

# IN THE HIGH COURT OF SINDH KARACHI

## **Before:**

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

## **C.P. No. D-2220 of 2022**

Muhammad Nadeem Akber  
Petitioner through : Mr. Muhammad Arshad Khan Tanoli, advocate  
alongwith Mr. Danish Rashid Khan, advocate.

Respondents 1 to 4  
Through : Mr. Ali Safdar Depar, AAG alongwith Ihsanullah  
Laghari, Deputy Secretary, College Education  
Department on behalf of respondent No.3.

Respondent No.5  
Through : Mr. Faizan Hussain Memon, advocate alongwith  
Mr. Muhammad Saleem Khaskheli, advocate

Date of hearing : **17.05.2022**  
Date of announcement : **23.05.2022**

## **J U D G M E N T**

Through this petition, the petitioner has called in question the vires of the notification dated 31.03.2022, whereby the services of the respondent No.5 have been placed at the disposal of School Education and Literacy Department, Government of Sindh on deputation basis for one year for posting as Director Inspection and Registration of Private Institutions, Shaheed Benazirabad Region, School Education, and Literacy Department, *inter-alia*, on the ground that the posting of respondent No.5 is hit under Article 199(2)(b)(ii) of the Constitution of the Islamic Republic of Pakistan, 1973. Besides that, his deputation in School Cadre violates dicta laid down by the Hon'ble Supreme Court in the cases of Contempt Proceedings against Chief Secretary, Sindh, and others 2013 SCMR 1752 and Ali Azhar Baloch and others v. Province of Sindh and others 2015 SCMR 456. Petitioner has averred that the private respondent is an Associate Professor of Physics of the College Education Department and is not entitled to hold the post in School Education Department on the administrative post under the garb of the exigency of service. Per learned counsel for the petitioner, the out of cadre transfers are restricted under the Sindh Civil Servants and Rules framed thereunder. learned counsel relied upon the recruitment rules dated 08.09.2009 and submitted that the post of Director could be filled by transfer from amongst the DMG/Ex-PCS/PSS officers of the Government of Sindh and/or by promotion from amongst Deputy Director of all Registrar (BPS-18) working in the Directorate of Registration and Inspector of Private Institutions of Sindh with at least 12 years' experience in BPS-17.

2. Mr. Muhammad Arshad Khan Tanoli, learned counsel for the petitioner, has submitted that the Chief Secretary Sindh vide notification dated 21.01.2022 repatriated the respondent No.5 to his parent department i.e. College Education Department, however, he succeeded in obtaining another transfer order vide impugned notification

dated 31.03.2022, which is apathy on the part of Chief Secretary Sindh, which practice needs to be curbed by this Court. He prayed for directions to the competent authority of respondents to send back the services of the private respondent to his parent department i.e. College Education Department Government of Sindh.

3. Mr. Faizan Hussain Memon, learned counsel for respondent No.5, has refuted the allegations and submitted that this Court vide order dated 15.12.2021 passed in CP No.D-1564 of 2021 allowed the petition in terms of paragraph 11 of the order. He further submitted that the petition is a counterblast to the aforesaid petition filed by respondent No.5 against the close associate of the petitioner and this is a proxy petition filed for the benefit of someone else, and it is tainted with mala fide and has been filed with ulterior motives. He next submitted that there is one essential condition for invoking the jurisdiction of this Court under Article 199 of the Constitution, the condition is that the subject matter of the petition under this Article must relate to the enforcement of any of the Fundamental Rights conferred by Part II, Chapter 1 of the Constitution, and the burden of proof was/is upon the petitioner to demonstrate as to which of his fundamental rights had been infringed upon but he failed and neglected to point out an infraction of any of his fundamental rights. He asserted that under Article 199(1)(b)(ii) of the Constitution the petitioner has to show that the private respondent is holding office in violation of the Constitution or the law and thereafter same can be asked from the private respondent that under what authority of law he is holding the public office. Learned counsel averred that respondent No.5 has been posted by the competent authority, keeping in view his seniority and experience on the college side, and he has been posted within the cadre School Education Cadre. Per learned counsel since there is no officer available for promotion and posting from amongst the officers of DMG, Ex-PCS, and PSS cadre, therefore, officers belonging to Education and Literacy Department which includes both the College Education and School Education could be posted in the Directorate of Inspection and Registration of Private Institutions. Learned counsel cited various notifications to claim that under similar circumstances the colleagues of the private respondent have already enjoyed the posting in the Directorate of Inspection and Registration of Private Institutions, thus no illegality has been committed by the respondent department while posting the private respondent. He however submitted that the proposed recruitment rules of provincial and regional directorates of Inspection and Restoration of Private Institutions are under consideration and there is a likelihood that aforesaid recruitment rules could be approved wherein the Director BS-19 from the Education and Literacy Department Cadre could be posted by way of transfer; and if this Court deems it proper to allow the private respondent to continue on the subject post till the recruitment rules are framed. In support of his contentions, he relied upon the cases of *Muhammad Hanif Abbasi v. Jahangir Khan Tareen and others*, **PLD 2018 Supreme Court 114**, *Dr. Azim-ur-Rehman Khan Meo v. Government of Sindh and another*, **2004 SCMR 1299**, *Nasir Khan Khattak v. Haji Adam, Director General (Admin), PEMRA Headquarter, Mauve Area, Islamabad and another*, **2021 PLC (CS) 140**, *Atta Muhammad Qureshi and 5 others v. Province of Sindh through Chief Secretary and 3 others*, **2018 PLC (CS) Note 16**, *Mirza Luqman Masud v. Government of Pakistan*,

