

**IN THE HIGH COURT OF SINDH KARACHI**

Present:-

Mr. Justice Syed Hassan Azhar Rizvi

Mr. Justice Adnan-ul-Karim Memon

**1. C.P. No.D-965/2016**

Abdul Qayoom Solangi ..... Petitioner

Versus

Province of Sindh and others ..... Respondents

**2. C.P. No.D-6498/2014**

Muhammad Shafi Khaskheli ..... Petitioner

Versus

Abdul Qayoom Solangi and others..... Respondents

**Date of hearing: 21.12.2017**

Mr. Tehmas Rizvi, Advocate for the Petitioner in C.P. No. D-965 of 2016.

Mr. Abdul Salam Memon, Advocate for the Respondent No.1 in  
C.P. No.D-6498 of 2014.

Mr. Abdul Jalil Zubedi, AAG.

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**JUDGMENT**

**ADNAN-UL-KARIM MEMON-J.** Through the instant Petition the Petitioner has sought following relief(s):-

- a) Declare the impugned order dated 15.02.2016, issued/passed by Respondent No.2, as illegal, arbitrary, malafide, having been passed in colorable exercise of powers and not sustainable in law and liable to be set aside.
- b) Declare and direct that the impugned order dated 15.02.2016 is issued by incompetent authority without necessary approval from competent authority hence illegal and of no legal consequence.
- c) Set-aside the impugned order dated 15.02.2016, issued/ passed by the Respondent No.2.

- d) Suspend the operation of the impugned order dated 15.02.2016, being perverse, illegal, arbitrary and not sustainable in law.

2. Brief facts of Petitioner's case are that Petitioner in C.P. No. D-965 of 2016 was appointed as Assistant in BPS-11 in defunct Sindh Agricultural Supplies Organization (SASO), vide Appointment Letter dated 15.05.1995. The Petitioner added that the Government of Sindh vide Notification dated 14.01.2004, abolished SASO and services of all employees of SASO were dispensed with from 31.01.2004; that Petitioner did not accept Golden Handshake and requested Chief Minister, Sindh through application for his adjustment/absorption in any department of Government of Sindh in the same grade; on the said application, Chief Minister, Sindh was pleased to pass an Order dated 05.5.2008 for Petitioner's absorption in any department, preferably in Anti-Corruption Department. The Petitioner contends that in pursuance of order of the Chief Minister, Sindh he was declared surplus employee vide Services, General Administration and Coordination Department (SGA&CD) order dated 26.8.2008 and his services was placed in surplus pool of SGA&CD for absorption in any department of Government of Sindh; that pursuant to that Petitioner was absorbed under Rule 9-A of Sindh Civil Servants (Appointment, Promotion & Transfer) Rules, 1974, as Assistant in BPS-11 against a vacant post; that the said post was upgraded to BPS-14 in the year 2007 in Excise & Taxation Department vide its order bearing No. SO(LR) SGA &CD-II-38/2008 dated 27.9.2008, and the Respondent No. 3 vide his order dated 29.9.2008 placed Petitioner's services at disposal of Director Administration, Karachi. But,

thereafter the Respondent No. 3 vide order bearing No. SO(ADMN-II) E&T/3 (237)/2008 repatriated the Petitioner to the Services, General Administration & Co-ordination Department with immediate effect. The Petitioner in C.P. No. D-965 of 2016 assailed the aforesaid order in C.P. No. D-2233 of 2014 before this Court; that this Court vide order dated 14.05.2014 suspended operation of the repatriation order and issued notice to the parties. The Respondents contend that the Petitioner in C.P. No. D-965 of 2016 was repatriated in compliance of orders passed by the Hon'ble Supreme Court of Pakistan. However, as per Petitioner, the said process resulted in cancellation of repatriation order vide Respondent No. 3's order bearing No. SO(ADMN-II) E&T/3/237/2008 (P.I) dated 11.7.2014 and his services as Excise & Taxation Inspector in BPS-14 were placed at the disposal of Director Excise, Taxation & Narcotics (II) for further posting. As per Petitioner, the Respondent No. 3 vide letter bearing No. SO(ADMN-II) E&T/3 (237) 2008 dated 28.01.2016, signed by Section Officer (Admn.II), requested the Respondent No. 2 for the following action:

