

# IN THE HIGH COURT OF SINDH KARACHI

## **Before:**

Mr. Justice Naimatullah Phulpoto  
Mr. Justice Adnan-ul-Karim Memon

## **Constitutional Petition No.D-2308 of 2020**

Zubair Javed  
Petitioner through : Malik Naeem Iqbal, advocate alongwith Mr.  
Faizan Hussain Memon, advocate

Respondents 1 & 2  
through : M/S M.M Aqil Awan, advocate along with  
Mr. Danish Rashid Khan, advocate

Mr. Ali Safdar Depar, AAG

Date of hearing : **05.04.2022**

Date of announcement : **15.04.2022**

## **JUDGMENT**

**Adnan-ul-Karim Memon, J.** Through the captioned Constitutional Petition, the petitioner has assailed the vires of the notification dated 21-04-2020 issued by the Secretary, Provincial Assembly of Sindh, whereby, the petitioner was relieved/repatriated from the Secretariat of the Provincial Assembly of Sindh to his parent Department i.e. Intelligence Bureau, Government of Pakistan.

2. The relevant facts of the case are that vide advertisement dated 16-08-2018 Respondent No.1 invited applications for the post of Assistant Secretary (BS-18) amongst other posts and the petitioner being an eligible and qualified candidate applied for the subject post through the proper channel. Petitioner has averred that he was working as Sub Inspector in the Intelligence Bureau, as such he applied for the post of Assistant Secretary (BS-18) after obtaining a No Objection Certificate {NOC} from the competent authority. He further asserted that vide notification dated 01-10-2018, Respondent No.1, under the Chairmanship of Respondent No.2, constituted the Selection/Promotion Committee. The petitioner further submitted that the Selection Committee conducted his test and interview and recommended his candidature vide letter dated 15-01-2019 for the subject post. Petitioner went ahead by saying that, after the competitive process, he was appointed as Assistant Secretary (BS-18); vide notification dated 20-02-2019. He further submitted that vide notification dated 25-04-2019 Respondent No. 2 requested for the relieving of Petitioner from Intelligence Bureau. The request of the Respondent No.2 was allowed and accordingly vide the office memorandum dated 10-05-2019, the petitioner was relieved to join his present duties. The Petitioner accordingly joined his duties which were notified by Respondent No.2 vide notification dated 14-05-2019; that all of a sudden on 22-04-2020, the petitioner came across the notification dated 21-04-2020 whereby he was ordered to be relieved/ repatriated from the secretariat of the Provincial Assembly of Sindh to his parent department i.e. Intelligence Bureau. It was shocking for the petitioner to learn that he had been relieved/ repatriated in compliance with orders

passed by the Hon'ble Supreme Court in the judgment reported as **2013 SCMR 1752** and certain orders passed by this Court in **CP No. D 6431/2019** (Re. *Irshad Hussain Versus POS & Others*); that the petitioner also came across a statement filed on behalf of respondents wherein the petitioner had been shown as an absorbed employee as such the appointment of the petitioner was held to violate the dictum laid down by the Hon'ble Apex Court. Petitioner has averred that the aforementioned facts and circumstances are sufficient to demonstrate that he has neither been appointed on a transfer basis nor he is an absorbed employee rather, he has been appointed through due process of initial appointment, through the proper channel. The petitioner being aggrieved by and dissatisfied with the impugned notification has rushed to this Court.

3. Malik Naeem Iqbal, learned counsel for the petitioner, has contended that the petitioner was appointed as Assistant Secretary in the Provincial Assembly of Sindh with effect from 2019 based on the recommendation of the Selection Committee through a notification dated 14-05-2019. On successful completion of his probationary period, he was confirmed in the above post by another notification. Learned counsel further submitted that during his service, the petitioner received the above-impugned order, which he challenged through the above petition, inter-alia on the ground that the Impugned Notification dated 21.04.2020 was/is illegal, unlawful, unconstitutional, malafide, and against the principles of natural justice, equity, and fairness; that the petitioner has been appointed after observing all codal formalities, as such hardly any room is available to allege that services of the petitioner were absorbed in the secretariat of the Provincial Assembly of Sindh; that the dictums laid down by the Hon'ble Apex Court has been seriously misapplied on the petitioner's case, for reasons absolutely not known to the petitioner, hence the impugned Notification is liable to be set-aside; that the Impugned Notification has been issued at the whims and wishes of the respondents and personal wishes apparently have more bearing than the exhaustively drafted rules, regulations and practice; that the impugned notification is violative of section 24-A of the General Clauses Act, hence is not sustainable in law; that the Impugned Notification is clear example of violation of law, Constitution and principles of rule of law. Learned counsel further submitted that it smacks of the worst kind of favoritism and nepotism; the issuance of the Impugned Notification ensures personal rule instead of rule of law as envisaged in the country's Constitution.