Establishment Division through Secretary and 14 others, **2015 PLC (CS) 526**, Dr. Muhammad Tahi-ul-Qadri v. Federation of Pakistan through Secretary M/o Law, Islamabad, and others, **PLD 2013 Supreme Court 413**, Ali Azhar Khan Baloch and others v. Province of Sindh and others, **2015 SCMR 456** and Contempt Proceedings against Chief Secretary Sindh and others, **2013 SCMR 1752**. He prayed for dismissal of the instant petition.

4. At the outset Mr. Ali Safdar Depar, learned AAG has also opposed this Petition on the ground that policy decision has been taken by the Government of Sindh which cannot be interfered with by this Court; learned AAG has submitted this Court while deciding the writ of quo warranto, the conduct and the motive of the petitioner could be seen to the extent that this practice of instituting proceedings by way of Quo Warranto with oblique considerations or motives of self-gain, has been deprecated by the Honorable Supreme Court. He further submitted that petition filed by an interested person is not maintainable. He asserted that a writ of quo warranto only lies against a person who is holding some post for which he is otherwise not eligible or disqualified, whereas the private respondent in BS-19 of Education Cadre is fully entitled to hold the subject post. He added that executive policymaking is not the domain of this Court in the scheme of the Constitution and, is the prerogative of the executive to ascertain based on its need, requirement, available resources, and fiscal space, which posts it wishes to keep and which it wishes to abolish and which Civil Servant is to be transferred and posted in a particular place in exigency of service. He further averred that the petitioner has failed to substantiate the violation of any of his Fundamental Rights conferred by Chapter 1 Part II of the Constitution. He added that in the instant case, neither violation of any of the Fundamental Rights has been listed in the petition nor established during arguments. He further submitted that for a person to activate the jurisdiction of this Court as a public interest litigant, for the enforcement of the Fundamental Rights, he must show on the given facts that he is acting bona fide. He next submitted that the constitutional jurisdiction of this court is always discretionary and he who seeks equity must come with clean hands. At this stage, we reminded him that relief is not to be denied to the litigants on technical consideration. He admitted this legal proposition however averred that the service of the private respondent was requisitioned by the School Education and Literacy Department and keeping in view the no objection for his posting on deputation basis as Director, the Secretary College Education Department Government of Sindh did not object to the posting of the private respondent on the subject post. In support of his contentions he relied upon the cases of Government of Khyber Pakhtunkhwa v Saeed-ul-Hasan (**2021 SCMR 1376**), Abdul Ghafoor v National Highway Authority (**2002 SCMR 574**), and Asif Hassan v Sabir Hussain (**2019 SCMR 1720**). He lastly submitted that a writ of quo warranto is a discretionary relief that can be denied by this Court and the same is not required to be issued in the instant matter, thus this petition is devoid of merit and liable to be dismissed.

5. We have heard learned counsel for the parties at length and have also examined the material available on record and case law on the subject.

6. Prime grievance of the petitioner is that Recruitment Rules, framed for the post of Director (BS-19) Inspection and Registration of Private Institutions, School Education, and Literacy Department Government of Sindh and notified on 08.09.2009, provide no room for posting of the outsider, but the respondent No.5 in deviation of aforesaid rules has been posted out of cadre against the aforesaid post. The term "Cadre" this term has been defined in rule 9(4) of Fundamental Rules, 1922. The said Rule defines "cadre" to mean "the strength of the service or a part of the service sanctioned as a separate unit. The terms "department" and "cadre" are not defined in the Sindh Civil Servants Act, 1973 and the term "cadre" given in the Fundamental Rules is not inconsistent with any of the provisions of the Sindh Civil Servants Act, 1973. The same, therefore, will apply to the service laws of the Province. What is of significance is that the cadre to which a civil servant belongs and the terms and conditions of his service or even the matter of transfer, posting, seniority, and promotion within his/her cadre can only be made by or under laws which are traced to and sourced in Article 240 of the Constitution. On the aforesaid proposition, reliance is placed on the cases of Muhammad Bachal Memon and others vs. Syed Tan veer Hussain Shah and others **2014 §CMR 1539, 2017 §CMR 2051, Contempt proceedings against the Chief Secretary Sindh and others** **2013 §CMR 1752, Ali Azhar Khan Baloch v. Province of Sindh** **2015 §CMR 456**), and Ajmal Hassan Khan and another Versus Government of Sindh and others **2012 P L C (C.S.) 1153**.

