

IN THE HIGH COURT OF SINDH KARACHI

Before:

Mr. Justice Muhammad Shafi Siddiqui

Mr. Justice Adnan-ul-Karim Memon

Constitutional Petition No. D –3271 of 2020

Bilqees

Versus

The Secretary, Wafaqi Mohtasib Ombudsman's and 02 others

Date of hearing : 24.02.2021

Date of announcement : 04.03.2021

Mr. Muhammad Daud Narejo, advocate for petitioner.

Mr. Ameer Bakhsh Metlo, advocate for respondent No.3.

Mr. Muhammad Nishat Warsi, DAG.

JUDGMENT

ADNAN-UL-KARIM MEMON, J. – Primarily, the main grievance of the petitioner is against respondent No.3, who is holding the public office, therefore, fall within the purview of Sub-Clause (1)(b)(ii) of Article 199 of the Constitution, which permits this Court to issue “Writ of Quo-warranto” requiring a person within its territorial jurisdiction of the Court holding or purporting to hold a Public Office to show under what authority of law he/she claims to hold such office.

2. Mr. Muhammad Daud Narejo, learned counsel for the petitioner, argued that initially, respondent No.3 who an employee of Women Development Department, Government of Balochistan, was brought by the learned Wafaqi Mohtasib (Ombudsman)'s Secretariat Islamabad (hereinafter to be called as “Secretariat”) on deputation in the year 2012 for a certain period, thereafter her services were absorbed in Wafaqi Ombudsman Office, in violation of the law and rules besides the Judgment of Hon'ble Supreme Court rendered in the case of Ali Azhar Khan V/s Province of Sindh and others (2015 SCMR 456). At this stage, we confronted the learned counsel for the petitioner that the issue of promotion could not be looked into till the absorption of respondent No.3 is decided either way. He agreed in principle and confined his arguments to the extent of absorption of respondent No.3 in the Wafaqi Mohtasib (Ombudsman) Office, Islamabad.

3. We have heard the learned counsel for the parties on the issue of absorption of respondent No.3 to the post of Director BPS-18, Wafaqi Mohtasib (Ombudsman)'s Secretariat, Regional Office Karachi, by way of transfer from

the post of Women Development Department Government of Baluchistan, under rule 14 of the Wafaqi Mohtasib Secretariat Officer's Service Rule, 2009 (hereinafter to be called as "Rules 2009").

4. To see as to whether the case of respondent No.3 is at par with rule 14 of Rules 2009, whereby appointment by transfer from a post to another post had been allowed by the learned Wafaqi Mohtasib (Ombudsman). The important question which arises for our determination is whether Wafaqi Mohtasib is competent to absorb any deputationist by appointing her/him by transfer in the Establishment of the Wafaqi Mohtasib, Islamabad?

5. Rule 14 of Rules 2009 provides that an appointment can be made in Wafaqi Mohtasib Secretariat by way of transfer amongst person holding appointment on regular basis in the Federal Government or a Provincial Government in the post in the same basic pay scale or equivalent to or identical to a post to be filled. Whereas, Section 8 of the Establishment of the Office of Wafaqi Mohtasib (Ombudsman) Order, 1983 (hereinafter to be called as "Order 1983") provides appointment and terms and conditions of service of the staff, which shall be made by the President or by a person authorized by him in such manner as may be prescribed by the Federal Government.

6. Mr. Ameer Bakhsh Metlo, learned counsel for respondent No.3 contended that she met the criteria as provided in the aforesaid rules, consequent upon the recommendation of the selection and promotion committee, and with the approval of the competent authority, she was permanently absorbed (appointed by transfer) as Deputy Director BS-18 in the Wafaqi Mohtasib Secretariat vide notification dated 03rd March 2015. Learned counsel has relied upon various documents i.e. Notification dated 4th September 2012, letter dated 21st May 2013, NOC dated 08.04.2014, letter dated 11.4.2012, No proceeding certificate dated 28.04.2014, Minutes of meeting dated 27.06.2014, Office Memorandum dated 25.9.2014, Notification dated 03.03.2015, Notification dated 04.08.2016, letter of appreciation by the learned Wafaqi Muhtasib dated 21.01.2017 and Response letter dated 22.02.2021 to the letter of DAG dated 19.02.2021. He also placed reliance on the case of Abdul Sami Memon and 8 others V/s Federation of Pakistan through Secretary Establishment Government of Pakistan and 5 others, (2020 PLC 125), and argued that a writ of quo-warranto is not available to one set of Civil/Public Servants against another set of Civil/Public Servants and if a colleague is allowed to challenge another colleague's appointment, there would be no end to this; there will be anarchy

