

Judgment Sheet
IN THE HIGH COURT OF SINDH KARACHI

Before:

Mr. Justice Muhammad Shafi Siddiqui
Mr. Justice Adnan-ul-Karim Memon

Constitutional Petition No. D –5868 of 2016

Muhammad Salman & 24 others

Versus

Federation of Pakistan and 2 others

Constitutional Petition No. D –6909 of 2016

Asadullah Shaikh & 11 others

Versus

Federation of Pakistan and 2 others

Date of hearing : 11.03.2021

Date of announcement : 18.03.2021

Ms. Fauzia Rasheed, advocate for the petitioners.

Mr. Khalil Dogar, advocate for respondents.

Mr. Muhammad Nishat Warsi, DAG.

JUDGMENT

ADNAN-UL-KARIM MEMON, J. - Through the captioned petitions, the petitioners are aggrieved by the notification dated 08.9.2016 issued by the respondent-Federal Board of Revenue (‘FBR’). Through the said notification, FBR re-designated the post of Auditor (BS-16) Inland Revenue as Senior Auditor (BS-16) Inland Revenue with immediate effect.

2. This stance of the respondent-FBR has been objected by Ms. Fauzia Rasheed learned counsel for the petitioners on the ground that they were initially appointed as Auditor (BPS-14) through the competitive process; and, subsequently their post was upgraded and re-designated as Senior Auditor (BS-16). She further argued that the aforesaid post ought to have been upgraded with effect from 27.5.2008 against which they made representations before the respondent No.2 but to no avail. She further argued that the respondent No.2 could not take away from the petitioners their legitimate right to be up-graded & re-designated as Inland Revenue Audit Officer (BS-18) as FBR had itself recommended to the Finance Division to re-designate the then post of ‘Auditor’ as “Senior Auditor” and such recommendation having been based on the policy

decision has now created a legal vested right in their favour; that the re-designation of the post of Auditor as the then Senior Auditor, now Inland Revenue Audit Officer (BS-18) is in commensurate with law as the job description/nature of work of the Auditors and Inland Revenue Audit Officers (Senior Auditors), their requisite qualifications for appointment to the said post and reporting officer were/are the same, hence the upgradation & re-designation of the posts is in line with the removal of disparity and discrimination amongst equals; that the denial of designation as Inland Revenue Audit Officers (Senior Auditor) to the petitioners was/is discriminatory, conceived and fainted with defect of naked and unbridled discretion, hence liable to be corrected; that the respondents could not superimpose the terms and conditions in utter disregard of the up-gradation/ re-designation policy, law and rules; that the post of Senior Auditor (BPS-16) and Auditor (BS-14) respectively; and, the required qualification for both positions is bachelor's degree in Commerce etc., with the two years and five years post qualification experience in the field of audit and accounts; that the job description issued by Board/FBR for Senior Auditor/Auditor is also the same, hence the up-gradation & re-designation / merger of the posts would remove the disparity and discrimination amongst equals. She referred to Articles 25,27,33 & 37 of the Constitution and argued that the petitioners were/are being discriminated in terms of the grant of designation of Inland Revenue Audit Officers IRAO (the then Senior Auditor); that the refusal of the respondents to grant equal designation of Inland Revenue Audit Officers was/is against the right guaranteed under the Constitution as the Constitution especially Article 25 forbids class legislation but permits reasonable classification for legislation, which classification must satisfy the twin tests of classification.

3. We have heard the learned counsel for the parties on the subject issue and have gone through the record of the case file and case-law cited in this regard.

4. To appreciate the proposition whether the post of Senior Auditor officer (BPS-16) could be upgraded and re-designated as Inland Revenue Audit Officers (BPS-18). It appears from the record that Income Tax, Sales Tax departments were merged in the year 2003 and a new department in the name of Inland Revenue Department was created and accordingly the post of the petitioners, as Auditor (BPS-14) Inland Revenue Service (IRS) was upgraded to (BPS-16) vide letter dated 27.1.2012 (with effect from 27.5.2008), however, the said post

was re-designated as Inland Revenue Senior Auditor (BS-16) vide notification dated 08.9.2016 issued by the `FBR`. Excerpts of the notifications dated 27.1.2012 & 28.09.2016 are reproduced as under:

“Islamabad, the 27th January 2012

Subject: **UPGRADATION OF THE POST OF AUDITOR FROM BS-14 TO BS-16 IN THE FBR.**

Dear Sir,

I am directed to convey the sanction of the President, Islamic Republic of Pakistan to the up-gradation of the post of Auditor along with incumbents in the Federal Board of Revenue, Islamabad as per following details:-

Sr.No.	Designation	Existing BPS	UP-Graded BPS	Effective Date
1	Auditor	14	16	27.05.2008

2. This issues with the concurrence of the Establishment Division's O.M No.8/73/2007-R-1 dated 13.07.2010 and Finance Division (Regulation Wing)'s O.M No.1(1)/R-1/2007-1292/11 dated 12.01.2012.

