

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Muhammad Iqbal Kalhoro

Mr. Justice Adnan-ul-Karim Memon

C.P. No. D- 6360 of 2019

(Kamran Shamshad v. Province of Sindh and another)

Mr. M.M. Aqil Awan, advocate alongwith Danish Rashid Khan,
advocate for the petitioner

Mr. Ali Safdar Depar, AAG

Date of hearing

& Order:

07.02.2023

ORDER

Through this Petition, the Petitioner has approached this Court against his deferment of promotion from BS-19 to BS-20, inter alia, on the ground that his deferment on account of not qualifying the Departmental Examination of Assistant Collector Part-I & II, was in gross violation of Article 10-A of the Constitution of the Islamic Republic of Pakistan, 1973. Further that the action on the part of the Provincial Selection Board-II (PSB) was arbitrary and capricious, thus untenable in law; that Section 24-A of the General Clauses Act, 1897, obliges every person exercising powers conferred by a statute, to act "reasonably, fairly, justly and for the advancement of the purpose of the enactment". It also stipulates that the person making any order under the power conferred by any enactment shall, so far as necessary or appropriate, "give reasons for making the order". Therefore, unreasoned order of deferment, without providing an Appellate forum is violative of various provisions of the Constitution and law; that impugned action was/is virtually coram-non-judice and of no legal effect; that there is no other efficacious and adequate remedy available with the Petitioner but to invoke the Constitutional Jurisdiction of this Court for the relief(s) as prayed in the Memo of Petition.

2. The case of the petitioner is that in the year 1993, he was appointed as Assistant Commissioner (BPS-17), by the then Chief Minister Sindh, in the exercise of powers conferred upon him under Rule 5(4)(g) and 5(c) of West Pakistan Civil Service (Executive Branch) Rules, 1964. Petitioner, during his tenure of service, earned promotion in BPS-19, and his further promotion to BPS-20 was deferred by the PSB -II on the ground of non-qualifying Departmental Examination of Assistant Collector Part-I and II, though he was given six months' time to clear the Examination. The petitioner being aggrieved by and dissatisfied with the deferment of his promotion filed this petition on

05.10.2019 with the narration that he was granted exemption in 2005 by the competent authority and thereafter his service was confirmed as Assistant Commissioner, followed by promotion to the post of BS-18 and BS-19 on regular basis. The exemption granted to the petitioner has statutory protection in terms of the General Clauses Act, thus the promotion of the petitioner could not be deferred as the grounds of deferment for promotion are altogether different; that the colleagues of the petitioner who were exempted for appearing in the said examination on the ground of hardship case as well as the advice tendered by the learned Advocate General Sindh to the respondent department, which was acted upon by the Chief Minister Sindh on 08.10.2021 and consequently his colleague namely Makhdoom Shakeel uz Zaman was promoted to the post of Secretary/equivalent BS-21 vide notification dated 01.04.2022. Petitioner wants similar treatment to be meted out to him.

3. Mr. M.M. Aqil Awan, learned counsel for the petitioner, contended that the deferment of the petitioner without assigning any reason is illegal, unconstitutional, malafide, contrary to the principle of natural justice and promotion policy in vogue. He next contended that since the case of the petitioner was deferred, therefore, the respondents needed to keep one vacancy available for the petitioner. He contended that no officer could be deferred without assigning any reason and/or if any material is available against such officer then without confronting the same, no opinion could be formed. He further contended that the petitioner has been deliberately left by the respondents to accommodate the junior officers. Learned counsel emphasized that the meeting of PSB-II has been conducted in a manner that would give rise to nepotism and favoritism. Learned counsel added that the respondents have failed to implement the mandate of section 24- A of the General Clauses Act. He asserted that civil servants are to be dealt with under the law rather than based on the wishes of high-ups. He further submitted that the petitioner has been deferred in a manner that is contrary to Article-10A of the Constitution of Pakistan. Learned counsel alleged that the meeting of the PSB-II suffers from material irregularities and the meeting was conducted in a manner that is alien to the criterion laid down in the promotion policy for promotion from BS-19 to BS-20 for officers. He submitted that deferment by the PSB-II on the ground that the petitioner did not qualify Assistant Collector Part I & II examination in BS-17, is an absolute mockery of the law for the simple reason that even if it was so, based on the same record he was promoted to BS-18 & BS- 19 as such he ought not to have been deferred on that basis as it is not one of the consideration either for eligibility/fitness for promotion for the post of BS-20 or deferment. He lastly