in the service structure. In support of his contentions, he placed reliance on the cases of Dr. Azeem ur Rehman V/s. Government of Sindh (2004 SCMR 1299) and Ali Hassan Brohi V/s Province of Sindh and others (2015 SCMR 353). On the point of laches, he relied upon the case of Abdul Rehman Vs Chairman, Pakistan National Shipping Corporation and another, (2020 PLC (CS) Note 3), and argued that the instant petition is suffering from laches on the premise that the petitioner for the unknown reason waited for 6 years to file the instant petition against the absorption of respondent No.3, thus the instant Petition is hit by the doctrine of laches as the Petitioner has filed the instant Petition in July 2020, whereas the respondent No.3 was absorbed in March 2015, i.e. approximately 5 years before the filing of the instant Petition. On the term of public interest, he relied upon the case of Dr. Ghulam Shabbir Saqib, DHO V/s Government of Punjab, through Secretary L.G. and Respondent No. R.D. Department and others, (2005 PLC (CS) 993), and argued that the appointment of respondent No.3 to the post in question had been made by the competent authority in good faith and the public interest on administrative grounds. He further argued that the impugned action neither being unreasonable nor in violation of any fundamental right of the petitioner and is not liable to be struck down merely for the reason that petitioner's promotion will be blocked. On the same subject, he relied upon the cases of Miss Naheed Khan V/s Government of Pakistan and others, PLD 1997 Karachi 513, Dr. MUHAMMAD HUSSAIN v. PRINCIPAL; AYUB MEDICAL COLLEGE, P L D 2003 Supreme Court 143, ABID HUSSAIN SHERAZI v. SECRETARY M/O INDUSTRIES AND PRODUCTION, GOVERNMENT OF PAKISTAN, ISLAMABAD, 2005 S C M R 1742, R.B. AVARI & CO. (PVT.) LTD. through Director v. FEDERATION OF PAKISTAN through Director-General Ministry of Food, Agriculture and Livestock and another, 2007 CLC 157, Mirza BASHIR AHMED and another v. HABIB and 6 others, 2006 MLD 148, NAZAR HUSSAIN and others v. DEPUTY DISTRICT EDUCATION OFFICER and others, 2003 SCMR 1269, Syed Mubashir Raza Jaffri v. Employees Old-Age Benefits Institutions (EOBI), 2014 SCMR 949 Supreme Court, **Suo Motu Case No. 13 of 2016** (Action against illegalities, contraventions and violations in appointments within NAB), 2017 SCMR 838, MUHAMMAD SALEEM v. FEDERAL PUBLIC SERVICE COMMISSION and others, 2020 SCMR 221, and Saghir Ahmed through Legal Hiers v. Province of Punjab through Secretary, Housing and Physical Planning Lahore and others, PLD 2004 Supreme Court 261.

7. Learned DAG has supported the arguments advanced by the learned counsel for the respondent No.3.

8. This assertion made by the learned counsel for the respondent No.3 has been refuted by learned counsel for the petitioner on the ground that her absorption was/is hit by the judgment passed by the Hon'ble Supreme Court rendered in the case of Ali Azhar Khan Baloch as discussed supra. He further argued that Junior Officer/respondent No.3 has been placed in senior grade and the petitioner whose promotion was due has been blocked. He next argued that as per section 13(2) of Rules 2009 provides the length of service for promotion to BPS-19 is 5 years in BS-18 and the petitioner qualifies such length of service, however, due to absorption and subsequent promotion of respondent No.3 on the post of Director BS-19 her promotion has been virtually obstructed. She prayed for the direction to respondents No.1 and 2 to cancel the notification dated 18.05.2020 for the appointment of respondent No.3 as Director BS-19.

9. We have noticed that respondent No.3 was initially transferred by the Wafaqi Mohtasib (Ombudsman)'s Secretariat on deputation at her request for a certain period; and, subsequently, she was absorbed in the Secretariat vide notification dated 03rd March 2015. It is seen that *prima-facie*, the assertions of the learned counsel for respondent No.3 do not align with the decisions rendered by the Hon'ble Supreme Court on the issue of deputation and absorption as discussed supra, for the simple reason that the word Civil Servant is defined under Section 2(1)(b)(i) of the Civil Servant Act, 1973; that a person who is on deputation to the Federation from any Province or other authority, is not a civil servant, therefore, the basic absorption of respondent No.3 in the Secretariat, is against the law and dicta laid down by the Hon'ble Supreme Court of Pakistan in its various pronouncements on the aforesaid issues.

10. Much emphasis has been laid on Rule 14 of Establishment of the Office of Wafaqi Mohtasib Secretariat Officers Service Rules 2009 to justify, absorption of respondent No.3 in the Secretariat, by way of transfer. For convenience, the relevant Rule is reproduced hereunder: -

“14. **Appointment by transfer.** - (1) An appointment by transfer from a post to another post shall be in the public interest with the approval of the appointment authority.

