

IN THE HIGH COURT OF SINDH, AT KARACHI

Present:

Mr. Justice Aziz-ur-Rehman

Mr. Justice Adnan-ul-Karim Memon

C.P. No.D-740 of 2018

Dr. Mazhar Ali HisbaniPetitioner

Vs.

Province of Sindh & 02 othersRespondents

Dates of hearing: 29.03.2019

Date of Decision: 03.04.2019

Mr. Aijaz Ali Hisbani, Advocate for the Petitioner.

Mr. Abdul Jalil Zubedi, AAG alongwith Mr. Wali Muhammad Baloch, Deputy Secretary (Service Appeals), on behalf of the Chief Secretary Sindh and Mr. Muhammad Younus, Section Officer, Health Department, Government of Sindh.

J U D G M E N T

ADNAN-UL-KARIM MEMON, J:- By this Writ Petition, the Petitioner has impugned the Notification dated 28.11.2017, issued by Chief Secretary, Sindh, whereby the promotion of Petitioner from BS-19 to BS-20 has been deferred on account of pendency of a criminal case against him, arising out of FIR No.GO-02/2012 of ACE, Naushahro Feroze. The Petitioner has seriously criticized the action of the respondents as arbitrary, vindictive and violative of his fundamental rights.

2. The facts leading to the present case, in nutshell, are that the Petitioner is working as `Senior Doctor` in BPS-19 in Health Department Government of Sindh. The basic grievance of the Petitioner is that his case for promotion in BS-20 was placed before the Provincial Selection Board-I under the Chairmanship of Worthy Chief Minister, Sindh. The Board in its meeting as discussed

supra, deferred the promotion of Petitioner for the reason that he is facing Anti-corruption case i.e. FIR No.GO-02/2012 of ACE, Naushahro Feroze. The Petitioner has submitted that his juniors have been promoted in BS-20 vide office order dated 28.11.2017, as this is sheer discrimination which has been meted out to him, which is not sustainable in law. Petitioner being aggrieved by and dis-satisfied with the aforesaid decision of the Provincial Selection Board-I has filed the instant Petition on 27.01.2018.

3. Upon notice, the Respondents have filed `para-wise comments` in which they have controverted the stance taken by the Petitioner.

4. Mr. Aijaz Ali Hisbani, learned counsel for the Petitioner has contended that the impugned order dated 28.11.2017 is result of personal grudge and departmental intrigues; that prior to issuance of impugned office order no departmental inquiry was conducted on the purported allegations leveled against him in the FIR, no opportunity of hearing was given to the Petitioner, as such, impugned order is not lawful, non-speaking order thus not sustainable in law; that discrimination has been meted out with the Petitioner; that the Petitioner is denied from being promoted merely because of pendency of an FIR against him, which ground is not justiciable under the law. He emphasized that no promotion of the civil servant can be withheld on account of pendency of a criminal case for the reason that every person is presumed to be innocent till proven guilty by competent Court of law; that no disciplinary proceedings are pending against the Petitioner, arising out of the aforesaid F.I.R, therefore, the decision of the Provincial Selection Board-I deferring the case of Petitioner for promotion in BPS-20 is erroneous and is against the basic spirit of Service Law; that the case of Petitioner for promotion has not been considered

on merit. In support of his contention, he relied upon in the case of *Muhammad Hanif vs. Province of Sindh & others* [2011 PLC (C.S) 534], *Muhammad Amin vs. Managing Director, House Building Finance Corporation and others* [2016 PLC (C.S) 569] & *Muhammad Akbar Khan Durrani vs. Federation of Pakistan and others* [2017 PLC (C.S) Note 31]. He lastly prayed for allowing the instant Petition.

5. On the contrary, Mr. Abdul Jalil Zubedi, learned AAG has raised the preliminary objection with respect to the maintainability of the instant Petition and supported the stance of the Respondent-Department. Learned AAG has argued that under Rule 13(d) of Sindh Civil Servants (Probation, Confirmation and Seniority) Rules, 1975, the case of Petitioner for promotion in high rank can be deferred on account of pendency of disciplinary proceedings or criminal case, which has far reaching effect on the service career of the civil servant, therefore, till final adjudication of the matter the petitioner cannot be considered for promotion in next rank; that the competent authority decided his case on merits without any discrimination purely in accordance with rules/ promotion policy; that the Petitioner's service record is not clear, therefore cannot be placed at par with those who have unblemished service record; that the main case of corruption and corrupt practices is still pending for adjudication before the competent Court of law, as such his promotion in BS-20 is subject to final outcome of the criminal case under the promotion policy as discussed *supra*; that no any discriminatory treatment has been meted out with the Petitioner on any ground of whatsoever nature; that no vested/fundamental right of the Petitioner is involved in promotion case. Learned AAG in support of his contention has relied upon the case of *Chief Secretary Sindh vs. Riaz Ahmed*

Massan & others [2016 SCMR 1784]. He lastly prayed for dismissal of the instant Petition.

