

# IN THE HIGH COURT OF SINDH, AT KARACHI

Present: Mr. Justice Irfan Saadat Khan  
Mr. Justice Adnan-ul-Karim Memon

## C.P No.D-7142 of 2017

Mumtaz Ali Magsi ..... Petitioner

Versus

Government of Sindh & others ..... Respondents

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Petitioner: Through Mr. Faizan Hussain Memon.

Respondents No.1,2 &3: Through Mr. Shehryar Mehar AAG along with  
Mr. Khaliullah Jakhro, (Internee)  
Mr. Muhammad Habib Khan AIGP (legal) and  
Mr. Raza Mian DSP (Legal).

Respondent No.4: Naeem Ahmed Shaikh, DIGP (HQ).

Date of hearing: 07.09.2018

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## **J U D G M E N T**

**ADNAN-UL-KARIM MEMON, J:** - Basically, Petitioner through the instant petition is seeking implementation of the Order dated 13.09.2017 passed by the Home Secretary, Government of Sindh.

2. Brief facts of the case as per averments of the parties are that the Petitioner was serving in Sindh Police Department as Inspector in BPS-16. Petitioner has averred that he was lastly posted in Crime Branch No. II, Karachi, in the year 2015, wherein he was falsely involved in the purported departmental proceedings upon certain allegations leveled against him, thereafter the Competent Authority i.e. Inspector General of Police, Sindh awarded him Major penalty of dismissal from service vide order dated 09.04.2015 in the following terms:-

**“Inspector Mumtaz Ali Magsi (U/s) of Crime Branch Karachi (now posted HQ: Hyderabad Range) was called in O.R on 20.03.2015 and his verbal explanation were found unsatisfactory. Therefore, he was issued a final show Cause Notice bearing No. 1794-96/E.II/DP dated 30.03.2015 on the following charges:-**

***The DIGP/Crime Branch, Karachi vide letter No. DIGP/CB/KHI/PA/678-79 dated 16.03.2015 has reported that during his posting in Crime Branch-Ii Karachi serial of complaints for corruption received against him and his subordinate staff. A police party under his supervision given an official vehicle to a private party for committing crimes, which was also highlighted by ARY News on Electronic Media. In presence of such documentary evidence, there is no need for enquiry. As such the DIGP/ Crime Branch Karachi has recommended for dismissal from service to him.***

***His reply has not been received within stipulated period, which shows that he nothing say in his defence. As such, by taking an ex-parte decision he is awarded a Major Punishment dismissal from service with immediate effect as defined in Rule-3 RSO-2000”***

Petitioner being aggrieved by and dissatisfied with the penalty of dismissal from service awarded by IGP, Sindh Karachi under Removal from Service (special powers) Ordinance-2000(RSO) preferred a departmental appeal before Home Department Government of Sindh. Petitioner has submitted that the Competent Authority i.e. Home Secretary, Government of Sindh, vide order dated 20.05.2016, after examining the record and impugned order dated 09.04.2015 ordered reinstatement of the Petitioner in service, and in the meanwhile directed the IGP, Sindh to conduct De-novo proceedings in the matter. Petitioner has submitted that the IGP Sindh vide order dated 01.06.2016 nominated Additional IGP, Karachi Range to get the matter enquired and furnish report. The allegations leveled against the Petitioner were then enquired by the Superintendent of Police Saddar Division, District South, Karachi, vide order dated 14.07.2016, who opined that the order passed by the Home Secretary is just and proper and recommended as under:-

***“After personal hearings, statements, study of earlier enquiry, perusal of available recorded and thorough examination of matter it is safely concluded that PI Mumtaz Ali Magsi of Crime Branch II was not involved in Ferozabad incident of 28.02.2015. The decision of his dismissal from service was too harsh. His reinstatement into service by Home Secretary Sindh merits justice and fair play”***

