and Ms. Kashifa Niaz Awan

AND

ICA No. 353/2016
Mian Khaliq-ur-Rehman
Versus
Pakistan Telecommunication Authority

Appellant by:	Hafiz Arfat Ahmad Chaudhry and Ms. Kashifa Niaz Awan
Respondent by:	Barrister Faisal Khan, Mr. Muhammad Khurram Siddiqui, Director (Law) PTA
Date of Decision:	01.02.2017

MOHSIN AKHTAR KAYANI, J:- Through this single judgment, we intend to dispose of aforementioned two ICAs i.e. ICA No.333/2016 (Pakistan Telecommunication Authority VS Mian Khaliq Ur Rehman) and ICA No.353/2016 (Mian Khaliq Ur Rehman VS Pakistan Telecommunication Authority). Both ICAs have arisen out of a judgment dated 19.05.2016 rendered by the learned single Judge in chambers in writ petition No.1766/2016.

2. Factual background of the matter is that Mian Khaliq Ur Rehman (appellant in ICA No. 353/2016) working as Deputy Director with Pakistan Telecommunication Authority (***hereinafter referred to as "PTA"***) preferred a writ petition No.1766/2016 making therein the following prayer:

> *"In view of the foregoing, it is very respectfully prayed that this Honourable Court may graciously be pleased to:*
>
> *a) Declare that regulation 21(4) of PTA Employees Service Regulations 2008 is illegal, unlawful and based on malafide and*

the same may graciously be ordered to be deleted from the PTA Employees Service Regulations, 2008 forthwith;

b) *Direct the respondent Authority to itself frame (in a shortest possible time which should not be later than 30 days) comprehensive regulations governing the subject of promotion for all posts with a further direction to the Authority to publicise the same in accordance with the spirit of Section 20-A of General Clauses Act, 1897.*

c) *Direct the Authority to constitute a Departmental Promotion Committee (immediately after framing of new regulations about promotion) to consider the case of the petitioner w.e.f. the date his junior (respondent No.3) was promoted;*

d) *Direct the respondents not to appoint any deputationist/contractual employee as member of DPC which has to consider the cases of promotion of regular employees of the Authority;*

e) *Direct the respondents not to place the cases of contractual employees for promotion in a DPC meeting where the cases of regular employees are to be considered and if at all the Authority feels the necessity of improving the perks/privileges of contractual employees the same may only be done through revision/modification in their respective employment contracts after fulfilling all codal formalities;*

f) *Direct the respondents not to convene any DPC meeting on the basis of flawed regulation [21(4)] during pendency of the instant petition;*

g) *Direct the respondent No.1 to immediately issue seniority list of employees which the Authority has not issued since 2003 and the same may kindly be directed to be issued periodically like all other government organizations;*

h) *Direct the respondents not to take any adverse action against the petitioner during pendency of the instant writ petition;*

Any other relief this Honourable Court deems fit and appropriate may also be granted."

3. The writ petition came up for hearing before the learned single Judge on 19.05.2016 and on the said date of hearing, the learned counsel for PTA opted to argue the case without filing written reply/parawise comments. Accordingly the learned counsel for both the parties argued the case and the writ petition was decided on the same day.

4. Feeling aggrieved of the judgment of the learned single Judge, both the parties have filed their separate Intra Court Appeals.

5. Today when both ICAs were taken up for hearing, the learned counsel for PTA Barrister Faisal Khan, at the very outset, raised an objection that ICA No.353/2016 is time barred; hence the same requires to be dismissed on this ground alone. To support this contention, the learned counsel adds that the ICA No. 353/2016 was filed on 10.06.2016, the office raised certain objections on the said ICA and 07 days time was given for removal of those objections. The appellant (Mian Khaliq Ur Rehman) in the said ICA, after removing objections filed his ICA but this was not done within the 07 days time granted by the office. The re-filing date as per learned counsel for PTA was 21.06.2016 which according to him is beyond the time given by the office.

6. The learned counsel for PTA contended that since the re-filing was not done within the time given by the office, the ICA deserves to be dismissed. He also pointed out that no application for condonation of delay was filed at the time of re-filing of the said ICA.

