

IN THE HIGH COURT OF SINDH, AT KARACHI

C.P No. D-6666 of 2016

Present:

Mr. Justice Irfan Saadat Khan

Mr. Justice Adnan-ul-Karim Memon

Petitioner Through Mr. Maula Buksh Khatiyani and Mr. Masood Ahmed Noorani advocates

Respondents Through Mr. Abdul Jalil Zubedi, AAG alongwith Ahmed Ramzan, Director-I Sindh Local Govt. Board.

Date of hearing 07.02.2017

J U D G M E N T

ADNAN-UL-KARIM MEMON, J:- This judgment will dispose of the Petition, wherein the Petitioner has sought quashment of a letter dated 01.12.2016, by the Competent Authority where his out of turn promotion granted from BS-11 to BS-16 and BS-16 to BS-17 was withdrawn.

2. The relevant facts of the case are that on 18.01.2008, the Petitioner was appointed in BS-11 in Sindh Councils Unified Grades Service (hereinafter referred to as "SCUG Service") Admin: Branch, in the Local Government Department (Sindh Local Government Board) (hereinafter referred to as "SLGB").

3. Subsequently, vide Order dated 14.09.2010, the Secretary of Local Government Department, Government of Sindh, acted upon the recommendation of SLGB dated 1.7.2010 and promoted the Petitioner to BS-16 on acting charge basis. The said promotion, vide Order dated 14.1.2012, stood regularized with retrospective effect from 17.1.2010. On 01.04.2013, the Petitioner yet again stood promoted from BS-16 to BS-17 on a regular basis.

4. In the pleadings at Paragraph No.7, the Petitioner has also claimed that his name was recommended by the SLGB for promotion from BS 16 to BS 17 and the same is evident from the minutes of the meeting dated 01.10.2011 which are available at pages 43-67.

5. However, the Hon'ble Apex Court, in Cr. Org. Petition No. 89 of 2011, took cognizance of the fact that various out of turn promotions were granted to civil servants/police officials and held that the same were against the injunctions of Islam and were unconstitutional. The same matter is reported in the case of Contempt Proceedings against Chief Secretary Sindh and others (2013 SCMR 1752). ("Judgement"). Pursuant to the Judgement, the respondent No.1 issued an Order dated 14.07.2013, whereby 30 officers/ officials of SCUG Service, including the Petitioner, were demoted to their original grades. Hence, the Petitioner stood demoted from BS-17 to BS-16. The Petitioner, however, claims, that he was demoted illegally and by misconstruing the Judgment and without being provided an opportunity of hearing to the Petitioner.

6. Thereafter, the Respondent No.1 on 25.07.2014 issued another Order, in suppression of the Order dated 14.07.2013, whereby it was held that pending the recommendation of the Fact Finding Committee, the Petitioner may be treated as a BS-17 Grade Officer.

7. On 13.02.2015, the Respondent No.1 yet again reverted the Grade of the Petitioner from BS-17 to BS-16. On 23.09.2015, the Petitioner once again was recommended by the Secretary, Local Government Department to continue his service in Grade BS-17. The said recommendation stood approved by the Minister, Local Government via note dated 5.6.2015. The same is available at page 79.

8. Consequently, vide Order dated 08.10.2015, the earlier Order of reversion dated 13.02.2015 stood cancelled. On 1.12.2016, ("impugned letter") the petitioner was in receipt of the impugned letter whereby he was informed that he stood demoted to his original Grade i.e. BS-11 on the ground that his out of turn promotions were against the rules/policy

and the Judgement of the Hon'ble Apex Court. The Respondents have filed para wise comments in instant petition.

9. The learned counsel for the Petitioner has contended that the Impugned Letter was not passed by the Competent Authority. He further argued that the Petitioner was never given out of turn promotion in terms of Section 9-A of Sindh Civil Servants Act, 1973 ("the Act") and the Petitioner was allowed promotion in accordance with SCUG Service Rules, 1982. ("the Rules") The learned counsel further argued that the Judgement pertains exclusively to service of Civil Servants and the same is not applicable to the case of the Petitioner as he is a public servant.