(2) Appointment by transfer shall be made from amongst persons holding appointment on regular basis in the Federal Government or a Provincial Government in a post in the same basic pay scale or equivalent to or identical with the post to be filled.

(3) Only an officer, possessing the qualifications and meeting other conditions laid down for initial appointment to the post on which appointment by transfer is to be made, shall be considered for appointment by transfer on recommendations of the Selection and Promotion Board or the Selection and Promotion Committee, as the case may be.”

11. To appreciate the term appointment by transfer, the concept of appointment by transfer is known to service jurisprudence. A power to appoint includes a power to revoke an appointment, and so also a power to make an appointment includes a power to make an appointment by transfer, subject to satisfying the requirements of recruitment rules for the subject post. So far as the appointment by transfer is concerned, the normal rule is that a person working on one post can be transferred to another, provided, the post is in the same rank and scale of pay and the transferee must have the matching qualification and conditions laid down in the initial appointment. In certain services even appointment by transfer to a higher post is permissible; however, this depends upon the provision in the rules. In a case where a person working on a lower post is appointed by transfer to a higher post, then every eligible person has a right to be considered. Thus, a person working on a lower post cannot claim that he has an indefeasible right to be appointed by transfer to a higher post to the exclusion of every other eligible candidate. However, subject to his/her fulfilling the conditions of eligibility along with that of the eligible persons who may offer their candidature for the appointment. Coming to the present case, firstly the respondent No.3 was brought on the deputation and then was absorbed by way of transfer under Rule 14 of Rules 2009. Her appointment by way of transfer is not covered under the Rules 2009. Before going ahead, initially, respondent No.3 was a civil servant and was appointed on deputation in the Secretariat in the year 2012 which is an autonomous body. Besides deputation is defined in the ESTACODE 2009 Edition Chapter-III on page 385, Part-II at Page 426 ref. The procedure provided under the ESTACODE requires that a person, who is transferred and appointed on deputation, must be a Government servant, and such transfer should be made through the process of selection. In the present case, the Secretariat has to establish the exigency in the first place, and then the person who is being transferred/placed on deputation in the secretariat must have matching qualifications, expertise in the field with the required experience. In absence of these conditions, the competent authority cannot appoint anyone by transfer on deputation.

12. Let us further elaborate on the aforesaid issue of deputation; we have to see Rule 20A of the Civil Servants (Appointment, Promotion & Transfer) Rules, 1973. An excerpt of the same is reproduced as under: -

20A. Appointment on deputation.-

(1) A person in the service of a Provincial Government or an autonomous, semiautonomous body or corporation or any other organization set-up, established owned, managed or controlled by the Federal Government who possesses the minimum educational qualifications, experience or comparable length of service prescribed for a post shall be eligible for appointment to the said post on deputation for a period of two years on such terms and conditions as may be sanctioned by Federal Government in consultation with the lending Organization.

(2) Subject to any rule or orders on the subject issued by the Federal Government, a civil servant who fulfills the conditions and is considered suitable may be sent on deputation to an autonomous, semi-autonomous body or corporation established by law or to the Provincial Government on such terms and conditions as may be decided by the lending and borrowing organizations.

(3) In case of appointment under sub-rule (1) or sub-rule (2) pension contribution shall invariably be made by the borrowing organizations”.

13. In the light of the foregoing legal status of the term deputation, which explicitly recognizes the appointment on deputation under the terms and conditions as set forth under the aforesaid provision of law, however, it does not speak about the permanent absorption of a person in the service of Secretariat, controlled by the Federal Government and employees therein are not civil servants.

14. We have noticed that certain conditions have been imposed in the aforesaid Rules that a person, who possesses the minimum educational qualifications, experience, or comparable length of service prescribed for a post shall be eligible for appointment to the said post on deputation for two years on such terms and conditions as may be sanctioned by the Federal Government in consultation with the lending Organization. It means that only a Civil Servant as defined under the Civil Servant Act, 1973, who fulfills the conditions as discussed supra can be considered suitable to be appointed on deputation on such terms and conditions as may be decided by the lending and borrowing organizations/departments. We have noticed that the office of Wafaqi Mohtasib (Ombudsman) is established under Order 1983, which explicitly provides that Wafaqi Mohtasib (Ombudsman) is to be appointed and its terms of service shall be settled by the President under Sections 3 & 6 of the Order 1983. The learned Wafaqi Mohtasib is empowered to make the appointment of advisors, consultants, fellows, bailiffs, interns, commissioners, and experts or ministerial staff without remuneration under Section 20 of the Order 1983 and he enjoys

administrative and financial autonomy as may be prescribed by the Federal Government. The aforesaid legal position established that the establishment of the office of Wafaqi Mohtasib (Ombudsman)'s Secretariat falls within the purview of the Government of Pakistan, Ministry of Law, and Parliamentary Affairs (Law Division). Prima-facie, while absorbing the respondent No.3 in the office of Wafaqi Mohtasib (Ombudsman)'s Secretariat, the Rule 20A (1) of the Civil Servants (Appointment, Promotion & Transfer) Rules, 1973 had not been complied with, however, the record is silent whether such sanction of the Federal Government was accorded in the present case or otherwise.