7. While rebutting the contentions of the counsel for PTA on the point of limitation, the learned counsel for the appellant (Mian Khaliq Ur Rehman) argued that it is now a settled law that once the appeal/ petition has been presented within the prescribed period of limitation, it can not be treated barred by time for the reason that the office has noted defects and the same have not been removed by the party or his advocate within the time frame specified by the office. He further contended that assuming that his appeal is time barred, the same cannot be dismissed as the connected ICA preferred by PTA involving same legal questions and arising out of the same impugned judgment was filed within time. In support of his contentions on the point of limitation, the learned counsel placed reliance on 2000 SCMR 847, PLD 2013 SC 392, PLD 2010 Lah 160, PLD 2014 Lah 1 and 2016 MLD 988.

8. On merits, the learned counsel for appellant in ICA No. 353/2016 (filed by Mian Khaliq Ur Rehman) contended that the learned single Judge in chambers, while rendering the impugned judgment, did not appreciate the true spirit of Section

10(3) of Pakistan Telecommunication (Re-organization) Act, 1996 (***hereinafter the "1996 Act"***) according to which the power to frame regulations for appointment, promotion, termination etc. has been specifically conferred upon the Authority by the Legislature and this rule making power could not have been further delegated to the Departmental Promotion Committee (***hereinafter "DPC"***).

9. The learned counsel referred Section 3 (2) of the 1996 Act which defines the "Authority". As per the said provision of law, as contended by the learned counsel, the Authority consists of three members to be appointed by the Federal Government for a term of four years. He emphasized that as per Section 10(3) read with Section 3(2) of the 1996 Act, only the Authority could have framed regulations and this power could not have been further delegated to the DPC. He contends that DPC has been given unfettered discretion in regulation 21 (4) of the PTA Employees Service Regulations, 2008 (***hereinafter the "Service Regulations"***) and in past, DPC has exercised this discretion to accommodate blue eyed chaps.

10. Learned counsel for the appellant Mian Khaliq ur Rehman has drawn our attention to a table incorporated in his writ petition as well as in the impugned judgment showing that how DPC misused the discretion conferred upon it. He contended that the DPC, in pursuance of the regulation 21(4) of the Service Regulations, frames specific criterion for promotion of employees prior to its annual meeting. Upon conclusion of DPC meeting, the life of criterion so made comes to an end. The process is repeated in the same manner before convening of next meeting by the DPC. He pointed out that in past the DPC, instead of considering service dossier of employees, gave preference to the appreciation letters which were issued on the basis of personal liking and disliking by the higher authorities.

11. The learned ASC Hafiz Arfat Ahmad Ch. further contended that fixation of criterion is not the domain of DPC in any statutory organization and it is always incorporated in Employees Service Regulations. The Employees Service Regulations are framed and approved by the statutory authority keeping in view all legal provisions contained in parent enactment. The DPC is only an executing body

which, in all organizations, acts as per the instructions contained in the service regulations.

12. The learned counsel further contended that the regulation 21(4) of the Service Regulations is in violation of a settled principle of law "***delegata potestas non potest delegari***" (no delegated powers can be further delegated). While placing reliance on various judgments, the learned counsel argued that rules can be made by an authority empowered under the Act and by no other authority which was not empowered under the Act.

13. The learned counsel also contended that there is no concept of promotion of a contractual employee serving in an organization. He argued that a contract employee is always governed by its employment contract and there is no concept of promotion for a contractual employee. He further argued that the employer and employee may introduce amendment/s in employment contract after completion of term of the contract and if they do so, the relationship shall, from that point onwards, be governed in accordance with the amended employment contract. He pointed out that the situation in PTA is quite contrary to that. All contractual employees are granted promotion from time to time by the DPC and their cases for promotion are placed along with regular employees in the same DPC. The DPC, as per the learned counsel, mostly comprises of contractual employees and the members of DPC mostly ignore regular employees and grant promotion only to the contractual employees.

14. The learned counsel for Mian Khaliq-ur-Rehman argued that while rendering the impugned judgment, the learned single Judge in chambers did not discuss various facts/grounds agitated by him in his writ petition. The impugned judgment is silent on his claim made in prayer clause(c) of his writ petition regarding grant of promotion w.e.f. the date his junior was promoted.

15. The learned counsel lastly contended that the learned single Judge in chambers should have allowed the writ petition in *toto* as there was no written reply/para-wise comments filed by the PTA. He relied upon 2005 PLC (CS) 494, 2003 MLD 1361 and 2009 PLC(CS) 824. To substantiate other contentions, he placed reliance on PLD 2007 Lah 170, 2012 PLC(CS) 968, PLD 1969 Dhaka 451,

PLD 1972 Lah 316, 1994 CLC 2214, 1994 PLC 38, 2005 PLC (CS) 551, 2011 PLC(CS) 778, PLD 2014 Sindh 574, 1999 MLD 3001, 2002 YLR 3433, PLD 2013 SC 195, 2013 SCMR 1707 and PLD 2016 SC 377.