Petitioner has submitted that IGP, Sindh did not agree with the findings of the Superintendent of Police Saddar Division, District South, Karachi and vide order dated 09.09.2016 appointed Mr. Azad Khan, Deputy Inspector General of Police as an enquiry officer to conduct comprehensive enquiry in the matter. As per Petitioner enquiry was conducted by the enquiry officer, however he found the Petitioner guilty and a report was then furnished to IGP, Sindh, vide letter dated 03.11.2016 with the following recommendation:-

***“As a result of the enquiry it has been established that Inspector Mumtaz Ali Magsi is equally responsible for the episode in which a police mobile with staff was trapped in a sting operation which brought bad name to police department and resulted in conviction of police officials involved in the episode.***

***He is recommended for major punishment.”***

Petitioner has averred that on 06.01.2017 he was served with a show cause notice on the aforesaid allegations and on 17.07.2017 Dr. Aftab Ahmed Pathan Additional IGP, Sindh awarded major punishment of dismissal from service to the Petitioner as under:-

***“You submitted reply to the show cause notice on 13.06.2017. The same was perused but found not satisfactory. You were called to appear in O.R on various dates but you failed to turn up till to date. Therefore ex-parte decision is taken and major punishment of dismissal from service is awarded to you under RSO-2000, with immediate effect”***

Petitioner being aggrieved by and dissatisfied with the order dated 17.07.2017 preferred a departmental appeal to IGP Sindh as well as to the Home Secretary, Government of Sindh. Per

Petitioner, the Home Secretary Government of Sindh vide order dated 13.09.2017 decided the departmental appeal in his favor by reinstating him on his service, in the following manner:-

***“Now therefore, keeping in view the above facts, taking lenient view, and with the approval of competent authority i.e. Home Minister of Sindh, being the appellate authority, the order bearing No. 4587-92/E-II/DP, dated 17.07.2017 issued by IGP Sindh is hereby set aside and Mr. Mumtaz Ali Magsi is hereby reinstated in service, with immediate effect. His out of service period is treated as leave without pay.”***

Petitioner has submitted that he is not aware with regard to the appellate order dated 28.08.2017 passed by IGP, Sindh rejecting his Appeal, as the Respondent department has attached a copy of the aforesaid order along with their comments, wherein they have disclosed the appellate decision as under:-

***“Appeal of Ex-inspector Mumtaz Ali Magsi of CIA Karachi against major punishment of dismissal from service is hereby considered and filed.”***

Petitioner has lastly submitted that the Respondent department is not implementing the order dated 13.09.2017 passed by the Home Secretary Government of Sindh. Petitioner being aggrieved by and dissatisfied with the aforesaid act of the Police department has filed the instant petition on 23.10.2017. At this stage learned AAG has pointed out that the AIGP Establishment vide letter dated 21.09.2017 addressed to the Home Secretary Government of Sindh requested him to review the order dated 13.09.2017 and the same may be withdrawn on the premise that the departmental appeal of the Petitioner was rejected by the IGP vide order dated 28.08.2017 and as per law any person aggrieved by any final order may prefer an appeal to the Sindh Service Tribunal.

3. Upon notice the Respondents filed parawise comments and controverted the allegations leveled against them.

4. Mr. Faizan H. Memon learned counsel for the Petitioner has argued that in the enquiry proceedings, the Petitioner has been declared innocent, therefore he was rightly reinstated in the service by the order of the Home Secretary Government of Sindh; that the allegations leveled against the Petitioner were enquired and disapproved by the Competent Authority as such no exception to that can be taken in this regard; that exercising powers by Additional IGP on behalf of IGP Sindh is without lawful authority; that the reinstatement order passed by the Home Secretary Government of Sindh, being an Appellate Authority of Additional IGP Sindh, cannot be called in-question by the IGP Sindh through his order dated 28.08.2017 (not communicated). During the course of arguments, Learned counsel emphasized that Home Secretary Government of Sindh is Competent/Appellate Authority of IGP, Sindh under RSO-2000, in support of his contention he referred to the Notification dated 10.06.2015 issued by the Government of Sindh and attempted to convince this Court that the Appellate Authority of the order of IGP/Additional IGP Sindh is Home Minister, who delegated his powers to the Home Secretary Government of Sindh to pass an order, which has been done in accordance with law; that the Respondent No.4, under instructions of IGP, Sindh referred the departmental appeal of the Petitioner to Home Secretary, who upon receiving the same, passed the order dated 13.09.2017, which is protected under the law. Learned counsel in support of his contention has referred to various provisions of RSO and argued that in similar situation, the Hon'ble

