

ORDER SHEET

IN THE HIGH COURT OF SINDH, HYDERABAD CIRCUIT.

C.P.No.D-23 OF 2013.

DATE	ORDER WITH SIGNATURE OF JUDGE
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PRESENT.

Mr. Justice Aqeel Ahmed Abbasi.

Mr. Justice Habib-ur-Rahman Shaikh.

1. FOR KATCHA PESHI.
2. FOR HEARING OF M.A. No.109 of 2013.
3. FOR HEARING OF M.A. No.846 of 2013.
4. FOR HEARING OF M.A. No.1883 of 2013.

Date of Hearing: 16.4.2013.

Date of order: 16.4.2013.

Mr. Amjad Ali Sahito, Advocate for the Petitioner.

Mr. Syed Tarique Ahmed Shah, Advocate for Respondent No.3.

Mr. Allah Bachayo Soomro, Addl. A.G. Sindh.

ORDER

AQEEL AHMED ABBASI, J.- Through instant petition the petitioner has impugned Notification dated 31.12.2012 issued by Government of Sindh Works & Services Department, whereby one Mr. Mukhtar Ali Soomro, Executive Engineer (BPS-18) awaiting posting has been posted as Superintending Engineer (BPS-19) (Works & Services) Tando Muhammad Khan (on OPS) in place of petitioner namely Nizamuddin Shaikh who has been directed to report to Works & Services Department.

2. Brief facts as stated by the Petitioner are that petitioner is working as Superintending Engineer (BPS-19) at Works & Services Department Tando Muhammad Khan, to the satisfaction of his superiors having unblemished and spotless service career. It has been stated that the Petitioner was earlier

posted as Superintending Engineer Works & Services Department at Matiari vide Notification dated 26.11.2010 till further orders whereafter vide Notification dated 24.01.2012 one Muhammad Bachal Executive Engineer (BPS-19) Works & Services Department awaiting posting was posted as Superintending Engineer (Works & Services) Matiari on his own pay and scale in place of the petitioner who was transferred and directed to report to Works & Services Department till further orders. Lastly Petitioner was posted as Superintending Engineer (BPS-19) at Tando Muhammad Khan where he was performing his duties before filing instant petition. It has been stated that the work of the Petitioner was satisfactory, whereas, Petitioner also reported some complained about the misconduct by public functionaries with regard to construction work of Public School Tando Muhammad Khan, to the concerned Secretary Government of Sindh. It has been stated that vide impugned Notification dated 31.12.2012 the Respondent No.3 has been posted in place of the Petitioner whereas, petitioner has once again been directed to report to Works & Services Department which transfer postings is based on malafides.

3. Learned counsel for the Petitioner has argued that Petitioner was serving as Superintending Engineer (BPS-19) in Works & Services Department at Tando Muhammad Khan which is a tenure post, therefore, his transfer from said post before expiry of three years is not permissible. It has been further contended that the Respondent No.3 who was serving in BPS-18 has been transferred in place of the Petitioner as Superintending Engineer which is a post of BPS-19, hence such transfer posting on this account also is illegal. It has been further stated that even otherwise the Petitioner is Senior to Respondent No.3, in the department whereas, no reason whatsoever has been assigned while issuing the impugned notification with regard to

transfer/posting of the Petitioner. Learned counsel has further argued that impugned Notification is illegal as the same has been issued in violation of the provisions of Section 10 of Sindh Civil Servants (Appointment, Promotion or Transfer) Rules 1974, as according to learned counsel the same has been issued by the Secretary Government of Sindh, who is not the competent person to issue Notification of transfer posting in respect of officers working in BPS-19, whereas, Chief Secretary is the only Authorized person who can issue such transfer/posting orders in respect of officers of BPS-19. In support of his contention, the learned counsel for the petitioner has placed reliance on the cases of (i) *CORRUPTION IN HAJI ARRANGEMENTS IN 2010 (PLD 2011 963)* (ii) *Syed MEHMOOD AKHTAR NAZVI and others v. FEDERATION OF PAKISTAN and others (2013 S.C.M.R. 01)* and (iii) *Syed MEHMOOD AKHTAR NAZVI and others v. FEDERATION OF PAKISTAN and others P.L.D. 2013 195*.