16. On the other hand, Barrister Faisal Khan, the learned ASC appearing on behalf of PTA contended that the writ petition preferred before the learned single Judge was not maintainable as the regulations of PTA are non-statutory in nature. He also contended that the learned single Judge in chambers, vide the impugned judgment has misinterpreted the service regulations by placing restrictions on the powers of the DPC. He further contended that the service regulations provide a flexible approach for the determination of promotion criteria by the DPC and through the impugned judgment, the learned single Judge has curtailed the powers of DPC lawfully vested in it. He also contended that the learned single Judge has on one hand upheld the vires of Regulation 21(4) and on the other placed various restrictions on the powers of DPC. The learned Judge has rendered a self contradictory judgment.

17. The learned counsel for PTA while referring to the definition of "employees" under section 2 (xii) of the Service Regulations contended that the contractual employees of PTA are at par with the regular employees for promotion. He vehemently argued that contractual employees of PTA serve till the age of superannuation; hence there is no difference between the status of a regular and contractual employee of PTA. While advancing this argument, the learned counsel tried to justify the act of PTA whereby it considers cases of promotion of regular as well as contractual employees in the same DPC meeting. The learned counsel argued that in view of the peculiar status of contractual employees of PTA, it can not be said that they are unaware of the working/performance of regular employees. It was also contended that inclusion of contractual employees in the composition of DPC does not violate any law or regulation. He, however, candidly conceded that the authority is ready to implement the observations rendered by the learned single Judge in chambers whereby the learned single Judge has directed the authority not to include any deputationist in the composition of DPC.

18. While placing reliance upon the above mentioned arguments, the learned counsel for PTA prayed for acceptance of ICA 333/2016 preferred by PTA against the judgment passed by the learned single Judge in W. P. No.1766/2016.

19. We have heard both the learned counsel for the parties and perused the record with their able assistance.

20. Both the appeals have been filed against the judgment of learned Single Judge in Chambers dated 19.05.2016. I.C.A No.333/2016 has been filed by PTA against Mian Khaliq ur Rehman, whereas I.C.A No.353/2016 has been filed by Mian Khaliq ur Rehman against the PTA. In I.C.A No.353/216 Mian Khaliq ur Rehman has initially assailed the regulation No.21(4) of Service Regulations before the learned Single Judge in Chambers. The appellant Mian Khaliq ur Rehman also prayed for direction to the authority to frame comprehensive regulations governing the subject of promotion.

21. The appellant Khaliq ur Rehman was aggrieved with the working of present Departmental Promotion Committee. From perusal of the record, it has been observed that appellant Khaliq ur Rehman joined the service of authority against the quota of KPK in the year 1999 as Data Processing Assistant (BPS-16) through competitive test and he was given promotion after 11 years of the service to the post of Assistant Director BPS-17 on 10.02.2009. The current status of employees in PTA is based upon two different categories i.e regular and contract service positions. All the key positions involving decision making have been occupied by contract employees. Although the definition provided in regulation 2 (XV) means an officer/official appointed on regular/contract basis given in Service Regulations, which has confirmed the fact that all kind of employees have been called employees of PTA and there is no difference amongst the regular as well as the employees working on contract. Appellant Khaliq ur Rehman has raised question before this Court that as a result the contractual employees managed to get their promotion and the regular employees are deprived from their rights in terms of Article 25 of the Constitution. In order to understand the working of DPC under Regulation 2(XI) of Service Regulations, it is necessary to understand the provisions of Regulation 21(4) of Service Regulations, which is reproduced as under:-

"21 Procedure for Promotion

(1) ……..

(2) ……..

(3) ……..

(4) <u>The Departmental Promotion Committee shall make its own criterion</u> for merit based on the length of service, qualification, ACRs, Skills, previous service, special projects/assignments completed written test/interview etc. and communicate the merit to all those Employees likely to be considered for promotion on annual basis for consideration of cases of eligible Employees."

In view of above referred definition of Regulation 21(4), it is apparent that the procedure for promotion provides unbridled powers to the DPC as they shall make their own criterion, which is based upon on certain factors but the words "***<u>shall make its own criterion</u>***" has to be seen in the light of the 1996 Act.