Supreme Court of Pakistan has dealt with the issue and relied upon the Judgment passed by the Hon'ble Supreme Court of Pakistan in the case of Muhammad Ismail Lashari & others Vs. Government of Sindh and others (2016 SCMR 2098). The learned counsel further argued that the Notification dated 09.05.2005 issued by the Services and General Administration, Government of Sindh confers power upon the Competent Authority as Appellate Authority, as such direction can be issued to the IGP, Sindh to implement the order passed by the Home Secretary; that the Petitioner has been vexed twice for the same allegations, which is violative of Article 13 of the Constitution; that the Petitioner is entitled for a fair opportunity in terms of impugned order dated 17.07.2017 passed by the Additional IGP Sindh to clear his position in terms of Article 10-A of the Constitution of the Islamic Republic of Pakistan 1973. He lastly prayed for allowing the instant petition.

5. Mr. Shehryar Mehar, learned AAG has controverted the submissions of the learned counsel for the Petitioner and raised the question of maintainability of the instant petition and argued that Additional Inspector General of Police enquired about the allegations leveled against the Petitioner and after giving proper opportunity of hearing to the Petitioner, found him guilty of misconduct, as defined under the RSO, and awarded him major punishment of dismissal from service vide order dated 17.07.2017. Per learned AAG the Petitioner preferred the departmental appeal against the impugned order dated 17.07.2017 before the I.G. Police Sindh, who considered his appeal and rejected the same vide order dated 28.08.2017, therefore the question of approaching the Home

Secretary for obtaining order of reinstatement of the petitioner, during pendency of Departmental Appeal/review before IGP, Sindh is erroneous/ not available under the law; that under Police Service of Pakistan (Composition, Cadre and seniority) Rules 1985, and Schedule attached thereto, there are various categories of police officers of PSP cadre and the post of Additional IGP is provided under the schedule, therefore exercising powers by the Additional IGP on behalf of the IGP, Sindh cannot be termed to be without lawful authority. He next argued that the Petitioner has adequate and efficacious remedy against the order dated 28.08.2017 passed by the IGP Sindh. In rebuttal the learned counsel for the Petitioner stated that the said order, as pointed out by the learned AAG, has never been communicated to him as such Petitioner cannot approach the learned Sindh Service Tribunal without having appellate order in hand.

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

7. The following legal questions have been raised in the present proceedings:-

**i) Whether the Civil Servants can file a Writ Petition by invoking Constitutional Jurisdiction of this Court in respect of the terms and conditions of his service when there is a bar contained in Article 212 of the Constitution?**

**ii) Whether the Minister of Home Department, Government of Sindh is Appellate Authority of the orders passed by the Inspector General of Police, Sindh?**

**ii) Whether Home Secretary, Government of Sindh is competent to pass an order dated 13.09.2017, on his behalf, reinstating the petitioner in police service?**

8. Foremost point in the present proceedings is whether Civil Servants can file a Writ Petition by invoking Constitutional Jurisdiction of this Court in respect of the terms and conditions of their service, when there is a bar contained under Article 212 of the Constitution?

9. We are of the view that Article 212 of the Constitution ousts the jurisdiction of this Court in respect of the matters pertaining to the terms and conditions of the Civil Servants. The ouster Clause under Article 212 of the Constitution is a Constitutional command, which restricts the jurisdiction of this Court under Article 199 of the Constitution on the subject, which squarely falls within the exclusive domain of the Tribunals. The expression “terms and conditions” includes transfer and posting, we are fortified on this point by the decision of the Hon’ble Supreme Court in the case of Ali Azhar Khan Balouch and others Vs. Province of Sindh and others (2015 SCMR 456).

