

IN THE HIGH COURT OF SINDH KARACHI

Before:

Mr. Justice Salahuddin Panhwar

Mr. Justice Adnan-ul-Karim Memon

C.P. No. D- 4925 of 2021

Nazir Ahmed Palijo

Petitioner

Through : Mr. Ali Asadullah Bullo, advocate.

Respondents No.1 to 3 : Mr. Ali Safdar Depar, AAG along with
Through : Muhammad Ramzan Solangi, S.O (W&D).

Date of hearing : **13.10.2021**

Date of Order : **13.10.2021**

ORDER

ADNAN-UL-KARIM MEMON, J. Through this petition, the petitioner has called in question the initiation of process for promotion against the posts of Chief Engineer BS-20 in Works & Services Department, Government of Sindh, which is scheduled to take place in the ensuing month, by Provincial Selection Board-1 (PSB) vide office working Paper for PSB-1 available on record, as illegal and violative of Sindh Civil Servants (Appointment, Promotion and Transfer) Rules, 1974 and Sindh Civil Servants (Probation, Confirmation and Seniority) Rules, 1975. Petitioner also seeks direction to the respondents to issue seniority list of superintending engineers BS-19 and thereafter convene the meeting of PSB-I and consider the cases for promotion against the existing / available posts of Chief Engineer BS-20 in accordance with law.

2. Mr. Ali Asadullah Bullo, learned counsel for the petitioner drawing the Court's attention to the annexure "I" (page 79), which is a working paper created for PSB-I (Provincial Selection Board) titled "Promotion to the post of Chief Engineer (Civil) (BS-20)" points out that while the respondent has admitted that there are seven sanctioned posts of Civil Engineers in Grade-20 and besides those, there are four more posts of Grade-20 available with the respondent department wherein three are Project Posts and one for Director General (CMIT).

Learned counsel by referring to paragraph 2, points out that through the instant working paper the respondents have tried to diffuse and distort the distinction between sanctioned posts and Project Posts and have shown that four vacancies of Chief Engineer (BS-20), through the instant working paper, which is only vacancies of Project Post and Director General (CMIT) whereas apparently as admitted in the opening paragraph of the working paper none of the seven sanctioned posts for Chief Engineers (BS-20) are vacant. Counsel contends that in such a disguise the respondents are contemplating to promote Superintendent Engineers (SEs) of Grade-19 to Grade-20 showing as if sanctioned posts are available at the moment. Counsel further contends that the just process would have been that the respondents first make a seniority list of those in Grade-19 and thereafter promote them as per the seniority list without causing any confusion between the sanctioned post and the project post. Counsel contends that certain 2 individuals falling in Grade-19 are being scoped for future vacancies, which are not available as none of the seven sanctioned Chief Engineers (BS-20) have since retired and if at all a promotion was to be made from Grade-19 to Grade-20 only three Project Posts and one Director (CMIT) post was available, which, however, have not been sanctioned. In these circumstances, counsel requests that to his knowledge the process has been initiated by the respondents with intend to promote Grade-19 Superintend Engineers to Grade-20 sanctioned posts and a request has been made to set aside the working paper to the extent of its use as anticipated therein.

3. The learned AAG has questioned the very maintainability of this Petition filed by the petitioner before this Court on the ground that the jurisdiction of this Court is ousted by Article 212 of the Constitution in matters relating to the terms and conditions of services of the civil servants. Referring to Section 3(2) of the Sindh Service Tribunal Act, 1973 he contended that the matters relating to the terms and conditions of service of the Sindh civil servants fall within the exclusive jurisdiction of the Sindh Service Tribunal. However, he conceded that the exclusion from the jurisdiction of the Sindh Service Tribunal under the said provision matters relating to fitness or otherwise of a civil servant to be promoted or appointed to a particular post means that this question cannot be agitated ever before the Sindh Service Tribunal.

4. We have heard the learned counsel for the parties at length and considered their submissions and perused the record.

5. We first attend to the preliminary objections raised on behalf of learned AAG to the maintainability of this Petition on the touchstone of Article 212 of the Constitution. Article 212(1)(a) is an enabling provision empowering the legislature to establish Tribunals exercising exclusive jurisdiction in matters relating to the terms and conditions of service of persons who are or have been in the Service of Pakistan / Province. It is in view of this Constitutional provision that the Federal / Provincial Service Tribunal Act, 1973 was enacted. Clause (2) of Article 212 of the Constitution excludes the jurisdiction of all Courts in matters falling within the exclusive jurisdiction of the Tribunal set up under Clause (1) of Article 212 of the Constitution. It reads:

“(2) Notwithstanding anything hereinbefore contained where any Administrative Court or Tribunal is established under clause (1), no other court shall grant an injunction, make any order or entertain any proceedings in respect of any matter to which the jurisdiction of such Administrative Court or Tribunal extends and all proceedings in respect of any such matter which may be pending before such other court immediately before the establishment of the Administrative Court or Tribunal; other than an appeal pending before the Supreme Court, shall abate on such establishment.”

