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**ORDER SHEET**

IN THE HIGH COURT OF SINDH, KARACHI

C. P. No.D-43 of 2008

Date	Order with signature of Judge
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Petitioner Abdul Kadir Haji in person.  
Pakistan Steel Mills through Mr. Khalid Imran Siddiqui, advocate.

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**MUHAMMAD KARIM KHAN AGHA, J.**, The petitioner is an employee of Pakistan Steel Mills, who was due for promotion from Manager to the post of Deputy General Manager (Non-Engineering). He was denied promotion following a decision of Departmental Promotion Committee ("DPC") held on 25.10.2007. The petitioner alleges that respondent No.1 did not treat the petitioner equally with other successful applicants and thereby discriminated against him and as such abridged the fundamental rights of the petitioner as, inter alia, guaranteed by Articles 4 and 25 of the Constitution of Islamic Republic of Pakistan, 1973.

2. According to the petitioner, on account of the discrimination against him by the DPC held on 25.10.2007, he was illegally superseded by respondents Nos.2 and 3, who were junior to him. The petitioner further alleges that as per Service Rules and Regulations of respondent No.1, the promotion from the post of Manager to Deputy General Manager is to be given on "best out of best" formula, as set-out in the Service Rules and the Minutes of DPC meeting held on 25.10.2007, which the petitioner claims were flouted in his case by the DPC. For brevity sake relevant paragraph (a) of the said minutes of DPC held on 25.10.2007 is reproduced herein below:-

**"a) Promotion from Manager to DGM Grade  
(Both Technical/Non Technical Cadre)**

As per organogram approved by the Board of Directors, 59 posts of Deputy General Managers are sanctioned. At present only 40 posts of Deputy General Managers are held. 19 clear vacancies of Deputy General Managers are available.

Minimum 65% marks in quantification of last 5 years ACRs.

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As per rules post of DGMs and above shall be treated as selection post as such suitability of DGMs be assessed on the basis of Best out of the Best formula as well as disciplinary action initiated against them during last three (03) years: if any and their general reputation.”

3. According to the petitioner he met all the above requirements but was not promoted in contravention of the Rules and Regulations of Pakistan Steel Mills. Instead, respondent No.3 who did not meet all the requirements, in particular, the average 65% marks in quantification of last five years ACRs was promoted ahead of him.

4. Respondent No.1 has filed parawise comments alongwith a set of documents in support of its contention that the petitioner was not discriminated against by the DPC. Respondent No.1 has also raised preliminary objection to the maintainability of this petition under Article 199 of the Constitution of the Islamic Republic of Pakistan. According to respondent No.1, the petitioner has no vested right to promotion and the petition should be dismissed.

5. Respondent No.1 additionally claims that the petition is not maintainable as Respondent No.1 has its own rules and regulations of service, which are non-statutory in nature and, therefore, the petitioner's service is solely governed by such rules and is not subject to the writ jurisdiction under Article 199 of the Constitution, 1973. In support of this contention, Respondent No.1 places reliance on the cases of PAKISTAN RED CRESCENT SOCIETY v. NAZIR GILLANI (PLD 2005 SC 806) and GOVERNMENT OF PAKISTAN v. HAMEED AKHTAR NIAZI (PLD 2003 SC 110).

6. Respondent No.1, however, agrees with the petitioner's contention that promotion to the post in question is governed by adopting best out of best formula as opposed to that of seniority-cum-fitness.

7. Having heard the petitioner in person and learned counsel for the respondents in depth and having reviewed the documents placed on file the Court reaches the following conclusion.



