

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE GULZAR AHMED, HCJ
MR. JUSTICE MUHAMMAD ALI MAZHAR
MRS. JUSTICE AYESHA A. MALIK

CIVIL APPEAL NO. 202 OF 2021

(Against the judgment passed
by High Court of Balochistan
at Quetta on 24.10.2019 in C.P.
No. 833/2015)

Muhammad Amjad

...Petitioner

VERSUS

The Director General, Quetta Development Authority
and another.

...Respondents

For the Appellant: Mr. Zulfiqar Ahmed Bhutta, ASC

For Respondents: Mr. Ayaz Khan Swati, Addl. AG,
Balochistan along with Mr. Mehmood A.
Shaikh, AOR

Date of Hearing: 27.01.2022

JUDGMENT

Muhammad Ali Mazhar, J. This Civil Appeal is directed against the judgment passed by learned High Court of Balochistan at Quetta on 24.10.2019 in C.P.No.833 of 2015, whereby the Constitution Petition filed by the appellant was dismissed.

2. The transient facts of the case are as under:

According to appellant's narrative, his case was recommended for promotion and adjustment in B-19 as Chief Officer in City District Government Quetta by the Governing Body of QDA on 3.12.2004 which was not actualized, so he filed a representation before the respondents which remained pending adjudication. However, he was promoted to the Post of Chief Accounts Officer (B-19) on 27-9-2012 with immediate effect while he claimed the promotion effective from 3.12.2004. He filed another representation which was rejected consequently, he filed a Constitution Petition in the High Court which was also dismissed *vide* the impugned judgment.

3. The leave to appeal was granted by this Court vide Order dated 17.03.2021 in the following terms:

“Learned counsel for the petitioner contends that through Ex-Agenda Item the petitioner was recommended for being up-graded in BPS-19 as Chief Accounts Officer, Quetta Development Authority by the DCO. He contends that by the minutes of the meeting of the Governing Body dated 03.12.2004, the recommendation was approved and the petitioner was granted up-gradation in BPS-19 as Chief Accounts Officer. He contends that having not been granted up-gradation as Chief Accounts Officer (BPS-19), the petitioner filed a constitution petition before the High Court of Balochistan, Quetta (**the High Court**) in which the impugned order dated 24.10.2019 has been passed, where it was noted that the petitioner has been granted promotion on 28.09.2012, as Chief Accounts Officer (BPS-19). He further contends that in the first place, the promotion of the petitioner has to be made with effect from 03.12.2004, when the Governing Body has approved the case of the petitioner for up-gradation and secondly, the High Court has made a serious mistake in noting down as a fact that the petitioner has been promoted on 28.09.2012, as there is no order passed by the Quetta Development Authority nor by its Governing Body or by any notification issued by it, showing that the petitioner has been promoted as Chief Accounts Officer (BPS-19) on 28.09.2012.

2. The submissions made by the learned counsel for the petitioner require consideration. Leave to appeal is granted to consider, *inter alia*, the same. The appeal shall be heard on the available record but the parties are allowed to file additional documents, if any, within a period of one month. As the matter relates to service, office is directed to fix the same, expeditiously, preferably, after three months.”

4. The learned counsel for the appellant argued that the learned High Court failed to consider that the post of Deputy Director Accounts (BPS-18) was upgraded to Chief Accounts Officer in BPS-19 by the Governing Body of the respondents, however, the promotion Order was issued in the year 2009 with reference to the meeting of the Governing Body. He further argued that the subsequent recommendations of the Selection Board and decision of Governing Body for approving promotion of the appellant from the date of creation of post of Chief Accounts Officer Body were contrary to the provisions of Quetta Development Authority Ordinance, 1978. The appellant is entitled to the pensionary benefits from the date of his actual promotion i.e. 03.12.2004. It was further averred that the findings of the learned High Court in the impugned judgment with regard to the non-availability of post for promotion is not based on

proper law and facts of the case as the post of appellant was already upgraded, hence the promotion order issued on 13.8.2009 could not have withdrawn by subsequent Office Order dated 10.09.2009. It was further contended that the promotion order had created a vested right in favour of the appellant henceforth, the principle of locus poenitentiae was also attracted.

5. The learned Additional Advocate General argued that the recommendation for promotion of the appellant was without legal basis or justification as, at that time, there was no post of Chief Accounts Officer available in the QDA. This post was created for the first time in the year 2012, and was included in the Schedule of the posts provided under the service regulations. After creation of this post the Selection Board recommended the case of the appellant for promotion from the date of creation of post which was also approved by the Governing Body. The claim of appellant is misconceived and misconstrued that the post of Chief Accounts Officer was created on account of upgradation of post and not as a creation of new post.