22. We have gone through the 1996 Act and it has been observed that section 10(3) empowers the authority to make regulations for appointment, promotion and other terms of employment of its employees and the said powers have been used by PTA and regulation under the title PTA Employees Service Regulations 2008 were framed, whereby Chapter-V deals with the appointment by promotion, wherein section 21(4) eligibility to promotion is as under:-

1. *An employee possessing such minimum qualification as may be prescribed shall be eligible for promotion to higher post for the time being reserved under the rules, if departmental promotion to a cadre or post to which he belongs;*
2. *Promotion to post shall be subject to passing of examination or training as may be determined by Chairman or so specified in……..*

23. We have gone through Service Regulations, wherein the details of every position from DG BPS-20 to Sweeper BPS-01 have been given in Annexure-B and the other provisions have been referred as Annexure-C.

24. From the perusal of provisions of the 1996 Act, it has been observed that there is no substantive provision, through which promotion criterion has been framed except section 10(3), which empowers the authority to make regulations for appointment, termination and other terms and conditions of service of employees.

25. It is settled law that regulations and rules have to be framed within the parameters defined in the parent statue and any subordinate legislation, which is

contrary to the parent statue is to be struck down and it has been settled by the different judgments of the Higher Courts that any subordinate legislation, rules, order or instructions, if made in violation of fundamental rights guaranteed under the Constitution of Islamic Republic of Pakistan, 1973 are ultra vires and all those bye-laws made by the subordinate authority were subject to system of check and balance. Reliance is placed upon ***PLD 2007 Lahore 170 (Abdul Sattar Ghughtai Malik vs. Pakistan Bar Council through Secretary and another)***, wherein it was held that:-

> *"Act passed by the Parliament and Ordinance issued by the nation would be called the `statutory law'---Rules framed under the powers conferred by the Act were integral part of the Act and those rules were called statutory rules and those were part of the parent Act---Rules or bye-laws made under the statute or Act could not override the provisions of other statutes---Rules under the Act would be made by the authority, empowered under the Act to frame rules or bye-laws and by no other authority which was not empowered under the Act to make rules"*

Similarly, if a statue expressly confers a statutory power on a particular body or authority or imposes a statutory duty on the same then such power must be exercised or duly performed by that very body or authority itself and none other. Reliance is placed upon ***2012 P L C (C.S) 968 [Sindh High Court] (Piyar Ali Gadiwan vs. Province of Sindh through Chief Secretary and 5 others),*** wherein it was held that:-

> *"It is a well-settled (and indeed, bedrock) principle of administrative law that if a statute expressly confers a statutory power on a particular body or authority or imposes a statutory duty on the same, then such power must be exercised or duly performed (as the case may) by that very body or authority itself and none other. If the body or authority exercises the statutory power or performs the statutory duty acting at the behest, or on the dictate, of any other body or person, then this is regarded as an abdication of the statutory mandate and any decision taken on such basis is contrary to law and liable to be quashed. It is important to keep in mind that, in law, it matters not that the extraneous element is introduced (i.e., the advice, recommendation, approval, etc. of the person not empowered by the statute is obtained or given) in good faith or for the advancement of any goal or objection howsoever laudable or desirable. The rule of law requires that a statutory power vests in the body or authority where the statute so provides, and likewise,*

> *the discharge of the statutory duty is the responsibility of the body or authority to which it is entrusted. That body or authority cannot merely rubberstamp an action taken elsewhere or simply endorse or ratify the decision of someone else."*

Similar principle has also been referred in ***PLD 1969 Dacca 451(B. S. Industries vs. The Deputy Registrar, Trade Marks and another),*** which is as under:-

> *"Held, when a statute confers a certain duty on an officer it is that officer who has to make up his mind and pass the order in accordance with law and exercise his discretion uninfluenced by any opinion of his superior officers."*

It has also been settled law that when a statue confers certain duty on an officer it is that officer who has to make up his mind and pass the order in accordance with law and exercise his discretion uninfluenced by any opinion of his superior officer. Reliance is placed upon ***PLD 1972 Lahore 316 (Syed Fayyaz Hussain , Advocate vs. The Administrator, Lahore Municipal Corporation, Lahore and 4 others),*** wherein it was held that:-

> *When a statute confers a certain duty on an officer it is that officer who has to make up his mind and pass the order in accordance with law and exercise his discretion uninfluenced by any opinion of his superior officers. It was held in B. S. Industries v. Deputy Registrar, Trade Marks (P L D 1969 Dacca 451) that even an Executive Officer when he performs a statutory function is not to be influenced by any direction from any quarter.*

Same principle has been held in ***CLC 2214 [Lahore] (Taj Muhammad vs. Municipal Committee Fateh Jhang through Chairman, etc),*** whereby administrative functions and actions are under judicial scrutiny, if the same are in violation of basic principle of safe administration of justice.