4. On the maintainability of the captioned petition, learned counsel has submitted that the determination of eligibility of a civil/public servant is a question on which jurisdiction of the Service Tribunal has not been barred for the reason that the question of eligibility relates primarily to the terms and conditions of the service, whereas the fitness introduces an element of subjective evaluation based on objective criteria where substitution for an opinion of the competent authority is not possible by that of Service Tribunal or Court. He further submitted that the question of fitness or suitability for promotion has always been considered to be exclusively within the jurisdiction of the competent authority not shared by the Courts or Tribunals exercising supervising jurisdiction in respect of eligibility and qualification. He further submitted that on the question of eligibility and qualification no such bar exists either in express words of Section 4 of the Service Tribunals Act or even by implication, as in the present case, the petitioner

is qualified and eligible to hold the subject post, therefore, the bar of jurisdiction under Article 212 of the Constitution, as portrayed by the respondents, will not come into play in the present case. He further argued that the appeal before the Service Tribunal can only be filed against the final order passed by the departmental authority; but the Secretary, Provincial Assembly of Sindh who issued the impugned order is not a departmental authority as is evident from the definition of that phrase giving explanation attached to Section 4 of the Sindh Service Tribunals Act. He further argued that the petitioner is neither deputationist nor absorbee, thus his terms and conditions could be looked into by this Court under Article 199 of the Constitution and the same could not be looked into under Section 4 of the Sindh Service Tribunal Act, 1973, for the reason that the petitioner has not sought the declaration of his legal character and status, as he is already holding the subject post within the parameters of the law, however, he has come forward against the notification of his repatriation from the Secretariat of the Provincial Assembly of Sindh to his previous department i.e. Intelligence Bureau, Government of Pakistan. He added that the issue raised in this Petition covers parameters, which attract the jurisdiction of this Court under Article 199 of the Constitution. He prayed for allowing the instant petition.

5. Mr. M.M. Aqil Awan, learned counsel for the respondents, has submitted that the service rules of the employees of the Provincial Assembly have been framed under Clause (3) of Article 87 read with Article 127 of the Constitution, and the case of the petitioner is covered by the definition of "civil servant" given in Clause (a) of section 2 of the Sindh Civil Servants Act, 1973. He further submitted that the definition of "civil servant" given in the above provision of the Act, 1973, the petitioner is deemed to be a member in the service of the Province of Sindh, as he holds a civil post in connection with the affairs of the Province, therefore, Petitioner being a civil servant, for all practicable purposes, has an alternate efficacious remedy of appeal under Section 23 of Sindh Civil Servants Act, 1973 read with Rule 3 of Sindh Civil Servant (Appeal) Rules 1980 against the decision of the respondents. He further submitted that the present petition is not maintainable before this Court under Article 199 of the Constitution on the premise that the grievance of the petitioner falls within the domain of the Sindh Service Tribunal as mandated by Article 212 of the Constitution; however in case, he makes a representation/departmental appeal to the competent authority of the respondent-Assembly, on verification of his service/selection record and personal file, he will be provided the fair opportunity to prove his case for retaining in the respondent-assembly subject to his service profile. He further submitted that not only this, if the Petitioner is yet aggrieved by the order passed on his appeal, he could file an appeal before the Sindh Service Tribunal under Section 4 of the Sindh Service Tribunal Act, 1973 because the impugned order is the original and final order which is adversely touching upon the terms and conditions of his service, therefore, the jurisdiction of this Court is barred under Article 212 of the Constitution. Learned counsel further submitted that once the civil/public servant is de-notified by the Sindh Government pursuant to the judgment and/or orders passed by the Hon'ble Supreme Court of Pakistan, no Court including this Court can pass an order calling in question the vires of the repatriation order, issued by the department, or suspending such notification. Learned counsel further submitted that the petitioner who has been de-notified, if he has any grievance, he has to approach the Hon'ble Supreme Court of Pakistan by filing a review petition and not petition under Article 199 of the Constitution. In support of his