6. Heard the arguments. The chronology of the lis divulges that the primary and dominant dependence of the appellant is on the minutes of meeting of the Governing Body of QDA which was convened on 03.12.2004 under the Chairmanship of City Nazim/Chairman QDA. In Agenda No. 6 of the meeting, the promotion and adjustment of the appellant was approved as Chief Officer in the City District Government Quetta after completing all codal formalities. Since his promotion was not actualized, the appellant moved a representation which remained pending and then also lodged a complaint to the Provincial Ombudsman (Mohtasib) Quetta which was disposed of with direction to the respondent agency to dispose of the representation of the appellant as soon as possible. On 13.08.2009, an Office Order was issued by the Chairman, QDA, whereby the appellant was promoted as Chief Accounts Officer in BPS-19 with retrospective effect from 03.12.2004 by upgrading the post of DD Accounts. However, after few days on 10.09.2009 *vide* an Office Order, the promotion of 22 Officers was withdrawn from the date of their promotion in the next grade on the notion and astuteness that Chairman, QDA was not competent to accord the promotions. Being aggrieved by the

withdrawal/cancellation of the promotion order, the appellant again moved a representation, which was pending without any fate, so he filed a Constitutional Petition No.432/2008 in the Balochistan High Court at Quetta which was disposed of on 03.03.2015 with the consent of parties that the Competent Authority should decide the fate of the representation within two months. In compliance with the directions articulated by the learned High Court, a working paper was configured for taking into consideration the promotion case of the appellant in the meeting of Selection Board which was convened on 30.03.2015. The Agenda No.1 was linked with the promotion case of the appellant. The Selection Board evaluated and reviewed the matter assiduously and reached to the conclusion that the post of Chief Accounts Officer (BPS-19) was created for the first time in Quetta Development Authority Budget in the Financial Year 2012-2013, therefore, appellant should be promoted from the date of availability of the post and he was accorded promotion effective from 20.09.2012. The meeting of Governing Body of Quetta Development Authority was convened on 14.07.2015 for ratification of recommendations jotted down in the minutes of meeting of Selection Board. The proceedings of Governing Body's meeting unveil that in Item No. 4, Clause (3), the matter of appellant's promotion was ruminated with the sequence of events. The Governing Body observed that the appellant was promoted as Chief Accounts Officer in BPS-19 w.e.f 20.09.2015 but the post of Chief Accounts Officer (BPS-19) was created in Quetta Development Authority Budget in the Financial Year 2012-13, therefore, the appellant was promoted from the date of availability of post i.e. 20.09.2012.

7. We have also delved into and explored the Quetta Development Authority Ordinance, 1978. According to Section 4 of this Ordinance, the general directions and administration of the Authority and its affairs are vested in the Governing Body which may exercise all powers and do all acts and things which may be exercised or done by the Authority. "The Authority" means Quetta Development Authority established and incorporated under Section 3 of the Ordinance. Section 8 relates to Appointment, Punishment and Appeal. Sub-Section 3 of Section 8 is quite reminiscent which reads as under:

“3. Subject to any rule for the time being enforced, the power of making appointments and promotions to posts in the service of the Authority, of granting leave to the officers and servants holding such posts, of censuring, fining, withholding promotions from, reducing, suspending, removing or dismissing, such officers and servants for any breach of departmental rules and disciplines, or for carelessness, unfitness, neglect of duty or other misconduct, and of discharging such officers and servants from the service of the Authority for any other reason, shall be exercised by the under-mentioned authorities-

- a) In the case of posts lying in grades-1 to 17, the Director General; and
- b) In the case of posts lying in grade-18 and above, Governing Body.”

8. In the aforesaid Ordinance, Section 16 empowers the Authority to make regulations with the rules made under Section 15 for all matters for which provision is necessary or expedient for the purpose of giving effect to the provisions of this Ordinance, *inter alia*, the regulations for recruitment policy, conditions and terms of service including provident fund and pension. Consistent with the powers conferred under Section 16 of the Ordinance, the Authority framed Quetta Development Authority Employees (Service) Regulations, 2010 which were notified on 20.10.2010. The Regulation No. 5 relates to the appointment against permanent or temporary posts by promotion and the transfer or initial recruitment as specified in Appendix-A attached to the aforesaid Regulations. In Regulation No.8, the method is provided for initial recruitment as well as the promotions of various posts with the rider that no person shall be appointed in the service of the Authority by initial recruitment unless he possesses the qualification prescribed for the post in Column No. 4 of Appendix-A and in tandem the Appointing Authority has been prescribed under Column-6 of the same Appendix. The procedure for appointment is explicated under Regulation No. 6 which includes promotions required to be made on the recommendations of Departmental Selection or Promotion Committee or Selection Board, however a clarification has been expounded that the Governing Body or the Competent Authority shall not be bound to accept the recommendations of the concerned Selection or Promotion Committee/Board in any case, but the

reasons in all such cases for non-acceptance of the recommendations of such Committees/Board shall be recorded.