4. Conversely, learned counsel for the Respondent No.3 has vehemently opposed the maintainability of the instant petition on the ground that a civil servant cannot dispute or challenge the order of transfer posting in terms of Section 10 of the Civil Servants Act, 1973, whereas in terms of Article 212 of the Constitution of Islamic Republic of Pakistan, there is specific bar with regard to filing Constitutional Petition, instead of approaching the relevant forum as provided under the Statute i.e. Services Tribunal. Learned counsel has also disputed the facts as disclosed in the petition and stated that no malafide, whatsoever, has been pointed out by the Petitioner in the impugned Notification of transfer/posting. It is further stated that the Respondent No.3 is also an officer in BPS-19 who was awaiting posting since long. It has been further contended that the Petitioner has concealed material facts while filing instant petition and has not placed on record the Notification whereby he himself was posted at the present position. The said

Notification dated 17.5.2012 has been annexed with the comments filed by the Respondent No.3 as annexure 'A' which shows that the petitioner Niazmuddin Shaikh Executive Engineer (BPS-18) Works & Services Department was posted as Superintending Engineer BPS-19 Works & Services Tando Muhammad Khan in his own pay and scale relieving one M. Masood Memon. Per learned counsel at the time of transfer/posting, to the present place, the Petitioner was also an officer of BPS-18, hence contention of the counsel for the Petitioner that present post is a tenure post of BPS-19 and the transfer/posting of the Respondent No.3 on the said post is illegal, is not only misconceived, but also self defeating. It has been stated that the Respondent No.3 is also an officer of BPS-19 which fact has also been concealed by the Petitioner. As regard reference to the case law relied upon by the learned counsel for the Petitioner learned counsel states that reliance upon such case law is misconceived in law as well as in facts as according to learned counsel for the Respondent the facts of the instant case are entirely distinguishable from the facts of the case law relied upon by the learned counsel for the Petitioner. As regards the objection of the learned counsel for the petitioner with regard to authority of the Secretary to issue Notification for transfer/posting of an officer in BPS-19 learned counsel for the Respondent states that such objection in the instant case is entirely misconceived as the impugned Notification has been issued by the Secretary to the Works & Services Department Government of Sindh, however, with the approval of the competent authority i.e. the Chief Secretary Sindh which fact can be verified from the plane reading of the impugned Notification. While concluding his arguments learned counsel for the Respondent No.3 has submitted that a civil servant cannot claim choice with regard to their transfer/posting whereas all matters relating to terms and conditions of the

employment can be agitated before the competent forums as provided under the Civil Servants Act, 1973. It has been stated that since no jurisdictional error, illegality or malafide has been pointed out by the Petitioner in the impugned Notification, therefore, instant petition is liable to be dismissed in limine with costs. In support of his contention learned counsel has placed reliance on the case of *PEER MUHAMMAD v. GOVERNMENT OF BALOCHISTAN through Chief Secretary and others* (2007 S.C.M.R. 54).

5. Mr. Allah Bachayo Soomro, Addl. A.G. Sindh has also vehemently opposed maintainability of the instant petition by referring to Article 212 of the Constitution of Islamic Republic of Pakistan 1973 and the provisions of Section 10 of the Civil Servants Act 1973 and submits that Petitioner cannot agitate his transfer/posting by filing instant Constitution Petition. It has been further contended that the Petitioner has concealed material facts whereas, at the time of transfer/posting at the present place, the Petitioner was also a BPS-18 officer. It has been further stated that the Petitioner has miserably failed to show any reasonable cause requiring interference by this Court in its Constitutional jurisdiction particularly when the matters relating to terms and conditions of the employment can only be agitated by filing appropriate proceedings before the proper forums as provided under the Statute. It has been further contended by learned A.A.G. that reliance placed by the learned counsel for the Petitioner is also misconceived, as, in the case of *CORRUPTION IN HAJI ARRANGEMENTS* in 2010 reported as P.L.D. 2011 963 the apex Court has taken cognizance under Article 184 of the Constitution in the case of massive corruption in the Hajj arrangements whereas, the act of the Government for placing an officer as OSD was determined by the Honourable Supreme Court. Per learned A.A.G. the facts of the present case

are entirely different and distinguishable as in the instant matter the transfer/posting has been made on the basis of OPS and not as OSD. Learned A.A.G. further states that case law relied upon by the learned counsel for the Petitioner are not relevant to the facts of the present case which is liable to be dismissed.

