

IN THE HIGH COURT OF SINDH, KARACHI

Present:

Mr. Justice Muhammad Shafi Siddiqui

Mr. Justice Zulfiqar Ahmad Khan

C.P. No.D-7596 of 2017

[Zulfiqar Ali Domki v. Province of Sindh & others]

Petitioner : Mr. Zulfiqar Ali Domki, Advocate in person

Respondent Nos.1 to 4 : Province of Sindh & others through Mr. Salman Talibuddin, Advocate General, Sindh

Respondent No.5 : Mr. Jawad Dero, Advocate held brief for Mr. Ghulam Shabbir Shah

Respondent No.6 : Mr. Shahryar Manzoor Mahar in person

Respondent No.7 : Mr. Shahryar Imad Awan in person

Respondent Nos.8 & 9 : Nemo

Respondent No. 10 : Liaquat Ali Shar through Mr. Sarfaraz Ali Metlo, Advocate

Respondent No. 11 : Mr. Allah Bachayo Soomro in person

Respondent No. 12 : Mr. Sarwar Khan through Mr. Malik Naeem Iqbal, Advocate alongwith Mr. Muhammad Nasir, Advocate

Date of Hearing : 18-11-2019

Date of Judgment : 27-11-2019

JUDGMENT

Zulfiqar Ahmad Khan, J:- Petitioner, an advocate by profession, through the instant petition, has challenged the appointment of respondents No. 5 to 12 as Additional Advocate General and Assistant Advocate General alleging that these appointments were made by way of cherry-picking amongst favorites in sheer violation of applicable rules. While respondent Nos. 5, 10, 11 and 12 are currently appointed and working as Additional Advocate General, whereas respondent Nos.6 to 9, are Assistant Advocate General. The petitioner stated that with regard to

the appointments of Assistant Advocate General, Rule 3-C(1) of Sindh Law Officers (Conditions of Service) Rules, 1940 ("Rules 1940") provides that these appointments to be made from amongst the lawyers having not less than ten years standing as advocate of High Court, and per Notification No.S.REG:1(22)2015/117 dated 10.05.2016 ("Notification 117") to be an Additional Advocate General, similar experience of ten years of standing as an Advocate of the High Court is also required. Per petitioner, through the said Notification minimum and maximum age limit for these appointments are also prescribed, where for Additional Advocate General, age has to be between 40-60 years and for Assistant Advocate General, this age bracket falls between 40-45 years. To support his contention that the afore-mentioned appointments as Additional Advocate General as well as Assistant Advocate General are against these prescribed requisites, petitioner in respect of respondent No.6, points out that he was appointed by Notification dated 23.10.2017 (Annexure-B) and from the record of Sindh Bar Council it could be seen that he was enrolled as an advocate of High Court on 24.12.2013 and as per the same docket, his date of birth is shown to be 19.01.1987; respondent No.7 was appointed by Notification dated 15.07.2014 (Annexure-C) and he was enrolled as an advocate of High Court on 17.02.2011 while his date of birth is shown to be 17.06.1985. Respondent No.8 was appointed by Notification dated 15.07.2014 (Annexure-D) and she was enrolled as an advocate of High Court on 07.11.2011 while her date of birth is shown to be 23.11.1982 and respondent No.9 was appointed by Notification dated 01.11.2013 (Annexure-E), while he was enrolled as an advocate of the High Court on 07.03.2012, his date of birth is shown to be 08.01.1983, whereas, in respect of Additional Advocates General, respondent No.5 was appointed by Notification dated 23.08.2017 (Annexure-A) and he was enrolled as an advocate of High Court on 23.10.2010 while his date of birth as per the same records is 16.06.1987. Respondents No.10 and 11 were both appointed by Notification dated 10.05.2008 (Annexure-F),

where the former was enrolled as an advocate of High Court on 31.03.1986 while his date of birth is shown to be 10.12.1951, and the latter was enrolled as an advocate of High Court on 23.07.1979 and his date of birth is 03.04.1942.

