

**ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI**

Suit No.630 of 2020

Mohammad Tarique Khan
Versus
Trading Corporation of Pakistan (Pvt.) Ltd. & others

Date	Order with signature of Judge
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1. For orders as to maintainability of suit.
2. For orders on CMA 11915/2020
3. For hearing of CMA 4778/2020
4. For hearing of CMA 4779/2020
5. For hearing of CMA 5151/2020

Date of hearing: 24.01.2022, 25.01.2022 and 11.02.2022

Mr. Junaid Ahmed for plaintiff.

Mr. Fayyaz Ali Metlo for defendants No.1 to 4.

Mr. Khursheed Jawed, Deputy Attorney General for defendants No.5 and 6.

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Muhammad Shafi Siddiqui, J. - By this order I intend to dispose of three applications filed by the plaintiff seeking interim relief and one filed by the defendants No.1 to 4 for rejection of plaintiff.

Brief facts to decide the interim applications are that plaintiff is an employ of defendant No.1 in terms of office order dated 03.10.2001 followed by office order 04.11.2011 in terms whereof he was regularized. In order to show mala fide on part of defendants, it is pleaded by the plaintiff that though he performed satisfactorily however was deprived of promotion in 2016 to which he agitated which annoyed the high-ups and plaintiff became their target. Consequently plaintiff was issued show-cause notice dated 12.04.2017, which was subject matter of Suit No.1097 of 2017 filed by the plaintiff, in which show-cause he was exonerated in terms of inquiry report dated 28.12.2018. However, the competent authority did not concede to the findings of

inquiry report and issued another show-cause notice to the plaintiff on 11.06.2019 which was impugned in Suit No.1068 of 2018 wherein injunction application was allowed and show-cause notice was suspended. The plaintiff pleads that the defendants thereafter, in order to deprive the plaintiff of his rights, changed the promotion policy and also reconstituted the selection board for promotion. Plaintiff has thus filed this suit mainly challenging the policy in respect of promotion and bonus etc. Through interim application plaintiff seeks to (i) consider him for promotion in the upcoming selection board meeting, (ii) to release withheld Eid assistance since 2017 and to restrain defendants from withholding the same in future and (iii) suspend order dated 17.06.2020 that concerns promotion respectively.

Defendants have pleaded that the suit is not maintainable in terms of Section 21 of Specific Relief Act, 1877 as defendant No.1 is a private limited company with no statutory rules. Furthermore, the suit is claimed to be barred in terms of Order XXIII Rule 1(3) CPC. The defendants claimed the subject matter of instant suit to be the same which was already agitated in the earlier suit hence the suit is not maintainable. It is further pleaded that in terms of Rule 21(iv)(d) of TCP Recruitment Rules 2005 no promotion can be given during pendency of departmental proceedings.

I have heard learned counsel appearing for parties and perused material available on record.

Defendant No.1 served first show-cause notice upon plaintiff on 12.04.2017 followed by charge sheet dated 15.08.2017. The said show-cause notice was impugned in Suit No. 1097 of 2017 and this Court on 27.04.2017 passed interim order in terms whereof defendants were restrained from passing final order. The plaintiff then withdrew the aforesaid suit on 25.08.2017. The inquiry officer however vide his report

dated 29.12.2018 exonerated the plaintiff of the charges leveled in terms of first show-cause notice. However, defendant No.1's authorized officer did not concede to the findings of inquiry report and issued fresh show-cause notice on 11.06.2019 which was impugned in Suit No.1068 of 2019 wherein vide order dated 17.12.2019 this second show-cause notice was suspended. The operative part of the order is as under:-

"8.Apparently, on the basis of the record placed before the Court, this appears to be an exercise of unfettered discretion on the part of the officer, perhaps to settle some personal grudge, which this Court cannot permit; whereas, apparently the rules have been violated, and the impugned action has been taken in haste and without proper application of mind.

9. In view of hereinabove facts and circumstances of this case, I am of the view that the Plaintiff has made out a prima facie case and balance of convenience lies in his favour, whereas, if the injunction is refused irreparable loss would be caused to him as admittedly the 8 impugned Show Cause Notice appears to be without any lawful authority and jurisdiction and if permitted the Defendants would proceed further on such basis which shall seriously prejudice the Plaintiff. Accordingly, by means of a short order on 17.12.2019, listed application was allowed in the terms that the impugned Show Cause Notice shall remain suspended and defendants were restrained from any further proceedings till final adjudication of this Suit and these are the reasons in support thereof."

