

ORDER SHEET.
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

Crl. Misc. No.510-Q/2018.

Kashif Bashir etc.

Versus

The State etc.

S. No. of order/ proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
	04.02.2020.	Syed Muhammad Tayyab, Advocate for the petitioners. Barrister Ayesha Siddique Khan, State Counsel for respondent No.1. Syed Ali Murtaza, Deputy Director, HRD (Confidential) & Neem Khan Niazi, Inspector, FIA for respondents No.2 & 3.

Vide my judgment of even date, passed in connected writ petition No.2367/2018, the instant criminal miscellaneous petition stands allowed.

(MOHSIN AKHTAR KAYANI)
JUDGE

R.Anjam

JUDGMENT SHEET.
ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT.

W.P No.2367/2018.

Syed Hamid Ali Shah etc **Vs.** **The State, etc.**

Petitioners by: Syed Naeem Bokhari and Mr. Muhammad Imad Khan, Advocates.

Respondent No.1 by: Ms. Ruqia Samee, AAG and Barrister Ayesha Siddique Khan, State Counsel.

Respondents No.2 & 3 by: Syed Ali Murtaza, Deputy Director, HRD (Confidential). Naeem Khan Niazi, Inspector, FIA.

Respondent No.4 by: Mr. Aamir Latif Gill and Mr. G. Shabbir Akbar, Advocates.

W.P No.2717/2018.

Tassadaq Hussain etc. **Vs.** **FOP through its Secretary, M/o Interior Islamabad etc.**

Petitioners by: Mr. Khurram Farrukh, Advocate.

Respondent No.1 by: Ms. Ruqia Samee, AAG.

Respondents No.2 & 3 by: Syed Ali Murtaza, Deputy Director, HRD (Confidential). Naeem Khan Niazi, Inspector, FIA.

Respondent No.4 by: Barrister Ayesha Siddique Khan, State Counsel.

Crl. Misc. No.510-Q/2018.

Kashif Bashir etc. **Vs.** **The State, etc.**

Petitioners by: Syed Naeem Bokhari and Mr. Muhammad Imad Khan, Advocates.

Respondent No.1 by: Barrister Ayesha Siddique Khan, State Counsel.

Respondents No.2 & 3 by: Syed Ali Murtaza, Deputy Director, HRD (Confidential). Naeem Khan Niazi, Inspector, FIA.

Crl. Misc. No.509-Q/2018.

Ammad ud Din Muhammad **Vs.** **The State, etc.**

Petitioner by: Syed Naeem Bokhari and Mr. Muhammad Imad Khan, Advocates.

Respondent No.1 by: Barrister Ayesha Siddique Khan, State Counsel.

Respondents No.2 & 3 by: Syed Ali Murtaza, Deputy Director, HRD
(Confidential). Naeem Khan Niazi,
Inspector, FIA.

Date of Decision: **04.02.2020.**

MOHSIN AKHTAR KAYANI, J:- Through this single judgment, I intend to decide the above mentioned writ petitions and criminal miscellaneous petitions as all the petitioners have prayed for quashing of FIR No.05/2018, dated 29.05.2018, U/S 409/109 PPC r/w section 5(2)47 PCA, P.S FIA/CCC, Islamabad.

2. Brief facts referred in the FIR are that FIA consequent upon inquiry No.RE-15/2016 registered above mentioned FIR on the news item of the Daily Pakistan dated 01.12.2014, in which it transpired that post of number of employees of various directorates/formations of Capital Development Authority (CDA) had illegally been upgraded in violation of rules & regulations during the year 2007 to 2013. This illegal act is not only causing millions of constant financial loss to public exchequer and wrongful gain to beneficiaries but also promoted disparity amongst employees. According to Section 3(2) of CDA Employees Service Regulations 1992, *“in all matters not expressly provided for in these regulations, employees shall be governed by appropriate rules, orders and instructions of the Federal Government made applicable to the employees by orders of the Authority with such changes as are considered necessary”*. Since , upgradation of posts was not provided in these regulations, therefore, the CDA Board in its meeting held on 05.03.2007, approved delegation of powers for upgradation of posts in CDA in adherence to the instructions contained in Establishment Division memorandum dated 20.01.2001. The said memorandum states in para-2(d) that upgradation 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. It further states in Para-4 that *“it may also be pointed out that the up-gradation of posts does not mean automatic up-gradation of the incumbents of these posts as well. In fact, the appointment against the upgraded post is required to be made in the manner prescribed in the Recruitment Rules for that particular post and with the approval of the Competent Authority therefore”*.