2. Petitioner further submitted that the respondent No.5 was appointed as Additional Advocate General (on 23.08.2017) illegally as he was not eligible for appointment as he did not possess the required standing of ten years of advocacy at the High Court. However as a favor, the respondent No.2 granted exemption to him by relaxing the said experience threshold. By analyzing the data, the petitioner submits that respondent No.5's date of enrollment as per record uploaded on website of Sindh Bar Council is 23.10.2010 as such he had about seven years' High Court standing at the time of filing of this petition. He further submitted that the respondent No.6 falls in the same category and was appointed as Assistant Advocate General on 23.10.2017 when he was a junior lawyer having only little above three years standing of High Court as his date of enrollment as per record uploaded on website of Sindh Bar Council is 24.12.2013. He further stated that the respondent No.7 was appointed as Assistant Advocate General on 15.07.2014 and was given similar exemption in violation of the requisite criteria. Per petitioner, this respondent was also a junior lawyer having about three years' standing of High Court at the time of his appointment. He next pointed out that the Respondent No.8 was appointed as Assistant Advocate General on 15.07.2014 while she was a junior lawyer and held about three years' experience of High Court advocacy at the time of her appointment. Her date of enrollment as per record uploaded on website of SBC is 11.07.2011. He further stated that the respondent No.9 was appointed as Assistant Advocate General on 01.11.2013 when he only held about one year and four months' experience of High Court. His date of enrollment as per record uploaded on website of Sindh Bar Council is 03.07.2012. He further stated that the respondent No.10 is holding the office of Additional

Advocate General illegally as he is about 66 years old and as under Rule 4(2) of the Rules 1940, except the Advocate General, no law officer is to ordinarily continue office after he had reached 60 years of age. He further stated that the respondent No.11 who is also holding the office of Additional Advocate General is about 75 years old but he is still holding that post. He further stated that the Respondent No.12 holding the office of Additional Advocate General was overage too having about 72 years old. His appointment as Additional Advocate General is illegal also on the account that he was promoted to the position of Additional Advocate General from Assistant Advocate General on 14.12.1996 whilst there was no possibility of such promotion under Rules 1940 as the appointment of Additional Advocate General was neither a permanent nor promotional post. Notwithstanding therewith even after he having reached 60 years of age, he was still holding the office.

3. Petitioner further referred to Rule 4(3) of Rules 1940 which provides that in respect of Assistant Advocate General, initial term to hold that office was three years in the first instance, however, thereafter the said term could only be extended if Government was pleased with the services provide by that officer. He pointed out that some of the Assistant Advocate General(s) where holding this position even after this prescribed initial term of 3 years while no document was available on record to show that Government has shown any keenness to retain their services.

4. By referring to the judgment of Hon'ble Supreme Court of Pakistan rendered in the case of *Province of Sindh through Chief Secretary, Sindh and another vs. Messrs Miccon Mining and Industrial Consultant* (2019 SCMR 1885) petitioner informed the Court that on account of these handpicked appointments made in violation of the applicable rules and these officers compromising on the quality of assistance provided to the respective courts, the Hon'ble Supreme Court in the above mentioned case made the following observations:-

“It may be observed that the salaries to the Advocate Generals and Assistant Advocate Generals and other officers are paid through public money and it is expected that competent officers are appointed to defend government interest. It is noticed that the officers who come to defend the government case before the Court are not in fact as competent as required and when public servants are personally involved in the case the best of the best counsel are engaged. In such view of the matter we are not inclined to give any indulgence. No case for interference is made out. Leave to appeal is declined and the petition is dismissed.”

5. To conclude, he prayed that these appointments be struck down and official respondents be directed to terminate those respondents who are overage.