15. In view of the preceding paragraphs, we are clear in our mind that the Competent Authority does not have unbridled powers to first appoint on deputation and then absorb any civil servant in the establishment/organization/agency, which is not regulated by Civil Servants Act without fulfilling the conditions as outlined in the Recruitment Rules, thus, prima-facie the word "absorption" is not akin to the word-initial appointment /confirmation, in service, which has its meaning and procedure provided in-service law, there is no proper mechanism provided either under the Civil Servant Act or Rules of Establishment of the Office of the Wafaqi Mohtasib Secretariat Officers Service Rules 2009 for permanent absorption of any Civil Servant in another Organization, except under Section 11A of the Civil Servants, Act 1973 which provides as under:-

"11A. Absorption of civil servants rendered surplus.- Notwithstanding anything contained in this Act, the rules, agreement, contract or the terms and conditions of service a civil servant who is rendered surplus as a result of reorganization or abolition of a Division, department, office or abolition of a post in pursuance of any Government decision may be appointed to a post, carrying basic pay scale equal to the post held by him before such appointment, if he possesses the qualifications and fulfills other conditions applicable to that post: Provided that where no equivalent post is available he may be offered a lower post in such manner, and subject to such conditions, as may be prescribed and; where such civil servant is appointed to a lower post the pay being drawn by him in the higher post immediately preceding his appointment to a lower post shall remain protected."

16. Reverting to the contentions of the learned counsel for the private respondent No.3 that the Competent Authority of Wafaqi Mohtasib Secretariat was empowered under Rule 14 to absorb the deputationist from different organizations to Wafaqi Mohtasib Secretariat against the posts meant for Initial Appointment or Promotion. If this being the position, then we need to examine the entire scheme of the Rules, 2009.

The rules provides the qualification, experience, age limit for initial appointments in Wafaqi Mohtasib Secretariat. It also provides that on the

closing date for receipt of applications as fixed in the relevant advertisement, a candidate for initial appointment to a post must possess the educational qualifications and experience and must be within the age limit as amended against the post concerned.

For the post of Director BPS-18 the minimum qualification required is Second Class or Grade "C" Master's Degree from any recognized University in English, Economics, Statistics, political science, business administration, public administration, business administration (Finance) and Law with 12 years' service in BPS-17 and above or 07 years' service in BPS-18.

Rule 4 provides that the authorities competent to make appointments to various post other than those falling in Article 20.

Rule-5 provides method of appointment & qualification for appointment. Basically appointment to the above posts shall be made on regular basis by any of the following methods, namely: -(a) by initial appointment; (b) by promotion; and (c) by transfer.

Initial appointment in period reduced by (i) Basic pay scale 18. (ii) Basic pay scale 19. 12 years. (iii) Basic pay scale 20 17 years. It provides further that when the appointment of a person was made in a post in basic pay scale 16 or above, one half of service in basic pay scale 16 and one-fourth in basic pay scale 15 and below shall be counted as service in basic pay scale 17 for computing the minimum length of service for the purpose of promotion. The period of extraordinary leave or any other period of services which is not reckoned as service qualifying for the person shall not be counted towards length of service for promotion.

Rule 6(5) provides that Initial appointment, promotion, or appointment by transfer to various posts shall be made by the appointing authority on recommendations of the Selection and Promotion Board or the Selection and Promotion Committee, as the case may be.

Rule 7 provides about the initial Appointment that a person shall be eligible for initial appointment in the office.

Rule 8 provides that all vacancies shall be filled in by initial appointment through advertisement in the newspapers in accordance with the laid down policies of the Federal Government.

Rule 9 also says about the merit and provincial or regional quotas with the rider that vacancies in posts in basic pay scales 16 and above and equivalent shall be filled on all-Pakistan basis in accordance with the merit and provincial or regional quotas prescribed by the Federal Government from time to time.

Rule 14 clearly stipulates that about the appointment by transfer with the condition that an appointment by transfer from a post to another post shall be in the public interest with the approval of the appointment authority; and, appointment by transfer shall be made from amongst persons holding appointment on regular basis in the Federal Government or a Provincial Government in a post in the same basic pay scale or equivalent to or identical with the post to be filled. It further clarifies that only an officer, possessing the qualifications and meeting other conditions laid down for initial appointment to the post on which appointment by transfer is to be made, shall be considered for appointment by transfer on recommendations of the Selection and Promotion Board or the Selection and Promotion Committee, as the case may be.