6. We have heard learned counsel for the parties and considered their submissions and have perused the material available on record and case law cited at the bar.

7. As regards the preliminary objection raised by the learned AAG regarding maintainability of the present petition as according to him, since the matter is relating to terms and conditions of civil servants fall in the exclusive jurisdiction of Sindh Service Tribunal in terms of Article 212(2) of the Constitution of Islamic Republic of Pakistan, 1973 read with Section 3(2) of Sindh Service Tribunal Act, 1973, therefore, the Petitioner cannot invoke the jurisdiction of this Court, it may be observed that as per Section 4(1)(b) of the Sindh Service Tribunal Act, 1973, the Sindh Service Tribunal has no jurisdiction on the controversy of the determination of fitness and suitability of a Civil Servant for a job and for promotion. For the sake of convenience, Section 4(b) of the Sindh Service Tribunals Act, 1973, is reproduced as under:-

“4(b) no appeal shall lie to a Tribunal against an order or a decision of a departmental authority determining the fitness or otherwise of a person, to be appointed to or hold a particular post or, to be promoted to a higher post or grade; and”

8. In our view, no representation shall lie on matters relating to the determination of fitness of a Civil Servant to hold a particular post or to be promoted to a higher post. As is evident from the above provisions, no remedy by way of filing appeal etc. is provided to the Civil Servants against determination of fitness; therefore, no person can be left remediless under the law. Our view is supported by the decision rendered by the Hon’ble Supreme Court of Pakistan in the case of *Ali Azhar Khan Baloch vs. Province of Sindh*

[2015 SCMR 456]. The Hon'ble Supreme Court has held at Paragraph No.150 as under:-

“150. The High Court of Sindh has completely overlooked the intent and spirit of the Constitutional provisions relating to the terms and conditions of service, while entertaining Civil Suits and constitution petitions filed by the civil servants, which are explicitly barred by Article 212. The expression 'Terms and Conditions' includes transfer, posting, absorption, seniority and eligibility to promotion **but excludes fitness or otherwise of a person, to be appointed to or hold a particular post or to be promoted to a higher post or grade as provided under section 4(b) of the Sindh Service Tribunals Act, 1973.** Surprisingly, it has been ignored that it is, by now, a settled principle of law that the civil and writ jurisdictions would not lie in respect of the suits or petitions filed with regard to the terms and conditions of Civil Servants, and yet some of the learned Judges of High Court of Sindh have erroneously exercised both civil and writ jurisdictions with regard to the terms and conditions of civil servants.” **[Emphasis Added]**

Further reliance is made in the case of *Tariq Aziz-uddin in Human Rights Cases Nos. 8340, 9504-G, 13936-G, 13635-P & 14306-G to 143309-G of 2009* **[2010 SCMR 1301]**.

9. As per the pleadings of the parties and arguments extended thereon, it appears from the record that Petitioner has been shown senior Medical Officer in BPS-19 in the Seniority List vide Notification dated 20.08.2017, which was issued in pursuance of Rule 9 of the Sindh Civil Servants (Probation, Confirmation & Seniority) Rules, 1975, whereas the aforesaid FIR was lodged in the year 2012, which *prima-facie* show that no action i.e. disciplinary proceedings were undertaken by the Respondent-Department against the Petitioner during that tenure without assigning any cogent reason, which is sheer negligence on their part.

10. In the present proceedings, an important question arises is whether a Civil Servant against whom a case of corruption has been registered by the Anti-corruption police and is under adjudication before the competent court of law can be promoted to a higher rank, during the pendency of such criminal case?

11. We have noted that in case where a civil servant is accused of subversion, corruption or misconduct the authorized officer may require him to proceed on leave or, with the approval of the

authority, suspend him, provided that any continuation of such leave or suspension shall require approval of the authority after every three months under Sindh Civil Servants (Efficiency and Discipline) Rules, 1973 and if no action is taken against the delinquent official on the aforesaid charges, the department has to account for that departmental negligence, which is serious in nature cannot be ignored and condoned.

