

IN THE HIGH COURT OF SINDH KARACHI

Before :

Mr. Justice Muhammad Iqbal Kalhoro
Mr. Justice Adnan-ul-Karim Memon

Constitutional Petition No.D-5466 of 2022

Muhammad Hajan Ujjan

Petitioner: In person

Respondents: Through Mr. Abdul Jalil Zubedi, AAG

Date of hearing
& Decision: 23.01.2023.

ORDER

Through the captioned petition, Muhammad Hajan, the petitioner seeks promotion from BPS 18 to 19 in (Ex-PCS cadre), *inter alia*, on the ground that he has erroneously been deferred by the Provincial Selection Board-II,(PSB-II) vide decision dated 25.3.2022 on the erroneous premise that there was/is a dispute in seniority, in violation of the principle of natural justice.

2. Petitioner is working as Additional Commissioner-II Sukkur Division in BS-18 and is seeking promotion from BS-18 to 19 in Ex-PCS cadre which has been declined to vide minutes of the meeting of PSB-II held on 25.03.2022 and 30.03.2022 on the premise that his seniority is under dispute as well as his ACR for the period from 01.01.2018 to 20.07.2018 is missing. Petitioner moved an application dated 08.04.2022 to the competent authority in terms of sub-rule (1) of rule 9 of Sindh Civil Servants Promotion (BS-18 to BPS-21), Rules 2022, which has not been decided by the competent authority and before it decision his case for promotion has been deferred in terms of sub-rule (1) of rule 9 of Sindh Civil Servants Promotion (BS-18 to BPS-21), Rules 2022. Petitioner has averred that under the law a civil servant whose seniority is sub-judice could be considered for promotion subject to the outcome of court orders and in case no vacancy remains available in the cadre, the junior most shall be reverted to a lower post or grade, as the case may be.

3. Petitioner present in person has submitted that meaningful and fair consideration for promotion of an eligible and suitable officer is a vested right in terms of the ratio of the judgment rendered by the Honorable Supreme Court in the case of Tariq Aziz-Ud-Din and others: (in re: Human Rights Cases Nos. 8340,9504-G, 13936-G, 13635-P & 14306-G to 143309-G of 2009) (2010

SCMR 1301), and submitted that in the case where the appointing authority is satisfied that no suitable officer is available to fill the post and it is expedient to fill the same, it may appoint to that post on acting charge basis the most senior officer otherwise eligible for promotion in the cadre or service as the case may be. He next submitted that it is the duty and obligation of the competent authority to consider the merit of all the eligible candidates while putting them in juxtaposition to isolate the meritorious amongst them. He further submitted that discretion is to be exercised according to rational reasons. He averred that actions that do not meet the threshold as set out in the aforesaid decision are considered arbitrary and a misuse of power, hence, he cannot be deprived of such right without any plausible reason, causing serious prejudice to his seniority, prospects of promotion and his right to serve against the higher post. Per the petitioner, the respondents provided relief to Mr. Javed Ahmed Soomro, ex-PCS (BS-18) in the meeting of PSB-II which was held on 25.03.2022 and 30.03.2022, whereby he was promoted to BS-19 despite he is on bail in a NAB reference pending adjudication before the learned Accountability Court. According to the petitioner, he was not cleared for promotion in terms of Rule 9(1) of the Sindh Civil Servants Promotion (BS-18 to BPS-21), Rules 2022, which is an erroneous decision. Petitioner relied upon Article 25 of the Constitution and sought similar treatment as meted out to similarly placed colleagues.

4. Learned AAG has raised the question of maintainability of the instant petition in terms of Article 212 of the Constitution and prayed for dismissal of the instant petition.

5. We have heard the parties and perused the material available on record.

6. To attend to the preliminary objection raised on behalf of the learned AAG to the maintainability of the instant Petition under Article 212 of the Constitution. Article 212 of the Constitution and section 4 (b) of the Sindh Service Tribunal, Act 1973, it is evident that the jurisdiction of the Courts is excluded only in respect of the cases in which the Sindh Service Tribunal under subsection (a) of section 4 has the jurisdiction. It must, therefore, follow that if the Service Tribunal under subsection (b) of section 4 does not have jurisdiction to adjudicate upon a particular type of grievance, the jurisdiction of this Court remains intact. Primarily, the only remedy lies with this Court under Article 199 (1) (a) (ii) of the Constitution, which provides that on an application of the aggrieved person, the court can make an order “declaring that any act done or proceedings taken within the territorial jurisdiction of the Court have been done

