

**IN THE HIGH COURT OF SINDH, KARACHI**

Constitutional Petition No.D-2288 of 2016

Present:

Mr. Justice Syed Hassan Azhar Rizvi

Mr. Justice Adnan-ul-Karim Memon

Ms. Azra Muqem  
& another, Petitioners  
through

: Malik Naeem Iqbal, Advocate

Karachi Metropolitan Corporation  
& others, Respondents  
through

: Mr. M.M. Aqil Awan, Advocate for  
Respondents No. 1 & 3  
Mr. Rafiq Rajourvi, Assistant  
Advocate General, Sindh

Date of hearing

: 18.09.2017, 08.11.2017,  
29.11.2017 and 7.12.2017

**JUDGMENT**

**ADNAN-UL-KARIM MEMON, J.:-**Through the instant

petition, the petitioners have prayed for the following relief(s): -

- i. *Declare that the order dated 13.11.2013 to the extent of promotion of Respondent No.3 and 4 as Director Law (BS-19) and Office Order dated 29.03.2016 to the extent of transfer of Respondent No.3 as Legal Advisor (Litigation) are illegal, malafide, unconstitutional, contrary to the principle of natural justice and violative of the orders passed by Hon'ble Apex Court in Criminal Original Petition No.89 of 2011 and to set aside the same forthwith to the extent of Respondent No.3 and 4;*
- ii. *Suspend the operation of Order dated 13.11.2013 and 29.03.2016 to the extent of the Respondent No.3 and 4 till final adjudication of the captioned petition;*
- iii. *Direct the Respondents No.1 and 2 to consider the case of petitioners for promotion from BS-18 to BS-19 forthwith w.e.f. 13.11.2013 when Respondents No.3 and 4 were illegally promoted against the posts meant for petitioners.*

2. Brief facts of the case are that on 04.12.1997 and 19.12.1997, the Petitioners were appointed as Assistant Legal Advisors in BS-17 and promoted to (BS-18) vide order dated 22.11.2008 as District Officer Law and Additional District Officer Law, respectively. Petitioners have averred that owing to out of cadre of the promotion of Respondent No. 3 and 4 as Legal Advisors in BS-19 against the post of Petitioners' cadre/hierarchy, despite the fact they did not possess degree in Law and other requisite qualification. Petitioners added that the Petitioner No1, being eligible and possessed degree in Law, in the year 2013 moved an application for consideration of her promotion from BS-18 to BS-19. Being at Sr. No.1 and 2 of the seniority list of officers belonging to Law Department of KMC as stood on 02.04.2012, the case of Petitioner No.1 was recommended for promotion from BS-18 to BS-19. But, the Respondents No.1 and 2 vide their order dated 13.11.2013 promoted respondents No.3 and 4 against the post of Director Law (BS-19) having no qualification. The Respondent No.3 belongs to Accommodation Department, whereas the Respondent No.4 belongs to Land Department of KMC; thus, both of them are not eligible for promotion as Director (BS-19) for the reasons that they neither possess degree in Law nor belong to the Law Department of the respondent No. 01/KMC and have no concern with the Legal Department of Respondent No.1. As such, promotion of the respondents' No. 03 and 04 is illegal and violation of the order passed by Honorable Supreme Court of Pakistan in Criminal Original Petition No.89 of 2011. The petitioner No.2 preferred a representation to the respondent No.1 and 2 but of no avail and the Petitioners have been deprived of their i.e. promotion

as Director in BS-19 post. The petitioners have averred that the order dated 13.11.2013 to the extent of promotion of Respondents No.3 and 4 as Director (BS-19) and Office Order dated 29.3.2016 to the extent of transfer of Respondent No.3 as Legal Advisor (Litigation) are illegal, mala fide, capricious, contemptuous and contrary to the principles of natural justice, whereby rights of the petitioners have been infringed.

3. Upon notice, the Respondents have filed para-wise comments and denied the allegations leveled by the petitioners.

4. Malik Naeem Iqbal, learned Counsel for the Petitioners contended that the Respondents No.3 and 4 have been illegally promoted against the out of cadre post of Director Law (BS-19) belonging to Law Department and that they do not possess the degree in Law also; thus, blocked promotion of the Petitioners. In support of his contention, he placed reliance on West Pakistan Municipal Committees Service Rules, 1969 which govern service of KMC employees. He further asserted that in exercise of powers conferred under Section 8(2) of West Pakistan Municipal Committees Service Rules, 1969, KMC laid down method of recruitment and qualification for various posts in different branches in KMC, including Law Branch. As per method of recruitment and qualification, post of Legal Advisor BS-19 in Law Branch of KMC could be filled by promotion from amongst Deputy Legal Advisors (BS-18) subject to condition that they possess qualifications and experience prescribed for the post, which is BA, LLB, LLM and enrollment as an advocate of High Court/Supreme Court with 15 years' experience at Bar. Besides Rule 3(2), prohibits