Yet, in sheer violation of above policy of Establishment Division adopted by CDA, 34 officials/officers were illegally upgraded on their personal requests on pick & choose basis. These favorite employees were upgraded by abusing the powers which benefited them with wrongful gain of millions of rupees. Even the seniority of employees was not taken into consideration as some of these employees were lying at the bottom of seniority but upgraded to higher scale depriving officers/officials senior to them. Moreover, no DRC/DPC was conducted as per requirement of CDA Service Regulations and instructions of Establishment Division. A case under section 409/109 PPC r/w 5(2)47 PCA for abuse of authority was registered against officers, who processed/approved these illegal upgradations namely Imtiaz Inayat Ellahi & Farkhand Iqbal. Ex-Chairmen, Shaukat Ali Mohmand, Ex-Member, Muhammad Ali Shah, Najma Azhar, Muhammad Hayat Warraich, Syed Safdar Ali Shah, Muhammad Suleman Sweto, Ex-Director/Deputy Director Generals and Khalil Ahmad Sumro Ex-Director alongwith beneficiary officials/officers namely Amad-ud-Din Muhammad, Tanveer Ahmad, Taj Muhammad Khan Niazi, Tassaduq Hussain, Riaz Khan, Yasir Latif Gill, Muhammad Shafi, Irfan Niazi, Hamid Shah, Mehmfooz Raza, Rizwan Sarwar, Ghulam Rasool, Sumera Basit, Javed Masih, Nazneed Gul, Mohsin Zaheer, Malik Shehzad, Shahzad Malik, Faisal Imran, Ithbar Hussain, Raja Tariq Mehmood, Muhammad Roshan, Zulfiqar Ali, Kamran Ahmad, Muhammad Ayub, Chaudhry Shehzad Yasin, Chaudhary Zafar Mehmood, Zafar Iqbal, Kausar Abbas, Atta Bari Arshad, Irshad Ahmad Malano, Talib Hussain, Kashif Bashir and Baber Hussain.

3. Learned counsel for the petitioners contends that the FIR was lodged without considering minimum requirements of section 409 PPC, even the minimum requirements of the offence were not covered in the said contents of the FIR; that entire case is based upon the charges of illegal upgradation of posts, which were passed by the CDA Authorities pursuant to settlement with CBA unions or on personal representations of those persons, who have not been upgraded, which were sent to HR, Directorate, CDA, who made recommendations to submit the matter before the Chairman; that no employee of CDA has been upgraded without legal authority of the Chairman and the same were considered in the light of O.M dated

20.01.2001; that question of seniority cannot be considered an offence in the instant matter nor any statement of witness was recorded; that the authorities, who have upgraded the posts of employees have not received illegal gratification, which is key factor for criminal breach of trust by any servant of the state; that entire case deals with terms and conditions of service of the employees under the regulations as such the departmental authorities have not yet concluded about commission of any misconduct on part of the accused persons or other officials, who dealt with cases of upgradation of different individuals; that Apex Court in HRC No.23594/14 has dealt with the issue of different individuals, who have approached Apex Court for implementation of judgment in HRC case but the matter was decided to be considered in the line of reported cases *2015 SCMR 456* and *2013 SCMR 1752*.

4. Conversely, learned counsel for the respondents/CDA contends that competent authority of CDA has notified committee comprising of DG, Works CDA being Chairman, Deputy Director Khanpur Dam Division, Deputy Director-III, HRDC, CDA vide letter dated 12.11.2019, who are dealing with departmental proceedings to look into the affairs of the upgradation referred in the instant cases.

5. Learned State Counsel contends that instant matter requires interpretation qua terms and conditions of service by the competent authority and unless competent authority concludes the same, the matter cannot be decided.