All the principles mentioned above are based upon maxim ***delegatus non potest delegare*** (a delegatee cannot further delegate his powers). Reliance is placed upon ***1994 PLC 38 [Lahore High Court] (Muslim Commercial Bank Limited, Karachi and 2 others vs. Punjab Laboure Appellate Tribunal, Lahore and 2 others)*** and ***2005 PLC (C.S) 551 (Meraj Din Bhatti vs. Chairman, Punjab Board of Technical Education, Lahore and 4 others).*** Appellant Mian Khaliq ur Rehman has assailed the administrative actions of PTA, whereby they are exercising their powers of promotion in terms of Regulation 21(4) of the Service Regulations. We have gone through the same, it has been observed from the provisions that following factors

i.e. length of service, qualification, ACRs, skills, previous service, special projects/assignment completed, written test/interview, etc are to be considered for promotion. However, the disputed phrase used in the said Regulation is ***"The Departmental Committee shall make its own criterion for merit based",*** whereas PTA while taking advantage have stretched the said provision to the extent that on each and every occasion the DPC adjusted the marks and thrash hold factors referred above, which is evident from the previous years. Comparative analysis reproduced as under:-

Year/particular	12 Jan 2009	14 June 2011 (original)	12 Aug 2011 Revised	24 Dec. 2013 original	31 Jan. 2014 revised
Merit					
Length of Service	10	10	20	25	25
ACRs [PERS/PARS]	50	50	50	45	50
Discretionary powers used by DPC					
Extra Qualifications	10	10	5	5	10
Projects/Achievements/Discipline	15	15	10	10	10
Skills/others	15	10	-	-	-
Others (Awards, Appreciation letters, etc.)	-	5	5	-	-
Discipline	-	-	-	10	10
Appreciation (Chairman/Member)	-	-	-	5	5
Interview	-	-	10	-	-
Total (Merit + Discretionary Power)	100%	100%	100%	100%	100%

26. The above referred comparative analysis clearly demonstrates that any person delegated with the powers in terms of Regulation 21(4) has to follow the minimum standard of fairness, due process and in transparent manner, where fundamental rights should not be affected. Even otherwise, it is not an intent of framers of the statue to give un bridled powers to the DPC, although it was written

in the Regulation that DPC shall make its own criterion but this does not give unbridled powers to DPC for adjustment of marks thrash hold in order to deprive the individuals, especially when the information of all the individuals regarding their qualification, experience and appreciation letters, completed projects skill is already known and the DPC is well aware of the personal status of the individuals before adjustment of the thrash hold of the marks, hence, it has been observed from the above mentioned table that DPC in different years changed the thrash hold marks for experience, skill and qualification and as a result of the said changes, many of the employees have failed to cross thrash hold of the promotion.

27. Such kind of unbridled powers give rise to a situation, where the individual's rights have been violated and in result of said actions of DPC the discretion available to DPC give rise to general unrest and employees would be considered at the cruel mercy of the authority, therefore, such kind of discretion have been seen with different angle in the light of ***2011 PLC (C.S) 778 [Islamabad High Court] (Fazal Abbas vs. Federation of Pakistan through Secretary Ministry of Housing and Works, Islamabad and 2 others),*** wherein it was held that:-

> *"Art. 199---Constitutional petition---Exercise of discretionary powers by authorities---Scope---Authorities could not be blessed with whimsical and arbitrary exercise of discretion, because if such discretion was exercised, common people would be at the cruel mercy of the authorities; and there would be a general unrest and chaos in the society---Discretionary powers could be exercised by competent authority, but with due care and within the four corners of the relevant rules and laws---In no case fundamental rights could be violated on the basis of discretionary powers---Rules no doubt could be relaxed by the government, but not in an arbitrary manner which would cause inconvenience to the people, who enjoy the protection of law---Procedures were to be followed strictly in accordance with law; and the gross irregularities were always subject to correction by the High Court under Art.199 of the Constitution as the courts were the guardians for the protection of the rights of the common man and under obligation to provide justice and equity to the aggrieved persons---If such illegalities were ignored on the basis of technicalities and relaxation or discretion, purpose of Art.199 of the Constitution, would be frustrated."*