10. Per learned counsel, the promotions of the Petitioner from BS-11 to BS-16 and from BS-16 to BS-17 were arbitrarily withdrawn, without providing the Petitioner an opportunity of hearing, which are in violation of his fundamental rights and the principle of natural justice. However, the Petitioner in para 6 of his pleadings has admitted that he was granted only one out of turn promotion which was withdrawn and he stood regularized on merits in accordance with the law. The learned counsel also referred to the Order dated 7.4.2016 passed by the Hon'ble Lahore High Court in Writ Petition No.2356 of 2016 whereby in a similar matter relief was granted and the learned counsel argued that the Petitioner's case is also on the same pedestal and hence, he is entitled for the same relief. On the said grounds, he prayed for setting aside the Impugned Letter.

11. The learned counsel for the Petitioner has relied upon the Case of Contempt Proceedings against the Chief Secretary, Sindh & others [2013 SCMR 1752], on the Case of Ali Azhar Khan Baloch and Others versus Province of Sindh & others [2015 SCMR 456] and on the Case of Syed Mahmood Akhtar Naqvi vs. Federation of Pakistan [PLD 2013 SC 195].

12. On the other hand, the learned AAG has drawn attention of this Court to Paragraph No.1 of the comments filed by the Respondents and argued that the Petitioner is an Officer of BPS-11 of SCUG Service

(Administrative Branch) and was appointed in the said Grade on 18.01.2008. Subsequently, vide Order dated 14.09.2010, he stood promoted to BPS-16 on acting charge basis and that the same was in violation and contravention of Rule 8-A of Sindh Civil Servants (Appointment Promotion and Transfer) Rules, 1974. (“the Appointment, Promotion and Transfer Rules”). He further argued that the promotion of the Petitioner from BPS-16 to BPS-17 vide Order dated 01.04.2013, was also in violation of Rule 8-A (6) of the Appointment, Promotion and Transfer Rules. He next argued that officers senior to the Petitioner were not included in the seniority list of BPS-16 and that he was not eligible for promotion to BPS-17, which was an out of turn promotion and the same has rightly been reversed vide the Impugned Letter. He also argued that Civil Servants / Public Servants are not entitled to be granted out of turn promotions as per the Judgement given in the case of Ali Azhar Khan Baloch vs. Province of Sindh and others (2015 SCMR 456). He lastly argued that if the Petitioner is aggrieved and dissatisfied with the Impugned Letter passed in pursuance of the Judgement, then he should have agitated the matter before the Hon’ble Supreme Court and in light of the same the instant petition is not maintainable. He prayed for dismissal of the instant Petition.

13. We have heard the learned counsel for the Petitioner and learned AAG Sindh, representing the respondents and perused the material available on record with their assistance.

14. As far as the preliminary issue of maintainability is concerned, we are of the view that the instant petition is not maintainable on the ground that:-

- (i) A bare perusal of the material placed on record reveals innumerable anomalies in the appointment and promotions granted to the petitioner. Firstly, we fail to understand that when the out of turn promotion of the Petitioner, pursuant to the Judgement, had been reversed vide Order dated 4.7.2013, why on 6.6.2014, after a period almost an year

was there any need to belatedly constitute a Fact Finding Committee, under the garb of which the Order dated 25.7.2014 was passed which reversed the Order dated 4.7.2013 and held that till the pendency of the decision of the Fact Finding Committee the Petitioner was to be treated as a BS-17 officer?

- (ii) We do not see the need for the Fact Finding Committee to come to decide the matter of out of turn promotions when the same was conclusively determined by the Hon'ble Supreme Court. Thereafter, as mentioned in para 7 and 8 above, a number of other Orders were issued reverting and promoting the Petitioner from BS-17 to BS-16 and vice-versa, which in our view, the Orders dated 25.7.2014 and 8.10.2015, tantamount to circumventing the directions of the Hon'ble Supreme Court.

15. Further, a bare perusal of Order dated 14.9.2010 reveals that the promotion of the Petitioner on acting charge basis with effect from 1.7.2010 was regularized retrospectively with effect from 17.1.2010. We are of the view that the same is against sound service policy and not tenable in the eyes of the law.

16. In addition, the minutes of meeting held on 10.1.2011, reveal that the Petitioner was recommended to be promoted from BS-16 to BS-17, even though he had been appointed in BPS-11 on 18.1.2008 and stood regularized on 18.1.2010. Yet, in 2011, the Board recommended that he may be promoted from BS-16 to BS-17 even though it had just been a year since his services had been confirmed in BS-11 (however the letter of confirmation is not available on record). Therefore, we fail to understand as to how he could be directly promoted from BS-11 to BS-17 within a period of a year, when he was actually promoted to BS-16 in the year 2012. Thereafter, within a period of less than a year on 1.4.2013, he stood promoted from BS-16 to BS-17 on a regular basis. The aforementioned recommendation of the Board, to the extent of the

Petitioner's case, is against the policy/rules of promotion and also misleading so far as it tries to prove that the Petitioner was already in the BS-16 Grade, when he was only in the rank of BS-11.

