

IN THE HIGH COURT OF SINDH KARACHI

Before:

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

C.P. No. D-6221 of 2021

(Asif Ali Memon v. Province of Sindh and another)

Khawaja Shams-ul-Islam, advocate for the petitioner along with petitioner assisted by Mr. Shahzad Mahmood, advocate, Mr. Imran Taj, advocate, Mr. Vaqas Nadim Khan, advocate, Mr. Khalid Iqbal, advocate and Mr. R.B. Qureshi, advocate

Mr. Salman Talibuddin, Advocate General Sindh along with Mr. Sheheryar Mehar, Additional AG and Mr. Ali Safdar Deepar, Assistant AG

Mr. Zia-ul-Haq Makhdoom, advocate for the applicants/interveners along with Mr. Abdullah Nizamani, advocate, and Mr. Faisal Aziz, advocate

Date of hearing
& order : **09.02.2022**

ORDER

The case of the petitioner is that he is a Civil Servant and Cadre Officer as provided under the Cadre Rules, 1954, has called in question his transfer and posting orders vide notifications dated 12.10.2021 and 13.10.2021, *inter-alia*, on the ground that his case explicitly falls within the ambit of the decision of Hon'ble Supreme Court rendered in the case of *Syed Mehmood Akhtar Naqvi and others v. Federation of Pakistan and others* **PLD 2013 SC 195**, which has binding effect under Article 189 of the Constitution of Islamic Republic of Pakistan, 1973. Per learned counsel, the Hon'ble Supreme Court vide order dated 16.06.2021 assigned task to the petitioner in respect of Anti Encroachment Drive within the precincts of Karachi Development Authority (KDA) in C.P No. 09 of 2010. However, the respondent-department in violation of the law laid down by the Hon'ble Supreme Court and in total defiance of the directives of the Hon'ble Supreme Court in C.P No.9 / 2010 has made an abortive attempt by transferring his services by placing the junior-most officer on the post of Director General BS-20 Karachi Development Authority vide impugned notifications discussed supra. At this stage, we confronted him with section 10 of the Sindh Civil Service Act 1973, whereby a Civil Servant can be transferred and posted in the Province of Sindh. Learned counsel in reply to the query has submitted that the tenure of the civil servant has been protected in the *Aneeta Turab case* (**PLD 2013 SC 195**), thus no exception could be taken to that effect. We again asked him that transfer and posting fall within the ambit of terms and conditions of Civil Servant, he emphasized that the case of the petitioner is based on political victimization as well as within the ambit of the term of frequent transfer. Learned counsel in support of his contention has relied upon the order dated 07.10.2021 passed by this Court in C.P No.D-4434/2020 and argued that the Civil / Public Servant is not entitled to hold the higher post, on OPS, however, subject to all just exceptions as provided under the law. Learned counsel for the

petitioner relied upon the statement dated 04.12.2021 coupled with the KDA Employees Service Regulations, 1973, copy of NAB Reference No.4/2019 pending before the learned Administrative Judge Accountability Courts Islamabad, and argued that the officer of BPS-19 has superseded him in the impugned notification dated 12.10.2021 who is facing the NAB reference. Learned counsel for the petitioner also relied upon the order dated 25.10.2021 passed by the Hon'ble Supreme Court of Pakistan in CP No.9/2010 and other connected matters and referred to paragraph 4 of the order that the Hon'ble Supreme Court of Pakistan has taken cognizance of the matter about frequent transfer and posting of those officers heading the institutions and observed that the frequent transfer has led to maladministration, bad governance. Per learned counsel, the post of Director-General is a cadre post, thus he cannot be transferred in such a manner as he has been dealt with. In support of his contentions, he relied upon the case of *Karamat Ali and others v. Federation of Pakistan through Secretary, Ministry of Interior and others*, **PLD 2018 Sindh 8**, *Zahid Akhtar v. Government of Punjab through Secretary, Local Government, and Rural Development, Lahore and 2 others*, **PLD 1995 SC 530**, unreported order dated 22.03.2018 passed by the Hon'ble Supreme Court of Pakistan in Civil Appeal No.148 to 150 of 2018, and unreported order dated 24.1.2022 passed by this Court in CP No.D-33 of 2022.