Even otherwise it has been settled that all discretion is structured whether that structuring is on the basis of rules and principle enunciated in case law or provided in statute itself or for both. Reliance is placed upon ***2014 Sindh 574 (Karachi Electric Supply Company***

Ltd. through authorized Officer/Attorney vs. Lotte Powergen (Pvt.) Limited through Company Secretary and 3 others), wherein it was held that:-

> *"Unfettered---Scope---No such thing exist as "unfettered statutory discretion"---All discretion is structured whether that structuring is by rules and principles enunciated in case law or provided in statute itself or both."*

Regulation 21(4) clearly provides discretion to DPC but the subsequent term used in the phrase is "***for merits***" which give rise to a situation that every factor has to be consider on its highest best standard. In order to understand the term "merit" it is necessary to see its definition as the word "merit" used in Employees Service Regulation 2008 Sec. 21(4) has not been defined separately, therefore its ordinary meaning as defined in the Black's Law Dictionary has to be considered for the purposes of interpretation which is as under:-

> *"The elements or grounds of a claim or defense; the substantive consideration to be taken into account in deciding a case as opposed to extraneous or technical points."*

The above referred definition has also been acknowledged in different pronouncements of Superior Courts, we are fortified by **2010 SCMR 1301 (Tariz Aziz-ud-Din and others)** wherein it has been held that:-

> *"Interpretation of word `merit' includes eligibility as well as academic qualifications."*

Similarly, **2016 PLC(CS) 1232 (Pakistan Medical Association v/s Chancellor Dow University of Health Sciences and others)** it has been held that:-

> *"In the case of Tariq Aziz-ud-Din, (2010 SCMR 1301), the Hon'ble Supreme Court held that "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 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 statue in an intelligible and reasonable manner. Actions which do not meet these threshold requirements are considered arbitrarily and misuse of power."*

The definition of word "merit" has also been discussed in **2003 MLD 1543 (Lahore Development Authority vs Mst. Shamim Akhtar and another)** as in the following words:-

> *"Word "merits" is defined in Black's Law Dictionary as follows:--*

"As a legal term, refers to strict legal rights of parties"
Merits includes limitation prescribed under law"

The other meanings of the word "merit" referred in Oxford Thesaurus of English is as follows:-

> *""Merit" excellence, goodness, standard, quality, level, grade, high quality, caliber, worth, good, credit, eminence, worthiness, value, virtue, distinction, deservingness, meritoriousness"*

In view of above definitions of term "merit" it is apparent that it should be within legal rights of the parties and any person who qualifies to be on the highest standard should be appointed or promoted on the relevant position and any other factor negating the rules of merit shall not be considered as valid appointment or promotion, therefore, any other arbitrary exercise of such powers, where unfettered discretion has been used by the DPC, is not the import of the law as the same has been applied in violation of provision of General Clauses Act, 1897. Reliance is placed upon ***1999 MLD 3001 [Karachi] (Star Textile Mills Ltd. vs. Pakistan and others).***

The term discretion has been defined in ***2002 YLR 3433 [Lahore] Mian Manzoor Ahmad Wattoo vs. The State),*** which is as under:-

> *"Connotation---"Discretion " means the capacity to distinguish between right and wrong, lawful or unlawful, wise or foolish, sufficiently to render one amenable and responsible for his acts---Discretion further connotes wise conduct and management. cautious discernment especially as to matters of propriety and self-control, prudence, circumspection and wariness---Exercise of discretion is not uncontrolled, unfettered or absolute---Person vested with a discretion is not permitted to exercise the same imprudently, unfairly, unreasonably, arbitrarily, capriciously and in an impetuous way---Discretion and arbitrariness etc. are sworn enemies and cannot co-exist--Discretion undoubtedly cannot be exercised in a fanciful manner when the repository of discretion is disposing of the public property particularly in a democratic system governed by written Constitution and the laws."*

The above mentioned definition of the discretion refers wise conduct, prudence, fairness, which are the key factors under any system of administration of justice.