6. Malik Naeem Iqbal, learned counsel for Respondent No.12 hit the contentions of the petitioner at the bud by pointing out that the Notification 117 relied upon by the petitioner was issued under sub-rule (2) of Rule 3 of the Sind Civil Servant (Appointment, Promotion and Transfer) Rules 1974, through which qualification and other conditions for appointment of Additional Advocate General and Assistant Advocate General were prescribed. He contended that the said notification is *void ab initio* since the respondents are not civil servants, hence their qualifications and other conditions cannot be prescribed or enforced through any provision of above referred Rules 1974. He submitted that in fact the petitioner has not challenged competency of worthy Chief Minister who had made these appointments, and as long as appointments have been made by the competent authority, and particularly when the qualification and other terms are alleged to have been regulated through a notification issued under non-governing and alien legislation, those requirements having no force of law could not be considered directory let alone mandatory, and respondents cannot be penalized for latter's nonobservance. As his second line of defense, learned counsel challenged the very competency of the petitioner to move the instant petition by way of *quo warranto* by stating that to agitate a writ of *quo warranto* one has to fulfill a number of requisites, including (a) whether the appointments were not made by the competent authority; (b) whether the incumbent lacked the prescribed

qualification; and (c) whether the appointments were made in violation of any statutory provisions of law. Per learned counsel, none of these prerequisite existed in the case at hand.

7. Learned counsel also stated that conduct of the petitioner also ought to be examined who was in the habit of filing such petitions from time to time. In support of his contentions, learned counsel placed reliance on the case of (1) *Secretary, Ministry of Law, Parliamentary Affairs and Human Rights, Government of Punjab and others vs. Muhammad Ashraf Khan and others* (PLD 2011 SC 7) and *Rasheed Ahmad vs. Federation of Pakistan and others* (PLD 2017 SC 121). Learned counsel prayed that the instant petition be dismissed out rightly as the respondents are neither civil nor public servants rather they are in a lawyer-client relationship, wherein the provincial government acting as a client engages office of the Advocate General to represent the former before the competent Court and this relationship cannot be challenged through a writ of *quo warranto*.

8. Mr. Sarfaraz Ali Metlo, learned counsel for respondent No.10 stated that while Article 140 of the Constitution of Islamic Republic of Pakistan 1973 prescribed qualification for the appointment of Advocate General but no such qualification for the appointment of Additional Advocate General were prescribed by any law. By referring to the Sindh Government Rules of Business 1986, learned counsel stated that while entry 20 related to the appointment, resignation, removal, duties and terms and conditions of Additional Advocate General, but no reference to any Article of the Constitution is provided in the appropriate column 3, proving his contention that there were no statutory provisions with regard to the appointment, qualification, terms and condition of the appointment of Additional Advocate General. Also, per learned counsel, since there are no provisions in the Rules 1940 with regard to Additional Advocate General, thus it leaves an empty field for such appointments. Learned counsel has placed on record copies of C.P. Nos. D-5191/2015,

4577/2014, 792/2011 and 321/2009 filed by the present petitioner in the past on other aspects of good governance and he requested for the dismissal of the instant petition. With regards Notification 117, the learned counsel relied upon the arguments put forward by Mr. Iqbal in this regard.

9. Mr. Salman Talibuddin, learned Advocate General, Sindh supported the contentions of the learned counsel for the respondents and stated that the relationship of the Government as enshrined in the Rules 1940 is purely based on the pleasure of the Government, where a lawyer-client privilege exists between the parties and such relationship cannot be challenged through a writ of *quo warranto*. However, learned Advocate General produced in the Court Notification dated 09.04.2018 ("Notification 2018") in terms of which essential amendments in Rules 1940 were made. Full text of the said Notification is reproduced hereunder:-

**Government of Sindh
Law Department
NOTIFICATION**

Karachi dated the 9th April, 2018

NO.S.REG.4(07)/2018:- In pursuance of the provisions contained in Article 241 of the Constitution of the Islamic Republic of Pakistan, the Government of Sindh are pleased to make the following amendments in the Sindh Law Officers (Conditions of Service) Rules, 1940:

AMENDMENT

For rule 3-C, the following shall be substituted:

1. "3-C. **Appointment of Additional Advocate General.** The appointment of Additional Advocate General shall be made by the Chief Minister from amongst the lawyers with not less than seven years standing as an Advocate of High Court. "
2. After rule 3-C, the following new Rule 3-D shall be added:

"3-D. **Appointment of Assistant Advocate General.** The appointment of Assistant Advocate General shall be made by the Chief Minister from amongst the Lawyers with not less than five years standing as an Advocate of High Court".