**“10. in view of above, it is requested that the absorption order of Mr. Abdul Qayoom Solangi as Excise & Taxation Inspector (BS-14) vide order No. SO(LR)SGA &CD-II-38/2008 dated 27<sup>th</sup> September, 2008 may be cancelled, however, he may be absorbed against the original post, Junior Clerk (BS-5) as previously held in SASO.”**

Perusal of the above referred letter reveals that it was based on the finding that the Petitioner was appointed as Junior Clerk in BPS-5 and not Assistant in BPS-11. However, in pursuance thereof, the Respondent No. 2 vide his order bearing No. SO(LR) SGA & CD-II(38) 08, dated 15.2.2016 repatriated Petitioner to his parent

Department that is, Agriculture Department, with direction to ascertain his actual designation in the light of record of the Department and (Defunct) SASO as to whether he was Junior Clerk in BPS-5 or Assistant in BPS-11. The Petitioner being aggrieved by and dissatisfied with above specified repatriation order has filed the instant petition.

3. Upon notice, the Respondents filed para-wise comments and denied allegations leveled by the Petitioner.

4. Mr. Tehmas Rizvi, learned Counsel for the Petitioner in C.P. No. D-965 of 2016 contended that the impugned order has been passed and issued to frustrate the executive and judicial orders passed by this Court in the Constitution Petition filed earlier by the Petitioner. Per learned Counsel the department has probed into the allegations against the Petitioner and the Competent Authority has absolved the Petitioner from the allegations; that despite that the impugned orders have been passed against him based on the same allegations, hence are illegal, arbitrary and liable to be set aside; that Petitioner has not committed any forgery as alleged against him and he was appointed as Assistant in BPS-11 in the (Defunct) SASO and not as a junior Clerk in BPS-5, as claimed by the official Respondents; that the Respondents have themselves admitted the Petitioner's appointment as Assistant in BPS-11 in their correspondence. He has further contended that the impugned order, which is punitive in nature and discriminatory, not sustainable in law and is arbitrary, illegal and liable to be set aside. He further argued that the impugned order tantamount to

infringement of his rights guaranteed under Article 4,5,9,14,18 and 25 of the Constitution of Islamic Republic of Pakistan 1973.

5. Mr. Abdul Salam Memon, learned counsel for Respondent No.1 in Constitution Petition No.D-6498/2014 contended that the Respondent No.1 was appointed on 05.06.1995 in the (Defunct) Sindh Agricultural Supplies Organization (SASO) and joined as Assistant in BPS-11 on 15.05.1996; that after abolition of SASO, the employees became surplus and the Petitioner did not avail Golden Handshake and requested the then Chief Minister Sindh, that he may be absorbed in any Sindh Government Department in the same grade; that the then Chief Minister Sindh was pleased to order for his absorption as discussed supra and issued such directions and in pursuance of which he was absorbed in Excise & Taxation Department as Assistant in BPS-11; that the post of Assistant was already upgraded to BPS-14, against the vacant post of Excise & Taxation Inspector in BPS-14, where he joined on 29.9.2008. He continued and stated that the case of the Petitioner does not come within the ambit of the dictum/observations of the Hon'ble Supreme Court of Pakistan as contended by the official Respondents and that the Judgment has been twisted against the Respondent No. 1 with malafide intention to mislead this Court. He narrated that the then Minister for Excise & Taxation had some personal grudge and was biased against the Petitioner, on whose direction inquiries were conducted against him in the year 2008 on the fake and fictitious complaints, including the complaint mentioned in C.P. No. 08/2009 filed by the Petitioner before this

Court. Having explained his case, he prayed for dismissal of the C.P. No.D-6498/2014.

