

THE HIGH COURT OF SINDH, KARACHI

Present:

Mr. Justice Muhammad Shafi Siddiqui

Mr. Justice Adnan Iqbal Chaudhry.

Constitution Petition No. D-4047 of 2015

[Muhammad Ali Javed and others versus Province of Sindh and others]

Petitioners	Muhammad Ali Javed and 3 others through Mr. Muhammad Nishat Warsi Advocate.
Respondent No.1	Nemo
Respondents No.2&3	Lyari Development Authority and another through Mr. Nadir Khan Burdi Advocate.
Date of hearing	22-10-2019.

JUDGMENT

Adnan Iqbal Chaudhry J. - The Petitioners are employees in the Finance & Accounts Department of the Lyari Development Authority (LDA), which is a statutory authority under the Lyari Development Authority Act, 1993 with statutory service rules framed with the approval of the Government of Sindh pursuant to section 49 of the said Act. The Petitioners are aggrieved of office orders dated 30-06-2015 and 01-07-2015 issued respectively by the Local Government Department, Government of Sindh, and the LDA, whereby the previous order of up-gradation of the post of the Petitioners was withdrawn.

2. The Petitioners 1 and 4 were promoted in the year 2004 to the post of Accounts Officer in BS-17. The Petitioners 2 and 3 were promoted respectively in the years 2010 and 2011 to the post of Assistant Accounts Officer in BS-16. At the time the petition was filed in the year 2015, all Petitioners were serving as Accounts Officers or at equivalent posts in BS-17.

3. By gazette notification No.498/2010 dated 30-06-2010, the Ministry of Defense up-graded *inter alia* the post of Accounts Officer from BS-17 to BS-18 in the Pakistan Military Accounts Department. The said notification stated that it was being issued pursuant to an order dated 15-03-2010 passed by the Supreme Court of Pakistan. Relying on the same order passed by the Supreme Court of Pakistan, the Local Government Department, Government of Sindh, also proceeded to up-grade the post of Accounts Officer in departments/authorities under its control. Thus, in the year 2012, posts of Accounts Officer and Divisional Accounts Officer in BS-17 in the KDA-Wing of the erstwhile CDGK and in the Karachi Metropolitan Corporation were up-graded and re-designated as Additional Director in BS-18.

4. Vide letter dated 26-02-2013, and again vide letter dated 11-03-2014, the Local Government Department, Government of Sindh, communicated to the LDA that following the order dated 15-03-2010 passed by the Supreme Court of Pakistan, the Department had up-graded and re-designated the post of the 4 Petitioners from Accounts Officer in BS-17 to Additional Director in BS-18. In compliance, the LDA issued Office Order dated 12-03-2014 stating that the post of 8 officers of the LDA working in its Accounts Department in BS-17, which included the Petitioners, stand upgraded and re-designated as Additional Directors in BS-18. However, vide the impugned order dated 30-06-2015, the Local Government Department withdrew the said up-gradation and ordered that the said employees of LDA stand reverted to their previous grade in BS-17 and that all financial benefits allowed to them during the up-gradation period shall be recovered from their salaries. The LDA complied by issuing the impugned Office Order dated 01-07-2015 to withdraw the said up-gradation at its end.

5. Mr. Muhammad Nishat Warsi, learned counsel for the Petitioners submitted that in view of the gazette notification dated 30-06-2010 issued by the Ministry of Defense, the Local Government

Department, Government of Sindh, had also up-graded the post of Accounts Officers in the KDA-wing of the CDGK from BS-17 to BS-18; that since the Petitioners were at par with the employees of the KDA, they were entitled to and were given the same benefit; and therefore, the impugned orders issued by the Local Government Department and the LDA to withdraw the previous up-gradation were discriminatory.

During the course of his submissions, Mr. Nishat Warsi had withdrawn this petition to the extent of the Petitioner No.1 for the reason that in the meanwhile he had been promoted to BS-18 in the normal course. Therefore, all reference to 'Petitioners' hereinafter is to the Petitioners 2 to 4.

6. Mr. Nadir Khan Burdi, learned counsel for Respondents 2 and 3 (LDA) submitted that the impugned orders withdrawing the Petitioners' up-gradation had been passed to implement the judgment of the Honorable Supreme Court of Pakistan in *Ali Azhar Khan Baloch v. Province of Sindh* (2015 SCMR 456) delivered on 05-01-2015; that previously the post of the Petitioners had been up-graded by the LDA not of its own volition but on the instructions of the Local Government Department, Government of Sindh; that the up-gradation of the post of the Petitioners was unlawful to begin with inasmuch as it was person-specific and not all Accounts Officers of the LDA in BS-17 had been upgraded; that the up-gradation in question was essentially a promotion which was contrary to the Lyari Development Authority Employees (Appointment, Promotion and Transfer) Regulations, 1999, which provided for promotion by a committee.

7. Heard the learned counsel and perused the record.

The case of the Petitioners for the up-gradation of their post is premised on the gazette notification dated 30-06-2010 whereby the Ministry of Defense had up-graded the post of Accounts Officers from BS-17 to BS-18. But that gazette notification shows that it had been issued for incumbents in the Pakistan Military Accounts

Department and has no relevance to the Petitioners. However, since the said gazette notification makes reference to the order dated 15-03-2010 passed by the Supreme Court of Pakistan, which order is also the basis of up-gradation of the post of the Petitioners, it is necessary to examine the said order of the Supreme Court, a copy of which was placed on the record during the course of arguments.

