

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.No.2876 of 2016

Nazeer-ud-Din

Versus

Government of Pakistan through Secretary, Passport and
Immigration Department and others

Date of Hearing: 08.11.2016
Petitioner by: Mr. Amjad Ali, Advocate
Respondents by: Mr. Arshad Khan Jadoon, learned Deputy
Attorney-General.

MIANGUL HASSAN AURANGZEB, J:- Through the instant writ petition, the petitioner, Nazeer-ud-Din, seeks a direction to the respondents to consider him for promotion to the post of Assistant (BPS-14) with effect from the creation of a vacancy. The respondent's did not consider the petitioner for promotion due to the pendency of a criminal case against the petitioner.

2. Learned counsel for the petitioner submitted that the registration of an FIR under the provisions of the Prevention of Corruption Act, 1947, against the petitioner could not pose a valid ground for not considering him for promotion. He further submitted that every person is presumed to be innocent until proven guilty; and that the National Accountability Bureau had issued a circular to the effect that a civil servant cannot be denied promotion simply because he was under investigation. In making his submissions, the learned counsel for the petitioner placed reliance on the law laid down in the cases of Zia ul Hassan Vs. Nadeem Chaudhry (2000 SCMR 645) and Muhammad Ayaz Khan Vs. Government of Sindh (2007 PLC (C.S.) 716.

3. On the other hand, the stance taken by the respondents in their parawise reply is that the case against the petitioner was pending before the learned Trial Court; that the petitioner had obtained bail, but had not been acquitted from the charge; that the petitioner had not filed any departmental appeal; that the petitioner could invoke the jurisdiction of the Federal Service Tribunal, and that this petition was not maintainable under Article 199 of the Constitution. The learned Deputy Attorney-General

submitted that since the criminal case against the petitioner had not been concluded, he could not be considered for promotion.

4. I have heard the contentions of the learned counsel for the parties and have perused the record with their able assistance.

5. The record shows that the petitioner was appointed on 31.07.1990 as an Upper Division Clerk in the Bureau of Emigration and Overseas Employment. The petitioner claims to be eligible for promotion to the post of Assistant (BPS-14). On 26.01.2015, FIR No.19/2015 was registered at Police Station FIA, Peshawar, under Sections 5 (2) of the Prevention of Corruption Act, 1947, against the petitioner and three others.

6. The allegations against the petitioner in FIR No.19/2015, dated 26.01.2015 are that the petitioner along with other members of staff posted at the office of Protector of Emigrants at Malakand, were collecting bribe from the public for the Deputy Director, Protector of Emigrants, Malakand. As per the contents of the said FIR, the evidence against the petitioner included video footage of the office of Protector of Emigrants, Malakand in which officials are seen taking money from different people. This video footage was contained in three DVDs. Technical forensic report of the Deputy Director (Forensic) Cyber Crime Circle, Peshawar regarding the said DVDs had also been obtained. Reliance was also placed on reports in local newspapers regarding the grievances of the public against the staff at the office of Protector of Emigrants at Malakand. The accused nominated in the FIR denied any involvement in corruption, but could not justify as to why they were taking money directly from people, especially when their job description did not include dealing with money directly. The job description of the Protector of Emigrants is to register the emigrants proceedings abroad after depositing the requisite fee under Rules 22-A, 23 and 26 of the Emigration Rules, 1975. In view of these facts, a case under Section 5 (2) of the Prevention of Corruption Act, 1947, was registered against the accused nominated in the said FIR, including the petitioner.

7. The admitted position is that the petitioner has been nominated in FIR No.19/2015, dated 26.01.2015 registered at Police Station FIA, Peshawar under Section 5(2) of the Prevention

of Corruption Act, 1947. Although the petitioner has been granted bail, the trial against the petitioner has not been concluded.

8. The key issue involved in the present petition is that whether on account of pendency of a criminal case, the petitioner could be denied consideration for promotion. The only stand taken by the respondents is that the petitioner could be denied promotion by the respondents on account of pendency of a criminal case.

