

HCJD/C-121
JUDGMENT SHEET

ISLAMABAD HIGH COURT
ISLAMABAD

I.C.A. No. 510/2014

Chairman, Federal Board of Revenue, Islamabad

VERSUS

Atta Muhammad Mahsud & others

Appellant by : Mr Muhammad Irshad Chaudhry, Advocate.
Respondents by : Mr M. Shabbir Ahmed Bhutta and Mr M. Umair Baloch, Advocate.
Date of Hearing : 07-12-2016

ATHAR MINALLAH, J. Through this consolidated order, we shall decide the instant appeal and the connected Intra Court Appeal No.511/2014, since common questions of law and fact are involved. The appeals are directed against consolidated order dated 14-07-2014.

2. The facts, in brief, are that the respondents are holding the posts of Superintendents and Deputy Superintendents. The respondents had invoked the jurisdiction of this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (*hereinafter referred to as the 'Constitution'*), seeking a writ in relation to upgrading the posts held by them. The case of the respondents was that since similar posts in other departments had been upgraded and, therefore, the posts on which they were posted be also upgraded. The respondents were essentially seeking a declaration and a direction to the Federal Board of Revenue

(*hereinafter referred to as the "Board"*) for up grading their posts on the basis of discrimination i.e violation of Article 25 of the Constitution. The learned Single Judge in Chambers allowed the petitions vide the impugned order, dated 14-07-2014, and directed the respondents to initiate the process for the purposes of upgrading the posts held by the respondents. Hence the instant appeals by the Board.

3. The learned counsel appearing on behalf of the appellant has argued that; the learned Single Judge in Chambers while passing the impugned order did not take into consideration the policy relating to up gradating a post, which is provided in the Office Memorandum dated 20-01-2001 issued by the Establishment Division (*hereinafter referred to as the "Policy"*) ; it is a policy matter and, therefore, a direction could not have been given in violation of the Policy; reliance has been placed on the cases of '*Human Rights Case Nos.7734-G/2009, 1003-G/2010, 56712 of 2010* [2012 SCMR 773], '*Government of Khyber Pakhtunkhwa through Chief Secretary and others v. Muhammad Javed and others*' [2015 SCMR 269], '*Pakistan Defence Officers Housing Society and others v. Lt. Col. Jawaid Ahmed and others*' [2013 SCMR 1707], '*Gulshan Ara v. The State*' [2010 SCMR 1162]; a post can only be upgraded within the parameters prescribed under the Policy, notified vide the Office Memorandum dated 20-01-2001; the respondents have no vested right to claim the up gradation of their posts on the ground that in other departments similar posts have been upgraded.

✓

4. The learned counsels for the respondents, on the other hand, have argued that; the respondents have served the department for a long time; they were initially appointed as Inspectors in BPS-11 and despite having rendered services for more than two decades they have been deprived of their right to be promoted to higher grades; the Federal Board of Revenue, vide notification dated 07-01-2013, had upgraded various posts, ignoring those which are held by the respondents; the respondents cannot be treated differently since in other organizations similar posts have been upgraded; the conduct of the appellant is in violation of the principles of legitimate expectancy.

5. The learned counsels have been heard and the record perused with their able assistance.

6. The respondents are serving as Superintendents and Deputy Superintendents in various offices under the control of the Federal Board of Revenue. They had invoked the jurisdiction of this Court under Article 199 of the Constitution, seeking a writ relating to the upgradation of the posts held by them. The sole ground raised by the respondents for seeking a direction to the Board for upgrading their posts was to the effect that other posts have been upgraded by the latter and that other departments had also done so in relation to similar posts. It was the case of the respondents that refusal to upgrade the posts held by them violated their fundamental right guaranteed under Article 25 of the Constitution. The learned Single Judge in Chambers had allowed the petitions and had directed the Federal Board of Revenue to initiate the

process for upgrading the posts held by the respondents. Pursuant to the arguments advanced before us, the questions which emerge for consideration are, firstly, whether upgradation falls within the ambit of the terms and conditions of service; secondly, under what provision of law is a post upgraded; thirdly, if upgrading a post is a matter of policy then the scope and conditions thereof; fourthly, whether a right exists for an employee to claim that the post held by him or her be upgraded; fifth, whether a High Court exercising jurisdiction under Article 199 of the Constitution may direct that process be initiated for upgrading a post, and lastly, whether up grading posts in the same department or other departments can be treated as a valid ground for raising a plea of discrimination in the context of Article 25 of the Constitution..