3. This supersedes Board's sanction letter of even number dated 09.12.2010 and Notification No.2660-M-IV/2010 dated 28.12.2010.”

“Islamabad 08-09-2016

NOTIFICATION
(Re-designation)

No.2315-IR-III/2016: In pursuance of Board in Council meeting dated 21.07.2016 the post of Auditor (BS-16) Inland Revenue is redesignated as Senior Auditor (BS-16) Inland Revenue with immediate effect.”

5. It is surprising to note that, yet again the said post has been given retrospective effect from 27.5.2008 vide notification dated 14.10.2020. Now they have not stopped here; and, again ask for direction to the respondents for the upgradation of their post as Inland Revenue Audit Officer (BPS- 18) with effect from the date of the notification issued regarding upgradation of the said post in line with O.M. No.8/4/2010 R-1, dated 26.08.2016. Learned counsel for the petitioners emphasized that the posts of Inland Revenue Senior Auditors are similar to the Audit Officers in other Departments like Auditor General of Pakistan, Accountant General of Pakistan, and Controller General of Pakistan; and, the petitioners being similarly placed could be discriminated, because in all these departments, the posts of Senior Auditors were up-graded to BPS-18, but the petitioners are being deprived of their legitimate rights and wrongfully kept in BPS-16, which is against all canons of justice and the provisions of

Articles 4 and 25 of the Constitution of Pakistan, 1973. An excerpt of the notification dated 14.10.2020 is as follows:-

“Islamabad 14-10-2020

NOTIFICATION
(Re-designation)

No.1760-IR-III/2020: In pursuance of approval of Finance Division conveyed vide their O.Ms. No.1(1)R-I/2007-194/2020 dated 09.06.2020 & No.1(1)R-I/2007-247/2020 dated 27.05.2008; the post of Auditor (BS-16) is redesignated as Senior Auditor (BS-16) w.e.f. 27.05.2008 in terms of para 3(i) of Establishment Division's OM No.8/36/2000-R-1 dated ..0.01.2001 and in pursuance of Establishment Division's OMs No.8/73/2007-R.1 dated 18.12.2019 and 20.12.2019; and concurrence of Management Services Wing vide their O.M. No.12-5/2018-MSW-IV dated 07.05.2020.”

6. Learned counsel for the petitioners while relying upon the judgment dated 11.1.2016 of the Honorable Supreme Court rendered in the case of Chief Commissioner, Inland Revenue and others vs. Muhammad Afzal Khan and others, seek the same relief on the strength of law laid down by the Hon'ble Supreme Court of Pakistan in (1996 SCMR 1185), Hameed Akhtar Niazi v. Secretary Establishment Division Government of Pakistan, (PLD 2009 SC 1) Dr. Zahoor Mehdi v. Chief Election Commissioner of Pakistan/Returning Officer for Presidential Elections, wherein the Hon'ble Supreme Court of Pakistan held that where a question of law and facts has been decided by a Tribunal or by the apex court, it covers not only the case of the Civil Servants who litigated but also of other Civil Servants, who may have not taken legal proceedings, in such a case, the dictates and rule of good governance demand that the benefit of such judgment by Service Tribunal/Supreme Court be extended to other Civil Servants, who may not be parties to the litigation instead of competing them to approach the Service Tribunal or any other forum.

7. Mr. Khalil Dogar learned counsel for the respondent-FBR has resisted the request of the petitioners on the analogy that these writ petitions under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 are not maintainable. He urged that the controversy regarding up-gradation pertains to the terms and conditions of service, as the bar of jurisdiction of this Court under Article 212 of the Constitution of Islamic Republic of Pakistan, 1973 come in their way, thus they have no case to invoke the constitutional jurisdiction of this Court; that the Petitioners were initially appointed as Auditors (BPS-14), in the year 2001. Their post was upgraded as Auditor (BS-16) vide notification dated 22.07.2010, however, the subject post is again re-designated as Senior Auditor (BS-16) with effect from 27.5.2008 vide

notification dated 14.10.2020, as such their post could not be up-graded in BPS-18 as Audit Officer retrospectively in terms of notifications dated 3.8.2010 and 1.12.2016 and 14.10.2020. He asserted that as per the policy decision of the Government, two steps up-gradation is not permissible. Therefore the request of the petitioners is against law is untenable and liable to be discarded.