10. Admittedly, the Petitioner is a Civil Servant and his case falls within the ambit of Section 3 (2) of the Sindh Service Tribunals Act, 1973 which says that “Tribunal shall have exclusive jurisdiction in respect of matters relating to the terms and conditions of the service of the Civil Servants”. Section 4 of the Service Tribunal Act states that “a Civil Servant has a right to file an appeal against the impugned orders adversely affecting the terms and conditions of his service before the Tribunal subject to the qualification provided therein.”

11. In the facts and circumstance of the case, on this point, this Court has no jurisdiction to interfere by means of Writ. We are



fortified on this issue by the decisions rendered by the Hon'ble Supreme Court in the case of Government of Khyber Pakhtunkhwa and others Vs. Hayat Husain and others (2016 SCMR 1021).

12. In the present proceedings, the Petitioner has also raised another legal issue with regard to the powers of the Home Secretary, Government of Sindh as Appellate Authority of IGP, Sindh under RSO (since repealed on 16.8.2017). It is therefore in our view necessary to answer that question by shedding light on the provision of Rule-13 of Sindh Police (Efficiency & Discipline) Rules, 1988 which provides as under:-

**“13.Appeal.---(a) An appeal shall lie only against the order of dismissal, removal from service, compulsory retirement, reduction in rank or time scale and forfeiture of approved service.**

**(b) There shall be one appeal only from the original order and the order of the appellate authority shall be final:**

**(c) The appeal shall lie to an officer one step higher in rank as shown in the Schedule, than the one who passes the original order provided that in case of orders passed by the Inspector-General of Police, only a review petition would be admissible.**  
Emphasis Added

13. Rule 16.32 of the Police Rule, 1934 also provides as under:-

**“6.32. Revision – An officer whose appeal has been rejected is prohibited from assaying for a fresh scrutiny of the evidence. Such officer may, however, apply, within a month of the date of dispatch of appellate orders to him, to the authority next above the prescribed appellate authority for revision on grounds of material irregularity in the proceedings or on production of fresh evidence, and may submit to the same authority a plea for mercy: provided that no application for the revision of an order by the Inspector-General will be entertained. An officer whose appeal has been heard by the Inspector-General may, however, submit to the Inspector-General a plea for mercy or may apply to the Inspector General for a review of his appellate order only on the ground that fresh evidence has become available since the appellate order has been pronounced. This rule does not affect the provisions of rule 16.28.Such application or plea must be in English.”** Emphasis Added

14. Prima facie, the above legal position clearly depicts that the Minister, Home Department, Government of Sindh or Secretary, Home Department, Government of Sindh are not competent to exercise the powers of an Appellate Authority of the Inspector General of Police under the aforesaid rules.

15. Reverting to the plea taken by the learned counsel for the Petitioner that order passed by the Home Secretary reinstating the service of the Petitioner needs to be implemented by the Inspector General of Police. Suffice it to say that when the Home Minister or Home Secretary is not the Appellate Authority exercising such power as an Appellate Authority would be erroneous, thus the question of implementation of his order is not legally sustainable.

16. Returning to the second plea taken by the learned counsel for the Petitioner that under the Removal from Service Ordinance (Special Powers) Sind Ordinance, 2000 and Notification dated 10<sup>th</sup> June, 2015 issued in pursuance thereof, Competent Authority is the Chief Minister, Sindh who has delegated the powers to the concerned Minister being Appellate Authority. To address the above question raised by the learned counsel, it is expedient to elaborate the aforesaid issue, in the light of judgment rendered by the Hon'ble Supreme Court of Pakistan in the case of Muhammad Ismail Lashari & others Vs. Government of Sindh and others (2016 SCMR 2098), wherein it was observed as under:-