promotion of employees of one cadre of service in KMC against a post of any other cadre. Learned counsel relied upon the case of Ali Azhar Khan Baloch vs. Province of Sindh reported in 2015 SCMR 456, wherein the Honorable Supreme Court in paragraph 121 while considering the argument of counsel representing review Petitioners repelled the contention that the Judgment of the Honorable Supreme Court reported in (2013 SCMR 1752) is not applicable to non-civil servants, but applicable to the Government/Civil servants, employees of any statutory or non-statutory organization controlled by Sindh Government, who were wrongly absorbed in different cadres, services, posts in Government Departments, statutory organizations against their service Rules; that while applying principles of law enunciated in paragraph 126 of the Judgment reported in (2013 SCMR 1752) in the case of KMC, it is obvious that officer belonging to one cadre, service and grade cannot be appointed in other cadre, service and grade; that word cadre has been used in Rules, 1969 and meaning of cadre are now well settled; that all those posts having similar functions and against which similar qualification is prescribed are part of one cadre as per definition of "cadre" and its interpretation by Superior Courts. Accordingly, irrespective of any cadre being separately notified (which is not the requirement under any law), recognized norms of services laws, require that a group of Government servants doing similar duties and performing similar functions and for whose appointment, same qualifications and experience have been prescribed, constitute one cadre and another group of Government Servants cannot be appointed against such cadre.

5. The learned counsel for the Petitioners has further argued that the rules of 1969 were framed in exercise of powers conferred under Section 29 and Section 121 of Municipal Administration Ordinance, 1960. However, he continued and added that the said Ordinance, 1960 was repealed by Sindh Peoples Local Government Ordinance, 1972, but the rules framed there under were saved vide Section 4 of Sindh Peoples Local Government Ordinance, 1972 and that Sindh Peoples Local Government Ordinance, 1972 was repealed by Sindh Peoples Local Government Ordinance, 1979, but Service Rules of 1969 were saved vide Section 120 (2) (a) of the Ordinance, 1979. He further added that Sindh Peoples Local Government Ordinance, 1979 was repealed by Sindh Local Government Ordinance, 2001, but the Rules already in force/field were saved under Section 196 of Sindh Local Government Ordinance, 2001; which was also repelled vide Sindh Local Government Act, 2013; but under Section 160 of the Act, 2013 the 1969 Rules were saved. He concluded that West Pakistan Municipal Committees Service Rules, 1969 still hold the field and as per Section 8(2) of these rules, KMC have laid down method of recruitment and qualification prescribed for various posts in different branches in KMC including Law Branch, which are still in field and the promotion of the Respondents No. 3 and 4 against post in Law Department/Branch of KMC are nullity in law. Having presented his case as above, he prayed that the petition may be allowed and the Respondent No. 1 be directed to promote the Petitioners, who are eligible and possess required qualifications, against BPS-19 posts in Law Department /Branch.

6. In rebuttal, Mr. M.M. Aqil Awan, learned counsel for Respondent No.1 & 3 has referred to his counter affidavit and contended that Respondent No.3 is holding the post of Legal Advisor (Litigation) (BPS-19) after proper approval of Competent Authority; that Respondent No.3 had been promoted in BPS-19 vide order dated 13.11.2013 and at that time Petitioners did not object nor filed any application, but after the lapse of almost 2 and a half year this petition has been filed, as such the instant petition falls within the ambit of laches and not maintainable; that KMC Council, passed Resolution No.31 on 08.6.2006, the Officers of other Departments after promotion can be posted in Law Department with all allowances and other benefits. It is further contended that no violation of the Honorable Supreme Court's order has been made by the Department and Respondents No.3 and 4 have been promoted on the basis of seniority-cum-fitness. In support of his contentions, learned counsel for the Respondents No.3 has relied upon the case of Allah Nawaz Shaikh v. Punjab Labour Appellate Tribunal [1997 SCMR 573], Nizam Din v. Additional Settlement Commissioner (Land) [1989 SCMR 154], Dawood Yamaha Ltd. v. Government of Baluchistan [PLJ 1987 Quetta 195], Chairman, Pakistan Council of Scientific and Industrial Research, Islamabad v. Khalid Razi [1995 SCMR 698], Muhammad Din v. Abdul Ghani [2012 SCMR 1004].