submitted that exemption was granted to the Petitioner from passing the examination of Assistant Collector Part I & II vide notification dated 08.09.2005 and in pursuance of the same, he was confirmed as Assistant Commissioner and further promoted to the post of BS-18 and 19. And the respondents failed to show whether such exemption notification has ever been canceled or withdrawn and that being not so, how can the legality of such exemption granted by the competent authority in pursuance of Rule 13 of Rules of 1964, can be ignored or undone by the official Respondents, in terms of statutory protection. He submitted that Rule 13 was omitted from the statute book in the year 2009. Subsequently, the Rules of 1964 as a whole were repealed by the new Rules which were called Sindh Civil Servant (Provincial Management Service) Rules 2018. The vires of those Rules was challenged before this Court in two separate Constitution Petition which was clubbed together and decided vide judgment dated 13.08.2021 and the PMS Rules 2018 was held to be ultra-vires. He added that the judgment of this Court was further challenged before the Supreme Court of Pakistan and the Supreme Court set aside the judgment of this Court dated 13.08.2021 and remanded the case back for re-hearing by the order dated 09.09.2022 and such proceedings are still pending before this court. He relied upon the cases of Muhammad Zafeer Abbasi v. Government of Pakistan, **2003 PLC (CS) 503**, Muhammad Ashraf v/s Government of Pakistan, **2007 PLC (CS) 669**, Syed Afzal Muhammad Farooq Establishment Division, **1998 PLC (CS) 1175**, Muhammad Zaheer Raja v/s Federation of Pakistan, **2012 PLC (CS) 1300**, Ahmad Saeed Siddiqui v/s Pakistan, **2015 PLC (CS) 923**, Pervaiz Akhter v/s Federal Government, **2014 PLC (CS) 326 R 329**, Islamic Republic of Pakistan v/s Israr-ul-Haq, **PLD 1981 SC 531**, Tariq Azizuddin/Human Right case, **2010 SCMR 1301**, Orya Maqbool Abbasi v/s Federation of Pakistan, **2014 SCMR 817**, Secretary Revenue Division v/s Gul Muhammad, **2011 SCMR 295**, Federation of Pakistan v/s Dr. Muhammad Arif, **2017 SCMR 969**, Member Board of Revenue v/s Abdul Majid, **PLD 2015 SC 166**, Province of Punjab v/s Dr. S. Mohammad Zafar, **NLR 1997 (Civil) 301**, Nazir Ahmed v/s Ghulam Mehdi, **1988 SCMR 824**, Dr. Mushtaq Ahmed Shah v/s Government of Punjab, **PLD 2002 SC 757**, Abdul Wahid v/s Additional District Judge Quetta, **PLD 1994 Quetta 89**, Hussain Badshah v/s Akhter Zaman, **2007 PLC (CS) 157**, Muhammad Mobin us Salam v/s Federation of Pakistan, **PLD 2006 SC 602**, Pir Buksh v/s Chairman Allotment Committee, **PLD 1987 SC 145**, Raja Muhammad Nawaz v/s Government of Punjab, **1981 SCMR 523**, Chairman Election Committee v/s Wasif Zamir Ahmed, **1997 SCMR 15**, PIA v/s Shahzad Farooq Malik, **2004 SCMR 158**, Muhammad Akhter Sheerani v/s Punjab Text Book Board, **2004 SCMR 1077**, DIG Police v/s Shafiq-ur-Rehman, **2000 SCMR 669**,

Abdul Samad v/s Federation of Pakistan, **2002 SCMR 71**, Mehar Muhammad Nawaz v/s M.D. Small Business Finance Corporation, **2009 PLC (CS) 523**, Muhammad Idrees v/s Agriculture Development Bank, **PLD 2007 SC 681**, Fazalbash Waqf v/s Chief Land Commissioner Punjab, **PLD 1990 SC 99**, Sardar Muhammad Yousuf v/s Government of Pakistan, **PLD 1991 SC 760**, Haji Muhammad Anwar v/s Federation of Pakistan, **1994 SCMR 899**, Malik Wazir v/s Shafiq Ahmad, **PLD 2007 SC 595**, Muhammad Anwar Kurd v/s the State, **NLR 2003 Cr 644**, Senior Member Board of Revenue v/s Sardar Buksh Bhutta, **2012 SCMR 864**, Hashwani Motel Ltd v/s Federation of Pakistan, **PLD 1997 SC 315**, WAPDA v/s Haji Abdul Aziz, **2012 SCMR 965**, Lt. Muqadas Haider v/s FPSC, **2008 SCMR 773**, Muhammad Younus v/s Secretary Ministry of Communication, **1993 SCMR 122**, Muhammad Mukhtar v/s Aziz Ahmed, **1988 SCMR 485**, and Abdul Sattar Khan D.J. v/s the State, **2000 SCMR 652**.