SHARIQ AHMED
SECRETARY TO GOVT. OF SINDH
LAW DEPARTMENT

NO.S.REG:4(17)2017/51 Karachi, dated the 09th April, 2018

10. Mr. Talibuddin with regards to the issue of some Additional Advocates General crossing 60 years of age referred to clauses (2) and (3) of Rule 4 of the Rules 1940 and assured the Court that the Provincial Government being very pleased with the services of these senior Additional Advocate General, in the light of the provision made available by the aforementioned clause, would be pleased to issue appropriate affirmations that she is pleased with the services of the respective Additional Advocate General and government wishes to continue retaining services of these Additional A.Gs, which services “ordinarily” might would have come to an end upon the respective Additional Advocate General attaining 60 year of age.

11. Heard the learned counsel, the Advocate General Sindh and perused the record.

12. Admittedly no challenge has been made to the competency of the appointing authority, thus the question as to very legitimacy of these appointments is answered favorably. Now coming to the qualifications and age restrictions, admittedly the Rules 1940 seem to be the only uncontested piece of regulation at hand. It would thus not be out of place to reproduce relevant portions of these Rules at this juncture:-

Law Officers (Conditions of Service) Rules,-

3. Law offices to whom the rules apply-

These rules apply to the following Law Officers of Government:-

- (a) The Advocate-General;
- (b) The Assistant to the Advocate-General;
- (c) The Public Prosecutors, Government Pleaders and their Honorary Assistants.

3-A.....
[Not Relevant]

3-B.
[Not Relevant]

3-C. Appointment of Assistant Advocate-General,-

- (1). Appointment of Assistant Advocate-General shall be made by the Governor from amongst the lawyers with not less than ten years standing as an advocate of High Court.

4. Period of appointment-

- (1). All Law Officers hold office during the pleasure of Government.
- (2). Except the Advocate-General, no Law Officer shall ordinarily be continued in office after he has attained the age of 60 years.
- (3). Subject to the other provisions contained in this rule, a person appointed as Assistant to the Advocate-General, a Government pleader or a Public Prosecutor shall hold office for a term of 3 years in the first instance and thereafter during the pleasure of Government.
- (4). A Law Officer shall be liable to be removed from his office at any time, if he is guilty of any act or conduct which, in the opinion of Government, is Incompatible with his duties as such Law Officer. The decision of Government in such cases shall be final.
- (5). Ordinarily the term of appointment of an Honorary Assistant shall be 3 years and on the expiry of this period the appointment will *ipso facto* cease unless, for special reasons, an extension is granted by Legal Remembrancer.”

13. It would also be relevant to reproduce (one of the two) amendments brought in these Rules through Notification 2018 where above quoted Rule 3-C has been substituted with the following text:-

“3-C. Appointment of Additional Advocate General. The appointment of Additional Advocate General shall be made by the Chief Minister from amongst the Lawyers with not less than seven years standing as an advocate of High Court.”

14. While the vacuum existing in the Rules 1940 with regards to the appointment of Additional Advocate General seemingly has been filled by the above substitution, at the same time the newly added Rule 3-D has reduced High Court standing threshold for the appointment of Assistant Advocate General from ten years to five by the following amendment made via the 2018 Notification:-

"3-D. Appointment of Assistant Advocate General. The appointment of Assistant Advocate General shall be made by the Chief Minister from amongst the Lawyers with not less than five years standing as an Advocate of High Court".