7. In order to answer the above questions, it would be relevant to examine the relevant instrument or statute which governs the prescribed parameters and mechanism for upgrading a post, and the precedent law in this regard. It is an admitted position that upgrading a post is not envisaged or provided for in any statute, nor is it one of the terms and conditions of service. Moreover, it is not denied that a policy has been formulated for upgrading a post, and details of the terms thereof are contained in the Establishment Division's Office Memorandum dated 20-01-2001 (*hereinafter referred to as the "Policy"*). The said Office Memorandum is reproduced as follows.-

Sl. No.25-B
Policy for Upgradation/Redesignation of Posts

On a summary submitted recently to the Chief Executive, he has been pleased to approve the policy for upgradation/re-designation of posts as indicated in the

proceeding paragraphs.

2. Henceforth, the upgradation of posts shall be considered in the following cases only:

- (a) When it is considered necessary to up-grade certain posts in order to rationalize the administrative structure of a Ministry/Division or a Department to make it more effective or to bring about uniformity of pay scales of similar posts in different organizations
- (b) Where the duties and responsibilities attached to a post have considerably increased.
- (c) Where pay scale of a post is considered grossly incommensurate with the qualifications and experience prescribed for appointment to that post.
- (d) Up-gradation of a post on personal basis may not be allowed except if any officer, already holding on regular basis a higher grade post, is posted against a post, carrying lower grade, due to exigencies of service.

3. Subject to the observance of the parameters referred to in sub-paras (a) – (d) above, the future proposals for the up-gradation/re-designation of posts shall be processed as under:-

- (i) The cases for up-gradation/re-designation of the posts in BPS 1 to 19 will be decided by the Finance Division in consultation with the Establishment Division. However, the decision about the proposed up-gradation/re-designation of posts in BPS 1 to 19 will be taken at the level of Secretary, Finance Division and the Secretary Establishment Division.
- (ii) Cases of up-gradation/re-designation of posts in BPS 20 and above will be submitted to the Chief Executive for approval but after seeking the concurrence of Finance Division and the Establishment Division.

4. *[When the competent authority approves the up-gradation of a post in the situations mentioned in sub-paras (a), (b) and (c) of para 2, appointed to the up-graded post should be made in accordance with the provisions of the Civil Servants (Appointment, Promotion and Transfer) Rules, 1973**, and the specific rules which regulate appointment to the post.]

5. The above instructions may please be noted by the Ministries/Divisions for strict compliance.

8.

6. **[]

[Authority:-Establishment Div.'s O.M. No.F.8/36/2000-R.I., dated 20.01.2001].

The above is a self contained comprehensive policy in respect of upgrading a post. Clauses (a) to (d) of paragraph 2 specify the eventualities in which a post may be upgraded. A plain reading of the clauses clearly shows that the Ministry, Division or a Department, as the case may be, has to be satisfied that the circumstances described therein exist to justify initiating a proposal for upgrading a post. The eventualities do not envisage any other ground, such as posts with the same nomenclature having been up graded in other organisations. Paragraph 3

