

IN THE HIGH COURT OF SINDH KARACHI
Constitutional Petition No.D – 6847 of 2019

Date	Order with Signature of Judge(s)
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Before:
Mr. Justice Irfan Saadat Khan
Mr. Justice Adnan-ul-Karim Memon

Wazeer Ali Khushk
& others, petitioners
through : Malik Naeem Iqbal, advocate.

Province of Sindh
& another, respondents
through : Ali Safdar Depar, Assistant Advocate
General, Sindh along with Mr. Raza
Mian, DSP (Legal).

Date of hearing : 19.05.2021

ADNAN-UL-KARIM MEMON, J. – Petitioners, who are serving as Junior Clerks (BPS-11) in the civilian cadre of Police Department, Government of Sindh, are seeking promotion to the post of Senior Clerk (BPS-14), which has been deferred on account of the pendency of criminal cases.

2. At the outset, we queried from learned counsel for the petitioners whether a civil servant could be promoted in higher rank, against whom *prima facie* involvement in the serious charges of misconduct as defined under The Sindh Civil Servants (Efficiency and Discipline) Rules, 1973, was available in the shape of the criminal case.

3. Malik Naeem Iqbal, learned counsel for the petitioner, argued that the petitioners' promotion has been deferred and they have been superseded on the sole ground that they are facing criminal cases arising out of different FIRs lodged by the Anti-corruption Department in the year 2000 pending trial before learned Special Judge Anticorruption (Provincial). It is further urged that promotion could not be deferred on such ground; that no one could be punished by denying him promotion or consideration for promotion before the charge is established against him; that mere pendency of a criminal case is no ground for denying consideration for promotion. He next argued that though promotion is not the petitioners' vested right, consideration for promotion under the law, indeed is his right; that there could not be an absolute bar on promotion and findings of the Departmental Promotion Committee (DPC) in its meeting held on 10.10.2019 and 11.10.2019 vide notification dated 21.10.2019 does not cover the case of prolonged pendency

of criminal cases; he prayed for a direction to the competent authority of respondents to consider the petitioners' case for promotion in next rank on merits. In support of his contentions, he relied upon the case of Naseeruddin v. Government of Pakistan through Secretary Passport and Immigration Department & others (2017 PLC C.S.578), Muhammad Ayaz Khan v. Government of Sindh & others (2007 PLC C.S. 716) and Salahuddin Mughal v. Province of Sindh through Chief Secretary & two others (2012 PLC C.S. 1018).

4. Contrary to the contentions raised by learned counsel for the petitioners, learned AAG opposed the request of the petitioners on the premise that the petitioners are facing criminal charges before the learned trial Court, therefore, at this stage, they are not entitled to promotion in the next rank. He urged that the case of the petitioners was considered by the DPC in its meeting as discussed supra and deferred on account of pendency of criminal charges before the competent Court of law. In support of his contentions, he relied upon an unreported order dated 16.11.2020 passed by this Court in C.P. No. D-4802/2020 (Mansoor Ahmed Rajput & another Versus Province of Sindh & 07 others) and argued that the promotion of the civil servant can be deferred on account of pendency of an inquiry, investigation, case or a reference against him in Anti-Corruption Establishment (Provincial). He, therefore, prayed for dismissal of this petition.

5. We have heard learned counsel for the parties at some considerable length, perused the material available on record and case-law cited at the bar.

6. The primordial question involved in this petition is as to whether civil servant is entitled to be considered for promotion; and, /or could be deferred till the criminal proceedings, based on corruption and corrupt practices, is finalized by the competent court of law?

7. To answer the aforesaid proposition, primarily the promotion of a civil / Government servant can be deferred under Section 13 of the Sindh Civil Servants (Probation, Confirmation, and Seniority) Rules, 1975, if his / her seniority was/is under dispute or was/is not determined; or he/she was/is on deputation, training or leave; or disciplinary proceedings were/are pending against him/her, or he/she is not considered for promotion for any reason other than his / her fitness for promotion. It appears from the record that different FIRs were registered against the petitioners in the year 2000 under Section 420, 465, 409 PPC read with Section 5(2) of the Act of 1947, which *prima-facie* show that no action i.e. disciplinary proceedings were undertaken by the respondent-police Department against the Petitioners during that tenure without assigning any cogent reason, which is sheer negligence on their part. It is well-established law that in the 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 cannot be ignored and condoned. The Honorable Supreme Court in the case of *Chief Secretary Sindh vs. Riaz Ahmed Massan & others* [2016 SCMR 1784] has settled the aforesaid proposition once for all by interpreting the Rule 13 of Sindh Civil Servants (Probation, Confirmation and Seniority) Rules, 1975 and has held as under:

“Even otherwise, in presence of Rule 13 of Sindh Civil Servants (Probation, Confirmation and Seniority) Rules, 1975 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. **The moment causes as noted in rule 13 ibid for deferment of promotion of a Civil Servant is removed, in as much as 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.** (Emphasis added)