contentions, he relied upon the cases of *Hadi Bux v. Government of Sindh and another*, **PLD 1994 Supreme Court 532**, *Ali Azhar Khan Baloch and others v. Province of Sindh and others*, **2015 SCMR 456**, and *Syed Muhammad Arif and others v. Province of Sindh through Secretary Housing Town and Planning and Local Government Services of Sindh and others*. **2018 PLC (CS) Note 61**. He lastly prayed for the dismissal of the instant petition.

6. Mr. Ali Safdar Depar, learned AAG, has adopted the arguments advanced by the learned counsel of respondents.

7. We have given our thoughtful consideration to the entire matter and have perused pleadings available on record with the adept assistance of learned counsel for the parties as well as case-law cited at the bar.

8. The matters of terms and conditions of service of the employees of The Sindh Provincial Assembly are regulated by The Sindh Assembly Secretariat (Recruitment) Rules, 1974 read with The Sindh Provincial Assembly Secretariat (Appointment, Promotion, and Transfer) Rules, 1975 and other enabling laws. The constitutional protection has been provided to aforesaid Recruitment Rules under clause (3) of Article 87 of the Constitution of the Islamic Republic of Pakistan, 1973 read with Article 127 thereof. The Hon'ble Supreme Court of Pakistan in the cases of *Hadi Bux v. Government of Sindh and another*, **PLD 1994 SC 532**, and *Muhammad Azam Davi and others v. Speaker Balochistan Provincial Assembly and others*, **2010 SCMR 1886** has held that the employees of The Sindh Provincial Assembly are civil servants on the analogy that since the Supreme Court, the Federal Shariat Court, and the High Courts, and not the Parliament, have been conferred powers under Article 208 of the Constitution to make rules regarding terms and conditions of employment of their officers and servants, they cannot be termed 'civil servants'. The factor which distinguishes the status of the employees of the two categories is the exclusion or inclusion of the role of the Parliament in laying down Rules of service for the employees. Because of the non-conferment of power on the Parliament to make rules in the case of the employees of superior Courts, such employees have been held not to be civil servants. That as a corollary such status cannot be granted to the employees of the Establishments of the Parliament and the Provincial Assemblies as the Constitution has conferred on the Parliament and the Provincial Assemblies the powers to make law for the service of their employees.

9. The Hon'ble Supreme Court of Pakistan in the case of *Hadi Bux v. Government of Sindh and another*, **PLD 1994 SC 532**, further held that the appellant was holding a civil post in connection with the affairs of the Province, he is covered by the definition of section 2(a) of the Act to invoke the jurisdiction of the Tribunal. Additionally, it may be pointed out that the Act does not provide any precondition that only a civil servant or a person holding the civil post in connection with the affairs of the Province, who has been appointed under an Act of the Assembly and whose terms of service have been determined under the Sindh Civil Servants Act, 1973, can invoke the jurisdiction of the Tribunal. If a person is covered by the definition of "civil servant" given in the Act, he can invoke the jurisdiction of the Tribunal. Thus in the absence of any judgment to the contrary, the principle laid down in Hadi Bux's (supra) case holds the field.