On 04.05.2020 defendant No.1 constituted a Selection Board for promotions including for the subject post of Deputy General Manager. In the meantime Eid bonus of plaintiff was withheld on account of pendency of disciplinary proceedings. Plaintiff presuming that he may not be promoted has filed a representation before defendant No.1 followed by present suit.

It is a settled principle of law that promotion cannot be deferred on the ground of pendency of some disciplinary or departmental proceedings. It is held by the superior Courts that depriving an incumbent of his promotion merely on pendency of departmental or disciplinary proceedings is not a lawful ground, if otherwise he has fulfilled the criteria for consideration of the promotion.

Even otherwise, there is no departmental/disciplinary proceedings pending against the plaintiff as in the first show-cause notice, the plaintiff has already been exonerated whereas as far as second notice is concerned, the same has been suspended, in terms of the order reproduced above. Such facts are not disputed by the learned counsel appearing for the defendants, as being a matter of record. Thus, even the bonus/Eid allowance cannot be denied on account of pendency of the proceedings.

Eid Assistance/Bonuses are treated at par with that of salary and admittedly when there is no reason to stop salary, former also cannot be withheld on such pretext. Indeed it is a settled principle of law that unless an employee is terminated, none of his emoluments can be withheld hence for no reason Eid allowance/bonus can be withheld either of past period or for future.

A promotion cannot be deferred till such time the enquiry and/or disciplinary proceedings are finalized as a person is presumed to be innocent until found guilty¹. Pendency of inquiry and minor penalties could not come in way of promotion; enquiry proceedings pending against plaintiff for an indefinite period smacked of arbitrariness and mala fide and is a hanging sword on head of employees; such treatment could not sustain in eye of law to deprive the plaintiff of promotion². Pendency of inquiry was no ground for denying promotion to the employee and no one could be punished by denying promotion before establishing charge³. Any such rule formed in deviation of settled principle of law would not come in the way of equality rights guaranteed by Constitution.

¹ 2007 PLC (CS) 716 (Muhammad Ayaz Khan v. Government of Sindh)

² 2009 PLC (CS) 40 (Muhammad Afzal Khan v. Government of Punjab)

³ 2016 PLC (CS) 569 (Muhammad Amin v. Managing Director HBFC)

In order to demonstrate that second show-cause notice after the direction of the Court in Suit No.1068 of 2019 to be a harassment, learned counsel for plaintiff has cited the case of Nelson Paul⁴. Prima facie plaintiff has ably made out a case for consideration of his promotion and release of Eid/Bonus allowance as the plaintiff's case vis-à-vis promotion will stand on its own merit.

As regards rejection of plaint under order VII rule 11 CPC on the ground of res judicata is concerned, the defendants plead that the subject matter of instant suit has been decided in the earlier suit and/or the subject matter of earlier suit. In this regard firstly the subject matter of instant suit is a subsequent show-cause notice which was not even in existence at the time of filing earlier suit. Therefore neither principle of order 2 rule 2 nor doctrine of order 23 rule 1 CPC would apply.

Furthermore present suit as filed by the plaintiff is in respect of promotion while in earlier suits show-cause notices were challenged hence there are different causes of action matured at different occasions.

In view of above, applications bearing CMA No.4778 and 4779 of 2020 are allowed with direction to release withheld Eid/Bonus allowance, if any, to the plaintiff in two weeks' time and the plaintiff be considered for promotion on merit in the upcoming selection board meeting and his case be decided in accordance with law whereas application 11915 of 2020 under order VII Rule 11 is dismissed.

Insofar application bearing CMA No.5151 of 2020 is concerned, this application has two parts one in respect of letter whereby three incumbent officers were promoted whereas other part pertains to letter of even date recommending deferment of the case of plaintiff for

⁴ 2006 SCMR 647 (Nelson Paul v. Mst. Asmat Parveen)

promotion. As far as the first letter attached to this application is concerned since none of the three officers have been arrayed as defendants, therefore, in their absence this part of the application merits no consideration. However as far as second attached letter of even date i.e. 17.06.2020 is concerned this part of the application is disposed of as having become infructuous in view of findings on applications bearing 4778 and 4779 of 2020 above.

Dated:

Judge