8. It is also important to bear in mind that Article 25 of the Constitution is only attracted where there is an apple-to-apple comparison. In the present case, we have noticed that the Recruitment Rules notified on 14.12.2010 explicitly provide that the post of Assistant Manager (Audit) (BPS-17) could be filled amongst the eligible candidates i.e. Senior Auditor (BS-16), having five years' service in BS-16. The nomenclature of Assistant Manager (Audit) (BS-17) was subsequently revised and treated as Assistant Director (Audit) vide notification dated 28.10.2015 (pages 119 to 129).

9. Learned counsel representing the FBR has briefed us on the subject that as per recruitment rules notified in the year 1997 (page 247) the post of Senior Auditor in BPS-16 was to be filled 50% by promotion and 50% by initial appointment. He further averred that against 50% promotion quota Auditors (BS-14) being the feeding cadre with 5 years' experience were eligible for consideration for promotion as Senior Auditor (BS-16), subject to other conditions enumerated in the recruitment rules as discussed supra, whereas 50% quota, the candidates having requisite experience, age, qualification, etc. were required to be selected through the competitive process, as such the post of Auditor (BS-14) and Senior Auditor (BPS-16) were entirely different from each other, having different requirements of basic qualification, age, and experience, etc. Apart from other eligibility criteria, the qualification required for the post of Senior Auditor was post-graduation in Commerce, Economics, etc. He further apprised that they were directly appointed through the competitive process, two steps higher than the petitioners because Senior Auditor is/was head of the Audit team to conduct the audit of tax-payers. Per learned counsel, each post has a different workload nomenclature recruitment process prescribed qualification, experience, scales of pay, etc. He further pointed out that according to the creation of Inland Revenue Service (IRS) the post of Senior Auditor (BS-16) and Auditor (BS-14) were re-designated as Inland Revenue Audit Officer (IRAO) and Inland Revenue Auditor Officer (IRO) respectfully, keeping in view their basic scales, seniority, job description, etc. However, subsequently vide notification dated 27.11.2010 provided the career

path/progression to the petitioners the post of Manager Audit in BPS-18 and Assistant Manager (Audit) in BPS-17. For the post of Assistant Manager (Audit) in BPS-17, the method of appointment was 75% by promotion and 25% by initial appointment. Against the promotion quota, Senior Auditor in BPS-16 being feeding cadre with 5 years' experience were eligible for consideration for promotion to the post of Assistant Manager (Audit) (BPS-17). Learned counsel referred to the written objections filed on behalf of respondent No.2 on 02.02.2017 and referred certain paras (page 231 to 245) and argued that this petition is liable to be rejected on the premise that they have already been given their due right by re-designating their post as Senior Auditor (BPS-16) to make them eligible for promotion as Assistant Director (BS-17) under recruitment rules notified on 27.11.2010, duly amended vide notification dated 28.10.2015. He further argued that the petitioners cannot be equated with their seniors/Supervisory Officers i.e. IRAO (re-designated as Assistant Director (Audit) as provided under the policy decision of the respondent-department. He lastly prayed for the dismissal of these petitions.

10. If this is the legal position of the case, which prima facie show that both sets of individuals i.e. Senior Auditors in BPS-16 and Audit officer BPS-18 are not equally placed under the policy/recruitment rules. There is an obvious criterion that differentiates the two categories.

11. In principle upgradation is not a promotion, as generally misunderstood. Upgradation is carried out without necessarily creating posts in the relevant scales of pay. It is carried out under a policy and specified scheme. It is reported only for the incumbents of isolated posts, which have no avenues or channel of promotion at all. Upgradation under the scheme is personal to the incumbents of the isolated posts, to address stagnation and frustration of incumbent on a particular post for sufficient length of service on the particular post without any progression or avenue of promotion. Post of senior Auditor is one of such kind of post, which has avenues or channel of promotion to higher grades. Primarily upgradation is carried out under a scheme and or a policy to encourage and to give financial benefits without creating additional vacancies of higher grade, upgradation by no standards could be treated and or considered as a promotion to the higher grade. Incumbents occupying ungraded posts retain their substantive grades. The case law cited by learned counsel for the petitioners is of no help to the petitioners for the reason discussed in the preceding paragraphs.

12. In view of the above discussion, we are clear that petitioners proceeded on erroneous premises. On the issue of up-gradation, we seek guidance from the decisions of the Honorable Supreme Court rendered in the cases of GOVERNMENT OF THE PUNJAB through Chief Secretary, Lahore, and others Vs. Ch. ABDUL SATTAR HANS and 29 others and REGIONAL COMMISSIONER INCOME TAX, NORTHERN REGION, ISLAMABAD, and another Vs. Syed MUNAWAR ALI and others (2017 P L C (C.S.) 1030). Therefore, in our view, the petitioners have been unable to make out a case for the up-gradation/re-designation of their posts as Inland Revenue Audit Officer (BPS-18) with retrospective effect, based on discrimination under Article 25 of the Constitution.

13. These petitions fail and are hereby dismissed with no order as to costs.

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