9. Now, it is well-settled that no one could be punished by denying him promotion or consideration for promotion before the charge is established against him. Mere pendency of a criminal case is no ground for denying him consideration for promotion. Although an FIR has been registered against the petitioner, it is yet to be established whether or not the petitioner is guilty of the offence that he has been accused with. Until the conclusion of the trial against the petitioner, he cannot be denied consideration for promotion. Promotion is not the petitioner's vested right, but consideration for promotion in accordance with the law, indeed is. In holding so, it gain support from the law laid down in the following cases:-

- (i) In the case of Mumtaz Ali Shah Vs. Chairman, Pakistan Telecommunication Company Ltd. (PLD 2002 SC 1060), the appellant was not promoted due a criminal case pending against him, whereas civil servants junior to him were promoted. The appellant sought his promotion with effect from the date when his juniors were promoted. Even after the prosecution withdrew the case against the appellant, the authorities refused to promote him. The Services Tribunal upheld the decision of the authorities not to promote the appellant. The Hon'ble Supreme Court set aside the decision of the Services Tribunal, and *inter alia* held that the appellant had been wrongly denied promotion from the date when his juniors were promoted.
- (ii) In the case of Muhammad Hanif Vs. Province of Sindh (2011 PLC (C.S.) 543), the Hon'ble High Court of Sindh give a direction to the respondents to consider the petitioner's case for promotion purely on merits without any regard to the pendency of any criminal or civil case against him.

- (iii) In the case of Salahuddin Mughal Vs. Province of Sindh (2012 PLC (C.S.) 1018), the petitioner was not promoted because a number of enquiries were pending against him and a reference had also been filed against him by the National Accountability Bureau. It was held by the Hon'ble High Court of Sindh that pendency of a reference would not debar a civil servant for being considered for promotion. The Hon'ble High Court directed the department to consider case of the petitioner for promotion in accordance with law.

10. As regards the objection to the jurisdiction of this Court taken by the respondents in their written comments, I am of the view that this matter concerns the fitness of the petitioner for promotion, hence, the jurisdiction of the Service Tribunal would not be attracted in terms of the law laid down in the cases of Secretary, Establishment Division Vs. Aftab Maneka (2015 SCMR 1006), wherein it has been held as follows:-

“13. ... Article 212(1)(a) is an enabling provisions 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. It is in view of this Constitutional provision that the Federal 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 Tribunal set up under Clause (1) of Article 212 of the Constitution. ... Section 4 of the Federal 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 subsection (1) of section 4 of the Federal Service Tribunal Act expressly bars the Tribunal from entertaining appeal against the decision of a departmental Authority determining the fitness or other wise 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 jurisdiction of the Tribunal, the ouster Clause (2) of Article 212 therefore does not extend to such matters. It has been consistently held by this Court that the Constitutional Jurisdiction of the High Court is not ousted in matters pertaining to appointment of a civil servant to a particular post or to be promoted to a higher grade.”

11. Additionally, in the case of I.A. Sherwani and other v. Government of Pakistan (1991 SCMR 1041), it has been held as follows:-

“9. From the above-quoted Article 212 of the Constitution and section 4 of the Act, it is evident that the jurisdiction of the Courts is excluded only in respect of the cases in which the Service Tribunal under subsection (1) of section 4 has the jurisdiction. It must, therefore, follow that if the Service Tribunal does not have jurisdiction to adjudicate upon a particular type of grievance, the jurisdiction of the Court remains intact.”

12. As regards the case law relied upon by the learned counsel for the petitioner, in the case of Zia ul Hassan Vs. Nadeem Chaudhry (Supra) it was held that the mere fact that disciplinary proceedings were pending against a person was not a sufficient ground not to consider him for promotion. The proceedings against the petitioner, in the instant case, are not departmental proceedings, but criminal proceedings. Hence, the said judgment is distinguishable. In the case of Muhammad Ayaz Khan Vs. Government of Sindh (Supra) it was held by the Hon'ble High Court of Sindh that a civil servant could not be denied consideration for promotion merely because an inquiry against him was pending in the National Accountability Bureau.

13. In view of the above, the objection taken by the respondents to the jurisdiction of this Court is spurned. Consequently, this petition is allowed and it is held that the pendency of the above mentioned case against the petitioner should not be considered as an obstacle to the petitioner's consideration for promotion in accordance with the applicable law, if he is otherwise eligible for such consideration. There shall be no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2016

(JUDGE)

APPROVED FOR REPORTING

Qamar Khan*