Similarly, Hon'ble Supreme Court of Pakistan in ***PLD 2013 Supreme Court 195(Syed Mahmood Akhtar Naqvi and others vs. Federation of Pakistan and others)*** held that:-

> *"Discretion in matters of promotion must be exercised fairly and in a transparent manner---Such discretion had to be understood within the four corners of the concept of rule of law upon which the system of governance was founded---Every Authority in the State was bound to obey the dictates of the law and had no personal or absolute discretion."*

Whereas Mr. Jawad S. Khawaja, the then Judge given a separate note with the following words:-

"15۔ طارق عزیزالدین کے مقدمے میں ہم نے سرکاری ملازمت سے متعلقہ متعدد اہم مسائل کا جواب دیا ہے۔ بشمول ترقی کی بابت صوابدیدی اختیارات کے سوال کا۔ یہ اختیارات صرف شفاف اور منصفانہ انداز میں ہی استعمال ہو سکتے ہیں۔ بات یہ ہے کہ صوابدید بھی حکمرانی قانون کے حدودِ اربعہ کے اندر ہی استعمال ہو سکتی ہے، کیونکہ یہ وہ تصور ہے جس پر ہمارے پورے ریاستی نظام کی بنیاد ہے۔ ریاست کا ہر عہدہ دار اپنے فرائض کی ادائیگی میں قانون کی حکمرانی کی پاسداری کرے گا۔ اسی لئے عدالت نے کہا تھا کہ "ترقی کے لئے زیر غور آنے کا جو حق [سول سرونٹس ایکٹ] کے سیکشن 9 میں عطا کیا گیا ہے وہ کوئی فرضی وعدہ یا رسمی مرحلہ نہیں ہے۔ سول سرونٹس [فعالیت وتادیبی] قواعد، 1973 کے مطابق ایک افسر کی ترقی روکنا باقاعدہ سزا ہے۔ غرضیکہ جب ایک افسر کو ترقی کے لئے جانچا جائے تو فیصلہ متعلقہ قوانین وضوابط کی روشنی میں کیا جانا چاہیے، اور اُس افسر کی قابلیت کے متعلق ٹھوس شواہد کو بنیاد بنایا جانا چاہیے"۔

28. In view of above referred discussion, we are of the considered view that the discretion available to the DPC in terms of Regulation 21(4) does not give any additional powers to re-fix thrash hold in any manner rather the DPC was given an authority to exercise the same on merit basis concept, however, the element of discretion comes in this regulation has been used as negative tool to eliminate the employees from being promoted and they have not been considered for promotion which is illegal and the working of DPC by fixing threshold without any structure is illegal, therefore, DPC is directed to follow the merit as referred in Regulation 21(4) of Service Regulations.

29. The second limb of the arguments advanced by learned counsel for appellant Mian Khaliq ur Rehman is based upon the fact that the DPC is comprising of employees of PTA, even some of the members are on contract basis and they are considering the cases of regular employees for promotion and in this regard the inherited bias is visible and the same was used to eliminate the permanent employees and as a result of the entire process of DPC, the employees have to face the ordeal of mental agony and torture when their cases are in the hands of contract employees, whose services have not been confirmed. We have considered both limbs of the arguments and if one can seen the reasons advanced by learned counsel for appellant Mian Khaliq ur Rehman, it has been observed that employees are not in position to agitate the matter before any authority for re-fixation of criterion or for that matter they are remediless, especially when the entire scheme gives the

criterion in the hands of certain individuals and object of the law is not like that. The third question, which has been raised during the course of arguments by learned counsel for PTA is the maintainability of the writ petition as the employees of statutory body have no right to challenge the violation of the service rules or regulations which are non statutory in nature but in present the PTA Employees Service Regulations, 2008 are statutory in nature as the powers have already been notified in the 1996 Act, even if the rules are not statutory, the violations can be taken care of. We have been persuaded by the authoritative judgment of Hon'ble Supreme Court of Pakistan reported as ***2013 SCMR 1707 (Pakistan Defence Officers Housing Authority and others vs. Lt. Col. Syed Jawaid Ahmed),*** wherein it is held that:-