4. Mr. Ali Safdar Depar, learned AAG, contested the claim of the petitioner and submitted that the promotion case of the petitioner from BS-19 to BS-20 was placed for consideration before PSB-II in its meeting held on 23.09.2019 and the same was deferred for the reason that he was erroneously granted exemption from passing Assistant Collector Part-I & II and as per judgment dated 06.09.2019 passed by this court in CP No.D-3816/2011 and CP No.D-713/2013, he was given six months from the date of announcement of the judgment to pass the said departmental examination. However, he failed to qualify for the said examination in the given time frame. Learned AAG referred to comments filed by Sindh Public Service Commission and argued that the petitioner was declared fail in Departmental Examinations conducted in various sessions from 1996 to 2022 for which a comprehensive report about the departmental examination for A.C Part-I & II has already been submitted to the Secretary SGA&CD vide letters dated 08.12.2021 and 09.03.2022. Per AAG, the petitioner has managed a fake notification dated 25.01.2001 to the effect that he passed the said examination, the record of SPSC has been thoroughly checked which reveals that no such notification was ever issued by SPSC. He prayed for the dismissal of the instant petition and disciplinary action be ordered to be taken against the petitioner on account of the submission of fake documents in the court.

5. The grounds of deferment of the petitioner for promotion from BS-19 to BS-20 by the Provincial Selection Board-I in its meeting held on 11.04.2017 are that Petitioner did not possess the requisite capability and efficiency to hold a higher and independent post and he needs improvement in the performance of his official duties. Besides his ACR for the period from 14.04.2012 to 03.07.2012

(for about 3 months), 29.07.2013 to 10.09.2013 (for about two months), and 2016 are not available.

6. There is no cavil to the proposition that the promotion of the civil servant could be deferred if the officer did not meet the eligibility criteria as provided under the rule; he has not undergone the prescribed training or passed the departmental examinations as required under the law; that he has failed to submit Part-I and Part-II of the Performance Evaluation Report (PER) to his reporting officer in respect of his service in the present grade and the preceding grade; that when the PSB-I&II considers the record as incomplete or wants to further watch the performance of the officer or for any other reason to be recorded in writing; that disciplinary or departmental proceedings are pending against the civil servant; that the civil servant is on deputation abroad to a foreign government, private organization or international agency; that civil servants inter se seniority is sub-judice. Besides, the eligibility criteria for consideration for promotion are that the civil servant must have the requisite length of service for promotion, satisfactory completion of mandatory training; possess requisite qualification and experience as prescribed under the recruitment rules, fulfilling the conditions of a rotation policy for field posting, however, if the aforesaid condition is fulfilled, the competent authority shall consider his/or her case for promotion in the next rank.

7. In principle, promotion could not be claimed as a vested right for the reason that the determination of fitness of a person to be promoted is not capable of being scrutinized based on judicially manageable standards. Nevertheless, such subjective evaluation is to be premised on objective criteria with the object of evolving such objective criteria, 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. In our view in the seniority/promotions cases, no vested right/fundamental right can be claimed. This view finds support from the case of Secretary, Govt. of Punjab and others vs. Dr. Abida Iqbal and others **2009 PLC C.S. 431**, Government of Khyber Pakhtunkhwa and others vs. Hayat Hussain and others, **2016 SCMR 1021** & Khan M. Muti Rahman and others, **2006 PLC (C.S) 564**.

8. Touching the issue in hand, the petitioner has vociferously urged that the petitioner meets the eligibility criteria for promotion, thus he could not be nonsuited for consideration of his promotion to the next rank in terms of the decision of the learned Sindh Service Tribunal in Appeal No.146/2015. He also urged that his case also falls within the category of hardship with further narration that discrimination has been meted out to him while rejecting his candidature for promotion to the next rank by PSB-II on account of non-passing the RQ Part I & II Examination.

9. To elaborate on the subject issue, we have noticed that in the earlier round of litigation, the questions were framed as to whether the petitioner qualified to continue the office, whether the Chief Minister Sindh is/was competent under Rule 5(4)(b) of the West Pakistan Civil Service (Executive Branch) Rules, 1964 to nominate a person as Assistant Commissioner and whether the Chief Minister is competent to grant exemption to the petitioner and others from qualifying in passing the departmental examination prescribed for the post for regularization and promotion. The aforesaid issue has already been set at naught by the Hon'ble Supreme Court of Pakistan in the case of *Ali Azhar Khan Baloch v. Province of Sindh*, **2015 SCMR 456** at paragraph 110 of the judgment.