Rule 15 stipulates about appointment on contract basis against regular-posts in accordance with the policy issued by the Establishment Division from time to time. Rule 16 speaks about appointment on deputation and the Mohtasib has

been made competent to appoint an officer of the Federal Government or a Provincial Government or of a corporation or an organization set up or controlled by such Governments who is holding an appointment on regular basis, on deputation against an equivalent post in the office. It provides that the terms and conditions of such appointment shall be settled with the mutual consent of the lending authority and the Mohtasib Secretariat as per standard terms and conditions circulated vide Establishment Division's O.M No.1/13/87-Respondent No.R.I, dated 03.12.1990, as amended from time to time.

Rule 20 says about the Probation that a person appointed to a post by initial appointment, appointment by transfer or promotion shall be on probation for a period of one year. Rule 21 discuss about the confirmation of service with the rider that an officer appointed by initial appointment or by promotion or by appointment on transfer shall, on satisfactory completion of probation, be eligible for confirmation. Provided that the confirmation shall be made only against a permanent post: Provided further that two or more officers shall not be confirmed in the same post and at the same time or against a post on which another officer holds a lien: Provided also that an officer shall not be confirmed on – or more posts at the same time. It further provide s that an officer shall be considered for confirmation strictly in order of his seniority; and ,no confirmation shall be made against the post vacated on dismissal, removal or compulsory retirement of an officer until the appeal, if any, against such dismissal, removal or compulsory retirement is finally decided; and, confirmation of an officer in a post shall take effect from the date of occurrence of permanent vacancy or from the date of continuous regular officiation in such post, whichever is later.

Rule 22 says about the procedure of confirmation of service that the confirmation of an officer shall be made with the approval of appointing authority on the recommendation of the selection and Promotion Board or Selection and Promotion Committee, as the case may be. It provides further that the Selection and Promotion Board or the Selection and Promotion Committee, as the case may be, shall scrutinize the service record of an officer including his annual confidential reports, and determine his fitness for confirmation; and, where in case an officer, for the time being, is unfit or a disciplinary case is pending against him, the Selection and Promotion Board or. Rule 44 says about the application of other rules, etc.; that for matters not provided under the rules, the officer shall be governed by the laws, rules, regulations, orders, instructions, etc., issued by the Federal Government from time to time for the Federal Government employees. The method of appointment for the subject post is provided that the post of Deputy Director 33% by initial appointment and 67% by way of transfer.

17. Keeping in mind the aforesaid scheme provided by the Rules, we would like to examine the scope of Rule 14. Principally the appointment by transfer can only be ordered if the Civil Servant is eligible and qualifies for his/her transfer under Rule 14(3) of the Rules of the department to which he/she is to be transferred, read with Rules 2009, which prescribed the conditions as laid down for such appointments by transfer to such posts. A Civil Servant who is to be appointed by transfer has to appear before the Departmental Selection Committee, which will consider his/her eligibility, qualification, and other conditions applicable to the post as laid down in the recruitment rules of the department to which his/her transfer is to be ordered.

18. Upon perusal of notification dated 04.09.2012, which provides that respondent No.3 assumed the charge of the post of Director BS-18 on

deputation, whereas, her application for absorption was processed by the Additional Secretary / Member Incharge Wafaqi Mohtasib (Ombudsman)'s Secretariat vide letter dated 21.05.2013, which was later on processed by the Selection and Promotion Committee held on 27.06.2014 and subsequently she was absorbed (appointed by transfer) as Deputy Director BS-18) Wafaqi Mohtasib (Ombudsman)'s Secretariat on probation vide notification dated 03.03.2015. The aforesaid factual position explicitly shows that her initial appointment by transfer was neither made in the wake of stability of Balochistan Province, Wedlock Policy rather her request as per letter dated 21.05.2013, which cannot be termed in the public interest.

19. We, after looking at the scheme of the Rules, 2009, are clear in our minds that Rule 14 does not empower the Wafaqi Mohtasib / Secretary / Government or Selection Authority, as defined under the aforesaid Rules, to appoint a Civil Servant by transfer to any other cadre, service or post without examining her eligibility, qualifications and the conditions laid down under Rules discussed supra. Rule 14 does not confer permanent status to a Civil Servant on her appointment by transfer nor does it contemplate her absorption in the transferee Department as a consequence of her appointment. There is neither any procedure nor a mechanism provided under the order 1983 or the Rules 2009 to treat appointment by transfer as absorption in the transferee department. Rule 14 cannot be used as a tool to allow horizontal movement of a civil servant from his/her original cadre to another cadre against the scheme of the order 1983 and the Rules of 2009, nor could the order or Rules be used to condone eligibility of the civil servant, while appointing by transfer. The term 'transfer' has to be interpreted in its common phraseology/parlance and is subject to the limitations contained in the Rules discussed supra. Any appointment by transfer under Rule 14 has to be for a fixed term and on completion of such term, a Civil Servant has to join back his parent department. The word 'appointment' used in Rules 2009 cannot be equated with the word 'initial appointment' used under the Rules which excludes appointment by transfer and promotion. Therefore, the restricted meaning has to be given to the expression 'appointment by transfer'. The initial appointment is to be made through the competitive process and not otherwise.