12. We may observe here that, indeed the writ jurisdiction of this Court is not meant to be exercised to compel the competent authority to promote a Civil Servant against whom *prima facie* evidence showing his involvement in the serious charges of misconduct was available, for the reason that any such direction would be disharmonious to the principle of good governance and canon of service discipline. Rather causing undue interference to hamper smooth functioning of the departmental authorities. On the aforesaid issue, we are fortified with the decision rendered by the Hon'ble Supreme Court of Pakistan in the case of *Mst. Iffat Nazir vs. Government of Punjab and others* [2009 SCMR 703].

13. We are also cognizant of the fact that, posts in BS-20 positions require selection on the basis of merit and promotions to such posts could not be made in a mechanical manner and a variety of factors, such as examination of service records, evaluation reports of training institutions, record of disciplinary proceedings, reputation of integrity and efficiency, suitability for handling particular assignment, etc. had to be taken into consideration. It is also a fact that a substantial amount of subjective evaluation of an officer's capabilities is involved. Therefore, normally questions of determination of fitness of a person to be promoted are not capable of being scrutinized on the basis of judicially manageable standards. Nevertheless, such

subjective evaluation is to be premised on an objective criteria with the object of evolving such objective criterion, the Government itself has been issuing promotion policy guidelines and developed methods of quantifying confidential reports; which have been treated at par with statutory rules. It may be clarified that the assessment of an officer's performance during a year may completely depend on the subjective opinion of his Reporting Officer. The weightage required to be accorded to it for the purpose of determining fitness for promotion entails, an objective assessment. Indeed, the Courts will not sit in judgment over subjective evaluation but would indeed be competent to examine whether the required objective criterion was followed. In our view in the seniority/promotions cases no vested right/fundamental right can be claimed. 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], *Government of Khyber Pakhtunkhawa and others vs. Hayat Hussain and others* [2016 SCMR 1021] & *Khan M. Muti Rahman and others* [2006 PLC (C.S) 564].

14. Reverting to the present case, for “deferment” of promotion of the petitioner, in our view deferment is not equated with “supersession” in service jurisprudence that no promotion can take place in future. We have noted that Respondent-Department adopted the revision of Promotion Policy [October, 2007] of Government of Pakistan, whereby in light of clause “b” an officer of the department can be deferred for the promotion on the following reasons:-

“(b) Conditions for Deferment

A civil servant shall be deferred due to the following reasons:-

(i) Not undergone the prescribed training or passed departmental examination.

(ii) Non-submission of Part-I and Part-II of the PER by the concerned officer to his reporting officer in respect

of his service in the present grade and the preceding grade.

(iii) When the Board considers the record as incomplete, or wants to further watch the performance of the officer or for any other reason to be recorded in writing.

(iv) Disciplinary or departmental proceedings are pending against the civil servant.

(v) The civil servant is on deputation abroad to a foreign government, private organization or international agency.

(vi) The civil servants *inter-se-seniority* is sub-judice.

2. The civil servant whose promotion has been deferred will be considered as soon as the reason on the basis of which deferment took place ceases to exist provided that a civil servant falling in the category mentioned in para 1 (b)(v) above will be considered for promotion only on his return to Pakistan and earning at least one PER for one full year before he is considered for promotion.”(Emphasis Added)

15. The next point which needs serious attention, whether Petitioner’s promotion can be deferred for an indefinite period on the aforesaid charges?

16. In our view, if a Civil Servant, who is not promoted on his turn on the following grounds, shall on subsequent promotion, subject to any order made by the competent authority in this behalf, for the purpose of inter-se-seniority in the higher post is deemed to have been promoted in the same batch as his juniors. The Rule-13(1) of the Sindh Civil Servants (Probation, Confirmation & Seniority) Rules, 1975 makes the case in hand clear. For convenience sake an excerpt of the aforesaid Rule is reproduce as under:-

“(i) his seniority is under dispute or is not determined;
or

(ii) he is on deputation, training or leave; or

(iii) disciplinary proceedings are pending against him;
or

(iv) he is not considered for promotion for any reason other than his unfitness for promotions;
(Emphasis Added)

17. In the light of forgoing Rule position which clearly demonstrates that in case where an officer against whom disciplinary proceedings is pending, is proposed to be promoted,

the details of the allegations/report, invariably be put up to the Promotion/ Selection Board, it will then be for the promotion/ selection Board to take cognizance of the report and ask for progress report, postpone consideration of the case or ignore it. In present case the petitioner did admit that on account of pendency of a criminal case regarding corruption and corrupt practices is still pending against the Petitioner before the Court of law and he has yet to come out of that case. At this juncture, in our view his case for promotion in the next rank i.e. BS-20 was rightly deferred for the time being till the Petitioner overcomes from the aforesaid clog or department exonerates him from the charges after conducting the disciplinary proceedings. The Hon'ble Supreme Court has already settled the similar issue in the case of Mst. Iffat Nazir as discussed supra at paragraph-705 as under:-

“Indeed the writ jurisdiction was not meant to be exercised to compel the competent authority to promote a civil servant against whom prima facie evidence showing her involvement in the serious charges of misconduct was available, for the reason that any such direction would be disharmonious to the principle of good governance and canon of service discipline. Rather causing undue interference ' to hamper smooth functioning of the departmental authorities.”