> *"50. The principles of law which can be deduced from the foregoing survey of the precedent case-law can be summarized as under:-*
>
> *(i.) Violation of Service Rules or Regulations framed by the Statutory bodies under the powers derived from Statutes in absence of any adequate or efficacious remedy can be enforced through writ jurisdiction.*
>
> *(ii.) Where conditions of service of employees of a statutory body are not regulated by Rules/Regulations framed under the Statute but only Rules or Instructions issued for its internal use, any violation thereof cannot normally be enforced through writ jurisdiction and they would be governed by the principle of 'Master and Servant'.*
>
> *(iii.) In all the public employments created by the Statutory bodies and governed by the Statutory Rules/Regulations and unless those appointments are purely contractual, the principles of natural justice cannot be dispensed with in disciplinary proceedings.*
>
> *(iv.) Where the action of a statutory authority in a service matter is in disregard of the procedural requirements and is violative of the principles of natural justice, it can be interfered with in writ jurisdiction."*

30. Hence, it can safely be concluded that the view taken by the larger bench is applicable in this case as there is no adequate or efficacious remedy available under the PTA Regulations to resolve the controversy of thrash hold of employees promotion. Even otherwise the recent authority on the subject rendered in the judgment reported as ***PLD 2016 Supreme Court 377 (Shafique Ahmed Khan and others vs. NESCOME through Chairman, Islamabad and others),*** wherein it was held that rules and

regulations, which were framed without approval of the Federal Government have not to be considered as sole criteria to declare it as non-statutory.

31. The wisdom behind such kind of legislation is to make authority autonomous on all counts but the unaccounted exercise of unfettered powers is dangerous for any institution, where exercise of powers or exercise of discretion is involved, better and more uniform result in long term situation can only be achieved with structured and streamline concept of service regulations. Autonomous efficacy of the authority was better attained with statue rather than non statutory rules.

From perusal of the scheme of the regulations, it is apparent that the DPC on the basis of regulations framed by the authority have crossed the outline of the Pakistan Telecommunication (Re-organization) Act, 1996, whereby the status of regulations are considered as basic instructions for internal control and management of the organization, as held in the recent judgment of Apex Court in ***2017 SCMR 571 (Muhammad Zaman, etc vs. Government of Pakistan, etc)***.

Similarly, wherein it has further been held that:-

> *"---Statutory or non-statutory nature, determination of --- Test of whether rules/regulations were statutory or otherwise was not solely whether their framing required the approval of the Government or not, rather it was the nature and efficacy of such rules/regulations---Court had to see whether the rules/regulations dealt with instructions for internal control or management, in which case they would be non-statutory, or they were broader than and were complementary to the parent statute in matters of crucial importance, in which event they would be statutory."*

Learned counsel for PTA has taken a stance that the Service Regulations are non statutory, which is not correct on the touchstone of recent judgments of the Apex Court reported above as well as ***PLD 2016 SC 377 (Shafique Ahmed Khan and others vs. NESCOM through Chairman, Islamabad and others)*** and ***2013 SCMR 1707 (Pakistan Defence Officers' Housing Authority and others vs. Lt. Col. Syed Jawaid Ahmed).***

We are of the clear view that PTA Employees Service Regulations, 2008 are statutory in nature but the violation and discretion exercised in the instant mater clearly demonstrate the unbridled powers and exercise of authority has been done arbitrarily by the DPC in terms of Regulation 21(4) which persuaded us to declare

the said action of DPC as unconstitutional and against the concept of fundamental rights of the petitioner.

32. Lastly, we have gone through the prayer of W.P. No.1766/2016 and after considering all case laws, arguments advanced by the learned counsel, we are of the considered view that the issue relates with fundamental right of citizen who is not seeking his personal right under the regulations rather challenging the threshold formula applied by DPC under Regulations 21(4), therefore, question of maintainability of writ petition does not come in the way unless appellant Mian Khaliq ur Rehman claims his individual right against the PTA. Whereas no individual right has been claimed against PTA rather it is collective issue which relates to large number of employees, therefore, writ petition is maintainable, ICA No.333/2016 (*Pakistan Telecommunication Authority versus Mian Khaliq ur Rehman, etc*) is not maintainable and dismissed, ICA No.353/2016 (*Mian Khaliq ur Rehman versus PTA, etc.*) is allowed with the terms that all orders and proceedings of DPC by fixing or changing the threshold in terms of 21(4) of Employees Service Regulations 2008, are illegal as the same are not based upon merit under the law.

33. These are the detailed reasons of our short order dated 01.02.2017, which is reproduced herein below:-

> *"For the reasons to be recorded later on I.C.A. No.333/2016 is dismissed, whereas, I.C.A. No.353/2016 is allowed."*

(SHAUKAT AZIZ SADDIQUI)
JUDGE

(MOHSIN AKHTAR KAYANI)
JUDGE

Khalid Z.

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