

IN THE HIGH COURT OF SINDH, AT KARACHI

Present: Mr. Justice Muhammad Iqbal Kalhoro
Mr. Justice Adnan-ul-Karim Memon

C.P No.D-1389 of 2016

Petitioner : Anwer Ali through Mr. Muhammad Arshad
Khan Tanoli, Advocate

Respondents : 1 to 3 through Mr. Abdul Jalil Zubedi, A.A.G.

Respondent No. : 4 to 6 and 8 to 11 through Mr. Anwar Ali
Shah, Advocate.

Date of hearings: 19.4.2017, 27.4.2017, 03.5.2017,
03.5.2017, 10.5.2017 and 15.5.2017

J U D G M E N T

ADNAN-UL-KARIM MEMON, J:- Through this Constitution Petition Petitioner seeks implementation of Paragraph No. 114 to 121 and 138 of the judgment passed by the Hon'ble Supreme Court in the case of Ali Azhar Khan Baloch Vs. Province of Sindh (2015 SCMR 456). Simultaneously, prays for setting aside the up-gradation of Respondent Nos. 5, 6, 8 to 11 and their repatriation to original grade and post. Petitioner further seeks direction to official Respondents for consideration of his promotion to BPS-16 as Assistant from the date of promotion of his juniors.

2. Gist of the case is that the Petitioner was appointed Lower Divisional Clerk (LDC) in BPS-8 on 23.01.1984 in the then Karachi Building Control Authority (KBCA), presently known as Sindh Building Control Authority (hereinafter referred to as SBCA). The petitioner asserts that he attempted several times to approach the

competent authority for his promotion as Assistant but he was only given officiating charge in OPS (own pay and scale) vide Letter dated 20.05.2003 without seniority and promotion. Per Petitioner he continued to work on OPS in different wings of Karachi Building Control Authority/SBCA. He further added that several other officials who were juniors to the Petitioner have been promoted as Assistant but the Petitioner was ignored. The Petitioner also called in question the basic up-gradation and promotion of Respondent No. 5 to 11 on the ground that they are not eligible to hold the post as they were illegally up-graded, promoted and absorbed in violation of judgment of Hon'ble Supreme Court rendered in the case of Ali Azhar Khan Baloch Vs. Province of Sindh and others (2015 SCMR 456).

3. Comments were called; the Respondent No. 4 to 11 submitted their comments and denied the allegations leveled against them.

4. Mr. Arshad Khan Tanoli, learned counsel for the Petitioner contended that Respondent Nos. 5, 6, 8 to 11 are occupying the post in violation of the judgment rendered by Hon'ble Supreme Court in the case of Ali Azhar Khan Balouch (supra). He next contended that Hon'ble Supreme Court has declared out-of-turn promotions, up gradation and absorption which are person-specific as illegal and directed the Respondent No.1/Chief Secretary, Government of Sindh, for repatriation of the officials to their original position. But, the Respondents are in league with each others to gain personal benefits defeat the basic spirit of the

judgment passed in the case of Ali Azhar Khan Baloch (supra) retained the beneficiaries on their original position/posts. He next contended that the private Respondents have been appointed, absorbed, promoted and up-graded in an arbitrary manner without following Rules and Regulations. He next contended that Petitioner has rendered more than 30 years' of service in SBCA but is not given due promotion, whereas, Respondent No. 5 to 11 were illegally up-graded, promoted and absorbed in SBCA without lawful justification. Learned counsel for the Petitioner, in support of his contentions, has placed reliance upon the case of Ali Azhar Khan Baloch Vs. Province of Sindh (2015 SCMR 456).

5. Mr. Anwar Ali Shah learned counsel for Respondent No. 4 to 6 and 8 to 11 filed written arguments and contended that all the allegations levelled by Petitioner against the Respondents are frivolous, false and fabricated. Learned counsel next contended that Petitioner was employee of SBCA/Respondent No.4 and he was dismissed from service on account of corruption charges vide Order dated 26.10.2011. He next contended that Petitioner was reinstated in the employment of Respondent No.4 on 07.07.2014 without any order of the Competent Authority and is getting salary, perks and privileges without any lawful justification. He further added that Petitioner has not approached this Court with clean hands and his aim is to get regularized his illegal reinstatement. He next asserted that the Petitioner has not filed Departmental Appeal against said dismissal from service order dated 26.10.2011. Per learned counsel, Petitioner was given full opportunity to

improve his profile to meet the requisite criteria of promotion and up-gradation but he failed to do so. Per learned counsel the Petitioner was also offered the posts of Court Clerk and Auditor but he refused to accept the same. Due to this reason, name of the Petitioner was struck off from the list of promotion. He further argued that Petitioner was only interested in the Technical Cadre Post that is, "Senior Building Inspector". Per learned counsel, besides above illegalities, the Petitioner has also misused public money, therefore, the Respondents are well-within their rights to recover the same in due process of law. Learned counsel has concluded by arguing that the Petitioner has no locus standi to challenge the appointment of Respondent No.5 to 11 under Article 199 of the Constitution.