***'conduct prejudicial to good order or service discipline or conduct unbecoming of an officer and a gentleman or involvement or participation for gain either directly or indirectly in industry, trade or speculative transactions or abuse or misuse of the official position to gain undue advantage or assumption of financial or other obligations to private institutions of persons such as may cause***

***embarrassment in the performance of official duties or functions’.***

Similarly, ‘misconduct’ on the basis of which action can be taken under the Sindh Police (Efficiency and Discipline) Rules 1988 means:

***“Misconduct” means conduct prejudicial to good order or discipline in the Police Force, or contrary to the government Servants (Conduct) Rules or unbecoming of a Police Officer and a gentleman, any commission or omission which violates any provision of any law or rules regulating the function and duty of a Police Officer or to bring or attempt to bring political or other outside influence directly or indirectly to bear on the Government or any Government Officer in respect of any matter relating to the appointment, promotion, transfer, punishment, retirement or other conditions of service of a Police Officer.”***

17. Prima-facie, the penalty of dismissal from service of a police officer attracts only for the gravest acts of misconduct or as the cumulative effect of continued misconduct proving incorrigibility and complete unfitness for police service that whether such police officer is fit to continue in the police service. It is the prime duty of the superior officers in the police hierarchy to ensure discipline within the police force, which is a public service and also to keep a strict check on the conduct of such police officers. A constant watchful-eye on the police officer is need of the day and if the Competent Authority reaches the conclusion that the police officer has indulged in acts of misconduct, which prove incorrigibility and render complete unfitness of such police personnel in the service, then the Competent Authority should award the penalty of dismissal from service, as has been done in the instant case.

18. Upon perusal of Police Rule 16.2, its scope is wide and the object behind it is to discipline the police force and to ensure

that the police officers in uniform shall not behave in a manner which, entails patronizing crime or other social evils. The scheme which seems behind the Rule is to ensure that the police officials in discharge of their duties shall act in a manner which should restore confidence in the public at large. It is well settled law now that if a police official with such patchy record is allowed to continue in service, it would not only damage the image of police force, but will also encourage social evils in the society, which the police force is required, to eliminate.

19. To elaborate further on the issue of the Competent Authority, we refer to the definition of the “Competent Authority” given under section 2(a) of RSO 2000 which reads as under:

***“2(a) “Competent authority” means, the [Chief Minister] and where, in relation to any person or class of persons, the [Chief Minister] authorizes any officer or authority , not being inferior in rank to the appointing authority prescribed for the post held by the person against whom action is proposed to be taken, to exercise the powers of competent authority under this Ordinance, that officer or authority, and, in relation to an employee of a Court or Tribunal functioning under the Provincial Government, the appointing authority or the Chairman or Presiding Officer of the Court or the Tribunal.”***

20. Under the aforesaid definition contained in section 2(a), the Competent Authority under the RSO, is the Chief Minister. The said definition authorizes the Chief Minister to delegate the authority to take cognizance under the RSO against any officer or Authority not being inferior in rank to the appointing authority prescribed for the post held by the person against whom action is proposed to be taken to exercise the powers of the Competent Authority under the RSO 2000. On 09.05.2005, the Chief Minister in his discretion through the Services and General Administration issued a Notification, which reads as under:-

*Karachi, dated the May 9, 2005*

**NOTIFICATION**

**NO.SORIII(SGA&CD)9-28/2004:** In pursuance of the provisions of section 9 of the Removal from Service (Special Powers) Sindh Ordinance, 2000 the Chief Minister is pleased to designate the Officer next above the appointing/competent authority mentioned in the table below for the purpose of the said section.