provides the mechanism and specifies the authorities competent to grant approval in order to upgrade a post. Paragraph 4 of the Policy relates to how an appointment against an upgraded post is to be made. Reading paragraphs 2, 3 and 4 of the Policy together, it unambiguously shows that whether or not to initiate the process regarding upgrading a post is exclusively within the domain of the relevant Ministry, Division or Department, as the case may be. The decision in this regard can only be made on the basis of the criteria or eventualities explicitly mentioned in clauses (a) to (d). If, in the opinion of the Ministry, Division or a Department, as the case may be, upgradation of a post in BPS 1 to 19 is justified within the prescribed parameters, then the latter is required to initiate and send a proposal in this regard to the Finance Division for approval. The approval by the latter is subject to consultations with the Establishment Division. The approval of the Finance Division cannot be given unless the Establishment Division has given its sanction. The Policy specifically mandates that the respective Secretaries of the Finance and Establishment Divisions are empowered to take the decisions relating to the proposal regarding upgradation of a post, and no other officer lower in rank has been authorised in this regard. In the case of a proposal relating to a post in BPS 20 and above, the same is sent to the Chief Executive who, after consultation with the Finance and Establishment Divisions, is competent to give approval. It is pertinent to note that after approval by the competent authority and the subsequent upgradation of a post, the grade, salary, perks and privileges remain unaffected, because upgradation is restricted to the post and has no nexus with the person holding it. The person holding the post does not automatically get the

✓

higher grade to which the post has been upgraded. It may be illustrated by giving an example of a post which has been upgraded from BPS 18 to 19. If the person holding the post before its upgradation is in BPS 18, then he would not get the higher grade merely because the post has been upgraded nor will he become entitled to the benefits thereof. The appointment to such a post is made in accordance with the provisions of the Civil Servants (Appointment, Promotion, and Transfer) Rules, 1973 (*hereinafter referred to as the "Rules of 1973"*) or the specific rules which regulate appointment to such a post.

9. It is, therefore, obvious that upgradation of a post and appointment against such a post are distinct and independent of each other. Upgradation has no nexus with the grade of the incumbent person nor would he or she benefit in this regard. Likewise, a Ministry, Division or a Department, as the case may be, cannot be compelled to initiate a proposal. Whether or not a proposal is to be initiated is within the exclusive domain of the said entities and no vested right exists in favour of a person holding a post to claim its upgradation, except on the basis of the situation described in clause (d) of the Policy.

10. In a nutshell, an employee is entitled to claim upgradation of a post on a personal basis if he is able to show that the conditions mentioned in clause (d) of paragraph 2 of the Policy are fulfilled. In such an eventuality a constitutional petition seeking a writ of mandamus would only be competent if the pre requisites have been complied with, as enunciated by the august Supreme Court in the case of "*District*

Magistrate, Lahore and another vs. Syed Raza Kazim"[PLD 1961 Supreme Court 178], wherein it has been held as follows:-

"Now, having regard to the limited scope of the powers vested in the High Courts and this Court by the Laws (continuance in Force) Order to issue writs only of habeas corpus mandamus, prohibition, quo warranto and certiorari, we have to point out that the foundation for an application for a writ of mandamus (which alone is applicable in the present case as the function of the licensing authority is purely administrative) is that there must exist a legal right in the person seeking the writ to insist upon a clear duty being performed by some public officer or authority in respect of that right.

There are other good reasons, too, upon which this application for a writ of mandamus must fail. The accepted conditions for the grant of a writ of this nature are that it must be preceded by a demand of justice and the refusal thereof and that there should be no other equally expeditious, in expensive and efficacious remedy available to the person seeking this extraordinary remedy."

11. In the light of the above, it is essential for a person who invokes the jurisdiction under Article 199 of the Constitution, seeking a writ in the nature of mandamus, to explicitly show that there exists a legal right vested in such a person to insist upon a clear duty being performed by some public officer in respect of that right. Moreover, that a demand for performance of such duty ought to have been made and the same had been met with refusal by the public officer or authority in relation to the right being asserted. A person seeking a writ of mandamus is further required to satisfy the Court that no other equally expeditious, in expensive and efficacious remedy is available to him or her.

12. The expression "upgradation" has been examined by the august Supreme Court in the case titled *'Regional Commissioner Income Tax, Northern Region, Islamabad and another v. Syed Munawar Ali and others'* [2016 SCMR 859] wherein it has been observed and held as follows.-

"The expression "upgradation" is distinct, from the expression "Promotion" which is not defined either in the Civil Servants Act or the Rules framed thereunder, and is restricted to the post (office) and not with the person occupying it. The upgradation cannot be made to benefit a particular individual in term of promoting him to a higher post and 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 re-structuring, reform or to meet the exigency of service in the public interest. In the absence of these pre-conditions, upgradation is not permissible."