10. The second proposition has also been settled by this Court vide paragraphs 20 to 33 of the judgment dated 06.09.2019 passed in CP No.D-3816/2011 and CP No.D-713/2013 and directed the Chief Secretary Sindh to scrutinize the service record of the petitioner and others who have not qualified for the Departmental Examination of Assistant Collector for I and II and determine whether or not they were legally promoted and whether or not in their promotion the directions of the Hon'ble Supreme Court of Pakistan in the case of *Ali Azhar Khan Baloch*, supra, and principle settled about exemption in qualifying departmental examination to vide order dated 26.5.2016 in Civil Petition No.66-K and 77-K/2015, at paragraph No.6 have been adhered to or not.

11. The aforesaid decision was assailed before the Hon'ble Supreme Court of Pakistan in CP No.4105 of 2019, 1406 of 2019, 4144 of 2019, 4145 of 2019, 4410 of 2019 and 443 of 2019 vide order dated 12.05.2022, which is as under:

“C.P. No.4105 & 4106 OF 2019:-

Learned AOR for the petitioners says that he has instructions to withdraw these petitions. Both the petitions are dismissed as withdrawn.

C.PS No.4433 & 4410 OF 2019

Learned counsel for the petitioners submits that the grievance of the petitioners No. 1&2 stands redressed, therefore, the petition is not pressed to their extent. So far as petitioner No.3 is concerned his appeal is pending before the Tribunal and directions be issued for expeditious disposal whereas, petitioner No.4 has made a representation to the Chief Minister. Per ASC in case directions are issued for expeditious disposal of the appeal before the Tribunal and representation before the Chief Minister, he would not press these petitions. Petitions are dismissed as not pressed. We expect that representation as well as case of the petitioner would be decided as early as possible.

C.Ps No.4144 & 4145 OF 2019

Learned counsel for the petitioners says that the impugned judgment stands implemented and the petitioners have approached the Service Tribunal. He does not wish to press this petition but seek a direction for expeditious disposal of grievance petition before the Service Tribunal. These petitions are dismissed as withdrawn. Leave declined. We expect that the grievances of the petitioners, before the Tribunal would be decided as expeditiously as possible.”

12. Reverting to the present case, for “deferment” of promotion of the petitioner, in our view deferment is not equated with “supersession” in service jurisprudence that no promotion can take place in the future. We have noted that the respondent-Department adopted the revision of the Promotion Policy of the Government of Pakistan, whereby the officer of the department can be deferred for the promotion under the Promotion Policy and law on the subject. However, in the present case, prima facie, the petitioner has failed to comply with the directions contained in the judgment dated 06.09.2019 passed by this Court in the earlier round of litigation in which he was a party in the proceedings; therefore, this court will not be in a position to hold him eligible for promotion for the aforesaid reasons.

13. We have heard learned counsel for the parties, admittedly the judgment dated 06.09.2019 passed in CP No.D-3816/2011 and CP No.D-713/2013 requiring the revenue officers to pass the Revenue Qualifying (RQ- Part I & II) examination has not been set aside. This court directed the aggrieved officers to appear in the examination before SPSC within six months and the exemption granted by the Chief Minister was done away, therefore, the plea of granting similar treatment to the petitioner does not arise.

14. The judgment dated 06.09.2019 was appealed before the Honorable Supreme Court, however, it was withdrawn on the ground that departmental appeal before the Chief Minister Sindh and/or before the Sindh Service Tribunal has been preferred and therefore the petitions before the Honorable Supreme Court be allowed to be withdrawn.

15. It appears that favorable orders were obtained by the officer(s)/beneficiary (ies) in representation/departmental appeal from the Chief Minister Sindh. We are clear in our mind that judicial orders of this court containing directions to

pass the RQ- Part I & II examination within six months through SPSC cannot be nullified. In our view, in law, there is no concept of exemption from departmental examinations which are meant to make the revenue officer conversant with the relevant rules to accomplish assignments that they have to undertake in the field. No blanket cover can be given by the competent authority which breeds incompetence in revenue offices.

16. The aforesaid judgment holds the field, non-compliance of directions, *prima-facie* may expose the delinquent officials to contempt proceedings in terms of Article 204 of the Constitution; and, in the intervening period, no promotion could be claimed by the beneficiary(ies) based on any findings in representation/departmental appeal.

17. The issue of hardship as claimed by the beneficiaries/petitioner has already been set at rest by the Hon'ble Supreme Court of Pakistan; therefore, this premium cannot be given to the petitioner.

18. We, for the aforesaid reasons, dismiss the petition with the direction to the Sindh Government to ensure compliance of the judgment discussed supra and noncompliance may entail serious consequences including action as required under the law. The officers who failed to comply with the judgment passed by this Court and merged into the order of the Hon'ble Supreme Court of Pakistan, have to lose their right to consideration for promotion to the next rank, besides they are also exposed to consequences given in the judgment. Let a copy of this order be communicated to the Chief Secretary Sindh for compliance.

JUDGE

JUDGE