**TABLE**

S. NO.	AUTHORITY MAKING THE ORDER	AUTHORITY TO WHOM REPRESENTATION/REVIEW ARE TO BE MADE
1	2	3
1.	Officers in Basic Scales 16,17,18 and 19.	The officer next above under whom the officer making the order is working.
2.	Regional Head.	Head of the Attached Department concerned and if there is no Head of the Attached Department then Secretary of the Department concerned.
3.	Head of the Attached Department.	Secretary of the Department unless he is of a lower grade in which case Chief Secretary through the Secretary of the Department.
4.	Secretaries of the Department.	Chief Secretary
5.	Chief Secretary	Chief Minister

**CHIEF SECRETARY  
GOVERNMENT OF SINDH**

21. Under the aforesaid Notification, the Chief Minister delegated the Appellate Authority in terms of section 9 in respect of the officer next above the appointing / Competent Authority. In other words, original powers exercisable by the Chief Minister were delegated to the appointing Authority and an appeal against such order under the RSO in terms of Section 9 were conferred on the next officer above the appointing Authority. In partial modification of the above Notification, a further Notification was issued which reads as under:-

**NOTIFICATION**

**NO.SOR-I(SGA&CD) 3-2/2000(P-I): In partial modification of this Department's Notification No.SOR-III(S&GAD)9-28/2004 dated 9<sup>th</sup> May 2005 and in pursuance of provisions of section 9 of the Removal from Service (Special Powers) Sindh Ordinance, 2000 the Chief Minister is pleased to designate the Officer next above the appointing/competent authority mentioned in the table below for the purpose of the said section.**

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S. NO.	AUTHORITY MAKING THE ORDER	AUTHORITY TO WHOM REPRESENTATION/REVIEW ARE TO BE MADE
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1.	Officers in Basic Scales 16,17,18 and 19.	The officer next above under whom the officer making the order is working.
2.	Regional Head.	Head of the Attached Department concerned and if there is no Head of the Attached Department then Secretary of the Department concerned.
3.	Head of the Attached Department.	Secretary of the Department unless he is of a lower grade in which case Chief Secretary through the Secretary of the Department.
4.	Secretaries of the Department.	Minister Incharge of the Department concerned.
5.	Chief Secretary	Chief Minister
6.	If Minister concerned is appointing authority.	Chief Minister (Review Petition may be filled before the Chief Minister but not appeal).

**CHIEF SECRETARY  
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22. The Examination of Section 12 of the Police Act 1861 leaves no ambiguity as to the fact that the police force is headed by Inspector General of Police. We are fortified by the Judgment of the Honorable Supreme Court rendered in the case of Gul Hassan Jatoi & others Vs. Faqeer Muhammad Jatoi & others (2016 SCMR 1254). It is well settled now that the Sindh Civil Servants Act 1973, is an Act of general application and it has no Constitutional status, accordingly, it is as much a law as the Police Act 1861, with the added distinction that it is of general application, while the Police Act is of Special application on the officers of the Police Force, the same is true with the rules. In this view of the matter, the question as to which would prevail over the other in case of inconsistency is of no difficulty, as it is always the Act which prevails over the rules being subordinate legislation. Reliance is safely placed on the case

of Inspector General of Police, Punjab, Lahore another Vs. Mushtaque Ahmed Waraich and others (PLD 1985 SC 159).

23. We, for the aforesaid reasons are of the considered view that the Home Minister, Sindh/ Home Secretary was not competent to exercise the powers of an Appellate Authority in respect of the orders of Inspector General of Police under the aforesaid Police Rules or under Sindh Civil Servants Act, 1973 and the Rules framed thereunder. Therefore, at this juncture, the orders passed by the Home Secretary in favour of the Petitioner is found to be not in accordance with law, thus cannot be executed under the law. The answer to the above proposition of law is given accordingly.

24 The case law cited by the learned counsel for the Petitioner is distinguishable from the facts and circumstances of the present case.

25. Keeping in view the above mentioned facts and circumstances of the case, the captioned petition is not maintainable under Article 199 of the Constitution of the Islamic Republic of Pakistan 1973; hence dismissed. The Petitioner may however seek appropriate remedy as provided under the law subject to the conditions enumerated under the law.

JUDGE

JUDGE

Karachi

Dated: - .09.2018

**Shafi Muhammad P.A**