15. A combined reading of the originally existent and newly incorporated additions/substitutions in the Rules 1940 by the Notification 2018 shows that now standing requirement as an advocate of High Court for these appointments has been reduced from ten years to five in the case of Assistant Advocate General, and such standing for the appointment of Additional Advocate General has been specified to be

seven years. If one agrees with the contention of the learned counsel for the respondents that Notification 117 so far as it attempts to regulate terms and conditions for the appointment of Additional/Assistant Advocate General under the Sind Civil Servant (Appointment, Promotion and Transfer) Rules 1974 is void *ab initio* since the respondents are only law officers and not civil servants, and the said 1974 regulation being alien to the office of the Advocate General, a view with which we tend to agree, the 2018 Notification has thus recreated the universe for these appointments, however it is worth noting that no amendments have been made on the term (duration) of these appointments imposed by Rule 4(3), nor any changes have been made to the upper age limit of 60 years for these officers.

16. To reflect these criterion in a more understandable manner, the following table has been prepared where essential indicators and pre-requisites for holding the respective office of the Additional and Assistant Advocate General have been reproduced in a tabular form:-

Respondent No.	Position	Date of Birth	Date of Appointment	Date of Enrolment with High Court Bar	Standing at the Bar at the time of Appointment
05	Additional Advocate General	16.06.1987	23.08.2017	23.10.2010	6Y10M
06	Assistant Advocate General	19.01.1987	23.10.2017	24.12.2013	4Y2M
07	Assistant Advocate General	17.06.1985	15.07.2014	17.02.2011	3Y5M
08	Assistant Advocate General	23.11.1982	15.07.2014	07.11.2011	3Y8M
09	Assistant Advocate General	08.01.1983	01.11.2013	07.03.2012	1Y7M
10	Additional Advocate General	10.12.1951	10.05.2008	31.03.1986	10+ Y
11	Additional Advocate General	12.10.1952	10.05.2008	31.03.1986	10+ Y
12	Additional Advocate General	03.04.1942	10.05.2008	23.07.1979	10+ Y

17. An examination of the above table shows that the challenges posed by the petitioner in the instant case could be classified in three categories:-

1. Respondent Nos.10, 11 and 12 having attained 60 years of age thus barred to hold the office of Additional Advocate General under clause (2) of Rule 4;
2. Respondent Nos. 6 to 9 lacking requisite High Court standing of ten years, as required by clause (1) of Rule 3-C [un-amended version before the 2018 amendment was brought to reduce this experience threshold to five years] thus not competent to hold the office of Assistant Advocate General; and
3. Respondent No.5, an Additional Advocate General, having about seven years of High Court standing at the time of filing of the instant petition in the year 2017.

18. With regards category 1, from the foregoing, it is evident that no upper/lower age limit is prescribed for any law officer appointed or holding the office of the Additional Advocate General through Rules 1940 or Entry 20 of Schedule-IV to the Sindh Government Rules of Business, 1986. If for good order's sake one tries to read-in clause (2) of Rule 4, where except the Advocate General, no law officer is "ordinarily" permitted to hold the office once he has attained age of 60 years, use of the word "ordinarily" in the above clause leaves a lot of room enabling Government to permit any law officer to continue to hold such an office out of any extra-ordinary circumstances as well as if the services provided to the Government by the officer are extra-ordinary. In the given set of non-restrictive covenants, in our view one's continuation of holding office of the Additional Advocate General even after attaining 60 years of age should be left to the discretion of the client (i.e. provincial government) who engages the said officer to represent herself before competent courts. The view expressed by the Advocate General with regards the quality of services rendered by these officers being satisfactory, it would definitely be an unwarranted interference in this privileged relationship of lawyer-client if we were to order that these officers be removed from the office of Additional Advocate General only because they have turned over 60. We would leave this

issue to the discretion of the provincial government and the readiness of these officers to continue to provide their services to the provincial government even after celebrating their 60th birthday.