2. Learned AAG has controverted the stance of the petitioner with the assertion that under Section 10 of the Sindh Civil Servants Act, 1973, every civil servant is liable to serve anywhere within or outside the Province against the post in any organization, setup established by the Government of Sindh. Furthermore, there shall lie no representation on matters relating to the determination of fitness of a Civil Servant to hold a particular post as provided under Section 23 of the said Act, as such the competent authority is empowered to transfer and post any officer on administrative grounds and in the public interest. In support of his contentions, he relied upon the cases of *Asif Ali Memon v. The Province of Sindh through Chief Secretary and 2 others*, **2019 PLC (CS) 492** and *Khalilullah Kakar v. Provincial Police Officer*, **2021 SCMR 1171**, and argued that the Hon'ble Supreme Court of Pakistan is clear on the subject issue and has held that tendency to bypass remedy provided under relevant statute by resorting constitutional jurisdiction of this court is to be discouraged so that legislative intent could not be defeated. He prayed for dismissal of the instant petition.

3. Mr. Zia-ul-Haq Makhdoom, learned counsel representing the interveners, has raised the question of the maintainability of the instant petition on the premise that the petitioner has to cross the constitutional command as provided under Article 212(2) of the Constitution being a civil servant. In support of his contentions, he referred to Sections 4 and 10 of the Sindh Civil Servants Act, 1973, and argued that the petitioner has no vested right to remain on a particular post. He relied upon the case of *Ali Azhar Khan Baloch v. Province of Sindh*, **2015 SCMR 456**, *Asadullah Rashid v. Muhammad Muneer*, **1998 PLC (CS) 1371**, **2021 SCMR 1168**, **2020 PLC (CS) 297**, **2019 PLC (CS) 492**, **2016 PLC**

(CS) 518, 2014 PLC (CS) 797, 2012 PLC (CS) 489, 2009 PLC 735, 1992 SCMR 1843, 1997 SCMR 167. He lastly prayed for the dismissal of this petition.

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

5. There is no cavil to the proposition as put forward by the learned AAG that the Constitutional petition is not maintainable before this Court, because of the specific bar contained in Article 212(2) of the Constitution of Islamic Republic of Pakistan, 1973, so far as the terms and conditions of Civil Servant are concerned; and this Court assume its jurisdiction through the law and not otherwise. The Honorable Supreme Court in the case of Ali *Khalilullah Kakar v. Provincial Police Officer*, **2021 SCMR 1171** has settled this aforesaid proposition.

6. In this case, the petitioner claims that he could not be dislodged from his posting within the shortest period; and, secondly by replacing him through a junior officer of BPS-19, who is facing NAB Reference in the learned Accountability Court. Per learned counsel, the motive behind his haphazard removal from present posting is tented with malice on the ground that petitioner is carrying out the work assigned to him by the Honorable Supreme Court vide order dated 16.06.2021, in respect of Anti Encroachment Drive within the precincts of Karachi Development Authority (KDA), passed in C.P No. 09 of 2010. The Hon'ble Supreme Court of Pakistan vide order dated 25.10.2021 in the aforesaid CP in paragraph 18, 19 & 26, has directed the DG KDA to file the old maps and masterplan and shall also submit a further report regarding ST and amenity plots in the area of KDA. We have noticed that the Hon'ble Supreme Court has also taken note of the transfer of the petitioner by the respondent-department. If this is the position of the case, then we have no option but to look into the matter in its entirety in line with Article 187 (2) of the Constitution.

7. The Director-General KDA is head of the statutory and autonomous body, established by the order No. V of 1957. KDA is the city-planning authority of Karachi; and, is responsible for the development of undeveloped lands around Karachi, which is now under the direct control of the Government of Sindh under the Sindh Local Government Act, 2013 as amended from time to time. The post of DG KDA is a Cadre post as provided under the Civil Service of Pakistan (Composition and Cadre) Rules, 1954.