20. For the aforesaid reasons, we are clear in our minds that Rules 14 does not permit the transfer of a Civil Servant to a non-cadre post or a cadre post. The Hon'ble Supreme Court in the case of Ali Azhar Khan Baloch supra had recorded the following findings which are reproduced as under: --

"No Civil Servant of a non-cadre post can be transferred out of cadre to be absorbed to a cadre post which is meant for recruitment through competitive process. A Civil Servant can be transferred out of cadre to any other department of the Government subject to the restrictions contained under Rule 9(1) of the Rules of 1974."

21. We have noticed that respondent No.3 belonged to the Women Development Department Province of Baluchistan and was on deputation w.e.f. 17.08.2012, before her absorption in Wafaqi Mohtasib Secretariat, vide letter dated. 03.03.2015 We are not convinced that this is the only criteria on which respondent No.3 has been absorbed, besides that she has to fulfill the other conditions as provided under the Rules and dicta laid down by the Hon'ble Supreme Court in the aforesaid cases.

22. In the light of the above discussion, we are only concerned as to whether the decisions rendered by the Honorable Supreme Court of Pakistan in the case of Contempt proceedings against the Chief Secretary, Sindh (2013 SCMR 1752) and Ali Azhar Khan Baloch V/s Province of Sindh (2015 SCMR 456) have been complied with by the official respondents on the premise that the absorption of all the employees working in different departments of Government of Pakistan was declared nullity in the eyes of law, thus the status of the private respondent No.3 became deputationist only and in our view, a deputationist could not be treated as an aggrieved person, because she has no vested right to remain on a post as deputationist forever or for a stipulated period and can be repatriated at any time to her parent department more particularly in the light of aforesaid decisions of the Honorable Supreme Court. Reference is also made to the case of Dr. Shafi-ur-Rehman Afridi V/s CDA, Islamabad through Chairman and others (2010 SCMR 378).

23. When the Hon'ble Supreme Court has set the criteria of absorption in paragraphs No.132 & 136 of the Judgment, therefore, we have no hesitation to hold that the appointment of the private respondent No.3 in Wafaqi Mohtasib Secretariat by way of transfer on deputation as well as her permanent absorption is against the dicta laid down by the Hon'ble Supreme Court of Pakistan in the aforesaid judgments.

24. We have noticed that the Government of Pakistan Cabinet Secretariat Establishment Division vide office memorandum dated 31.01.2014 directed all the departments to streamline the service structure of Civil Servants inline the principle with the aforesaid judgments of the Honorable Supreme Court.

25. The Hon'ble Supreme Court has declared the following practice of the respective departments of Federal / Provincial Governments / autonomous / organizations bodies as illegal:

-A civil servant, who after passing the competitive exam in terms of the Recruitments Rules on merits, loses his right to be considered for promotion when an employee from any other organization is absorbed without completing or undertaking competitive process with the backdated seniority and is conferred the status of a Civil servant in complete disregard of recruitment rules.

(ii). Absorption of a non-Civil Servant conferring on him the status of a Civil Servant and likewise absorption of a Civil Servant from non-cadre post to a cadre post without undertaking the competitive process under the recruitment rules. A government servant and such transfer should be made through the process of selection. The borrowing Government has to establish the exigency in the first place and then the person who is being transferred/placed on deputation in Government t must have the matching qualification, expertise in the field with the required experience.

(d). An employee holding a post under any authority or corporation, body or organization established by or under any provincial or Federal Law or which is owned or controlled by Federal or Provincial Government or in which Federal Government or Provincial Government has controlling share or interest could not be conferred status of a civil Servant.

(e). It is a settled principle of law that if the right of promotion is not blocked by re-employment then such powers can be exercised, then too in exceptional cases for a definite period. Besides it violates the fundamental rights of the serving Civil Servants on account of such rehiring on contract are deprived of their legitimate expectancy of promotion to a higher cadre, which is violative of the provisions of Articles 4, 9 & 25 of the Constitution.