10. The Hon'ble Supreme Court of Pakistan in the case of Registrar, Supreme Court of Pakistan, Islamabad v. Qazi Wali Muhammad, **1997 SCMR 141**, has held that "Service of Pakistan is defined in Article 260 of the Constitution as meaning, any service, post, or office in connection with the affairs of a Federation or a Province. This expression also includes an All Pakistan Service and service in the Armed Forces or any other service declared under an Act of the Parliament or a Provincial Assembly as Service of Pakistan. The terms 'Civil Servant' is defined in the Civil Servants Act, 1973 as a person, who is a member of an All Pakistan Service or of a civil service of the Federation or a person holding a civil post in connection with the affairs of the Federation, including a civil post connected with the defense. However, a person on deputation to the Federation from any Province or other authority, a person who is employed on a contract or on a work charge basis who is paid from contingencies, and a person who is a 'worker' or workman' as defined in the Factories Act, 1934 or the Workmen's Compensation Act, 1923, are expressly excluded from the category of 'Civil Servant'. In principle, a Civil Servant is a person (i) who fulfills the conditions laid down in Section 2(b) of the Civil Servant Act, 1973 and (ii) whose terms and conditions of service i.e. tenure, appointments, probation, and confirmation, seniority, promotion, termination, reversion, removal, retirement, efficiency, and discipline, pay leave, pension, and gratuity, etc. are governed under the Civil Servant Act 1973 and the rules enacted thereunder. Any person who does not fulfill any of these two conditions materially may not be included in the category of Civil Servant, except for the exceptions provided under Article 87 read with Article 127 of the Constitution as discussed supra.

11. The Hon'ble Supreme Court of Pakistan in the case of Shahid Iqbal v. Government of Pakistan and another, **1995 SCMR 660** has held that the employees of the Senate do not fall in the category of civil servants because of the provisions contained in Article 87 (3) of the Constitution.

12. The Hon'ble Supreme Court of Pakistan in the case of Federation of Pakistan v. Muhammad Nazir **1998 SCMR 1081** held that the employees of Pakistan Rangers fell within the definition of a civil servant.

13. The Hon'ble Supreme Court of Pakistan in the case of Commandant Frontier Constabulary Khyber Pakhtunkhawa Peshawar and others Vs. Ghul Raqib Khan and others **2018 SCMR 903** held that the employees of the frontier constabulary fell within the definition of a civil servant.

14. The Hon'ble Supreme Court of Pakistan in the case of Chief Election Commissioner of Pakistan v. Miss Nasreen Pervez (**2009 SCMR 329**), held that "obviously the respondent whose terms and conditions were determinable by the Federal Legislature under Article 221 of the Constitution and was governed by statutory Rules are to be considered civil servants". While so holding, the Court distinguished the cases of Mubarik Ali Khan and Qazi Wali Muhammad (ibid) on the ground that the Parliament had not been given any role in regulating the terms and conditions of service of the Court' employees under Article 208 of the Constitution., thus, the principle laid down in the said judgments were held not applicable to the case before the Court because Article 221 of

the Constitution, like Article 240 expressly enables the Parliament to regulate the terms and conditions of the employees of the Election Commission of Pakistan.

15. The Hon'ble Supreme Court of Pakistan in the case of *National Assembly Secretariat through Secretary v. Manzoor Ahmed and others*, **2015 SCMR 253** has reiterated the aforesaid proposition.

16. The principle emerging from the aforesaid judgments of the Honorable Supreme Court is that the status of the employees of the Constitutional bodies as to whether or not they are civil servants to be amenable to the jurisdiction of the Service Tribunal depends upon whether or not the Parliament has been conferred power to regulate the terms and conditions of service of such employees. In case the Parliament has been bestowed with such a power, either specifically, like in Articles 87 and 221, or generally as in Article 240, whether or not exercised, the employees of such a body would be civil servants. Therefore every person in the "Service of Pakistan", merely for that reason, cannot be classed as a "Civil Servant" as defined in Civil Servants Act, 1973. The pre-requisites for attracting the definition of a civil servant to any government or public sector employees are laid down in the Civil Servants Act 1973.

17. From the above discussion, it is quite clear that a person may be in the service of the Federation/province but for that reason, he cannot be classed as a 'Civil Servant' as defined in the Civil Servants Act 1973, except the employees whose terms and conditions of service are protected under the constitutional protection. Primarily, Article 87 read with Article 127 of the Constitution expressly enables the Parliament and the provincial Assemblies to make law for regulating the terms and conditions of service of the employees. In this scenario, the Hon'ble Supreme Court of Pakistan in the case of *Muhammad Azam Davi* as discussed supra has held that the employees of such bodies are civil servants; therefore, no further discussion on the subject issue is required on our part.

18. Having discussed the status of employees of the constitutional bodies and another category of employees whose terms and conditions of service are set forth under the Civil Servants Act, we need not stretch further on the subject issue as much has already been elaborated.

