

# IN THE HIGH COURT OF SINDH KARACHI

**Before:**

Mr. Justice Aftab Ahmed Gorar  
Mr. Justice Adnan-ul-Karim Memon

**C.P. No. D- 5062 of 2020**

Engr. Muharram Khan and others  
Petitioners

through : M/s. Ravi Kumar and Asif Ali Jokhio,  
advocates

Respondent No.04

Though : Mr. Muhammad Arshad Khan Tanoli,  
advocate

Respondents

Though : Mr. Muhammad Nishat Warsi, DAG

Dates of hearing  
& order

: **12.01.2022**

**ORDER**

**ADNAN-UL-KARIM MEMON, J.** Through this petition, the petitioners are seeking a declaration to the effect that the benefit of upgradation awarded to the private respondents from BPS-16 to BPS-17 vide office orders dated 30.04.2008, 31.03.2021, 29.12.2015, and 06.09.2019 is a nullity in the eyes of law on the premise that they are not graduate engineers in terms of Pakistan Engineering Council Act,1975; thus not entitled to hold the post in BPS-17 in the light of ratio of the judgment passed by the Hon'ble Supreme Court in the case of Maula Bux Shaikh and others v. Chief Minister Sindh and others, **2019 PLC (C.S) 282**. An excerpt of the judgment is reproduced as under:

*“22. We may further observe that section 27 of the PEC Act provides for penalty for a person who undertakes any professional engineering work if his name is not borne on the Register but it also makes the employer who employs for any professional engineering work any person whose name is not, for the time being, borne on the Register to perform professional engineering work, shall also be liable for penalty as prescribed in the PEC Act itself. Thus both civil servant/employee and their employer would be liable to penalty as provided under section 27 if they undertake or allow a person to undertake professional engineering work whose name is not borne on register under PEC Act.*

*23. The net result of above discussion is that this petition fails. It is dismissed and leave refused, however with note of caution that government shall not allow or permit any person to perform professional engineering work as defined in the PEC Act, who does not possess accredited engineering qualification from the*

*accredited engineering institution and his name is not registered as a registered engineer or professional engineer under the PEC Act.”*

2. Mr. Ravi Kumar, learned counsel for the petitioner, inter alia, contended that petitioners No.1, 3 to 7 are qualified engineers and petitioners No. 2 and 8 are M.Sc. Degree holders are registered with the Pakistan Engineering Council; whereas, respondents 4 to 7 are merely diploma holders. Regarding respondent No.3 who is M.Sc. Degree holder, he contends that he proceeded on leave and remained out of the country for three years, but his said leave was illegally treated by respondents 1 and 2 as a deputation. The grievance of the petitioners is that in the final seniority list issued by respondents 1 and 2 on 02.09.2020, the names of respondents 3 to 7 have been placed before the names of the petitioners who are senior to the said respondents and as such their names ought to have been placed accordingly. It is averred by the petitioners that respondents No.4 to 7 were appointed as Field officers in BPS-16 in the year 1992. Whereas the petitioners and respondent No.3 were appointed as Deputy Assistant Director, Examiner, a field officer in the year 2007. It is the case of the petitioners that in terms of Resolution dated 5.9.2007, passed by the respondent-board, petitioners No.2, 4 to 8 were placed in BPS-17 vide office order dated 01.10.2007, subsequently, petitioners No.1 and 3, and respondent No.3 amongst others were also placed in BPS-17 vide office order dated 06.10.2007. Petitioners have urged that in terms of another Resolution dated 27.12.2019, passed by the respondent-board, Time Scale was awarded to the employees of the respondent-department including the petitioners on certain terms and conditions. However, no effect has been given to the subject Time Scale in their favor, as such, they are deprived of such benefit. He argued that respondent No.3 was not on duty for three years and the said period of his absence is illegally converted and respondent No.3 is malafidely put as senior to the petitioners; that the respondents 4 to 7 are diploma holders while petitioners are qualified PEC recognized Engineers/M.Sc. Degree holders; that insertion of respondents 3 to 7 in the seniority list of petitioners is illegal, malafide, and in violation of settled law and decision of the superior courts. He placed reliance on the case of Maula Bux Shaikh and others v. Chief Minister Sindh and others, **2019 PLC (C.S) 282**.

3. Mr. Muhammad Arshad Khan Tanoli, learned counsel for respondent No.04, has argued that the seniority of respondent No.4 has been restored in the impugned final seniority list under relevant rules, whereunder he was much senior to the petitioners as Field Officer, though his post had already been upgraded, however after upgradation of his post into BPS-17 he was/is entitled

to regain his seniority from the date of initial appointment with his batchmates, hence same was allowed vide order dated 06.09.2019, which is subsequently reflected in the impugned final seniority list.