19. Now coming to the second category which comprises of respondents No.6 to 9 holding the office of the Assistant Advocate General. As per the language of Rule 3-C(1) holding field at the time of appointment of these respondents (before this clause was amended in 2018) to be appointed as an Assistant Advocate General one must have no less than ten years standing as an advocate of High Court. It is not disputed that at the time of their appointment, these respondents did not have similar standing. From the above table, their standing could be seen to fall between 1- 5 years. While through the amendment of 2018, this standing has been reduced from ten years to five, the question is whether beneficial interpretation could be made out and the new rule be read retrospectively favoring the respondents who admittedly when appointed were not fulfilling this experience requirement (notwithstanding their educational qualifications were well suited), however with the passage of time and under the new embodiment they (with the exception of one of the respondent) are clearly matching this reduced experience requirement. Similar question came before the Hon'ble Supreme Court in the recent case of Asif Hassan & others v/s Sabir Hussain & others in Civil Petition No. 673-K of 2018 where the Apex Court vide order dated 25.07.2019 in a matter where challenge to petitioners' competency to hold to the post of Security Inspector was made by their rivals on the ground that at the time of petitioners appoint they did not have the requisite experience, and while this Court held their appointments as *null* and *void*, upon challenge at the Apex Court, in line with the earlier judgments of the Apex Court rendered in the case of Farzand Ali v/s West Pakistan (PLD 1970 SC 98) and M.A. Jabbar & another v/s Federation of Pakistan (1999 PLC (CS) 686) where it was held by that "*the crucial date to determine qualification of a person to hold a post is not only the date of appointment but also the date of*

issuance of writ petition and if pending disposal of the writ petition, a person fulfils the qualification to hold such a post, writ of quo warranto is not to be issued against such a person” and upon observing that while the petitioners at their time of appointment had the required education qualification but fell short of experience, and whereas during the course of their employment with the respondent company they attained the requisite experience as demanded from the new incumbents, the Hon’ble Supreme Court reached to the conclusion that petitioners appointment could not have been held *null* and *void* and reversed the findings of this court.

20. This issue could also be seen from the lens of rejuvenated extrapolation, that whether these officers if re-notified today would fulfil the requirement of the reduced High Court standing, the answer is that except for one of the respondent, all other respondents would qualify with flying colors as they now possess over five years standing. One must additionally keep in mind that the case at hand is neither one of a civil servant nor there exists master-servant relationship between the parties, what is between them is a special relationship of lawyer and client which is highly fiduciary in nature and warrants least intervention of outsiders, including courts until unless there are some earth-shaking irregularities seen afloat on the surface. Taking guidance from the ratio of the cases detailed hereinabove and considering the fiduciary relationship between the parties and where the learned Advocate General has shown pleasure to the services provided by these respondents and where all except one of the respondents at the moment fully satisfy the conditions of appointment, in our view it would a zero sum effort to pass any adversarial order for those respondents who now have attained five years’ standing as an advocate of High Court, hence they should be permitted to hold the office of the Assistant Advocate General to the pleasure of the appointing authority, and one who even don’t has a standing of five years by this time, his case be dealt with in accordance with law.

21. Now coming to the case of respondent No.5 who was appointed as an Additional Advocate General on 23.08.2017 when he only had about seven years' standing of an advocate of High Court. Admittedly neither the Rules 1940 nor any other statute or regulation (other than the Notification 117, which we have already held to be irrelevant and ultra vires to the 1940 Rules) prescribing High Court standing requisites at the time of appointment of the said respondent as Additional Advocate General though this position finds its mention in Entry No.20 of IVth Schedule of the Sindh Government Rules of Business, 1986, we are at loss to see any violations committed in appointing the said respondent as an Additional Advocate General vide Notification dated 23.08.2017. Nonetheless through Notification 2018, experience requisite for the said appointment having been reduced to seven years, which the said respondent very well possesses and in the light what has been discussed in paragraph 19, we do not see any reason to interference with his appointment.

22. This constitutional petition is accordingly disposed of in above terms.

Judge

Judge