6. I have heard arguments of learned counsel for the parties and gone through the record.

7. Perusal of the record reveals that the petitioners are mainly aggrieved with the registration of criminal case FIR No.05/2018, dated 29.05.2018, U/S 409/109 PPC r/w section 5(2)47 PCA, P.S FIA/CCC, Islamabad lodged on the basis of news item dated 01.12.2014 published in daily Pakistan, whereupon inquiry No.RE-15/2016 was initiated with the main allegation that various directorates/formations of CDA have illegally upgraded different employees against rules and regulations during the year 2007 to 2013, which caused financial loss to public exchequer and wrongful gain has been achieved by different individual, employees and other employees being beneficiary. As per inquiry report of CDA, the matters which are not provided in the regulations in terms of CDA Service Regulations 1992, those

matters of the employees shall be governed by appropriate rules, orders and instructions of Federal Government shall applicable to the employees by orders of the authority.

8. The assessment of record reveals that cases of number of employees have been considered for the purpose of upgradation and the matter was decided by the competent authorities. The primary allegation is regarding illegal upgradation of different positions in CDA hierarchy made by the different petitioners and officers of the authority and in this regard it was specifically stated by the FIA Authorities in the FIR as well as in the initial report that Establishment Division O.M dated 20.01.2001 highlights upgradation policy of Establishment Division, which refers following four pre-requisite:-

- “(a) When it is considered necessary to upgrade 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 posed against a post, carrying lower grade, due to exigencies of service.”*

9. While considering the above background, I have confronted learned counsel for CDA to demonstrate from the record that upgradation of different individuals in the year 2007 to 2013 were not dealt under CDA Employees Regulations, however, he failed to justify such position. However, he has referred certain fact finding inquiries, whereby certain direction of the CDA Authorities were not adhered to where complete ban was imposed on present upgradation and re-designation of 1068 employees on the basis of pick and choose policy but question remains the same that whether any offence was constituted if any person was upgraded alongwith his post by CDA Authorities as such the FIA Authorities are under obligation to prove that ingredients of section 409 PPC are reflected and justified

from the record. In order to resolve the controversy, it is necessary to reproduce section 409 PPC, which is reproduced as under:-

“whoever, being in any manner entrusted with property, or with any domain over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for life or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”

10. The above referred provisions of law spell out following minimum requirements of law (i) entrustment of the property (ii) Any dominion over the property in capacity of public servant while dealing with the business, committed criminal breach of trust in respect of that property, hence, there is no denial to the situation that requirements of entrustment of property and misuse of the same in dishonest manner or conversion of the same by the accused in their own favour in violation of trust by them are not available in this case.

11. As such the employees, whose terms and conditions have been defined in CDA Employees Service Regulations, have to be considered under the said law and as per version of the FIR the rules have not been adhered to and the upgradation as well as promotions have been made in violation of the said rules and regulations of CDA. Even otherwise, if same stance is admitted as gospel truth, the orders giving effect to upgradation and promotion are to be considered nullity in the eyes of law then all those individuals, who have dealt with the cases of the employees for the purpose of upgradation, promotion in violation of O.M/upgradation policy 2001 or any other service regulations, will be considered to have committed misconduct on departmental side and same have to be proceeded under the said law but surprisingly the FIA Authorities have considered news item published in daily Pakistan as source report, which was allegedly published on 01.12.2014, whereas upgradation was made in the years 2007 to 2013. This aspect demonstrates that the alleged offence if any was committed approximately 10 years ago and majority of the employees have achieved different promotions, benefits in these 10 years including the judgment passed by different Courts in their favour.

12. The FIA Authorities have been confronted time and again to demonstrate from the record that what property was entrusted to the petitioners, which has been

dishonestly misappropriated by them but surprisingly they could not demonstrate from the law whether upgradation of the employees amounts to entrustment of property or it can be equated with the said part of criminal breach of trust. Even though the Additional Director, FIA put appearance on 11.03.2019 and stated at bar that *“FIA has concluded investigation and no element of bribery has been found in the entire inquiry against any official of CDA”* this aspect leaves nothing in favour of FIA to proceed further in the matter. Learned counsel for CDA as well as concerned officials of CDA have placed letter dated 12.11.2019, which is reproduced as under:-

“In continuation of this Directorate’s Order No.CDA-5(355)HRD-1/2017/110 dated 28.01.2019, the Competent Authority i.e. Chairman, CDA has been pleased to reconstitute a Committee comprising following Officers of Authority to scrutinize the leftover cases of up-gradations/re-designations/change of cadre etc;

