

IN THE HIGH COURT OF SINDH KARACHI

Before:

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

C.P. No. D-6779 of 2021

Muhammad Salman
Petitioner through : Malik Altaf Hussain, advocate

Respondents No.1 & 2
Through : Mr. Ali Safdar Depar, AAG

Respondent 3
Through : Mr. Muhammad Awais Shaikh, advocate alongwith
respondent No.3

Date of hearing
& order : **16.02.2022**

ORDER

Petitioner has assailed the vires of the notification dated 9.11.2021 issued by the Government of Sindh, whereby the look after charge of the post of Controller Weights and Measure Wing Agriculture, Supply and Prices Department (BS-19), has been given to respondent No.3, *inter-alia*, on the ground that private respondent does not meet the requirement of Rule 8-A (i) of the Sindh Civil Servants (Appointment, Promotions & Transfer) Rules, 1974 and the ratio of judgment rendered by the Honorable Supreme Court in the case of *Province of Sindh & others v. Ghulam Fareed & others* [2014 SCMR 1189].

2. According to Malik Altaf Hussain, learned Counsel for the petitioner, a Writ of Quo Warranto would lie to challenge the appointment/ posting of the respondent No.3 made by the official respondents vide notification dated 9.11.2021, until further orders on the ground that it is not a regular appointment; that merely because the appointment is for until further orders would oust the jurisdiction of this Court to issue a Writ of Quo Warranto when it is found that the very appointment was illegal and not warranted within the provision of law. It is further submitted that the word serves in any post, outside his service or cadre, found in section 10 of the Sindh Civil Servant Act, 1973, cannot be given a meaning to grant arbitrary and unfettered powers to the Government of Sindh, for the appointment, more particularly, the appointment/posting of a Controller Weights and Measure Wing Agriculture, Supply and Prices Department government of Sindh, which is a promotion post, cannot be assigned to junior officer the department i.e. BS-18 cadre officer. It is submitted that the word "serve in any post, outside his service or cadre", cannot mean as the absolute and unconditional will of the Government of Sindh, for that, would go counter to the Constitutional scheme as provided under Article 240 of the Constitution; and to the rule of law itself. Per learned Counsel, no exceptional circumstances have been shown that the appointment of the private respondent to the

post of Controller Weights and Measure Wing Agriculture, Supply and Prices Department government of Sindh, in deviation to the regular mode of appointment of an officer, as per recruitment rules notified in 2010.

3. In regard to the maintainability of the Constitution petition, learned Counsel has submitted that the petitioner has approached this Court, in the public interest and has been attempting to dissuade the Government of Sindh, from granting favor to the private respondent herein by appointing/posting him at the higher post in grade. Per learned Counsel in the instant case, under the guise of look after charge, until further orders, the Government of Sindh, in fact, by misusing its discretionary powers, ensured that the respondent No.3's appointment continues without any limit as to tenure or term. It is submitted that no appointment to a public post can be made without a specific tenure. He prayed for a direction to the official respondents to adhere to the principles of law enunciated in the judgments of the Honorable Supreme Court in the cases, where the issue of posting on the Own Pay Scale settled.

4. Mr. Muhammad Awais Shaikh learned Counsel for respondent No.3 has filed Counter Affidavit to the main petition and refuted the claim of the petitioner by referring to various documents attached with the memo of Counter Affidavit, with the understanding that the law is well settled on the subject issue; that this Court in the exercise of its writ jurisdiction under Article 199 of the Constitution, in a matter of this nature, is required to determine, at the outset, as to whether a case has been made out for issuance of a Writ of Quo Warranto; that the jurisdiction of this Court to issue a Writ of Quo Warranto is a limited one which can only be issued when the appointment; posting is contrary to the statutory rules. Per learned Counsel respondent, No.3 had just been given "look after charge" till further orders, as he is already working in the same Department as Deputy Controller Weights and Measure Wing Agriculture, Supply and Prices Department government of Sindh. He emphasized that this Court cannot sit in judgment over the wisdom of the Government of Sindh, in the choice of the person to be appointed so long as the person chosen possesses prescribed qualification and is otherwise eligible for appointment; posting; besides that the evaluation of the comparative merits of the candidate would not be gone into public interest litigation under service jurisprudence; and only in a proceeding initiated by an aggrieved person, it may be open to being considered and it is for the aggrieved person to assail the legality or correctness of the action and that third party has no locus standi to canvass the legality or correctness of the action of the Government of Sindh. Further, only public law declaration would be made at the behest of the public-spirited person coming before this Court under constitutional jurisdiction as the petitioner lacks all the ingredients as discussed supra, however, that is not the case in hand, therefore, this Court could not go beyond the limits of Quo Warranto, so very well delineated by a catena of decisions of the Honorable Supreme Court and applied the test which could not be applied even in certiorari proceedings brought before this Court by an aggrieved party. He prayed for the dismissal of the petition.