18. The Hon'ble Supreme Court in the case of Hayat Husain and others as discussed *supra* has settled the issue in promotion cases of Civil Servants, which is guiding principle on the subject and held at paragraph-8 as under:-

“8. It is a settled proposition of law that the Government is entitled to make rules in the interest of expediency of service and to remove anomalies in Service Rules. It is the Service Rules Committee which has to determine the eligibility criteria of promotion and it is essentially an administrative matter falling within the exclusive domain and policy decision making of the Government and the interference with such matters by the Courts is not warranted and that no vested right of a Government employee is involved in the matter of promotion or the rules determining their eligibility or fitness, and the High Court has no jurisdiction by means of writ to strike it down as held by this Court in the case of The Central Board of Revenue, Government of Pakistan v. Asad Ahmad Khan (PLD 1960 SC 81), the relevant portion therefrom is reproduced herein below:-

"In our opinion the High Court made the above order without taking into consideration all the factors relevant to the case, namely, in the first place the taking out of the post of Deputy Superintendent of the category of class III, to which the petitioners belong amounted to abolition of the post and its upgrading on a higher scale of pay to a creation of the new post; appointment to which required a stricter test of efficiency by a competitive examination. Besides, all the Inspectors

were given the right to sit in the examination for any number of times to qualify themselves for promotion. At the same time the pay scale of those, who could not succeed, was raised to the limit of Rs. 350, namely, the same pay as that of a Deputy Superintendent when it was a class III post. In the circumstances it cannot be said that any rights of the petitioners were infringed, which they could enforce by a writ petition. The Government has every right to make rules to raise the efficiency of the services, and if no vested right is denied to a party, the High Court had no jurisdiction to interfere by means of a writ." (Emphasis supplied)

As far as the contention of the respondents that the rules could not be changed to affect them adversely is concerned, the said proposition has also been settled by this Court in the case of Muhammad Umar Malik and others v. Federal Service Tribunal and others (PLD 1987 SC 172), wherein the proposition that the rules of promotion could not have been changed so as to affect adversely those already on the eligibility list i.e., combined list of U.D.Cs and S.G.Cs, was repelled by observing that, "No such vested right in promotion or rules determining eligibility for promotion exists", and held as under:-

"Mr. Abid Hasan Minto, Advocate, when called upon to address arguments on merits, urged that the rules of promotion should not have been changed so as to affect adversely those already on the eligibilities list i.e. the combined list of the U.D.Cs. and S.G.Cs. In other words he was claiming a vested right in promotion for all the U.D.Cs. borne on the joint cadre on the date of its separation. The position of law on the subject is clear in view of numerous decisions of this Court, e.g. Government of West Pakistan v. Fida Muhammad Khan (1) Central Board of Revenue, Government of Pakistan v. Asad Ahmad Khan (2), Province of West Pakistan v. Muhammad Akhtar (3), Manzur Ahmad v. Muhammad Ishaq (4). No such vested right in promotion or rules determining eligibility for promotion exists."(Emphasis Added)

19. In the light of forgoing, we are clear in mind that pendency of the criminal case/disciplinary/departmental proceedings, a final decision against the Petitioner has yet to be taken by the Respondent-Department, therefore, respondents have rightly deferred the promotion of the Petitioner in BPS-20, which is in the line with the decision rendered by the Hon'ble Supreme Court in the case of Mst. Iffat Nazir as discussed *supra*.

20. To conclude the matter, we are of the considered view that if the Petitioner overcomes the clog of pendency of criminal case/disciplinary/departmental proceedings against him, if not finalized earlier, the disciplinary/departmental proceedings shall be finalized within a period of three months from the date of decision of this Court, thereafter he will be at liberty to move afresh application to the Competent Authority for consideration of his promotion purely on merits.

21. In the light of above facts and circumstances of the case, we direct the Chief Secretary, Sindh to implement the judgments of the Hon'ble Supreme Court as discussed in the preceding paragraphs on the service issues of the civil servants, in its letter and spirit.

22. Resultantly, the instant petition is found to be meritless, which is dismissed along with pending Application[s]. Let a copy of this judgment be communicated to the Chief Secretary, Sindh for information and compliance.

Nadir/PA

JUDGE

JUDGE