6. We have heard learned counsel for the parties and perused the record. Through this Constitutional Petition the Petitioner has challenged the impugned Notification dated 31.12.2012 of transfer/posting of the Petitioner viz: Respondent No.3 on the grounds of malafide. It has been argued that the post of Superintending Engineer (Works & Services) is a tenure post of BPS-19, therefore, the Respondent No.3 i.e. Mukhtar Ali Soomro who is Executive Engineer in BPS-18 cannot be given transfer/posting in place of the Petitioner whereas it has been further stated that the post of Superintending Engineer is a tenure post for three years. However, such contention of the learned counsel for the Petitioner has been specifically disputed by the counsel for the Respondent No.3 as well as learned A.A.G. in the comments filed wherein it has been stated that the Petitioner has not approached this Court with clean hands by concealing material facts. A Notification dated 17.5.2012 has been annexed alongwith the comments which shows that the Petitioner Nizamuddin while posted to the present post of Superintending Engineer (BPS-19) (Works & Services) Tando Mohammad Khan was himself an Executive Engineer in BPS-18 which fact was not disclosed by the Petitioner nor the Notification dated 17.5.2012 was filed alongwith instant petition. Similarly the contention of the learned counsel for the Petitioner whereby it has been claimed that the post of Superintending Engineer (BPS-19) (Works & Services) is a tenure post for three years is not supported by any law, rules or regulations. It has also come on record that Respondent NO.3 namely

Mukhtar Ali Soomro has been promoted in BPS-19, hence the contention of the counsel for the Petitioner that Respondent NO.3 namely Mukhtar Ali Soomro who is an officer in BPS-18 cannot be transferred/posted as Superintending Engineer (BPS-19) at Works & Services Department Tando Mohammad Khan in place of the Petitioner appears to be misconceived in facts as well in law. Nothing has been brought on record to show that the act of the Respondent is tainted with malice or is based upon political considerations. The facts disclosed in the petition also do not suggest that it is a case of frequent unreasonable transfer/posting of the Petitioner. The comments filed on behalf of the official Respondents show that the impugned transfer/posting has been made in view of administrative exigency. Moreover transfer/posting of a civil servant is a matter which relates to terms and conditions of the services which are required to be agitated before the competent authority whereas in terms of provisions of Section 10 of the Civil Servant Act 1973, a civil servant cannot dispute his transfer and posting by way of filing Constitutional Petition. It will be advantageous to reproduce Section 10 of Civil Servant Act 1973 which reads as follows:

“10. Posting and transfers: 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:

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 favourable than those to which he would have been entitled if he had not been so required to serve.”

8. Similarly, in terms of Article 212 of the Constitution of Pakistan 1973, the administrative courts/tribunals, including services tribunals have been constituted with the exclusive jurisdiction to decide the matters pertaining to the terms and conditions of service including disciplinary matters, of a civil servant. It will be advantageous to reproduce provisions of Article 212 of the Constitution of Pakistan 1973, which reads as follows:

“212. Administrative Courts and Tribunals.—Notwithstanding anything hereinbefore contained, the appropriate Legislature may by Act [provide for the establishment of] one or more Administrative Courts or Tribunals to exercise exclusive jurisdiction in respect of---

- (a) matters relating to the terms and conditions of persons [who are or have been] in the service of Pakistan, including disciplinary matters;
- (b) matters relating to claims arising from tortuous act of Government, or any person in the service of Pakistan, or of any local or other authority empowered by law to levy any tax or cess and any servant of such authority acting in the discharge of his duties as such servant; or
- (c) matters relating to the acquisition, administration and disposal of any property which is deemed to be enemy property under the law.