- i. **Mr. Ayaz Ahmed,** **Chairman**
Director General (Works), CDA.*
- ii. **Mr. Adnan Younas,** **Member**
Dy: Director (Khan Pur Dam Division).*
- iii. **Mr. Asif Ali Khan,** **Record Provider.**
Dy: Director-III (HRD), CDA.*

2. Since, some personal up-gradations/re-designations/change of cadre were made at Directorate level, therefore, all the concerned formations are directed to submit record of such cases before aforementioned Committee and certify that no such cases have been left out. In case of failure, disciplinary proceedings will be initiated accordingly.

3. The report shall be submitted to Chairman, CDA within 30 days positively.”

13. The entire background of the case demonstrates that CDA Authorities have already constituted a special designated committee comprising of three members to re-scrutinize upgradation and re-designation of different positions at Directorate level of CDA. This entire exercise is on departmental side under its administrative order as such CDA Authorities have not initiated any criminal prosecution as no offence is made out from bare reading of the FIR nor any of the officers of CDA was charged with allegation of misappropriation of any of the property although passing of the orders for upgradation, promotion on its administrative side by the CDA officials is not criminal offence. Similarly, this

Court in another reported judgment 2017 P Cr. L J 854 [Islamabad] (Syed Hamid Saeed Kazmi vs. State) held that question of violation of Rules of Business 1973 be treated on its administrative side and action be taken against officials of the Ministry on departmental side and such violation cannot be considered as an offence. It is settled law that any violation of employees service regulations or its terms and conditions or upgradation rules or upgradation policy 2001 is not a criminal offence. I have considered the entire aspect in the light of ratio settled by Apex Court in judgments reported as 2011 SCMR 1937 (Rana Shahid Ahmed Khan vs. Tanveer Ahmed and others), PLD 2013 SC 401 Director General, Anti Corruption Establishment Lahore vs. Muhammad Akram Khan, 2011 SCMR 1813 (Dr. Sher Afghan Khan Niazi vs. Ali S. Habib), 2010 SCMR 1835 (Akhlaq Hussain Kayani vs. Zafer Iqbal Kiyani), PLD 2007 SC 48 (The State through Prosecutor General, Punjab, Lahore vs. Sultan Ahmed) & 1990 SCMR 1299 (Muhammad Latif vs. Farman Ali), wherein following principles have been highlighted:-

- (a) *High Court under powers U/S 561-A, Cr.P.C can quash the proceedings even at initial stage, if allegations in FIR or complaint are un rebutted and no criminal case is made out.*
- (b) *When exceptional circumstances exist on record.*
- (c) *When the matter is purely of civil nature.*
- (d) *No incriminating evidence is available against the accused persons.*

14. The ingredients of any offence mentioned in the FIR are lacking in this case. The authorities, which have initiated the prosecution are not competent to lodge the FIR. The matter in issue deals with terms and conditions of service of the employees and violation of these terms and conditions can never be termed as misuse of authority as referred in section 5(2)47 PCA.

15. Keeping in view the above guiding principles, the FIA Authorities have failed to justify their action under the law for initiation of inquiry and registration of the FIR. Departmental authorities have yet to decide the fate of upgradation as referred in the FIR, therefore, the very registration of the FIR against the petitioners as well as other employees is just abuse of process of law. The petitioners are

suffering from illegal actions of FIA Authorities since long and in such situation this Court is equipped with powers U/S 561-A, Cr.P.C to protect life, liberty and dignity of the persons in terms of Articles 4, 9 and 14 of the Constitution of Islamic Republic of Pakistan, 1973.

16. In view of above discussion, all the captioned petitions are allowed. Resultantly, FIR No.05/2018, dated 29.05.2018, U/S 409/109 PPC r/w section 5(2)47 PCA, P.S FIA/CCC, Islamabad is hereby quashed. However, CDA Authorities are directed to conclude the inquiry of illegal upgradation/re-designation of CDA officers and officials within a period of 03 months from the date of receipt of copy of this judgment under intimation to this Court.

(MOHSIN AKHTAR KAYANI)
JUDGE

R. Anjam.