4. Mr. Muhammad Nishat Warsi, learned DAG, has argued that respondent No.3 was appointed in the year 2007 and he was allowed to join SARSO, Dhaka Bangladesh, on a deputation basis for 03 years; that the period of deputation is counted as on duty, hence the seniority of the official would be intact. The factual position is that the judgment of the Hon'ble Supreme Court of Pakistan dated 15.07.2014 passed in C.P No.585-K of 2013, which is not supportive to their case, as the petitioners or the private respondents have never been assigned any task related to the engineering side, hence they cannot claim any undue seniority over and above the private respondents. He lastly prayed for the dismissal of the instant petition.

5. We have heard the learned counsel for the parties and perused the material available on record and case-law cited at the bar.

6. The pivotal question involved in the present petition is whether the private respondents are undertaking the work of professional engineers in terms of the Pakistan Engineering Council Act, 1975, being Diploma Holders. And whether their case falls within the ambit of the ratio of the judgment passed by the Honorable Supreme Court in the case of Maula Bux Shaikh supra or otherwise.

7. It appears from the record that the respondent No. 4 to 7 were appointed as Field officers in BPS-16 in the year 1992, qualifying three years Diploma Degree, whereas the petitioners and respondent No.3 were appointed as Deputy Assistant Director (Mechanical), Examiner (Agriculture & Food) (Electrical, Mechanical, Chemical, Textile & Electronics), and Field Officer in the year 2007 in BPS-16 being Graduate Engineers and M.Sc. degree holder in the department of Development Centre, Pakistan Standards and Quality Control Authority Karachi (PSQCA). Having examined their case, the respondent-Board vide Resolution dated 05.09.2007, placed petitioners No.2, 4 to 8 in higher rank i.e. in BPS-17 vide office order dated 01.10.2007 based on an engineering degree, subsequently, petitioners No.1 and 3, and respondent No.3 amongst others were also given the same benefit of BPS-17 vide office order dated 6.10.2007.

8. In principle, there is no dispute that the respondents 4 to 7 are Diploma holders while petitioners are qualified Engineers/M.Sc. Degree holders. On the other hand, there is also no dispute that the private respondents, except respondent No.3, were allowed up-gradation from BPS-16 to BPS-17 vide office order dated 30.04.2008.

9. The foremost questions which require our determination are as under:-

*i) Whether up-gradation is distinct from the expression promotion?*

*ii) Whether up-gradation is restricted to the post and not with the Person occupying it?*

10. To answer the first and second proposition, in our view for up-gradation of the post, the following conditions are pre-requisite:-

*i) Firstly up-gradation is restricted to the post and not with the person occupying it.*

*ii) Secondly up-gradation of posts does not mean automatic up-gradation of the incumbents of these posts as well, the appointment against the upgraded post is required to be made in the manner prescribed in the Recruitment Rules for that particular post.*

*iii) Thirdly up-gradation cannot be made to benefit a particular individual.*

11. To justify up-gradation, the Department needs restructuring, reform or to meet the exigency of service in the public interest, in the absence of the aforesaid pre-conditions, up-gradation is not permissible under the law. Our view is supported by the decision rendered by the Hon'ble Supreme Court of Pakistan in the case of *Ali Azhar Khan Baloch & others v. Province of Sindh & others*, **2015 SCMR 456**.

12. In principle, upgradation cannot be construed to be promotion. The Hon'ble Supreme Court of Pakistan vide judgment dated 12.09.2017 passed in the case of *Kaneez Zehra Kazmi v. Syed Hassan Naqvi* (Crl. Org. Petition No.97/2017 in Crl. Org. Petition No.89/2011) has held in Paragraphs 9 & 11 as under:

*“9. The upgradation granted to the petitioner from BPS-16 to BPS-17 and from BPS-17 to BPS-18 appears to have been to incentive encourage and to grant financial benefits without creating additional vacancies. The petitioner did not have any prospect of promotion, there was no other librarian, and that the petitioner did not affect the right of any other person when she was granted the upgradation. It will also be a case of extreme hardship if the benefits that the petitioner has earned/accumulated over the years are retrospectively undone for no fault of her own when she has retired from service.*

*11. Therefore, for the reasons stated above the impugned notification is hereby struck down as its issuance was not necessitated by any judgment/order of this Court. This petition stands disposed of in such terms.”*

13. The Hon'ble Supreme Court of Pakistan vide judgment dated 30.09.2016 in Civil Petition No.1424/2016 has held in Paragraph No.9 that upgradation is not a promotion as generally misunderstood. Upgradation is carried out without necessarily creating a post in the relevant scale of pay it is carried out under a policy and specified scheme. It resorts only for the incumbents of isolated posts, which have no avenues or channel of promotion at all. Upgradation under the scheme is personal to incumbents of the isolated posts to address stagnation and frustration of incumbents on a particular post for sufficient length of service on the particular post without any progression or avenue in the service.

