

# IN THE HIGH COURT OF SINDH KARACHI

Before:

Mr. Justice Muhammad Shafi Siddiqui

Mr. Justice Adnan-ul-Karim Memon

## Constitutional Petition No. D -5020 of 2020

Irfan Mukhtar Bhutto

*Versus*

Federation of Pakistan and 02 others

Date of hearing  
& order : 23.02.2021

Chaudhry Atif Rafiq, advocate for the petitioner.  
Mr. Muhammad Nishat Warsi, DAG.

### ORDER

**ADNAN-UL-KARIM MEMON, J.** - Through this petition, the petitioner is seeking the following relief(s):

- A- *Restrain the Departmental Selection Board (DSB) constituted by the Respondent No.1 from deferring the Petitioner's promotion on grounds of the pending disciplinary proceedings initiated vide the Cabinet Secretariat, Establishment Division, Islamabad No.1/10/2018-D-3 dated 24.1.2019 to be held on 15.10.2020;*
- B- *Direct the Departmental Selection Board (DSB) constituted by Respondent No.1 to consider the Petitioner's case for promotion in accordance with Rule 7(e) of Civil Servants Promotion (BPS-18 to BPS-21) Rules, 2019."*

2. Petitioner belongs to the Police Service of Pakistan cadre (PSP). During his tenure of service, he was charge-sheeted with the allegations of gross misconduct vide charge sheet dated 1<sup>st</sup> July 2019. An excerpt of the accusations is as under:

- i. That it had been proved that you while posted in Anti-corruption had conducted an unwarranted raid on the house of 89-year-old complainant Mrs. Feroza Agha situated at Bungalow 20/1, Khayaban-e-Sehar, Phase VI, DHA, Karachi at 04:30 am on 28.01.2018.
- ii. Further, there are illegalities in the late-night raid conducted by you as you had used excessive force and brutality in attempting to arrest the accused Mr. Agha Jan Akhar (Ex-Secretary Agriculture Department), nominated in case FIR No.01/2018, u/s 420/409/467/466/471/34 PPC, of P.S. ACE Hyderabad. Most particularly, no warrant was issued for the arrest of the accused and as such, you had no authority to conduct the raid.
- iii. Moreover, there was irrefutable evidence on record that you and your team were responsible for damage of private property in the house of the complainant valuable items were taken from the house, as such,

mobile phones and wallets for harassment and intimidation of the complainant, her immediate family, and household members. It is also noted that despite the fact that the complainant is an elderly woman, no restraint was shown by you in the conduct of your raid. There were no female searchers of female policeman present and no regard was taken for the privacy, safety, and health of the complainant, who could have suffered tremendous damage to her health from the shock of such actions. Hence through your conduct, it was evident that you had ignored all professional standards in the raid conducted.”

3. In view of such allegations, this Court vide order dated 19.01.2021 directed the concerned officials/inquiry officer to conclude the inquiry preferably within two weeks and submit the compliance report. However, the implementation of such a report was subject to further observation of this Court in the present proceedings.

4. Chaudhry Atif Rafiq, learned counsel for the petitioner pointed out that the competent authority has imposed the major penalty of reduction to a lower post for one year, upon the petitioner, vide notification dated 16.02.2021. He, however, insisted that the petitioner was/is entitled to promotion to BPS-19, as such he filed this petition on 14.10.2020 before the conclusion of disciplinary proceedings. He emphasized that under Rule 7(e) of the Civil Servants Promotion (BPS-18 to BPS-21) Rules, 2019, his case for promotion could not be deferred, even after the conclusion of disciplinary proceedings. He further argued that the petitioner replied to the allegations and denied with a vehemence that he did nothing wrong, however, he had conducted the raid for the arrest of the accused on 28.01.2018 based on authority which the Director Anti-Corruption Establishment (ACE) Sindh had delegated to him under section 156 and 54 Cr. P.C. He asserted that disciplinary proceedings initiated against him were based on malice to stop him from being considered for promotion under law. Learned counsel referred to CMA No.5659/2021 filed by the petitioner and argued that the notification dated 16.02.2021 demoting him for one year to a lower post was/is the erroneous decision on the part of the respondent-Establishment Division, however, he is still entitled to be considered for promotion in the higher rank by the Departmental Selection Board (DSB) constituted by the respondent No.1, which is scheduled to be held on 24.02.2021, as such direction may be given to the DSB for considering his case for promotion in the meeting. In support of his contentions, he relied upon the minutes of DSB of Establishment Division for PSP, PAS, and OMG cadre. Learned counsel referred to the grounds raised in the memo of the petition and argued that the petitioner is entitled to the relief as prayed.