8. The question is whether the post of DG KDA is a tenure post and tenure protection has been provided to this post. The word "tenure post" is capable of different interpretations depending on the language of statutes. In civil service, tenure means a term during which an office is held. It is a condition of holding the office. The Honorable Supreme Court in its various pronouncements have held that once a person is appointed to a tenure post, his appointment to the said office begins when he joins and it comes to an end on the completion of the tenure but no right is conferred to hold the post for the entire period. The tenure could be curtailed on attaining the age of superannuation by the incumbent of the post. Primarily, the same condition applies to

the case in hand. Tenure of the office in the affairs of KDA encourages commitment, discipline, collegiality, and compassion to the institution. It is well-settled law that only where the tenure of service of an employee is protected under law, it cannot be curtailed without first initiating and completing disciplinary proceedings against him. On the aforesaid proposition, we seek guidance from the decision of the Honorable Supreme Court rendered in the case of *Syed Liaqat Shah vs. Vice Chancellor University of Engineering and Technology Peshawar and others* **2019 PLC (C.S.) 74** and *Khan Muhammad Vs. Chief Secretary Government of Baluchistan and others* **2018 SCMR 1411**.

9. We have noticed that the impugned notification has been challenged by the petitioner on the plea that a junior officer of BPS-19 was elevated and placed above his senior, and prima-facie no reason has been assigned to replace the petitioner and why this was done when he was carrying out the work assigned to him by the Honorable Supreme Court as discussed supra. Besides that, the petitioner had been posted as Director General KDA for a little over a month when he was posted/transferred again. The impugned notification does not state why it was considered necessary to post/transfer the petitioner again after such a short period. These are principles of law enunciated by the Honorable Supreme Court and have binding effect under Article 189 of the Constitution. At this juncture, the learned AAG has submitted the law empowers the Government of Sindh to post the petitioner anywhere in the province, by relying on section 10 of the Sindh Civil Servants Act, 1973, reproduced hereunder:

"10. Posting and transfer. Every civil servant shall be liable to serve anywhere within or outside the Province of Sindh, in any post under the Federal Government, or any Provincial Government or local authority, or a corporation or body set up or established by any such Government:

Provided that nothing contained in this section shall apply to a civil servant recruited specifically to serve in a particular area or region:
 Provided further, that where a civil servant is required to serve in a post outside his service or cadre, his terms and conditions of service as to his pay shall not be less favorable than those to which he would have been entitled if he had not been so required to serve."

10. The aforesaid section does not state that a civil servant can be posted or transferred by disregarding his seniority, nor does it empower the Government of Sindh to cut short the principle of normal tenure of a posted/transferred civil servant, particularly without assigning any reason. The Honorable Supreme Court in the case of *Mahmood Akhtar Naqvi {Anita Turab case}* (supra) held as under:

"16. In the Hajj Corruption Case, the court reiterated its earlier ruling in *Zahid Akhtar v. Government of Punjab* (PLD 1995 SC 530), where it had been held that "the normal period of posting of a Government servant at a station, according to Rule 21 of the Rules of Business is three years, which has to be followed in the ordinary circumstances unless for reasons or exigencies of service a transfer before the expiry of the said period becomes necessary in the opinion of the competent authority." Furthermore, with regard to transfers of civil servants, this Court has stated that transfers by political figures which are not legally sustainable. *Farrukh Gulzar v. Secretary Local Government and Rural Development Department, Lahore and 2 others* (1998 SCMR 2222). These are principles of law enunciated by this court and are to be followed in terms of Article 189 of the Constitution. We,

however, repeatedly come across violations of such principles. This unnecessarily leads to litigation which, in turn, clogs Courts and Service Tribunals."

11. The principles enunciated in the aforesaid judgment of the Honorable Supreme Court were summarized in paragraph 22 is reproduced hereunder:

"(i) Appointments, Removals and Promotions: Appointments, removals, and promotions must be made in accordance with the law and the rules made thereunder; where no such law or rule exists and the matter has been left to discretion, such discretion must be exercised in a structured, transparent and reasonable manner and in the public interest.

(ii) Tenure, posting, and transfer: When the ordinary tenure for a posting has been specified in the law or rules made thereunder such tenure must be respected and cannot be varied, except for compelling reasons, which should be recorded in writing and are judicially reviewable.

(iii) Illegal orders: Civil servants owe their first and foremost allegiance to the law and the Constitution. They are not bound to obey orders from superiors which are illegal or are not in accordance with accepted practices and rule-based norms; instead, in such situations, they must record their opinion and, if necessary, dissent.