8. Prima-facie the logic behind the deferment of promotion, in our view, is least that is expected of an employee is to have an unblemished record; this is the minimum expectation to ensure a clean and efficient administration and to protect the public interest. An employee if found guilty of misconduct could not be placed at par with the other employees, and his / her case has to be treated differently. While considering an employee for promotion his / her entire service record has to be taken into consideration and if a promotion committee takes the penalties imposed upon the employee into consideration and denies him / her promotion, such denial would not be illegal or unjustified under the service jurisprudence. Primarily, the competent authority needs to take disciplinary

action under Rule 5 of The Sindh Civil Servants (Efficiency and Discipline) Rules, 1973, against all Government / civil servants, against whom disciplinary and/or criminal proceedings are pending; and, in case of disciplinary proceedings against them, the same must be concluded/decided expeditiously under the law; if the Government / civil servant is exonerated of the charge(s) levelled against him, he/she shall be given the treatment provided for in Rule 8-A of The Sindh Civil Servants (Efficiency and Discipline) Rules, 1973, and Rule 13 of The Sindh Civil Servants (Probation, Confirmation and Seniority) Rules, 1975.

9. Coming to the issue at hand, admittedly the petitioners are facing criminal proceedings before the learned provincial Anti-corruption Court based on alleged charges, which are pending adjudication. The petitioners were considered for promotion in the DPC but were deferred on account of many factors including the reason as discussed supra. In this context, it may be observed that the writ jurisdiction of this Court is not meant to be exercised to compel the competent authority to promote a civil servant against him prima facie involvement in serious charges of misconduct was available, for the reason that any such directions could not disharmonious to the principle of good governance and canons of service discipline causing undue interference to hamper the smooth functioning of the departmental authorities. This view is fortified by the decision rendered by the Honorable Supreme Court of Pakistan in the case of Mst. Ifat Nazir v. Government of Punjab & others (2009 SCMR 703). It is well-settled law that in case of promotion vested/fundamental right cannot be claimed, besides above, the Honorable Supreme Court in the case of Muhammad Akbar Khan v. Inspector General of Police, NWFP Peshawar & 04 others (2000 SCMR 36) held that the petitioner was charge-sheeted on the charges of having received illegal gratification, a criminal case was registered against him under Section 419, 420, 468 and 471 PPC as such he was not held entitled to be considered for promotion till the inquiry is finalized. An excerpt of the order of the Honorable Supreme Court is reproduced as under: -

“6. We have, however, perused the record in Part-II of the Paper Book which indicated **that the petitioner was charge-sheeted on the charge of having received illegal gratification amounting to Rs.7, 000 in the case F.I.R. No.348 registered on 13-8-1996 in Police Station, Badaber, District Peshawar, under section 419/420/468/471, P.P.C., a final show-cause notice had also been issued to him. The departmental inquiry was also held in which though the petitioner had not participated but recommendations for the imposition of appropriate penalty were made to the higher authorities by Inspector/D.E.P., Peshawar. It is settled law that if an inquiry is pending against a civil servant under Efficiency and Discipline Rules, or the adverse findings have been recorded against him, then the**

delinquent civil servant is not considered for grant of selection grade or promotion till the inquiry is finalized. In the instant case the inquiry could not attain finality because, in the meantime, the petitioner voluntarily opted for leave preparatory to retirement for 365 days. The learned Tribunal was, therefore, justified to have not granted the relief to the petitioner in the peculiar circumstances of the case. (Emphasis added).

7. We do not find any infirmity of the kind in the impugned order warranting our interference under Article 212 (3) of the Constitution of the Islamic Republic of Pakistan, 1973.

8. The petition having no merit is dismissed and leave sought for is declined.”

10. It is well-settled law that departmental proceedings could be continued along with criminal proceedings against the civil servant. On this issue, the Honorable Supreme Court in the case of The DISTRICT POLICE OFFICER, MIANWALI and 2 others Vs AMIR ABDUL MAJID (2021 SCMR 420) has settled that a civil servant facing expulsive proceedings on the departmental side on account of his indictment on a criminal charge may not save his job in the event of acquittal as the department still may have reasons/material, to conscientiously consider his stay in the service as inexpedient; there are additional reasons to disregard his acquittal since criminal dispensation of justice involving corporeal consequences, comparatively, requires a higher standard of proof to drive home the charge beyond doubt, an exercise to be routed through a procedure stringently adversarial, therefore, the factuality of the charge notwithstanding, procedural loopholes or absence of evidence, sufficient enough to sustain the charge, at times occasion in failures essentially to maintain safe administration of criminal justice out of abundant caution. Departmental jurisdiction, on the other hand, can assess the suitability of a civil servant, confronted with a charge through a fact-finding method, somewhat inquisitorial without heavier procedural riders, otherwise required in criminal jurisdiction to eliminate any potential risk of error. Reference may be made to the cases of Dr. Sohail Hassan Khan and others v. Director General (Research), Livestock and Dairy Development Department, Punjab, Lahore and others (2020 SCMR 1708), Liaqat Ali v. Government of N.W.F.P. through Secretary Health, Peshawar and others (2011 PLC (C.S.) 990), Chairman Agricultural Development Bank of Pakistan and another v. Mumtaz Khan (PLD 2010 SC 695), Government of Pakistan through Secretary Ministry of Finance and others v. Asif Ali and others (2007 PLC (C.S.) 271), Superintendent of Police, D.I. Khan and others v.