(2) Notwithstanding anything hereinbefore contained, where any Administrative Court or Tribunal is established under clause (1), no other Court shall grant an injunction, make any order or entertain any proceeding in respect of any matter to which the jurisdiction of such Administrative Court or Tribunal extends [and all proceedings in respect of any such matter which may be pending before such other Court immediately before the establishment of the Administrative Court or Tribunal [other than an appeal pending before the Supreme Court,] shall abate on such establishment]:

Provided that the provisions of this clause shall not apply to an Administrative Court or Tribunal established under an Act of a Provincial Assembly unless, at the request of that Assembly made in the form of a resolution. [Majlis-e-Shoora (Parliament)] by law extends the provisions to such a Court or Tribunal.

(3) An appeal to the Supreme Court from a judgment, decree, order or sentence of an Administrative Court or Tribunal shall be only if the Supreme Court, being satisfied that the case involves a substantial question of law of public importance, grants leave to appeal.”

9. Perusal of the aforesaid provision reveal that a civil servant can be transferred/posted by the competent authority to meet the administrative exigency, whereas, a civil servant cannot raise any objection in this regard. However, if a civil servant is aggrieved by such transfer/posting then such dispute, which relates to terms and conditions of the employment, can be agitated before the forums provided under the Statute upto Services Tribunal, and not by way of filing a Constitutional Petition under Article 199 of the Constitution of Pakistan, 1973. Article 212 of the Constitution of Islamic Republic of Pakistan, 1973 provides for creation of an independent forum i.e. Services Tribunal for resolution of disputes by civil servant and prohibits filing of Constitutional Petition as such controversy involves determination of disputed facts and the malafide or otherwise which requires evidence.

10. In the case of *PEER MUHAMMAD v. GOVERNMENT OF BALOCHISTAN through Chief Secretary and others* supra Honourable Supreme Court while interpreting Section 10 read with Articles 199 and 212 of the Constitution has held as under:-

“4. Admittedly the Petitioner had no legal right to be posted against a particular post hence the question of its infringement does not arise as pressed time and again by the learned Advocate Supreme Court on behalf of Petitioner. It is well settled by now that the question of posting of a Government servant squarely falls within the jurisdictional domain of the competent authority subject to law and rules made thereunder. The question of posting/transfer relates to terms and conditions of a Government servant and Service Tribunal would have exclusive jurisdiction to dilate upon and decide such matters and Constitutional jurisdiction cannot be invoked to get such controversies resolved. We have also adverted to the question of malafides which according to the learned Advocate Supreme Court could have dilated upon in Constitutional Jurisdiction which is not correct because the provisions as contained in Article 212 of the Constitution of

Islamic Republic of Pakistan ousts jurisdiction of all other courts and orders of the departmental authority even though without jurisdiction or malafide can be challenged only before the Service Tribunal and jurisdiction of Civil Court including High Court is specifically ousted. The plea of malafide does not confer upon High Court jurisdiction to act in the matter in view of the Constitutional ouster as contained in Article 212 of the Islamic Republic of Pakistan and learned Service Tribunal has full jurisdiction to interfere in such like matters. In this regard we are fortified by the dictum laid down in the case Kh. Abdul Wahid v. Chairman, WAPDA 1986 S.C.M.R. 1534.”

11. We are of the opinion that the Petitioner has failed to make out a case which may require any interference by this Court in its Constitutional jurisdiction under Article 199 of the Constitution nor has been able to point out any exceptional circumstances under which Petitioner could cross the hurdle of Section 10 of Civil Servants Act, 1973 or the bar as contained under Article 212 of the Constitution of Islamic Republic of Pakistan, 1973. The ratio of case law relied upon by the learned counsel for the Petitioner is not attracted to the facts of the instant case which are entirely different and distinguishable from the facts of the instant case, whereas, the ratio of the judgments of the Honourable Supreme Court as relied upon by the learned counsel for the Respondent is fully attracted.

Accordingly we do not find any substance in the instant petition which was dismissed vide our short order dated 16.4.2013 and these are the reasons for such short order.

JUDGE

JUDGE