7. We have noticed that the post of Director (BS-19) in the Directorate of Registration and Inspection of Private Institutions, Sindh Karachi in the Education and Literacy Department, Government of Sindh, is to be filled in the following manner:-

S#	Name of Post with BPS	Method of appointment	Qualification and experience for initial appointment	Age Limited Min Max
01	Director (BPS-19)	By transfer from amongst the DMG/Ex-PCS/PSS Officers of the Govt. of Sindh.  OR By promotion from amongst the Deputy Directors or Registrars (BS-18) working in the Directorate of Registration and Inspection of Private Institutions Sindh with atleast twelve years' experience in (BS-17)		

8. It has been emphatically pointed out by the learned AAG that even with this limited prospect, individuals from other departments/cadres including the Education and Literacy Department Government of Sindh are being transferred to fill the post of Director (BS-19) on a deputation basis. The aforesaid stance has been objected by the learned counsel for the petitioner, on the premise that the appointment on the aforesaid post by way of transfer from College Education is not in conformity with the principles of natural justice as well as under the recruitment rules notified on 08.09.2009 and the aforesaid rules are still intact and have not yet been modified are amended as portrayed by the respondents under the garb of proposed recruitment

rules for provincial and regional directorate for Inspection and Registration of Private Institutions.

9. Learned Assistant Advocate General has submitted that under Rule 3(2) of the Sindh Civil Servants (Appointment, Promotion, and Transfer) Rules, 1974, ('Rules, 1974') the government is competent to appoint any civil servant by way of transfer under the proposed recruitment rules vide letter dated 22.08.2017, as such there is no illegality in posting the private respondent as Director (BS-19). At this stage, we asked learned AAG whether the aforesaid recruitment rules have been notified or gazetted, learned AAG candidly conceded that the proposed rules have not yet been finalized, however, due to the exigency of services, the civil servants from the College/School Education side are being posted on the subject post on deputation as stopgap arrangement till finalization of the aforesaid recruitment rules. Primarily, this is hardly a ground to appoint/post a College side Associate Professor, in presence of earlier recruitment rules notified on 08.09.2009. Even otherwise, the posts of Assistant/Associate/Professor are Teaching Cadre posts, they cannot hold Administrative Cadre posts under the law.

10. We again queried from learned A.A.G. that when the Recruitment Rules provide that the post of Director (BS-19) to be filled, fifty percent (50%) by initial appointment and fifty percent (50%) by promotion, then how the same post can be filled by transfer from other departments of Government of Sindh. He replied that the department has made certain appointments and postings under policy and rules and always posted experienced and technical officers in the interest of departmental work. In support of his contentions, he relied upon Section 10 of the Sindh Civil Servants Act, 1973, and argued that every civil servant shall be liable to serve anywhere within or outside the Province in any post under Government, Federal Government, or any Provincial Government or local authority, or corporation or body set up or established by any such Government. He next submitted that law provides that appointment to the aforesaid post can be made by promotion or transfer subject to qualifications and other conditions applicable to the post as laid down by the department concerned in consultation with the Services, General Administration, and Coordination Department. He referred to Rules 6-A to 8 of the Rules, 1974, and argued that in exigency of service the post of Director (BS-19) can be filled amongst the officers of the Education and literacy department.

11. The interpretation of the word 'by transfer' used in the Recruitment Rules dated 08.09.2009. In order to appreciate the contentions of learned A.A.G. and the petitioners' counsel as to whether the competent authority is empowered under the Rules, 1974, to appoint civil servants from different departments of Government of Sindh to the Inspection and Registration of Private Institutions, School Education, and Literacy Department Cadre, it may be observed that the term 'transfer' used in Rule 9(1) has been interpreted by the Honorable Supreme Court in the cases reported as *Contempt Proceedings against Chief Secretary, Sindh and others*, **2013 SCMR 1752**, and *Ali Azhar Baloch and others v. Province of Sindh and others*, **2015 SCMR 456**, and held that `the appointment by transfer can only be ordered if a civil servant is

eligible and qualifies for his transfer under Rule 3(2) of the Rules of the department to which he is to be transferred, read with Rules 4, 7 and 8 of the Rules, which prescribe conditions laid down for such appointments by transfer to such posts ; that a civil servant who is to be appointed by transfer has to appear before the Departmental Promotion Committee or the Provincial Selection Board as the case may be, which will consider his/her eligibility, qualification and such 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 ; that Rule 9(1) speaks of appointment by transfer to be made from amongst the persons holding appointments on regular basis mentioned in column-2 of the table given under the Rule. Therefore, the word 'person' as used in Rule 9(1) would relate to the officers, who are civil servants and mentioned in column-2 of the table given under Rule 9(1). The word 'person' could not be given an ordinary meaning beyond the scheme of the Act and Rules of 1974'.