6. Mr. Abdul Jalil Zubedi, learned AAG representing the official Respondents in both the petitions has contended that the Petitioner in C.P. No. 965 of 2016 was appointed as a Junior Clerk in BPS-05 and not Assistant in BPS-11 and the offer letter dated 05.06.1995 is a bogus/forged documents as per (Defunct) Sindh Agriculture Supplied Organization (SASO) letter No. SASO/ADMN/1-659/146/2009 dated 28.03.2009, wherein it has clearly been mentioned that the Petitioner is ex. Junior Clerk in BPS-5 in (Defunct) SASO has forged documents and in all the correspondence, the word Junior Clerk has been changed as Assistant. He argued that as per the (Defunct) SASO letter dated 28.03.2009 and Agriculture Department letter dated 28.05.2008 the Petitioner was appointed as Junior Clerk in BPS-05 vide order No. SASO/ADMN/9216 dated 05.06.1995 and he joined as Junior Clerk in BPS-05 on 09.06.1996 as per entry in his Service Book and the Service Book of the Petitioner provided by Administrative Department showing him as Assistant in BPS-11 is a forged/fake document, the stamp of DASO and signature on this forged Service Book are not of Incharge of (Defunct) SASO Cell Larkana and the Service Book of the Petitioner as Junior Clerk in BPS-05 maintained by the DASO, SASO (Defunct) Cell Larkana is genuine Service Book; that the letter No. SASO-330/2008 dated 17.07.2008 reporting therein that the Petitioner was appointed as Assistant in BPS-11 is also a forged and fictitious document and was not signed/issued by the Incharge, (Defunct) SASO Cell, this office had

not furnished such comments to the Administrative Department in this regard; that the Incharge SASO Cell has pointed out that his office had directed seven ex-employees of (Defunct) SASO, including the Petitioner, Ex. Junior Clerk vide letter No. SASO/FIN/GHS/330/2008 dated 13.06.2008 to visit his office and receive their cheques of Golden Handshake. He has further contended that the Agricultural Department letter No. SO(A-IV) 17(3)492/08/SASO dated 28.05.2008 states that Mr. Solangi was a Junior Clerk and he opted for Golden handshake, when SASO was dissolved w.e.f. 30.06.2001; that he signed his Golden Handshake documents as a Junior Clerk in BPS-05 and the Petitioner received amount of Rs. 16,200.00/- on account of encashment leave as a part of Golden Handshake. He has further contended that all the employees of SASO opted for Golden Handshake except 36 officials, who were included in surplus pool, and the Petitioner was not declared surplus employee, therefore his name was not included in the list of 36 surplus employees. However, in the year 2008 the Petitioner directly approached to Chief Minister Sindh, who instructed to include his name in the surplus pool and the Petitioner with fraudulent documents claimed to be Assistant BPS-11 and on that basis he was absorbed in Excise & Taxation Department as Excise and Taxation Inspector by the Respondent No.2 vide letter dated 27.09.2008; that after the complaint received against the Petitioner, the preliminary enquiry was conducted by Deputy Secretary of the Department and findings of the enquiry report state that the Petitioner was a Junior Clerk in BPS-05 and not Assistant in BPS-11 and the enquiry officer recommended to