7. Respondent No.4 also filed objection, wherein he has denied the contentions of the Petitioners. He submitted that the Petitioners have raised disputed questions of fact requiring a detailed factual enquiry, which cannot be entertained and

adjudicated in a Constitution Petition. It is contended that this Court in exercise of Constitutional jurisdiction cannot ordinarily embark upon an exercise to determine intricate and contested questions of fact. The Petitioners have alternate equally efficacious remedies, which they have not exercised, hence the captioned petition is liable to be dismissed as not maintainable as it involves disputed, controversial and complicated questions of fact, which cannot be decided in the Constitutional jurisdiction and the contents of the instant petition are false and frivolous, thus cannot be considered in the present proceedings.

8. Mr. Rafiq Rajourvi, Learned Assistant Advocate General, Sindh has referred to his statement dated 19.1.2017 and relied upon West Pakistan Municipal Committees Service Rules, 1969 and Manual of Municipal Administration Law and Practice and argued that as per law the prescribed qualification of Legal Advisor BPS-19 in Law Branch is B.A., LL.B and enrolment as Advocate of the High Court/Supreme Court with 15 years practicing experience at the Bar and the post can be filled by promotion from the existing incumbent of the post of Deputy Legal Advisor (BPS-18) provided he fulfills the prescribed qualification and experience. He further added that, if the existing incumbent of the post of Deputy Legal Advisor (BPS-18) does not fulfill the prescribed qualification and experience, then by initial recruitment, the post can be filled. He lastly prayed for decision of the instant petition on merit.

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

10. The primordial question which agitates the controversy in hand is as to whether Respondents No.3 and 4 can be absorbed/promoted in BPS-19 in Law Department of KMC?

11. To address this question we refer Rule 9-A of Sind Civil Servant (Appointment Promotion and Transfer) Rules, 1974, which provides that a person, who has been rendered surplus on account of abolition of a post of the Government or any autonomous body or on account of permanently taking over the administration of such autonomous body wholly or partially by the Government, he may be appointed to any post in any Department of the Government.

12. Admittedly the post of the Respondents No. 3 and 4 were not abolished before their purported absorption in law Department of KMC. Record shows that both the Respondents, who belonged to Accommodation and Land Departments of KMC respectively, and have been accommodated in the first place in Law Department and thereafter promoted in BPS-19 in the same department without legal observance, vide order dated 13.11.2013.

13. We have perused the order dated 13.11.2013, which is a recommendation of DPC-1, whereby Respondents No.3 and 4 were promoted in BPS-19 in Law Department of KMC. The Seniority list of officers belong to Law Department of KMC shows that Petitioner No.1 was initially appointed as Assistant Legal Advisor in BPS-17 on 28.11.1997, she was promoted as District Officer in BPS-18 on 22.11.2008, whereas the Petitioner No.2 was appointed on 04.12.1997 in BPS-17 and subsequently promoted in BPS-18 on



22.11.2008, surprisingly when DPC took place on 14.10.2013 the Petitioners were ignored/by passed for their promotion in BPS-19 and Respondents No.3 and 4 were promoted in place of Petitioners as per seniority list of Law Department of KMC. We have noticed that this is not a mere matter of transfer and posting in KMC but the Respondents No.3 and 4, who have been promoted in BPS-19 not in their parent department/cadre, but in another department in different cadre i.e. Law Department, that practice has been halted by the Honourable Supreme Court of Pakistan in the case of Ali Azhar Khan Baloch (supra).

14. We have perused Section 8(2) of West Pakistan Municipal Committees Service Rules, 1969. As per method of recruitment and qualification the post of Legal Advisor BPS-19 in KMC can only be filled by promotion from amongst Deputy Legal Advisors BPS-18 provided he fulfills the qualification and experience i.e. B.A., LL.B, and LL.M with 15 years' experience at the Bar. During the course of arguments the learned counsel for the Respondent No. 1 and 3 was confronted with such legal position, he could not give any convincing reply to rebut the query raised by this Court, however, he only relied upon Section 126 of Sindh Local Government Act, 2013 and argued that there is no legal bar that no officer outside of Law Department can be posted in Law Department, with further assertion that the Competent Authority of KMC passed Resolution on 08.6.2006, whereby the Respondent No.3 was posted in Law Department and promoted in BPS-19, which is within the parameters of law, we are not convinced with such assertion of the learned counsel for the Respondent No.1 and 3 in this regard.