13. The august Supreme Court in the case of *'Lt. Col. (R.) Abdul Wajid Malik v. Government of the Punjab and another'* [2007 PLC (C.S.) 617] has observed that upgradation of a post simpliciter does not confer a right to the person holding such an upgraded post to claim the benefits as well. No right can be claimed for the benefits, such as higher pay, allowances, perks and privileges and pensionary benefits due to upgradation of the post, since the same can only be conferred on an employee pursuant to promotion. The august Supreme Court in the case of *'Government of Pakistan M/o Railways, through Secretary and others v. Jamshed Hussain Cheema and others'* [2016 SCMR 442] has observed and

held that discrimination cannot be raised as a valid plea in case of up gradation of a post nor up gradation of a post was a vested right. Reference is also made to the cases of '*Chief Commissioner, Inland Revenue and another v. Muhammad Afzal Khan and others*' [2014 PLC (C.S.) 829], and '*Ali Azhar Khan Baloch and others v. Province of Sindh and others*' [2015 SCMR 456].

14. The principles and law enunciated by the august Supreme Court and the Policy determines the scope, conditions, mechanism, locus standi of a person holding a post and appointment against a post in the context of upgradation of a post. The principles are, therefore, summarized as follows.-

- (i) A post can be upgraded pursuant to a policy formulated by the Government since it is not contemplated under the Civil Servants Act 1973 and the rules made there under or under any other law.
- (ii) The details of the existing policy are contained in the Office Memorandum dated 20-01-2001.
- (iii) It falls within the exclusive domain of a Ministry, Division or Department to initiate a proposal, having regard to the conditions mentioned in the Policy.

- (iv) The proposal initiated for upgrading a post essentially has to be processed and approved in accordance with and in the manner prescribed in the Policy.
- (v) Upgradation is distinct from promotion and, therefore, no right accrues in favour of the holder of the post except when it is sought on a personal basis under clause (d) of paragraph 2 of the Policy.
- (vi) Upgradation can only be proposed on the basis of circumstances mentioned in clauses (a) to (d) of paragraph 2 of the Policy.
- (vii) Up gradation of a post is not a right vested in the person appointed against it.
- (viii) Even if a post is upgraded the person holding such a post is not entitled to claim higher pay, allowances, perks, privileges or pensionary benefits of the grade to which the post has been up graded.
- (ix) After the competent authority grants approval and pursuant thereto a post has been upgraded, appointment against such a post cannot be made except in accordance with the Rules of 1973 or the rules which regulate appointment to such post.

- (x) Discrimination i.e violation of Article 25 of the Constitution cannot be pleaded as a ground for upgradation of a post.
- (xi) If up gradation is claimed on a personal basis under clause (d) of paragraph 2 of the Policy, a constitutional petition seeking a writ of mandamus will not be competent unless the principles enunciated by the august Supreme Court in the case of *District Magistrate, Lahore versus Syed Reza Kazim* supra have been complied with.
- (xii) Since a post can only be upgraded pursuant to a policy, therefore, restraint will be exercised by a High Court while exercising powers under Article 199 of the Constitution.

15. In the light of the above principles, no right could be shown to exist in favour of the respondents to claim that the posts held by them be up graded. It is not their case that the grievance is covered under clause (d) of paragraph 2 of the Policy. The appellant Department i.e the Board does not consider it necessary to upgrade the posts on one of the grounds prescribed under clauses (a) to (c) of paragraph 2 of the Policy. In such circumstances, compelling the appellant Department to initiate a proposal indeed tantamounts to interference in policy matters. We are

✓

I.C.A. No.510/2011

afraid that the learned Single Judge in Chambers was not properly assisted and, therefore, the principles highlighted above were not taken into consideration.

16. For the above reasons, the appeals are allowed and the impugned judgment dated 14-07-2014 is accordingly set aside.

(MIANGUL HASSAN AURANGZEB)
JUDGE

(ATHAR MINALLAH)
JUDGE

Announced in the open Court on 11-01-2017

JUDGE

JUDGE

Approved for reporting.