revert the Petitioner to his original post of Junior Clerk in BPS-05 and that action may be taken against him for the fraudulent act committed by him. Accordingly, the Petitioner was relieved on 03.01.2009 and SGA&CD was requested to probe into the matter. However, the SGA&CD/the Respondent No. 2 replied that the Petitioner may not be relieved till enquiry is finalized and informed on 26.03.2009 that the complaint having no weight may be filed but on 28.03.2009 a detailed report from SASO was received with proofs that the Petitioner was a Junior Clerk in BPS-5 and not Assistant in BS-11 and a note for Chief Secretary Sindh was floated, who approved repatriation of the Petitioner to SGA&CD on the basis that he was Junior Clerk in BPS-5 and not Assistant in BPS-11. He has further argued that in compliance of the order passed by the Hon'ble Supreme Court of Pakistan in Criminal Original Petition No. 89/2011, the Minister for Excise Taxation & Narcotics Control directed for repatriation of the Petitioner to the SGA&CD/the Respondent No. 2 and accordingly, he was repatriated to SGA&CD on 28.04.2014. In compliance with the order dated 16.06.2014 passed by this Court, the repatriation order of the Petitioner was cancelled on 11.07.2014. However, a letter dated 23.7.2014 was sent to SGA&CD with the request that the continuation of services of the Petitioner on fake and forged documents may be treated as illegal and all the benefits availed by him may be recovered, as he has already taken Golden Handshake as Junior Clerk in BPS-05. He lastly prayed that the instant petitions may be disposed of with direction that all the benefits availed by him on the basis of fake and forged documents may be



recovered from him and a case may be filed against him for forgery and fraud.

7. We have heard learned Counsel for the parties, perused the material available on record and case law cited at the bar.

8. The issue before us is whether the Petitioner is a surplus employee as provided under Rule 9-A of the Sindh Civil Servants (Appointment Promotion and Transfer) Rules 1974. Record shows that the Petitioner was appointed on 05.06.1995, as Assistant in BPS-11 in SASO. The other version placed before us is that the Petitioner was appointed as Junior Clerk in BPS-5 on 05.6.1995 and that the documents produced by him showing that he was appointed as Assistant in BPS-11 have been forged by the Petitioner. However, after abolition of SASO in the year 2004, the Petitioner submitted an application to the Chief Minister Sindh, as Assistant in BPS-11 for his absorption in any department of Government of Sindh, who was pleased to order for his absorption in any department, preferably in Anti-Corruption Department and this process culminated on the Petitioner's absorption as Excise & Taxation Inspector in Excise & Taxation Department. We have noticed that the Government of Sindh vide order dated 15.02.2016 recalled the order dated 27.09.2008 whereby the Petitioner was absorbed as Excise & Taxation Inspector in BPS-11 in Excise Taxation and Narcotics Department Government of Sindh/Respondent No. 3, which apparently is after a period of around 07 years. The plea taken by the official Respondents is that Petitioner was appointed as a Junior Clerk in BPS-05 and not Assistant in BPS-11 and the letter of appointment of the Petitioner

dated 05.06.1996 is bogus and forged documents. This Court vide order dated 23.11.2016 directed the Chief Secretary Sindh to conduct enquiry into the allegation whether the Petitioner was appointed as Junior Clerk in BPS-5 or Assistant in BPS-11. The enquiry report dated 13.01.2017 has been submitted by the learned AAG along with the statement dated 23.10.2017, the relevant portion of the enquiry report is reproduced below:-

*“ I have very carefully perused the order of Honorable High Court of Sindh and the record available in the SGA&CD and the record placed before me by the representatives of the Agriculture, Supply & Prices Department, Excise, Taxation & Narcotics Department as well as the documents provided by the petitioner. I also patiently and considerately heard the departmental representatives and particularly the petitioner.*

*From the earlier enquiries/examinations, record and deliberations during the enquiry/hearing I have concluded that the substantive appointment of the petitioner is Junior Clerk (BS-05) (subsequently upgraded to BS-07) (now again upgraded to BS-11). The documents provided by the petitioner, regarding his appointment as Assistant (BS-11) in SASO (defunct) are prima facie suspicious.*

*Therefore, I will humbly suggest that he may be reabsorbed as Junior clerk (BS-05) (now upgraded to BS-11) in Excise & Taxation Department. The amount of 180 days encashment i.e. Rs. 16,200/- drawn by the petitioner as part of Golden Handshake may be got refunded from the petitioner in easy installments. However, the excess amount drawn by him in Excise, Taxation & Narcotics Department due to his absorption as Assistant Excise Inspector may not be refunded from him.”*