5. We have heard the learned counsel for the petitioner and perused the material available on record.

6. Admittedly, the petitioner is a civil servant and faced disciplinary proceedings and penalized by the respondent-department vide notification dated 16.02.2021 as discussed supra. Section 3(2) of the Service Tribunal Act provides that the Service Tribunal shall have exclusive jurisdiction in respect of matters relating to the terms and conditions of service of Civil Servants, including the disciplinary matters; and, the matter of the petitioner about disciplinary proceedings against which he has the remedy of appeal. So far as the case of the petitioner for promotion is concerned, the expression 'Terms and Conditions' also includes 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 Service Tribunals Act, 1973. Surprisingly, it has been ignored by the petitioner; that it is, by now, a settled principle of law that the writ jurisdiction would not lie in respect of the terms and conditions of Civil Servants. In other words, the jurisdiction of this Court is barred by the provisions of the Service Tribunals Act, 1973, read with Article 212 of the Constitution. Section 4 of the Service Tribunals Act provides Civil Servant with the right of filing an Appeal before the Tribunal, subject to the qualifications provided therein. Article 212 of the Constitution ousts the jurisdiction of this Court in respect of the matters about the terms and conditions of civil servants. The ouster clause contemplated under the said Article is a Constitutional command, and, therefore, of necessity restricts the jurisdiction of this Court on the subject, which squarely falls within the exclusive domain of Service Tribunal. On the aforesaid proposition, the decision of the Hon'ble Supreme Court of Pakistan rendered in the case of Ali Azhar Khan Baloch v. Province of Sindh, 2015 SCMR 456 is providing basic guidelines on the subject. Besides the above, Rule 7 of Civil Servants Promotion (BPS-18 to BPS-21) Rules, 2019, is clear in its terms which provides the condition for deferment. On consideration for promotion in order of seniority, a civil servant shall be recommended for deferment, if-

- a) The officer does not meet the eligibility criteria as contained in rule 6;
- b) The officer has not submitted Part-I and Part-II of his/her performance evaluation report (PER) form to his/her reporting officer;
- c) The CSB, DSB, or DPC considers that the service record of the officer is incomplete in any aspect;
- d) The CSB, DSB, or DPC wants to further watch the performance of the officer for any reason to be recorded in writing:  
Provided that period of performance to be watched under this clause shall not exceed twelve months;

e) **Disciplinary or departmental proceedings are pending against the civil servant:**

Provided that this clause shall not be applicable in cases, where on the date of consideration of the civil servant for promotion, such proceedings are pending for more than a year and delay has not been caused by any reason attributable to the officer.

7. In our view, the DSB /DPC is bound under the law to clear any Civil servant for promotion in a higher rank, however, if the Disciplinary or departmental/NAB proceedings are pending against the civil servant; and/or against whom prima-facie evidence of misconduct is available, he/she could not be considered for promotion, during the pendency of departmental/ NAB/criminal proceedings. However, his deferment shall be subject to the outcome of the departmental/NAB/criminal proceedings pending against him. This view is fortified by the decision rendered by the Hon'ble Supreme Court of Pakistan in the case of Mst. Ifat Nazir vs. Government of Punjab and others, 2009 SCMR 703.

8. In view of the facts and circumstances of the case and for the reasons alluded as above, we are not inclined to continue with any further on the captioned petition, in terms of new development in the matter vide notification dated 16.02.2021; and, in presence of such adverse findings against the petitioner, no promotion could be ordered to take place, till penalty remains in the field.

9. This petition is accordingly dismissed along with the pending application(s), leaving the petitioner to avail and exhaust the departmental remedy against the notification dated 16.02.2021, before the proper forum under law.

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