5. We have carefully considered the submissions of the parties, with reference to the entire records and case law on the subject.

6. The pivotal questions are whether a Writ of Quo Warranto lies to challenge the appointment; posting of the private respondent on higher grade, made "until further orders" on the ground that it is not a regular appointment/ posting of the officer as per recruitment rules notified on 28.12.2010. And whether a Writ of Quo Warranto cannot be issued unless there is a clear violation of the law.

7. To appreciate the aforesaid propositions of law, the order dated 19.11.2021, appointing/posting the private respondent, clearly stated that the appointment/posting is until further orders. The terms and conditions of the appointment made it clear that the appointment is temporary and is until further orders. In such a situation, this Court, in our view, can enforce the rights guaranteed under Article 199 of the Constitution, where the writ prayed for is for Quo Warranto, subject to the principles articulated thereunder.

8. Prima-facie, the recruitment Rules mandates that the incumbent of the post of Controller Weights and Measure Wing Agriculture, Supply and Prices Department, shall possess the prescribed qualification and experience in these words:

"The Controller BS-19, Weights and Measure Cell Agriculture Department shall be appointed by promotion from amongst Deputy Controller (Admn) (BS-18), having at least total length of Service Twelve years in Bs-17 and above possessing on at least B.Sc. Degree in Physics and Mathematics."

9. Taking about Writ of Quo Warranto, broadly speaking, the quo warranto proceeding affords a judicial remedy by which any person, who holds an independent substantive public office or franchise or liberty, is called upon to show by what right he holds the said office, franchise or liberty, so that his title to it may be duly determined, and in case the finding is that the holder of the office has no title, he would be ousted from that office by judicial order. In other words, the procedure of quo warranto gives the Judiciary a weapon to control the Executive from making the appointment to public office against law and to protect a citizen from being deprived of public office to which he has a right. These proceedings also tend to protect the public from usurpers of public office, who might be allowed to continue either with the connivance of the Executive or because of its apathy. It will, thus, be seen that before a person can effectively claim a writ of quo warranto, he has to satisfy the Court that the office in question is a public office and is held by a usurper without legal authority and that inevitably would lead to the inquiry as to whether the appointment of the alleged usurper has been made under law or not.

10. There is no dispute regarding the legal proposition that the rights under Article 199 of the Constitution of Pakistan can be enforced only by an aggrieved person except in the case where the writ prayed is for habeas corpus or quo warranto, another exception in the general rule is the filing of a writ petition in the public interest. The existence of the

legal right of the petitioner which is alleged to have been violated is the foundation for invoking the jurisdiction of this Court under the aforesaid Article.

11. The standard rule of interpretation regarding the locus standi of a person to reach the Court has undergone a sea-change with the development of Constitutional law in our Country and the Constitutional Courts have been adopting a liberal approach in dealing with the cases or dis-lodging the claim of a litigant, merely on hyper-technical grounds.

12. It is well settled now that if a person approaching the Court can satisfy that the impugned action is likely to adversely affect his fundamental right, which is shown to be having source in some statutory provision, the petition filed by such a person cannot be rejected on the ground of his having not the locus standi. In other words, if the person is found to be not merely a stranger having no right whatsoever to any post or property, he cannot be non-suited on the ground of his not having the locus standi.

13. The Writ of quo warranto mustn't lie if the alleged violation is not statutory. However, we are cognizant of the fact that where an authority has the power to make rules relating to a subject matter and also the power to decide disputes arising in the field occupied by that subject matter, the two powers and functions must be kept distinct and separate. This dispute must be decided concerning the rules in force at the time the adjudication had to be made and, the rule-making power cannot be invoked to that adjudication.

14. Coming to the point of public office, the prime characteristics of "public office" are (1) authority conferred by law, (2) fixed tenure of office, and (3) power to exercise some portion of sovereign functions of government, the key element of such test is that "officer" is carrying out the sovereign function. Essential elements to establish the public position as "public office" are position must be created by Constitution, legislature or through authority conferred by the legislature, the portion of the sovereign power of government must be delegated to position, duties, and power must be delegated to position, duties, and powers must be defined, directly or impliedly, by the legislature or through legislative authority, duties must be performed independently without control or superior power other than law, and position must have some permanency and continuity.

15. Prima-facie the subject issue falls within the ambit of OPS and, there is no doubt that the position of Controller BS-19 is a public office and meet with the aforesaid criteria, however, we are only concerned with the peculiar situation emerged in this petition that private respondent is already holding the position of Deputy Controller BS-18; and has been given the look after Charge of the Post of Controller BS-19, and, if this is the situation, then, we have to see whether the private respondent meet the threshold criteria as set forth by the Honorable Supreme Court in the cases of Province of Sindh & others v. Ghulam Fareed & others [2014 SCMR 1189] and Khan Muhammad vs. Chief Secretary Baluchistan and others (2018 SCMR 1411).