9. Upon perusal of the enquiry reports, which explicitly show two versions, whether the Petitioner was initially appointed as Junior Clerk in BPS-05 in (Defunct) SASO on 09.06.1996 or Assistant in BPS-11, now in BPS-14? This question was raised in earlier enquiry proceedings and the guilt of the Petitioner was not proved, on the contrary Additional Secretary SGA&CD submitted that due to non-availability of record no positive findings could be reached in the earlier enquiry and such observations were made by

this Court in its order dated 23.11.2016. It is still the same position that the department could not produce the original appointment letter of the Petitioner as Junior Clerk in BPS-05.

10. Now we take up the legal aspect of the case of absorption of the Petitioner in this regard, the basic concept of Rule 9-A of Sindh Civil Servants (Appointment, Promotion and Transfer) Rules 1974, is that a person who has been rendered surplus on account of abolition of a post of the Government or any autonomous body or on account of permanently taking over the administration of such autonomous body wholly or partially by the Government, may be appointed to any post in any Department of the Government.

11. Next we take up the question as to whether the post of the Petitioner in C.P. No. 965 of 2016 was abolished before his absorption in the light of Rule 9-A supra. The term 'abolition of post' is not defined in the Sindh Civil Servant Act 1973. However, this expression is used in Rule 9-A of APT Rules 1974. On this question the Hon'ble Supreme Court has held in paragraph No.139 in the case of Ali Azhar Khan Baloch (supra) as under:

“A department can only abolish a post with the concurrence of the S&GAD. Abolition of a post is permissible in case, if the department requires restructuring, reform or to meet exigency of services in public interest. The department can abolish a post for justifiable reason. Therefore, in future if a post has to be abolished within the Department and/or within the statutory body or organization controlled by the Sindh Government, the Department shall seek concurrence from the S&GAD coupled with the reasons justifying abolition”.(Emphasis Added)”

12. Record reflects that the Competent Authority vide order dated 05.05.2008 directed that the Petitioner may be absorbed in any department preferably in Anti-Corruption Department and the order of the Competent Authority was implemented and the

Petitioner was absorbed in Excise & Taxation Department as Excise & Taxation Inspector in BPS-11.

13. The second question, which agitates the controversy to be resolved, is whether the absorption of the Petitioner under Rule 9-A of the Sindh Civil Servants (Appointment Promotion and Transfer), Rules 1974, can be called in question. In this regard, the departmental enquiry, prima facie suggests that the Petitioner may be absorbed as Junior Clerk in BPS-05, now upgraded to BPS-11, in Excise & Taxation Department, which connotes that the Department has no objection, if the Petitioner is absorbed in BPS-11 rather than in BPS-14. We do not agree with such justification on the part of the Government of Sindh, which cannot change the legal position of the case as envisaged in Rules and dicta laid down by the Honorable Supreme Court of Pakistan in its various pronouncements on the issue of absorption.

14. Perusal of record reflects that the Competent Authority viz Chief Minister Sindh, vide order dated 21.07.2016 directed as under:-

***“If he is not covered in the Judgment. He may be retained in Excise & Taxation”***

15. The pivotal question is whether Petitioner can be accommodated /absorbed in Excise & Taxation cadre. Let us shed light on the concept of term cadre, which has neither been defined in the Sindh Civil Servants Act, 1973 or the Rules framed there under. However, the term ‘Cadre’ has been defined in Rule 9 (4) of the Fundamental Rules, 1992. The said Rule defines “Cadre” means the strength of a service or a part of a service sanctioned as a

separate unit.” Reliance is placed on the case of Muhammad Bachal Memon and others vs. Syed Tanveer Hussain Shah and others (2014 SCMR 1539).