(f) The absorption and out of turn promotion will also impinge on the self-respect and dignity of the civil servants, who will be forced to work under their rapidly and unduly promoted fellow officers, those who have been inducted from other services/cadres regardless of their (inductees) merit and results in the competitive exam (if they have appeared from an exam at all), hence, are violative of the Articles 14 of the Constitution.

(g) The principle of locus poenitentiae is the power of receding till a decisive step is taken but is not a principle of law that order once passed becomes an irrecoverable and past and closed transaction. If the order is illegal, then perpetual rights cannot be gained based on an illegal order.

(h) any backdated seniority cannot be granted to any absorbee and his inter-se-seniority, on absorption in the cadre shall be maintained at the bottom as provided under the Rules regulating the seniority.

26. To reiterate the proposition further the Hon'ble Supreme Court in the case of Muhammad Ali V/s Province of KPK (2012 SCMR 673) has held *inter alia* that the principles of good governance required every appointment in government service to be made under the relevant rules and completion of codal formalities. Additionally, in the case of Syed Mubashir Raza Jaffari V/s Employees Old-Age Benefits Institution (2014 SCMR 949), it has been held *inter alia* that appointments to public offices were to be made strictly under the

applicable rules and regulations. Recently, the Hon'ble Supreme Court in the case of Dr. Shamim Tariq V/s International Islamic University, Islamabad (2020 PLC (C.S.) 499) held as follows:-

“Adherence to the statutory rules and procedures for selection of public jobs is the only surest method to objectively select the best out of the best from a competing lot; it is rooted into the fundamentals of equal opportunity, equal treatment and equal protections; any deviation therefrom would rock the bottom of the Republic, resting upon equiponderance. State authority in every sphere of life is a sacred trust to be exercised fairly and justly by the functionaries to accomplish the purposes assigned to them by law; it is their bounden duty to do right to the all manner of people, without any distinction. It is most important that right people are selected for official positions to serve the Republic as it is imperative to survive and sustain into today's competitive World; deviation would be treacherously seditious. Constitutionally recognized principle of equal opportunity is strengthened by divine affirmation, upheld and followed by every modern constitution of the day.” (Emphasis added)

27. In exercise of the powers conferred by section 10 of the Federal Public Service Commission Ordinance, 1977, the Federal Government made the Federal Public Service Commission (Functions) Rules, 1978. Rule 3(1) of the said Rules provides that the F.P.S.C. shall conduct tests and examinations for recruitment to all posts in connection with the affairs of the Federation in BPS-16 and above or equivalent. In the said notification dated 15.03.2019, there is no quota reserved for appointment by transfer to any of the posts in BPS-16 and above. Appointment to civil posts in BPS-16 and above falls within the purview of the Federal Public Service Commission (“FPSC”). Appointment by transfer to posts in BPS-16 and above can be made only if either the department certifies that there is no person eligible for promotion or the departmental promotion committee, after considering the persons eligible for promotion, does not find them fit for promotion (where the post is to be filled by promotion), and if the competitive process for initial appointment initiated by the Federal Public Service Commission does not result in the appointment of a suitable candidate (where the post is to be filled by initial appointment). An appointment by transfer made to a post in BPS-16 and above without the departmental promotion committee considering candidates for promotion or without the F.P.S.C. carrying out a competitive process for the initial appointment, as the case may be, would violate the method of appointment set out in the said notification, and therefore, unlawful. In the case of Muhammad Sharif Tareen V/s Government of Baluchistan (2018 SCMR 54), it was held by the Hon'ble Supreme Court that a post which is required by the rules to be filled by initial recruitment cannot be filled by promotion, transfer, absorption, or by any other method which is not provided by the relevant law and rules.

Furthermore, after referring to the law laid down in the case of Ali Azhar Khan Baloch vs. Province of Sindh (2015 SCMR 456), it was held as follows:-

“8. The quintessence of the paragraphs reproduced above is that the appointments made on deputation, by absorption or by transfer under the garb of exigencies of service in an outrageous disregard of merit impaired efficiency and paralyzed the good governance and that perpetuation of this phenomenon, even for a day more would further deteriorate the state of efficiency and good governance.”

28. In the case of Sudhir Ahmed V/s The Speaker, Balochistan Provincial Assembly (2017 SCMR 2051), the Hon'ble Supreme Court held that since under the Baluchistan Provincial Assembly Secretariat (Recruitment) Rules, 2009, the post of Liaison Officer could not be filled except by promotion of an Assistant Liaison Officer with 5 years of service, the appointment to the said post by deputation or by absorption being against the law could not be maintained.

29. Section 5 of the Civil Servants Act, 1973 provides that appointment to an All-Pakistan Service or the civil service of the Federation or a civil post in connection with the affairs of the Federation, including any civil post connected with defence, shall be made in the prescribed manner by the President or by any person authorized by the President in that behalf. Section 2(1)(g) of the Civil Servants Act, 1973 defines “rules” to mean rules made or deemed to have been made under the said Act. Section 25(1) of the said Act provides that the President or any person authorized by the President on this behalf may make such rules as appear to him to be necessary or expedient for carrying out the purposes of this Act.