14. Now another question has cropped up, whether insertion of the names of respondents 3 to 7 in the seniority list with graduate engineers is under law or otherwise.

15. In principle, there are two independent principles for determining seniority, namely (1) seniority is reckoned from the date of substantive appointment and (2) from the date of the order of the first appointment, if such appointment is followed by confirmation. Therefore, in the absence of any specific rule of seniority governing a cadre or a service, it is well-settled that the length of continuous officiation will provide a more objective and fair rule of seniority. And that is exactly what the model in the memorandum prescribes. It says that seniority in service shall generally be determined from the date of substantive appointment to service. But the rule does not stop by merely saying that the seniority shall generally be determined from the date of substantive appointment to service. It further provides that it may be determined commencing from the date of the order of the first appointment, but proceeds to qualify the last clause by providing: 'if such appointment is followed by confirmation'. In other words, a rule for determining seniority may provide the length of continuous officiation from substantive appointment or the date of the order of the first appointment if such appointment is followed by confirmation. In the latter case, once confirmation is made and the service till then is uninterrupted and continuous it relates to the date of the order of the first appointment.

16. There was no specific seniority rule to determine inter-se seniority between the direct recruits and the promotees appointed regularly within their respective quota and though, in the absence of any specific seniority rule, the Court could apply the residuary rule based on length of continuous officiation.

17. Under Section 9 of the Sindh Civil Servants (Probation, Confirmation, and Seniority) Rules, 1975 provides that in each [Cadre] in a department there shall be a separate seniority list of a group of civil servants doing similar duties and performing similar functions and for whose appointment same qualifications and experience have been laid down.

18. In the present case, the recruitment rules notified by the Pakistan Standard & Quality Control Authority and seniority list of BPS-17 technical and non-technical for officers of head office, SGC&QCC, and TSC have been prepared, which show that respondent No.4 was appointed in the year 1992 as Field Officer in BPS-16, his post was upgraded in 2008 in BPS-17 and regularized with the same date, his case was considered by the competent authority vide speaking order dated 06.09.2019 in compliance with the orders dated 3.12.2018 and 18.4.2019 passed by this Court in CP No.D-8314/2018 and his seniority was fixed along with his batchmates, same is the position of respondents No.5 to 7.

19. So far as respondent No.3 is considered, he was appointed in the year 2007 as Assistant Director (Technical) in BPS-16 being MSc. Degree Holder and the competent authority placed him in a higher rank in BPS-17 in 2007. Initially, he was granted three years deputation in SARCO with the approval of competent authority and his seniority has also been maintained.

20. Coming to the assignment of work of professional engineer to the diploma holders, the Hon'ble Supreme Court of Pakistan has already set at naught the aforesaid issue and has held that professional engineering work could only be performed by a professional engineer, and the Government was directed not to allow or permit any person to perform professional work who does not possess engineering qualification. The petitioners were appointed in 2007 as graduate engineers, whereas the respondents were appointed in 1992 as diploma holders thus the seniority of the petitioners and respondents are required to be prepared under the ratio of the judgment rendered by the Hon'ble Supreme Court of Pakistan in the case of Maula Bux Shaikh as discussed supra and rules framed by the respondent-department; and, if the official respondents are adhering with the notification dated 18.06.2013, however, that is subject to the ratio of the judgment of the Hon'ble Supreme Court of Pakistan in the aforesaid case as more particularly in paragraph 21-23.

21. In view of the above, this petition stands disposed of, in the terms that the competent authority of respondent- PSQCA is directed to go ahead with the

cases of the promotion of the petitioners including respondents (subject to the quota reserved for diploma, B-Tech (Honors) degree holders) in next rank, based on seniority-cum-fitness, coupled with the length of service and subject to availability of the post. The competent authority shall also take into consideration the issue of upgradation of the private respondents in BPS-17 which is not promotion as discussed in the preceding paragraph, however, if the competent authority still feels that they are entitled to promotion in the next rank under the subject quota, they shall not be assigned professional engineering work as defined in the PEC Act,1975, in the light of ratio of the judgment passed by the Hon'ble Supreme Court of Pakistan in the case of Maula Bux Shaikh as discussed supra.

22. This petition stands disposed of in the above terms.

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