6. Section 4 of the Sindh Service Tribunal Act, 1973 provides for appeals to the Tribunal by a civil servant aggrieved of any order regarding terms and conditions of his service. Clause (b) of Sub-Section (1) of Section 4 of the Sindh Service Tribunal Act expressly bars the Tribunal from entertaining appeal against the decision of a departmental Authority determining the fitness or otherwise of a person to be promoted to a higher grade. The Tribunal has thus no jurisdiction to examine whether or not a civil servant is fit for promotion to a higher grade. Under Clause (2) of Article 212 of the Constitution, the jurisdiction of the Court is ousted only over matters falling within the exclusive jurisdiction of the Tribunal established under Clause (1) of Article 212. As the determination of fitness of a civil servant for promotion has been excluded from the jurisdiction of the Tribunal, the ouster Clause (2) of Article 212, therefore, does not extend to such matters.

7. It has been consistently held by the Honorable Supreme Court that the Constitutional Jurisdiction of this Court is not ousted in matters about the appointment of a civil servant to a particular post or to be promoted to a higher grade based on fitness. Fitness introduces an element of subjective evaluation based on objective criteria where substitution for an opinion of the competent authority is not possible by that of a Tribunal or a Court. It is in this background that the question of fitness or suitability for promotion has always been considered to be exclusively within the jurisdiction of the competent authority not shared by the Court or Tribunal exercising supervisory jurisdiction in respect of eligibility and qualification.

8. To dilate upon the case of the petitioner, he was appointed in the year 1987 on ad-hoc basis and his Adhoc service was regularized vide notification issued in October 1989 along with his colleagues, his seniority was fixed vide notification dated 15.06.1991. The working paper for PSB-1 explicitly shows that the cases of the promotion of some of his colleagues have been placed before PSB-1 for promotion in BS-20 without finalizing the seniority at the first instance. However, the petitioner has been ignored on the premise that he has just been promoted in BS-19 in the year 2020 and he lacks the seniority to compete with them. Prima-facie as per record petitioner, during his service tenure, was facing disciplinary proceedings as and when he crossed that clog; his case ought to have been considered along with his batchmates with proper seniority under the Sindh Civil Servants (Probation, Confirmation, and Seniority) Rules, 1975.

9. Rule 13 of Sindh Civil Servants (Probation, Confirmation, and Seniority) Rules, 1975 caters such a situation that a Civil Servant who is not promoted on his turn on the ground inter alia; (i) his seniority is under dispute or is not determined; (ii) he is on deputation, training or on leave; or disciplinary proceedings are pending against him; or (iii) he is not considered by the selection authority inadvertently. Primary, the moment cause as noted in rule 13 ibid for deferment of promotion of a Civil Servant is removed, in as much as a dispute as to his seniority is resolved in his favour, deputation, training or leave is over, disciplinary proceedings culminated in his favour or where inadvertence for his non-consideration is remedied, only then on subsequent promotion, such

civil servant would rank and be deemed to have been promoted in the same batch at par with his contemporary batch mates who were promoted earlier to him.

10. Prima-facie, the case of the petitioner for consideration of his promotion needs to be looked into by the respondent-department and if he is found fit to be promoted against the post of Chief Engineer BS-20 then the department is required to issue a seniority list by placing him at the proper place in the seniority and thereafter his case be placed before PSB-1 for consideration and decision thereon under law.

11. In our view, promotion to a particular post is not a right and a civil servant can only be considered for promotion. On the aforesaid proposition, we are guided by the decisions of the Honorable Supreme Court in the cases of Zafar Iqbal v. Director, Secondary Education, Multan Division (**2006 SCMR 1427**), Government of Pakistan through Establishment Division v. Hameed Akhtar Niazi (**PLD 2003 SC 110**), Saleem Ullah Khan v. Shahid Hamid (**2011 SCMR 788**) and Muhammad Azam v. Muhammad Tufail (**2011 SCMR 1871**).

12. Essentially in service jurisprudence, appointment, promotion is of utmost importance. If these are made on merit under definite rules, instructions, etc., and the same will rightly be considered and treated as part of the terms and conditions of service of a civil/government servant, which cannot be interfered with under the constitutional jurisdiction, under the service law. However, in the present case, the respondents have prepared the working paper for PSB-I and issued the final seniority list of superintending engineer BS-19, and a panel of 18 superintending engineers (BS-19) (Civil) in order of seniority has been placed before the PSB-I for consideration and as per contention of the petitioner that in the aforesaid panel his colleagues have been shown to have superseded him in the seniority list by ignoring his seniority as per Rule 13 ibid, which needs urgent attention to the effect whether the respondents have bypassed him or otherwise, this factum could only be looked by the competent authority of the respondent-department strictly under the law.

13. In the light of the above discussion, it is demonstrably clear that the petitioner has not been denied or deprived of a legal right. He has not sustained an injury to any legally protected interest. The impugned working paper does not operate as a decision against him, much less does it wrongfully affect his title to something. He has not been subjected to a legal wrong. He has suffered no legal grievance. He has no legal peg for a justifiable claim to hang on. However the petitioner has only sustainable cause to be considered for promotion in BS-20 subject to qualification, experience, and availability of the post, however, the petitioner is not precluded to ask for consideration of his case for promotion as per Rule 13 of Sindh Civil Servants (Probation, Confirmation, and Seniority) Rules, 1975 by PSB-I which is going to take place in the ensuing month.

14. In view of the above, the petition stands disposed of along with listed applications in the above terms. The competent authority shall also look into the factum of promotion on Project posts and issue of promotion on Future Vacancy, strictly in accordance with the law, with justifiable reasons.

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Shahzad Soomro