Ihsanullah (2007 SCMR 562), Sami Ullah v. Inspector-General of Police and others (2006 SCMR 554), Ractor Comsats v. Ghulam Umar Kazi (2006 SCMR 1894), Executive Engineer and others v. Zahid Sharif (2005 SCMR 824), Khaliq Dad v. Inspector-General of Police and 2 others (2004 SCMR 192), Arif Ghafoor v. Managing Director, H.M.C., Texila and others (PLD 2002 SC 13), Mir Nawaz Khan v. Federal Government through Secretary, Ministry of Finance, Islamabad and 2 others (1996 SCMR 315), Talib Hussain v. Anar Gul Khan and 4 others (1993 SCMR 2177), Mud Izharul Ahsan Qureshi v. Messrs P.I.A.C. (1994 SCMR 1608), Muhammad Nazir v. The Superintendent of Police, Toba Tek Singh and others (1990 SCMR 1556) Muhammad Tufail v. Assistant Commissioner/Collector (1989 SCMR 316), Muhammad Saleem v. Superintendent of Police, Sialkot and another (PLD 1992 SC 369), Muhammad Ayub v. The Chairman, Electricity Board, WAPDA, Peshawar and another (PLD 1987 SC 195), The Deputy Inspector-General of Police, Lahore and others v. Anis-ur-Rehman Khan (PLD 1985 SC 134) and Begum Shams-un-Nisa v. Said Akbar Abbasi and another (PLD 1982 SC 413).

11. Coming to the assessment of DPC, primarily the evaluation made by an Expert Committee/DPC ought not to be easily interfered with by the Court which does not have the necessary expertise to undertake such exercise that is necessary for such purpose. It is a settled proposition of law that subject to its powers and authority, the DPC has to assess every proposal for promotion on case to case basis under the law. In cases where the disciplinary case / criminal prosecution against the civil / Government servant is not concluded even after the expiry of two years from the date of the meeting of the first DPC which kept its findings pending in respect of the civil / Government servant, the appointing authority may consider his / her ad-hoc promotion under law.

12. Adverting to the plea that this Court is bound by the judgment delivered by a Bench of co-equal strength as discussed supra, therefore, this Court could not take the contrary view and if the contrary view is taken the Full Bench is required to be formed to reconsider the earlier view. There is no cavil to the aforesaid principle of law, however, in the present case, on the subject issue there is a clear judgment of the Honorable Supreme Court, as such the decision of this Court cannot be made precedent to deviate from the ratio of the judgment of the Honorable Supreme Court, as such we are not inclined to refer the matter to the Honorable Chief Justice for the formation of Full Bench.

13. The case law cited at the bar is distinguishable from the facts of the instant case on the premise that in presence of the judgment of the Honorable Supreme Court on the subject issue, the judgments passed by this Court could not be helpful to the petitioners.

14. We have noticed that due to the pendency of the criminal cases against the petitioners their case for promotion was considered by the DPC and after detailed deliberation, they recommended their case for deferment vide minutes of meeting dated 10th and 11th October 2019. If this is the position of the case, we have noticed that the criminal proceedings are still under adjudication before the learned trial Court since 2000, which needs to be concluded swiftly, for which the learned trial Court has to take pains to conclude the trial within a reasonable time.

15. We have further noticed that *Prima facie*, the departmental proceedings could not be initiated against the petitioners by the respondents as envisaged under the Sindh Civil Servants (Efficiency & Disciplinary) Rules, 1973, which the respondent-police department had failed and neglected to initiate and conclude within the permissible period, which is now required to be initiated and concluded within one month from the date of receipt of this order.

16. However, it is made clear that if the petitioners cross the clog of disciplinary proceedings as discussed supra and they come out of the above clog, their case shall be considered by the DPC for promotion in next rank strictly under the law within one month and if they are exonerated of the charges levelled against them, they shall be given the treatment as provided under Rule 8-A of The Sindh Civil Servants (Efficiency and Discipline) Rules, 1973, and Rule 13 of The Sindh Civil Servants (Probation, Confirmation and Seniority) Rules, 1975.

17. With the above observations and direction, the petition stands disposed of with no order as to costs. Let notice be issued for compliance to the Secretary Home Department, Government of Sindh and inspector General of Police Sindh.

JUDGE

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