12. The Honorable Supreme Court further held that 'Rule 9(1) does not empower the Government or Selection Authority defined under the Act to appoint a civil servant or any other person by transfer to any other cadre, service or post without his/her eligibility, qualifications and the conditions laid down under Rules 3(2), 4, 6, and 8 of the Rules. Section 8 of the Act makes the class of civil servants for the proper administration and such class is not interchangeable at the whims of the Selection Authorities and/or the Government to extend favors to their blue-eyed. There is no discretion given under Section 5 of the Act to appoint any person in Civil Service against a Civil Post in a manner other than prescribed by the Rules. There is neither procedure nor mechanism provided under the Act or the Rules to treat appointment by transfer as absorption in the transferee department. Rule 9(1) cannot be used as a tool to allow the horizontal movement of a civil servant from his/her original cadre to another cadre against the scheme of the Act and the Rules of 1974. The term 'transfer' has to be interpreted in its common parlance and is subject to the limitations contained in Rules 3, 4, 6, 7, and 8 of the Rules, 1974. Any appointment by transfer under Rule 9(1) has to be for a fixed term, and, on completion of such term, the Civil Servant has to join back his parent department. The word 'appointment' used in Rule 6(A) cannot be equated with the word 'initial appointment' used in the Act which excludes appointment by transfer and promotion. Therefore, restricted meaning has to be given to the expression 'appointment by transfer'; Rule 9(1) does not permit the transfer of a teaching Cadre officer to a cadre post. It is well-settled now that 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 a competitive process; and, the conditions enumerated under the aforesaid Rule.

13. We are of the considered view that the aforesaid post could only be filled as per Recruitment Rules notified on 08.09.2009 and subject to eligibility and entitlement, and not otherwise for the simple reason that the Directorate of Registration and Inspection of Private Institutions Sindh is a cadre of Education and Literacy Department Government of Sindh; and, Recruitment Rules for the subject post are already in the field. Besides that, the post of Director (BPS-19) is a cadre post and the cadre officers

i.e. DMG/Ex-PCS/PSS officers of the Government of Sindh are eligible to be posted; even though, this post could also be filled by promotion from amongst the Deputy Director or Registrar (BPS-18). Primarily, the said rules are framed in consultation with the Services, General Administration and Coordination Department, Government of Sindh in pursuance with sub-rule (2) of Rule 3 of the Rules, 1974 and have not yet been superseded.

14. At this stage, learned counsel for the private respondent has drawn the attention of the Court that the post of Director (BPS-19) has never been filled under the aforesaid recruitment rules as the cadre officers are reluctant to join the post. He further submitted that since the Directorate of Registration and Inspection of Private Institutions Sindh falls within the ambit of the cadre of Education and Literacy Department Government of Sindh, therefore, the officers of BPS-19 of College/School Education could be posted on deputation as the stopgap arrangement and this practice is in vogue and this a reason the respondent School Education and Literacy Department has proposed the new recruitment rules for provincial and regional Directorate of Registration and Inspection of Private Institutions Sindh and the same are under process, however, he suggested that till the rules are framed, the private respondent may be allowed to continue on the subject post.

15. In principle, this proposal cannot be acceded to in terms of recruitment rules for the subject post and the competent authority of respondents if they had any exigency of service they were required to make a stopgap arrangement by giving additional charge of the subject post to the senior-most Deputy Director/officer of the Directorate of School Education and Literacy Department, Government of Sindh in terms of Rule 8-A of the Sindh Civil Servants (Appointment, Promotions & Transfer) Rules, 1974, but they avoided to do and accommodated one Associate Professor of College Education Cadre to fill the lacuna, which acts on the part of Chief Secretary is not appreciable under the law.

16. In view of the above, the competent authority of respondents/Chief Secretary Sindh is directed to appoint a Cadre officer on the subject post forthwith under the recruitment rules discussed supra. In the meanwhile, no stopgap arrangement shall be made, and out of Cadre posting shall not be made. Let a copy of this order be transmitted to the competent authority of official respondents for compliance within time.

17. This petition stands allowed in the above terms with no order as to costs.

**JUDGE**

**JUDGE**

Nadir\*