16. To appreciate further on the issue of OPS, we have inquired from the learned AAG to show us any provision of law and or rule under which a Provincial Civil Servant / Public Servant can be appointed on an OPS basis.

17. This practice of appointment on an OPS basis has 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 / Public Servants who are forced to work under their rapidly and unduly appointed fellow officers junior to them. Discretion of nature, if allowed to be vested in the Competent Authority, will offend valuable rights of the meritorious Civil / Public Servants besides blocking promotions of the deserving officers. In this respect the law empowers the Competent Authority to appoint a Civil / Public Servant on acting charge and current charge basis, it provides that if a post is required to be filled through promotion and the most senior Civil / Public Servant eligible for promotion does not possess the specific length of service, the appointment of the eligible officer may be made on acting charge basis after obtaining approval of the appropriate Departmental Promotion Committee/Selection Board. Further that an appointment on an acting charge basis shall be made for vacancies lasting for more than 6 months and vacancies likely to last for less than six months. This acting charge appointment can neither be construed to be an appointment by promotion on regular basis for any purposes including seniority nor does it confers any vested right for regular appointment. In other words, an appointment on a current charge basis is purely temporary in nature or a stopgap arrangement, which remains operative for a short duration until a regular appointment is made against the post. It is crystal clear that there is no scope of the appointment of a Civil /Public Servant on an OPS basis except in exigencies appointment on an acting charge basis can be made, subject to conditions contained in the relevant Rules.

18. At this juncture, Mr. Ali Safdar Depar, AAG has submitted that in exigencies, the Government makes such appointments as a stopgap arrangement for a limited period. In this regard, he referred to the office order dated 19.11.2021 and argued that the private respondent being a senior-most officer of the department has been assigned to look after the day to day work of the vacant post of Controller Weights and Measure Wing Agriculture, Supply, and Prices Department as a stopgap arrangement till full-fledged posting of Controller in terms of Rule 8-A (i) of Sindh Civil Servants (Appointment, Promotions & Transfer) Rules, 1974. He prayed for dismissal of the instant petition. learned counsel representing the private respondent has supported the stance of learned AAG, however, he added that due to exigency of service and matters relating to Weights and Measure which are sensitive, as such the private respondent was allowed to look after the affairs of the respondent Department till further orders. Learned counsel referred to paragraphs 3 to 13 of the memo of Counter Affidavit and grounds raised therein and submitted that respondent No.3 is entitled to hold the post of Controller in BPS-19 as per recruitment rules and law laid down by the Hon'ble Supreme Court of Pakistan on the subject issue from time to time.

19. Prima-facie, the aforesaid assertions of the respondents are tenable, for the simple reason that this could be done, if the senior officer of the department is not available, he

could have been appointed to look after the affairs of the respondent-department; and, junior officer ought not to have been given such sensitive post to deal with the affairs of the respondent-department in a cursory manner and violation of the law. However, we cannot express our viewpoint so far as look after charge given to the private respondent for the subject post is concerned, in this regard, the learned AAG has placed on record seniority list of the officers of the respondent-department to claim that the private respondent meets the criteria for the subject post.

20. In the circumstances which we have narrated above in paragraphs supra, it is indeed difficult to hold that the private respondent did not have the requisite qualification to the extent that he is just holding look after charge of the post till further orders in the capacity as Deputy Controller of the said office, as per seniority notification dated 18.10.2021.

21. We are of the view that in the facts of this case, the reasonable conclusion to reach is that the Government of Sindh shall follow the criteria set forth by the Honorable Supreme Court in the cases of Province of Sindh & others v. Ghulam Fareed & others [2014 SCMR 1189] and Khan Muhammad vs. Chief Secretary Baluchistan and others (2018 SCMR 1411).

22. The above discussion leads us to an irresistible conclusion that the appointment/posting of Civil / Public Servant on OPS/additional charge basis, is violative of law and public interest.

23. As a result thereof, the instant petition is disposed of with the direction to the competent authority of respondents/ Chief Secretary Sindh to comply with the ratio of the decisions passed by the Honorable Supreme Court in the cases of Province of Sindh & others v. Ghulam Fareed & others [2014 SCMR 1189] and Khan Muhammad vs. Chief Secretary Baluchistan and others (2018 SCMR 1411) in its letter and spirit and avoid making the transfer and posting on own pay scale in future, however, subject to conditions as enumerated in the aforesaid judgments of the Hon'ble Supreme Court. Consequently, the competent authority of respondents/ Chief Secretary Sindh is directed to appoint a permanent Controller in BPS-19 within two weeks and in the intervening period, look into the matter of the private respondent No.3 and determine whether he qualifies for the higher post in the light of the ratio of the decision rendered by the Honorable Supreme Court in the case of Province of Sindh & others v. Ghulam Fareed & others [2014 SCMR 1189] or otherwise.

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