17. When the counsel for the Petitioner was asked to satisfy this Court as to how the Petitioner was granted backdated seniority and out of turn promotion, he submitted that the Petitioner's out of turn promotion was withdrawn and was again regularized on merits in accordance with law and rules as per departmental meetings and of Fact Finding Committee. However, in light of the Judgement and also the material available on record, we fail to find any substance in this argument, which the learned counsel for the Petitioner has failed to corroborate with any law or documents.

18. We are of the view that the initial reversal Order dated 4.7.2013 was made in pursuance of the Judgement. Hence, if the Petitioner was aggrieved by the same, the competent forum available to him was to file a review before the Hon'ble Apex Court. However, a bare perusal of the record reveals that the Respondents found a way of going around the Judgement and under the garb of the Fact Finding Committee attempted to nullify the same.

19. As far as the issue of the Impugned Letter having been passed by an incompetent authority is concerned, we are of the view that the Respondent No.3 had issued the letter to intimate the Petitioner that the Competent Authority has held that his promotions from from BS-11 to BS-16 and from BS-16 to BS-17 were out of turn and hence, against the rules and policy as well as against the spirit of the Judgement. Therefore, the said promotions stood withdrawn. As such, the claim of the Petitioner that his promotions were reversed by an incompetent authority is not tenable in the eyes of law.

20. We also do not find any merit in the claim of the Petitioner that the Judgement is not applicable to his service. Suffice to say that the Hon'ble

Apex Court In the case of Ali Azhar Khan Baloch & others (supra) has held at Paragraph No. 121,

“that the impugned judgement is only applicable to Civil Servants and does not cover non-civil servants. We, with respect, disagree with the contentions of the learned Counsel. The impugned judgment would be equally applicable to the Government Servants, employees of any statutory or non-statutory organization controlled by the Sindh Government, who were wrongly absorbed in different Cadres, Services, Posts of the Government Departments, Statutory Organizations against their Service Rules.”

Therefore, in our view the Judgment is fully applicable in the case of the Petitioner.

21. Another argument put forward by the learned counsel for the Petitioner that the he was given promotion on acting charge basis and the same was regularized with effect from 17.1.2010, we are of the view that the same is against the spirit of Rule 8-A of the Sindh Civil Servants (Appointment, Promotion and Transfer) Rules, 1974. As the appointment of an officer of a lower scale on a higher post on current charge basis is made as a stopgap arrangement. Therefore, the same should not be, under any circumstances, for more than six months. A promotion on acting charge basis could neither be construed to be an appointment by promotion on regular basis nor did it confer any vested right on the Petitioner for regular appointment. As such, the regularization of appointments on promotion posts against which officers were appointed on current charge basis, especially of a junior officer would cause heart burning to the Senior Officers within the cadre and/or department. This practice of appointment has always been discouraged by the Superior Courts, as it did not have any sanction of law, besides it impinged the self-respect and dignity of the Civil Servants who were forced to work under their unduly appointed fellow junior officers. It is a well settled law that promotion cannot be given retrospectively so the point raised by the learned counsel for the Petitioner is also against the basic spirit of law and the same is also not tenable.

22. So far as the Order of the learned Lahore High Court is concerned, the same is quite distinguishable from the facts and circumstances of the present case. It is now well settled law that once the employees are de-notified in compliance of the judgment of Honourable Apex Court, the employees if aggrieved have to approach the Honourable Supreme Court by filing review rather than filing Constitutional Petition. It is also a well settled principle of law that when the Hon'ble Apex Court takes cognizance of a matter particularly in the cases of out of turn promotions declaring the same to be unconstitutional, this Court cannot interfere with such a finding.

23. Resultantly, the Petitioner, who has admitted that he was given out of turn promotion and was also granted promotion on acting charge basis, which was subsequently regularized, which acts clearly are violative of the basic spirit of law as the acting charge promotion cannot be regularized retrospectively, and out of turn promotion cannot be granted, as the same is unconstitutional.

24. The instant Constitutional Petition is, thus, not maintainable under Article 199 of the Constitution, therefore, the same is dismissed. The listed applications are also disposed of accordingly. However, the Petitioner may avail his remedy in accordance with the law.

JUDGE

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