8. As a preliminary matter the Court finds that the Const. Petition filed against the respondents by the petitioner under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 is maintainable on a number of grounds. These include the fact that the petitioner claims that he has been discriminated against in breach of his fundamental rights guaranteed by the Constitution and that Article 199 of the Constitution, 1973 can be resorted to if no other adequate remedy is available to the petitioner, as is the case in hand. The Court cites with approval the conclusions reached in the case of MUHAMMAD DAWOOD v. FEDERATION OF PAKISTAN (SBLR 2007 SINDH 495), relevant portion of which is set out below:-

- i) "Irrespective of an employee of a State controlled corporation not being a civil servant the corporation themselves continue to remain amenable to the jurisdiction of this Court under Article 199 of the Constitution.
- ii) The rule of master and servant is inapplicable to cases where there is violation of statutory provisions or of any other law.
- iii) The expression 'violation of law' would not be confined merely to violation of any specific provision of a statute but the expression 'law', as observed by Hamoodur Rehman, J., (as his lordship then was) in Government of West Pakistan vs. Begum Aga Abdul Karim Sorish (PLD 1969 SC 14 @ 31) and ought to be considered in its generic sense as connoting all that is treated as law in this country including even the judicial principles laid down from time to time by the superior courts. It means according to the accepted norms of legal process and postulates a strict performance of all the functions and duties laid down by law. It may, instance, includes the principles of natural justice, the public duty to act fairly and honestly and absence of malafides in fact and law. In all such cases the Court would be competent to grant relief of reinstatement."

9. It is significant to record that the cases relied upon by respondent No.1 and referred to earlier in this judgment were decided before the decision of the Hon'ble Supreme Court of Pakistan in MUHAMMAD MUBEEN-US-SALAM AND OTHERS v. FEDERATION OF PAKISTAN (SBLR 2006 SC 258) which in effect precluded the Federal Service Tribunal from hearing cases of employees of state owned or controlled corporations. As such the above cited cases are distinguishable as the legal position has now changed on account of the ruling in MUHAMMAD MUBEEN-US-SALAM's case and the subsequent findings of this Court in MUHAMMAD DAWOOD's case.



10. Paragraph 2.34 of the Pakistan Steel Officers Service Rules and Regulations prescribes the procedure for promotions from Manager to Deputy General Manager. This paragraph makes it clear that the minimum qualifying service is seven years and the promotion criteria is not based on seniority-cum-fitness but is a selection post where best out of best formula is to be applied. Furthermore, the minutes of DPC meeting held on 25.10.2007, as mentioned above, postulates certain guidelines for the promotion from Manager to Deputy General Manager. Such guidelines include the minimum 65% of marks in quantification of last five years ACRs and as per rules confirms that the post of Deputy General Manager and above should be treated as Selection Post to be filled on the basis of best out of best formula.

11. A careful review of the documents provided to the Court by respondent No.1 clearly show that the respondent No.3 had an average ACR over the last five years of 63.2%. As such according to respondent No.1's own rules and best out of best formula and the minimum average grade, as laid down in the board meeting, it is clear that respondent No.3 should not have been considered for promotion as he did not meet the basic requirement of 65% average marks in quantification over his ACRs for the last five years. On the other hand the documents provided by respondent No.1 reveal that the petitioner did meet the required grading of having an average ACR of 65% marks in quantification over the last five years.

12. The Court does not subscribe to respondent No.1's argument that because respondent No.3 had greater specialization in Horticulture he was more suitable for the position and this obviated the need for respondent No.3 to meet the minimum requirement of 65% marks in quantification of last five years ACRs.

13. In the given circumstances, we, therefore, hold that the petitioner was discriminated against by the DPC held on 25.10.2007 as according to its own formula the petitioner should have been selected for promotion ahead of respondent No.3, who did not even meet the minimum requirement of averaging 65% marks in quantification in his ACRs over the last 5 years. Even then, on the best out of best formula, the petitioner's higher average ACR of 65% entitled him to be promoted ahead of respondent No.3, who had a lower average ACR of 63.2%. More so as other

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documents placed on record by Respondent No 1 in compliance with this courts order dated 14.11.08 indicate no other shortcoming or disqualification in the service record of the petitioner which could justify the decision of the DPC for withholding his promotion or allowing promotion of Respondent No 3 ahead of him.

14. As such, we allow the petition with the direction to the respondent No.1 to immediately promote the petitioner on the post of Deputy General Manager in place of Respondent No 3. We, however, decline the relief of consequential back benefits.

The petition is allowed and disposed of in the above terms.

Karachi,  
March 19, 2009

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