16. We seek guidance from the Judgment passed by the Hon’ble Supreme Court of Pakistan in the case of Ali Azhar Khan Baloch supra whereby the Hon’ble Supreme Court has dealt with the Rule 9-A supra, that a person who has been rendered surplus on account of abolition of his post, in any Office or Department of the Government or autonomous body and / or on account of permanently taking over the administration of such autonomous body wholly or partially by the Government, can be appointed by transfer to any post in a Department or Office in the Government subject to his eligibility and qualifications as laid down under Rule 3(2) for appointment to such Office. Under Rule 9-A of the Rules 1974 that such person shall be appointed to a post of equivalent or comparable basic scale and, in case such post is not available, then to a post of lower Basic Scale, said Rule provides further restriction to the seniority of such person to the post by reckoning his seniority at the bottom of the seniority list from the date of such appointment. The Honorable Supreme Court has dealt with the aforesaid issue in para 116 of the Judgment supra and have set parameters of Rule 9-A of the Rules in para 126 of the Judgment. The scope of Rule 9-A of the Rules 1974 has been introduced with the object to accommodate the persons, who are rendered surplus by abolition of their posts or the organization in which they were working has been taken over by the Sindh Government. This Rule, as has been noticed, cannot be used as a tool to accommodate a

person by abolishing his post with an object to appoint him by transfer to a cadre or service or post in deviation of Rule 3(2), which is a condition precedent for appointment to such post. In order to exercise powers under Rule 9-A of the Rules, there has to be some justification for abolition of the post against which such person was working. This justification should come from the Department and or organization which shall be in consultation with the S&GAD and approved by the Competent Authority. Rule 9-A of the Rules does not permit appointment by transfer of a non-Civil Servant to any other Department and/ or organization controlled by the Government to a post, which restricts the transfer under Rule 3(2) of the Rules. A person can only be appointed by transfer under Rule 9-A of the Rules, if he has the eligibility, matching qualifications, expertise coupled with the conditions laid down under Rule 3(2) for appointment to such post. The Competent Authority under Rule 9-A of the Rules, while ordering appointment by transfer cannot lose sight of the conditions prescribed under Rules 4, 6(A) and 7. The Honorable Supreme Court has already dealt with the issue that any appointment by transfer under Rule 9-A of the Rules in violation of the aforesaid conditions is nullity.

17. We have noticed that Petitioner in C.P No. 965 of 2016 belonged to (Defunct) SASO, and its employees were not Civil Servants, therefore, the Petitioner cannot be allowed to be absorbed/ retained in Excise and Taxation cadre. It is well established principle of law that a non-civil servant cannot be conferred the status of a civil servant, which the Petitioner has acquired by absorption in Excise & Taxation Department, on the

above issue, our view is further strengthened by the decision rendered by the Honorable Supreme Court in the case of Ali Azhar Khan Baloch & others vs. Province of Sindh & others [2015 SCMR 456].

18. We are clear in our mind that no department can be allowed to absorb any employee to another cadre. Therefore the order passed by the Competent Authority for absorption/retaining the Petitioner in Excise and Taxation cadre is not sustainable in law.

19. Since, the matter has been dealt with up to the level of Chief Secretary, Government of Sindh and the matter explained in detail needs to be placed before worthy Chief Minister, Sindh for an appropriate order.

20. In the wake of above discussion, the aforementioned Constitution Petitions are disposed of in the following terms along with pending application(s):-

- (a) Government of Sindh / Competent Authority is directed to take decision whether Petitioner's initial appointment in (Defunct) SASO is as Junior Clerk in BPS-5, now in BPS-11 or as Assistant in BPS-11.
- (b) The Competent Authority to pass an appropriate order as provided under Rule 9-A of Sindh Civil Servants (Appointment, Promotion and Transfer) Rules 1974, and the dicta laid down by the Honorable Supreme Court of Pakistan in the case of Ali Azhar Khan Baloch & others vs. Province of Sindh & others [2015 SCMR 456], after granting Petitioner in C.P. No. 965 of 2016 a meaningful hearing within a period of two months.

JUDGE

JUDGE