19. Touching on the merits of the case, we have scanned the stance of the parties. It appears from the record that the petitioner was appointed as Assistant Secretary (BS-18) in the Provincial Assembly of Sindh through a competitive process vide notification dated 20.02.2019. The impugned notification dated 21.04.2020 issued by the Secretary, Provincial Assembly of Sindh is based on erroneous premises; for the simple reason that the petitioner has neither been shown, working on deputation nor absorbed in the Secretariat of Provincial Assembly of Sindh, which could attract the judgment dated 07.4.2020 passed by this Court in CP No.D-6431/2019. Besides that the case of the petitioner is not covered by the judgment of the Hon'ble Supreme Court of Pakistan in the case of *Contempt Proceedings against Chief Secretary, Government of Sindh and others*, **2013 SCMR 1752** and *Ali Azhar Khan Baloch v. Province of Sindh*, **2015 SCMR 456**, therefore, the impugned notification dated 21.04.2020 relieving/repatriating the petitioner to his previous department, which is no more his parent department after confirmation of his service in the respondent-Assembly, is not in conformity with the directives contained in

the aforesaid judgment of the Hon'ble Supreme Court and this Court. On the aforesaid proposition, we are fortified with the unreported order dated 21.09.2016 passed by the Hon'ble Supreme Court of Pakistan in Civil Misc. Application No.3171/2016 in Civil Review Petition No.49/2016 in Civil Appeal No.148-L/2013 (**Shahid Pervaiz v. Aijaz Ahmed and others**).

20. Adverting to the jurisdiction of the Service Tribunal, which is established in pursuance of Article 212 of the Constitution has been conferred exclusive jurisdiction only in respect of the dispute relating to terms and conditions of the service of a 'Civil Servant' as defined under the Civil Servants Act, 1973 and as such the jurisdiction of the Service Tribunal could not be extended to any other category of employees, except the categories of employees whose terms and conditions of service have been framed/settled by the competent authority of the establishment/institution under the powers conferred by the Constitution as discussed in the preceding paragraphs.

21. Primarily, the case of the petitioner is different, as portrayed by the respondents, on the premise that the petitioner has impugned the notification dated 21.4.2020 issued by the Secretary, Provincial Assembly of Sindh, whereby he has been relieved/repatriated from the Secretariat of the Provincial Assembly of Sindh to his parent department on the pretext that this Court passed the order in CP No.D-6431/2019, which factum is not the correct. In principle, the issue of the initial appointment, absorption, repatriation, up-gradation, regularization of service, re-employment, and deputation could be looked into by this Court under Article 199 of the Constitution as such the issue of terms and conditions of service of the petitioner is not involved in the present matter to attract the bar of jurisdiction under Article 212 of the Constitution. On the subject issue, we seek guidance from the decisions of the Honorable Supreme Court and High Courts in the cases of Ali Azhar Khan Baloch and others v. Province of Sindh and others, 2015 SCMR 456, Dr. Ahmad Salman Waris, Assistant Professor, Services Hospital, Lahore v. Dr. Naeem Akhtar and 5 others, PLD 1997 Supreme Court 382, Muhammad Aslam Khan v. Government of Pakistan through Secretary, Ministry of Health, Special Education and Social Welfare, Islamabad and 2 others, PLD 1993 Karachi 41, Munir Qadir v. Chairman, PSC and 4 others, 2003 PLC (C) 743, Abdul Hameed Anjum and others v. Federation of Pakistan and others, PLD 2010 Supreme Court 857, Dr. Khalil ur Rehman v. Government of Punjab through Chief Secretary, Punjab, and 5 others, 2015 PLC (C) 793, and M.A. Jabbar and 3 others v. Federation of Pakistan through Secretary, Establishment Division, Government of Pakistan, Islamabad and 3 others, 1999 PLC (C) 686.

22. In view of the above facts and circumstances of the case, this petition is allowed in terms of prayer clause (i) of the memo of the petition. The competent authority of the Provincial Assembly Sindh is directed to withdraw the notification dated 21.4.2020 issued by the Secretary, Provincial Assembly of Sindh, immediately; and, the petitioner shall be allowed to join the Provincial Assembly of Sindh as Assistant Secretary (BS-18).

Let a copy of this order be communicated to the competent authority of respondents for compliance.

**JUDGE**

**JUDGE**