or taken without lawful authority and is of no legal effect”. Again under Article 199 (1) (c), this Court can make an order giving such directions to any person within the territorial jurisdiction of this Court for enforcement of fundamental rights conferred under the Constitution. These are loud reminders of the jurisdictional expanse enjoyed by this Constitutional Court. Worth to add that this Court under Article 199 of the Constitution at all times equipped with the jurisdiction to probe into any public wrong affecting the public at large, when the same has come before it through a petition. In the present case, the petitioner is seeking promotion which is excluded to be adjudicated by the tribunal under section 4(b) of the Sindh Service Tribunal Act, 1973. In our view, the petitioner can invoke the jurisdiction of this court for enforcement of his fundamental right, therefore the objection to the jurisdiction of this Court is uncalled for and hereby rejected.

7. On merits, during arguments, we have been apprised of the factual position of the case, with the narration that Mr.Tahir Ali Memon, an officer of ex-PCS BPS-18 submitted a representation for assigning inter-se seniority on the premise that he was appointed in the Revenue Department in 1984 and subsequently, qualified Revenue Qualifying Examination (RQE) in 1992. The Board of Revenue vide letter dated 2.3.2022 submitted that Mr. Muhammad Yousuf Abbasi and petitioner passed the Revenue Qualifying Examination on 26.6.1992; and, in terms of Method of Appointment of Mukhtiarkar, the Select List is to be revised annually on 1st September, thus based on the date of passing of RQE and completion of one-year training before 1.9.1993. prima-facie, the Board of revenue is required to maintain a select list of such members, who shall be assigned merit according to the higher marks obtained by them after the date of passing the Revenue Qualifying Examination; additionally, that marks for bachelor degree other than a degree in Law; marks for LLB Degree; and, additional marks of Master’s degree are of paramount consideration for promotion.

8. From the foregoing, it is inferred that if marks obtained by two or more members are the same, the member older in age shall, in the order of merit, be placed above the number younger in age; that the proviso of section 4 of the Civil Servants Act, 1973 provides that civil servant who is selected for promotion to higher post in one batch shall, on their promotion to a higher post, retain inter-se seniority as in the lower post, therefore, officers including the

petitioner assigned inter-se seniority in the ex-PCS (BS-17) based on seniority in the seniority list of lower grade i.e. Mukhtiarkar (BS-16) as stood on 1.1.2012.

9. Primarily, before the decision on the seniority list, the case of the petitioner for promotion was deferred though the vacancy is available. In the present case, the petitioner has pleaded that he was appointed to the Revenue Department in 1984 and subsequently qualified Revenue Qualifying Examination in 1992. Per petitioner, as per the seniority list notified from time to time up to 02.11.2020, he stood senior to Mr. Tahir Ali Memon and Mr. Muhammad Yousuf Abbasi and his case has only been deferred for want of ACRs, thus the application moved by Tahir Ali Memon on 23.8.2021 to the competent authority for assigning seniority in terms of rule 13 of the Sindh Civil Servants (Probation, Confirmation, Seniority) Rules, 1975 and subsequently allowing him the seniority over and above the petitioner is illegal and the case of the petitioner was deferred with a vacancy for the reason that his seniority is disputed based on the report of Board of Revenue, Sindh and subsequent withdrawal of seniority as stood on 02.11.2020 is illegal. He prayed that let this matter be referred to the competent authority to decide the seniority issue first and theater, if he is found senior his promotion may be considered. Be that it may, for the proper administration of service, cadre, or post, the appointing authority is required to make out a seniority list of the members, but no vested right is conferred to a particular seniority in such service, cadre, or post. The letter of the law further elucidates that seniority in a post, service, or cadre to which a civil servant is appointed shall take effect from the date of regular appointment to that post, whereas Section 9 is germane to the promotion which prescribes that a civil servant possessing such minimum qualifications as may be prescribed shall be eligible for promotion to a higher post under the rules for departmental promotion in the service or cadre to which he belongs. However, if it is a Selection Post then promotion shall be granted based on selection on merit, and if the post is Non-Selection Post then based on seniority-cum-fitness.

10. It is a well-settled principle that eligibility itself is not the benchmark for promotion, rather the most vital yardstick is fitness, which can be judged from the service record which includes ACRs, qualification, length of service in a particular grade/scale, integrity, knowledge, and proficiency in the work/assignments, all of which are essential dynamics for weighing and appraising the merits for promotion to the selection post which is a common procedure and practice articulated under the law for considering the promotions on merit. The question of eligibility is different from the question of fitness.