30. In exercise of the powers conferred by Section 25 of the said Act, the President made the APT Rules. The three modes of appointment provided in Section 3(1) of the said Rules are (i) by promotion, (ii) by transfer, and (iii) by initial appointment. Appointments by transfer are required to be made under Part-II of the said Rules titled “Appointments by Promotion or Transfer.” Rule 7 which finds its place in Part-II of the said Rules provides that promotions and transfers to posts in BPS-02 to BPS-18 and equivalent shall be made on the recommendation of the appropriate departmental promotion committee, and promotions and transfers to posts in BPS-19 to BPS-21 and equivalent shall be made on the recommendation of the selection boards. Rule 8 provides that only such persons possess the qualifications and meet the conditions laid down for promotion or transfer to a post shall be considered by the departmental promotion committee or the Central Selection Board, as the case may be. Rule 9 of the said Rules provides that appointments by transfer shall be made from

amongst the persons holding appointments on a regular basis in posts in the same basic pay scale or equivalent to or identical with the posts to be filled. Although the APT Rules do not expressly provide for the absorption of a deputationist to be one of the modes of an appointment by transfer, in the case reported as 2013 SCMR 1752 (In the matter of contempt proceedings against Chief Secretary, Sindh, and Others), the Hon'ble Supreme Court, after referring to the three modes for the appointment of civil servants prescribed in the APT Rules. It is well-settled law that "deputation" is an administrative arrangement between borrowing and lending Authorities for utilizing the services of an employee in the public interest and exigency of services against a particular post against which the deputationists cannot claim any right of permanent absorption. Respondent No.3 does not have any vested right to remain on the post as deputationist for an indefinite period or to get absorption in the other department. Reliance is placed on the case reported as S. Masood Abbas Rizvi V/s Federation of Pakistan and others (2014 SCMR 799).

31. In the light of the foregoing, we are of the considered view that the private respondent No.3 could not have been absorbed and subsequently promoted in Wafaqi Mohtasib Secretariat. We are clear in our minds that no department can be allowed to absorb any employee of another department/cadre except with certain exceptions as set forth by the Honorable Supreme Court of Pakistan in the cases referred to above. On the aforesaid issues, we are fortified with the recent decision dated 05.10.2018 rendered by the Hon'ble Supreme Court of Pakistan in the case of Criminal Review Petition No.207 of 2016 in Criminal Original Petition No.89 of 2011. The Hon'ble Supreme Court has held as under: -

"3. The case of the petitioners in Criminal Original Petitions No. 62/2016 & 69/2017 is that they were directly appointed employees of NH&MP; that most of the officials were hired from different departments and the petitioners are deprived of their legitimate right of seniority and that most of the deputationist lacked the requisite qualification and experience. According to them this Court in the above said judgment has cancelled all absorptions/appointments by transfer and deputations but the department has partially implemented the said judgment. Hence, they pray that contempt of court proceedings be initiated against the respondent Authority.

4. So far as the case of the petitioners in Criminal Review Petition No. 207/2016 is concerned, we have perused the judgment under review. The respondent Department on the recommendation of the Departmental Committee has repatriated the petitioners on the ground that their induction was without the recommendations of the Departmental Induction Committee, which to our mind is unexceptionable. No ground for review is made out. Criminal Review Petition No. 207/2016 is accordingly dismissed."

32. The case-law cited by the learned counsel for respondent No.3 are distinguishable from the facts obtained in the present petition.

33. In the light of the foregoing, this petition is allowed with the direction to respondents 1 and 2 immediately to repatriate respondent No.3 to her parent department Women Development Department, Government of Balochistan, as if she was never sent on deputation and or absorbed she will be entitled to her original seniority in the parent department and issue of lien will not come in her way strictly in the light of the directions of the Hon'ble Supreme Court of Pakistan in its judgments rendered in the cases of Contempt proceedings against the Chief Secretary, Sindh (2013 SCMR 1752) and Ali Azhar Khan Baloch V/s Province of Sindh (2015 SCMR 456) and observations made in the preceding paragraphs. They are directed to submit a compliance report through MIT-II of this Court within two months. The period of two months shall commence from the date of announcement of this judgment. Respondents are further directed to implement the aforesaid judgments of the Hon'ble Supreme Court in their letter and spirit and repatriate all the beneficiaries if their case falls within the ratio of the aforesaid judgments passed by the Hon'ble Supreme Court of Pakistan.

34. The petition stands disposed of along with the pending application(s) in the above terms.

J U D G E

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Nadir*