6. Mr. Abdul Jalil Zubedi, learned A.A.G representing Respondents No.1 to 3 has contended that the instant petition is not maintainable under Article 199 of the Constitution because on the one hand, the Petitioner has sought his own promotion and on the other, he is calling in question the basic appointment/up gradation/promotion/absorption of the Respondent Nos. 5 to 11. Per learned counsel, both prayers cannot be allowed by this Court. The allegations leveled are of serious nature and those appointments, absorptions and up-gradations should be regulated in compliance of the judgment of the Hon'ble Supreme Court in the case of Ali Azhar Khan Balouch (supra). He next contended that the same Judgment is fully applicable to the service of Respondent No. 5 to 11. He next contended that so far as allegations against the

Respondent No.5 to 11 are concerned, the matter may be referred to Respondent No.1 for scrutinizing the service record of the Respondent No, 5, 6, 8 to 11.

7. We have heard learned counsel for the parties and perused the material available on record as well as case law cited at the bar.

8. The main prayer of the Petitioner is for his promotion, and setting aside of appointment/absorption/up-gradation of Respondents No.5 to 11 in the nature of Writ of quo-warranto under Article 199 of the Constitution.

9. During the course of arguments, learned counsel for the Petitioner pointed out that the appointment of Respondent No.7 was challenged in Cr. Orig. Petition No. 222/2016 in Civil Review Petition No. 193 of 2013 filed by Mr. Sertaj Ahmed Malgani before the Hon'ble Supreme Court of Pakistan, and in view of such fact, he did not press this Petition to the extent of Respondent No.7 which was disposed of accordingly to this extent vide order dated 10.05.2017.

10. Respondent No.4 has filed statement accompanying documents showing details of service record of Respondents No. 5 to 11 which are reproduced as follows:

- i) Respondents No. 5 was appointed as Ferro Printer BPS-5 on 25.1.1984 in KBCA,
- ii) Respondent No.6 was appointed as Assistant BPS-15 on 10.5.1992 in KBCA,

- iii) Respondent No.7 was appointed as Assistant BPS-15 on 17.9.1992 in KBCA,
- iv) Respondent No.8 was appointed as Assistant Store Keeper in BPS-5 on 28.8.1984 in KBCA,
- v) Respondent No.9 was appointed as Record Keeper in BPS-5 on 13.7.1980 in KBCA,
- vi) Respondent No.10 was appointed as Store Keeper in BPS-9 on 23.7.1992 in KBCA, and
- vii) Respondent No.11 was appointed as Naib Qasid in BPS-1 on 2.4.1985 in KBCA.

11. We have found that prima facie, there are serious discrepancies in the service record of Respondents No.5,6,8 to 11 regarding their appointment, up gradation, promotion and absorption in Sindh Building Control Authority (Sindh Local Government Department), which needs serious attention that whether the Respondents No.1 has fully implemented the judgment of Hon'ble Supreme Court. The Hon'ble Apex Court In the case of Ali Azhar Khan Baloch & others (supra) has held at Paragraph No. 121, which is as under:

“That the impugned judgment 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.”

12. Therefore, in our view the Judgment of the Honourable Apex Court is fully applicable in the case of the Respondent No. 5, 6, 8 to 11.

13. So far as the contention of the Petitioner with respect to his eligibility for promotion is concerned, record reflects that the Petitioner was suspended and reverted to his original post of L.D.C on the allegations that he failed to demolish the structures of the Flats built under his jurisdiction vide order dated 6.7.2011, an enquiry was conducted and he was found responsible by the Enquiry Officer on 20.8.2011, and finally he was dismissed from service vide order dated 26.10.2011. Per learned counsel for the petitioner he was subsequently reinstated in service and was still on regular duty, but on the contrary the learned counsel for the Respondent No 5 ,6,8 to 11 has refuted the claim of the Petitioner.

14. In the above circumstances, we are of the view that the claim and counterclaims of the Parties cannot be adjudicated by this Court under Constitutional jurisdiction therefore, at this juncture, we are not inclined to direct the Respondent No. 4, to consider the case of Petitioner for promotion. It is an established principle in law that in service cases there exists a two pronged criteria for promotions, one being eligibility for promotion and the other being fitness. In service matters, the promotion depends upon eligibility, fitness and availability of vacancy and thus no one including the Petitioner can claim promotion as a matter of right. No employee can claim promotion as his fundamental and vested right. This view finds support from the case of Secretary, Govt. of Punjab and other vs. Dr. Abida Iqbal and others [2009 PLC C.S. 431] and Government of Khyber Pakhtunkhawa and others vs. Hayat Hussain and others (2016 SCMR 1021).

15. In the light of foregoing, we direct the Respondent No. 1/Chief Secretary, Sindh to scrutinize the service record of Respondent No.5, 6, 8 to 11 within a period of two months and determine whether or not they have been legally promoted, up graded and absorbed and whether or not in their promotion, up-gradation and absorptions the directions of the Hon'ble Supreme Court in its judgment rendered in the case of Ali Azhar Khan Balouch (supra) have been adhered to or not and submit compliance report through MIT-II of this Court. The period of two months shall commence from the date of communication of this order to the Respondent No. 1/Chief Secretary/Sindh who is further directed to implement the judgment of the Hon'ble Supreme Court rendered in the case of Ali Azhar Khan Balouch supra in letter and spirit.

16. The Petition stands disposed of in the above terms.

JUDGE

JUDGE

Menohar P.A.