Indeed, from the definition of the words “eligible” and “fit” given in the dictionaries, it appears that the meanings of the above two words are interchangeable and at times they carry the same meanings but at the same time, they have different meanings. The question of whether a person is legally qualified for appointment or promotion to a particular post and grade is relatable to the factum whether he possesses the requisite qualifications for consideration, whereas the question of fitness pertains to the competency of the person concerned, which is to be decided by the competent authority. The question of fitness of their being appointed is to be determined by the functionaries mentioned therein. In other words, a person may be eligible for consideration for a particular post, but may not be fit to be appointed. The concept of eligibility implies a qualification to be appointed or promoted, whereas that of fitness encompasses a person's competence to be chosen or selected for appointment or promotion. The eligibility tests are objective and open to scrutiny by a judicial forum. However, even in matters involving fitness to be appointed or promoted to a particular post or grade, there has to be necessary material based on which an opinion, one way or the other, is to be formed.

11. Principally, promotion matters to such post could not be made mechanically and a variety of factors, such as examination of service records, evaluation reports of training institutions, the record of disciplinary proceedings, reputation of integrity and efficiency, suitability for handling the particular assignment, etc. had to be taken into consideration. It is also a fact that a substantial amount of subjective evaluation of an officer's capabilities is involved. Therefore, normally questions of determination of fitness of a person to be promoted are not capable of being scrutinized based on judicially manageable standards. Nevertheless, such subjective evaluation is to be premised on an objective criterion with the object of evolving such objective criterion, the Government itself has been issuing promotion policy guidelines and developed methods of quantifying confidential reports; which have been treated at par with statutory rules. It may be clarified that the assessment of an officer's performance during a year may completely depend on the subjective opinion of his Reporting Officer. The weightage required to be accorded to it to determine fitness for promotion entails an objective assessment. Indeed, the Courts will not sit in judgment over subjective evaluation but would indeed be competent to examine whether the required objective criterion was followed.

12. It has been pointed out that the Board has deferred the petitioner's case for promotion in PBS-19 due to a dispute in seniority and the non-availability of his

Evaluation Reports (PERs). If this is the position of the case, it may be observed that the preparation of PERs relates to the Efficiency and Discipline of a civil / Government servant, which is the function of the reporting officer. Prima-facie the evaluation reports play a vital role in considering the case of promotion under the prevailing promotion policy. However, the promotion depends upon eligibility, fitness, and availability of vacancies. As far as deferment of promotion of a civil / Government servant is concerned, his / her promotion can be deferred, 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.

13. In our view, to qualify for the promotion, the 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 found guilty of misconduct cannot be placed on 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.

14. Coming to the issue at hand, the prime object of maintaining PER is to assess whether the officer under consideration is entitled to promotion or not, and such assessment, in addition to his / her performance and eligibility, would also include whether or not he/she has been awarded any major or minor penalty. The PSB/DPC, which is held to finalize the decision about promotion based on the above assessment, is required to make an overall assessment of the performance of the civil servant based on a working paper prepared by the department concerned. Therefore, the preparation and presentation of PER is the duty of the department concerned and not of the civil / Government servant for the simple reason that PER is confidential documents to which the officer concerned cannot have any access. The law only requires that if any adverse remarks are made in PER, the officer concerned should be informed so that he/she may be able to improve his / her performance to make up for the deficiency.

15. Primarily the evaluation made by an Expert Committee should not 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 PSB/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 PSB/ 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.

16. 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 and 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 favor, 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, a 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:”

17. 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 on 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) leveled 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.

18. The petition stands disposed of with no order as to costs with direction to the competent authority of respondents to reconsider the case of promotion of the petitioner in BPS-19, however after the settlement of his seniority issue with his batch mates, if any, within two weeks, more particularly in the light of dicta laid down by the Hon'ble Supreme Court in the cases of Federation of Pakistan v. Dr. Muhammad Arif, **2017 SCMR 969**; and Chief Secretary Sindh vs. Riaz Ahmed Massan & others, **2016 SCMR 1784** and, his earlier deferment as recorded in PSB-II, meeting will not come in his way, while considering his case for promotion in next rank, by way of circulation.

JUDGE

JUDGE

Nadir*