15. We have found that prima-facie, there are serious discrepancies in DPC proceedings held on 14.10.2013 regarding their promotion and absorption in Law Department of KMC (Sindh Local Government), which needs serious attention that whether the Respondents No.1 has fully implemented the Judgment of the Hon'ble Supreme Court rendered in the case of Ali Azhar Khan Baloch & others vs. Province of Sindh & others [2015 SCMR 456] 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.”*

16. Therefore, in our view the Judgment of the Honorable Supreme Court is fully applicable in the case of Respondents No. 3 and 4.

17. We have perused the West Pakistan Municipal Committees Service Rules, 1969 which provides as under: -

**3. Constitution of the Service; (1)** *for every Municipal Committee there shall be a Municipal Service to be known by the name of the Municipal Committee concerned.*

*(2) Each service shall consist of such cadres, classes and grades, and each cadre, class and grade of Service shall consist of such number of posts as may be specified by the Municipal Committee concerned with the approval of the Government.*

*(3) Members of one cadre of service shall not be liable to appointment to a post borne on any other cadre of the Service.*

8. **Method of recruitment:** (1) vacancies in the different classes and grades of a Service shall be filled by –

- (a) initial recruitment; or
- (b) transfer of a person in the service of Government, are subject to the provisions of Article 44(5) of the Basic Democracies Order, 1959 of a Local Council or any other Municipal Committee;
- (c) by promotion on the basis of seniority subject to fitness from among the members of the Service in the next below grade or class; or
- (d) selection on merit from among members of the Service in the next below grade or class seniority being considered only in the case of officials of practically the same standard of merit.

(2) The Municipal Committee shall determine by which of the method specified in sub-rule (1), the vacancies in various posts shall be filled.

(3) Vacancies to be filled by initial recruitment shall be reserved for bonafide residents of the Municipality.”

18. Perusal of Sub-section 3 of Section 3 of the West Pakistan Municipal Committees Service Rules, 1969 is clear in terms that members of one cadre of service shall not be liable to appointment to a post borne on any other cadre of the service, as such the Respondents No.3 and 4's appointment by way of promotion in Law Department, KMC is against the basic rule of law and the Judgment of the Honourable Supreme Court as discussed supra, therefore, no sanctity can be attached to the recommendation of Departmental Promotion Committee held on 14.10.2013 and notified on 13.11.2013 to the extent of Respondent Nos.3 & 4.

19. Let us shed light on the concept of term cadre has neither been defined in the Sindh Civil Servants Act, 1973 or the rules framed there under. However, the term 'Cadre' has been defined in Rule 9(4) of the Fundamental Rules, 1992. The said Rule defines "Cadre" means the strength of a service or a part of a service

sanctioned as a separate unit.” Reliance is placed on the case of Muhammad Bachal Memon and others vs. Syed Tanveer Hussain Shah and others (2014 SCMR 1539).

20. We have noticed that Respondents No.3 and 4 do not belong to Law Department of KMC, therefore cannot be allowed to be absorbed and subsequently promoted in that cadre.

21. We are clear in our mind that no department can be allowed to absorb any employee to another cadre. We have found that the promotion of Respondents No.3 and 4 by way of DPC in Law Department of KMC is not in accordance with law.

22. On the issue of promotion of Petitioners, we are fortified by an established principle of law that in service cases there exists two pronged criteria for promotions, one being eligibility for promotion and the other being fitness. In service matters, the promotion depends upon eligibility, fitness, seniority and availability of vacancy in that cadre. 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).

23. Besides above, we do not concur with this assertion of the learned counsel for the Respondent No.1 & 3 with regard to the point of laches and we are of the considered view that the instant Petition does not fall within the doctrine of laches for the simple reason that prima-facie, the basic promotion of Respondents No.3 and 4 is not in accordance with law as discussed in the preceding

paragraphs, therefore, further discussion on the point of laches is not necessary as the issue in hand has been decided on merit.

24. The case law cited by the learned counsel for Respondent No.1 and 3 is not applicable in the case in hand.

25. In the light of above facts and circumstances of the case, the instant petition is disposed of along with pending application(s) in the terms whereby, we hold that the proceedings of DPC dated 13.11.2013 to the extent of promotion of Respondents No.3 and 4 in BPS-19 in Law Department of KMC is without any justification, thus, declared nullity in the eyes of law. The Respondent No. 1/Competent Authority is directed to consider the case of the Petitioners for promotion in BPS-19 in accordance with law, if the Petitioners fulfill the criteria for the post of Director BPS-19 in KMC and decision shall be taken within a period of one month from the date of receipt of this judgment.

JUDGE

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