(iv) OSD: Officers should not be posted as OSD except for compelling reasons, which must be recorded in writing and are judicially reviewable. If at all an officer is to be posted as OSD such posting should be for the minimum period possible and if there is a disciplinary inquiry going on against him, such inquiry must be completed at the earliest."

12. The impugned notifications stipulate that the junior officer of BPS-19 was posted/transferred in his place, in "own pay and scale". The Honorable Supreme Court in the case of *Province of Sindh v. Ghulam Fareed 2014 SCMR 1189*, it was held, that posting/transferring a civil servant on his pay and scale (OPS) is not legally permissible:

"11. We have inquired from the learned Additional Advocate-General to show us any provision of law and or rule under which a Civil Servant can be appointed on a higher grade/post on OPS basis. He concedes that there is no specific provision in the law or rule which permits appointment on OPS basis. He, however, submitted that in exigencies the Government makes such appointments as a stop-gap arrangement. We have examined the provisions of the Sindh Civil Servants Act and the Rules framed thereunder. We do not find any provision which could authorize the Government or Competent Authority to appoint [of] any officer on higher grade on "Own Pay And Scale Basis". Appointment of the nature that, too of a junior officer causes heart burning of the senior officers within the cadre and or department. This practice of appointment on OPS basis to a higher grade has also always been discouraged by this Court, as it does not have any sanction of law, besides it impinges the self-respect and dignity of the Civil Servants who are forced to work under their rapidly and unduly appointed fellow officers junior to them. Discretion of the nature if allowed to be vested in the Competent Authority will offend valuable rights of the meritorious Civil Servants besides blocks promotions of the deserving officers."

13. It is well settled that under section 10 of the Sindh Civil Servants, Act, 1973, a civil servant cannot insist to be posted or transferred to a particular post but this does not mean that a civil servant can be humiliated by replacing him through the junior officer of BPS-19. Moreover, while section 10 does not prescribe a minimum period during which a civil servant must serve at his post, it does not mean that the Government without assigning any reason can move a civil servant from the place he was posted to after a month or subject the civil servant to repeated postings in a short period because this would amount to punishing him. Such postings also adversely affect the public interest and result in the wastage of rare resources and constitute bad governance.

14. The Rules and regulations of KDA designate certain posts in KDA as 'tenure posts' and prescribe certain tenure for an incumbent to serve on such posts. Such prescribed

tenure may therefore, be categorized as the ideal duration for which a civil servant should serve at a particular post. The post of Director General KDA though is not a tenure post in its terms, however, the principle of serving for a particular duration at this post should be followed as discussed supra. In the present case, the petitioner was posted for a little over a month when he was again posted. Any civil servant posted to a particular post requires some time to familiarize himself with the workings of the office and the requirements of the post whereafter he will be best placed to acquit himself of the responsibilities of the post. However, a one-month posting, as in the case of the petitioner, would not serve the interest of the public at large. However, since there is constitutional command as provided under Article 212(2) of the Constitution, we have no option, but to follow the judgment passed by the Hon'ble Supreme Court in the cases discussed supra which have also binding effect under Article 189 of the Constitution.

15. We, in the circumstances of the case, by following the ratio of the judgments passed by the Hon'ble Supreme Court of Pakistan in the cases of *Khalilullah Kakar v. Provincial Police Officer* 2021 SCMR 1171, *Khan Muhammad v. Chief Secretary Government of Baluchistan and others* 2018 SCMR 1411 and *Ali Azhar Khan Baloch v. Province of Sindh* 2015 SCMR 456 direct the Sindh Government to adhere to all the principles as laid down by the Honorable Supreme Court on the subject issue of transfer and posting of officers having the security of tenure of service at the particular station of posting.

16. In view of the above facts and circumstances of the case, this petition is held to be not maintainable in terms of the ratio of the judgment passed by the Hon'ble Supreme Court rendered in the case of *Khalilullah Kakar* (supra). However, the Government of Sindh shall ensure that a civil servant who is facing NAB reference based on moral turpitude before the learned Accountability Courts shall not be allowed to carry out financial undertakings in any manner of whatsoever nature.

17. As a result, the petition is disposed of in the above terms.

Let a copy of this order be transmitted to the Chief Secretary, Sindh, and all Secretaries of Government of Sindh and head of the departments of Government of Sindh for information and compliance.

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