8. The order dated 15-03-2010 was passed by the Supreme Court of Pakistan in Civil Petition No.325/2010 etc. whereby the Federal Ministry of Finance had impugned the order of the Federal Service Tribunal [FST] directing implementation of its judgment. The judgment of the FST had directed the Establishment Division and the Finance Division to implement a proposal for the up-gradation of certain posts under the Accountant General Punjab and Controller General of Accounts, which proposal had been made pursuant to an Up-gradation Policy issued by the Establishment Division. The affected employees, who were respondents before the Supreme Court, contended that since the judgment of the FST had never been appealed by the Federal Government, the petition against the implementation order passed by the FST was misconceived. While dismissing the petition of the Ministry of Finance, the Supreme Court observed that once there was an up-gradation policy by the Federal Government, then employees under the Controller General of Accounts and Accountant General Punjab could not be discriminated, and directions were issued to the Finance Secretary, Controller General of Accounts and the Accountant General Punjab to implement the judgment of the FST. It is to be noted that under section 6 of the Controller General of Accounts (Appointment, Functions and Powers) Ordinance, 2001, certain accounting organizations including the Military Accountant General and the offices of the Provincial Accountants General are under the administrative control of the Controller General of Accounts.

9. It is clear, firstly that the order dated 15-03-2010 passed by the Supreme Court of Pakistan in Civil Petition No.325/2010 etc. related to up-gradation of posts that were under the control of the 'Controller General of Accounts'; and secondly, that the said up-gradation had come about pursuant to a policy issued by the Federal Government. In other words, the Supreme Court's order dated 15-03-2010 had no relevance to the employees of the LDA which is a statutory authority under the administrative control of the Local Government Department of the Government of Sindh and the said order could not have formed the basis for up-grading the post of Accounts Officers in the LDA.

10. With regards to 'up-gradation', the Supreme Court of Pakistan in *Ali Azhar Khan Baloch v. Province of Sindh* (2015 SCMR 456) observed and directed as follows:

"MECHANISM FOR UPGRADATION OF POSTS

138. During the hearing of the review petitions, we have noticed that the Sindh Government has upgraded certain posts of individuals without any mechanism of upgradation to benefit them. The expression 'upgradation' is distinct from the expression 'promotion' which has not been defined either in the Act or the Rules framed thereunder, and is restricted to the post and not with the person occupying it. The upgradation cannot be made to benefit a particular individual in terms of promoting him to a higher post or further providing him with the avenues of lateral appointment or transfer or posting. In order to justify the upgradation, the Government is required to establish that the department needs restructuring, reform or to meet the exigency of service in public interest. In the absence of these pre-conditions, upgradation is not permissible. We have noticed that some of the civil servants have been promoted to higher posts against the tenural limitations, without qualifying the requisite departmental examinations /trainings under the garb of upgradation. Such civil servants having not been promoted in accordance with law need to be reverted to their substantive ranks/posts which they were holding immediately before their upgradation and their seniority shall be determined along with their batch-mates. The Sindh Government shall undertake this exercise and report compliance within 4 weeks through the Chief Secretary, Sindh".

The concept and modalities of 'up-gradation' again came under discussion before the Supreme Court of Pakistan in the cases of *Regional Commissioner Income Tax v. Munawar Ali* (2017 PLC (C.S.) 1030); and *Federal Public Service Commission v. Anwar-ul-Haq* (2017 SCMR 890).

11. The general principles of up-gradation that to our mind emerge from the aforesaid three enunciations of the Supreme Court can be elucidated as follows:

- (i) 'Up-gradation' is not the same as 'promotion', the latter being a term specifically defined in civil service statutes;
- (ii) Up-gradation is essentially an upgrade of the post to a higher 'pay-scale' and not a promotion to a higher 'grade'. Thus, the incumbent of the upgraded post retains his substantive grade;
- (iii) Up-gradation is meant for isolated posts, where the service structure does not provide avenues for promotion to a higher pay-scale thus putting the incumbent at a disadvantage as compared to other employees, its purpose being to address the stagnation and frustration of the employee of such post so that he/she remains productive;
- (iv) To justify up-gradation, the Government will have to demonstrate that it is required for restructuring or reforming the department or to meet exigencies of service in the public interest. In other words, up-gradation should be pursuant to a scheme or a policy;
- (v) Up-gradation should not be to the prejudice of other employees and should not be used to by-pass prescribed rules of promotion.

12. Under the Lyari Development Authority Employees (Appointment, Promotion and Transfer) Regulations, 1999, the post of Accounts Officer in BS-17 is not an isolated post. The said Accounts Officers have an avenue for promotion to Senior Accounts Officer/Deputy Director Finance in BS-18. Admittedly, the up-

gradation of the post of the Petitioners was also not pursuant to any scheme or policy, rather on the misconception that there was an order of the Supreme Court of Pakistan to effect such up-gradation. Therefore, the said up-gradation did not meet the test laid down by the Supreme Court of Pakistan in *Ali Azhar Khan Baloch* and the subsequent cases discussed in paras 10 and 11 above. *Ali Azhar Khan Baloch* categorically stated that the law laid down therein would also be applicable to the employees of statutory and non-statutory organizations under the control of the Government (see para 121 of the judgment). The LDA is such an organization. Therefore, the impugned office orders dated 30-06-2015 and 01-07-2015 issued respectively by the Local Government Department, Government of Sindh, and the LDA, whereby the previous order of up-gradation of the post of the Petitioners was withdrawn, were in compliance of *Ali Azhar Khan Baloch*, were rightly passed, and do not call for any interference.

By short order dated 22-10-2019 we had dismissed this petition. The above are the reasons for the same.

JUDGE

JUDGE

KARACHI

DATED: -10-2019