9. The Quetta Development Authority Employees (Service) Regulations, 2010, had repealed the Quetta Development Authority Employees (Service) Regulations, 1977, that were framed and notified in exercise of powers conferred under Section 16 of the erstwhile Quetta Development Authority Ordinance, 1977. The Office Order dated 20.09.2012 shows that the Governing Body in its meeting held on 11.07.2012 decided to create three new posts i.e. one post for Director (Design) in BPS-19; one post for Chief Accounts Officer (BPS-19) and third post for System Analyst (BPS-19) in the budget of Financial Year 2012-2013 with further directions that the necessary amendment/addition should be made in the relevant Appendix to Quetta Development Authority Employees (Service) Regulations, 2010. Obviously, after creation and sanction of the aforesaid nomenclatures of posts, the Appendix-A of the Regulations was amended. Noticeably, in the insignia or caption of the posts for Finance, Audit and Accounts which encompassed in the Schedule, one post of Director Finance-cum-Chief Accounts Officer was assimilated as a promotion post to be filled from amongst the members of the service holding the post of Deputy Director (A&F)-cum-Senior Accounts Officer BPS-18, Deputy Director Audit and Deputy Director Economics BPS-18, having at least 12 years of service in BPS-17 and above including 5 years of service in BPS-18 on seniority-cum-fitness basis. The appointing authority of this post is the Governing Body acting on the recommendation of the Selection Board.

10. The claim of the appellant for his antedated promotion w.e.f. 2004 seems to be quite illogical and irrational when the post on which promotion was claimed was neither created, nor it was part of service structure/schedule appended to the Quetta Development Authority (Employees Service) Regulations enacted in 1977 that were in vogue. Before considering the promotion matter, the availability of post is necessary in the service structure even for an antedated promotion. Though the promotion is not a vested right, but it depends on the eligibility as well as fitness of the candidate. The concept of eligibility implies a qualification to be appointed or

promoted, whereas determination of fitness encompasses a person's competence to be chosen or selected for appointment or promotion subject to the availability of post on which the credentials and antecedents of person could be examined for examining his merits and worthiness for promotion.

11. The learned counsel for the appellant could not controvert the defence put forward by the respondents with regard to the date of creation of the post of Director Finance-cum-Chief Accounts Officer in 2012, and also that no such post was in field in the Service Regulations, 1977 of QDA which were repealed by 2010 Service Regulations. It was also not denied that, with the approval of Governing Body, three new posts were created on 20.9.2012 with the directions to make necessary amendments in the Appendix-A attached to 2010 Service Regulations. In the case of Ch. Muhammad Siddique and 4 others vs. Director, Special Education and 7 others (1998 SCMR 88), the order of the Service Tribunal was challenged by the petitioner with regard to the consideration of his proforma promotion. While affirming the judgment of the Tribunal, this Court observed that the respondent was entitled to seek promotion with effect from the date the post became available and/or the date when her case was deferred by the Departmental Promotion Committee (DPC). Whereas in the case of Abdul Hameed vs. Ministry of Housing and Works, Government of Pakistan through Secretary and others (PLD 2008 SC 395), this Court held that the promotion to a certain post has never been considered to be a vested right of a civil servant. It is a well-recognized principle of law that in case of non-selection post, the promotion is made on the basis of seniority-cum-fitness and no civil servant can ask for or claim a promotion as a matter of right as it is within the exclusive domain of the government. Neither the promotion could take place automatically, nor the seniority alone is the deciding factor as a number of factors constitute fitness for promotion. While in the case of Government of N.W.F.P. and others vs. Buner Khan and others (1985 SCMR 1158), this Court converted the petitions into appeals and allowed to the extent that the direction of the Tribunal for promotion was modified and substituted by the directions that promotees shall be considered for promotion for Grade-18 post with

effect from the dates when vacancies in their quota became available.

12. We have meticulously perused the minutes of meeting of Governing Body dated 03.12.2004 wherein the appellant was allowed promotion and adjustment as Chief Officer in the City District Government Quetta in an ambiguous manner without highlighting any office order or notification which may substantiate or justify any alleged adjustment to the promotion. The adjustment could be possible in case the post was abolished/redundant, or the appellant was found surplus or sent to a surplus pool due to any reorganizational or restructuring steps so that he could have been adjusted or accommodated in some other department to save their jobs under some reorganizational drive, otherwise, the use of word "adjustment" was meaningless or purposeless for a person who was allegedly promoted with adjustment in the guise of upgradation without any Upgradation Policy despite that upgradation of post was done across the board and not to favour or accommodate any specific person. Moreover, the Office Order dated 13.08.2009 in which a line was added in the handwriting "by upgrading the post of Deputy Director (Account)" also seems to be dubious and quite illogical as on one hand, the appellant was allowed promotion as Chief Accounts Officer in BPS-19 with retrospective effect and, on the other hand his former post of Deputy Director was upgraded which does not look commonsensical. If he was granted promotion in BPS-19 then there was no question of upgradation of the post of Deputy Director (Accounts). The expression up-gradation is disparate and incongruent to the term promotion which is resorted to in order to ventilate the sufferings of employees from stagnation who are stuck up in some isolated posts without any pathway or probability of promotion despite satisfactory length of service in a particular post. No Upgradation Policy document of QDA was presented which could apply or cover the case of appellant in 2004. However, an Upgradation policy formulated by Government of Balochistan, Finance Department dated 23.4.2007 is available on record which delineates salient features, *inter alia*, that, consequent upon upgradation of a post, its method of recruitment and qualification has to be prescribed in the relevant Recruitment Rules with further conditions that upgradation of post never implies automatic elevation of the incumbent holding post and as the

matter of Rules, appointment to the upgraded post has to be made in the prescribed manner, as per relevant rules of concerned department and in this very policy, in paragraph No.3, the procedure for upgradation has also been laid down.

13. In the case of Fida Muhammad versus Government of Khyber Pakhtunkhwa (2021 SCMR 1895), this Court held that **upgradation** cannot be claimed as a matter of right but it is in fact based on a policy decision of the competent authority for its implementation across the board for the particular categories of employees jotted down in the scheme/notification who fulfilled the required qualification which is normally a particular length of service in a particular pay scale. The promotion involves advancement in rank, grade or a footstep en route for advancement to higher position, whereas the facility or benefit of upgradation simply confers some monetary benefits by granting a higher pay scale to ventilate stagnation. It is also a well-settled exposition of law that the benefit of upgradation is normally granted to the persons stuck-up in one pay-scale for considerable period of their length of service either having no venue for promotion or progression. In order to minimize the anguish or suffering being stuck-up in particular pay scale for a sizeable period, the mechanism of up-gradation as a policy decision comes in field for redress and rescue. In the case of Ali Azhar Khan Baloch and others vs. Province of Sindh and others (2015 SCMR 456), this Court, in paragraph 138 of the judgment, has held that 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. Reference can also be made to the dictums laid down by this Court in the case of Regional Commissioner Income Tax versus Syed Munawar Ali (2016 SCMR 859) and Federal Public Service Commission through Secretary vs. Anwar-ul-Haq (Private Secretary) Islamabad and others (2017 SCMR 890).

14. The powers of granting promotions in the posts lying in BPS-18 and above was vested in the Governing Body, therefore, as soon as this anomaly came into knowledge, the Nazim, City District Government Quetta/Chairman Quetta Development Authority within few days rectified the mistake and issued another Office Order on 10.09.2009 for cancellation of promotion orders of 22 Officers including the appellant. Obviously, as the post was *non est*, hence no antedated promotion could be granted. No vested right can be claimed on the basis of promotion issued without any legal sanction or authority. In these circumstances, the doctrine of locus poenitentiae has no application. There is no hard and fast rule that if some benefit was wrongly extended due to some misunderstanding, error, misconception of law or without sanction of competent authority, that act should be treated as so sacred and sacrosanct that it could not be withdrawn to retrace or redo the wrong decision or action taken or made under the guise of the locus poenitentiae principle. A wrong benefit extended beyond the scope of law and rules/policy cannot be claimed in perpetuity or eternity.

15. In the wake of above discussion, we do not find any infirmity or perversity in the impugned judgment. The appeal is dismissed.

Chief Justice

Judge

Judge

Islamabad, the
27th January 2022
Approved for reporting