

IN THE HIGH COURT OF SINDH KARACHI

Before :

Mr. Justice Muhammad Iqbal Kalhoro

Mr. Justice Adnan-ul-Karim Memon

Constitutional Petition No.D-6118 of 2021

(Waheed Ali v. Province of Sindh and 02 others)

Constitutional Petition No.D-6119 of 2021

(Waheed Ali v. Province of Sindh and 02 others)

Constitutional Petition No.D-6120 of 2021

(Waheed Ali v. Province of Sindh and 02 others)

Constitutional Petition No.D-6121 of 2021

(Waheed Ali v. Province of Sindh and 02 others)

Constitutional Petition No.D-6122 of 2021

(Waheed Ali v. Province of Sindh and 02 others)

Mr. Altaf Hussain, advocate for the petitioners

Mr. Zamir Hussain Ghumro, advocate for respondent No.3 in CP No.D-6118/2021

Syed Abrar Ahmed Bukhari, advocate for respondent No.3 in CP No.D-6120/2021

Nemo for respondents No.3 in C.P Nos.D-6121/ 2021 & 6122 2021 though served.

Mr. Abdul Jalil Zubedi, AAG

Date of hearing : 27.02.2023.

Date of Order : 08.03.2023.

ORDER

Through these petitions, the petitioner has brought the common question of law and facts for the issuance of the writ of quo warranto under Article 199 (1)(b) (ii) of the Constitution of the Islamic Republic of Pakistan, 1973, against the private respondents in all petitions to vacate the public office presently they are holding, *inter alia*, on the ground that they were/are not qualified to hold the office as their initial appointment of Assistant Commissioner (BPS-17) in Ex-PCS Cadre by way of nomination by the Chief Minister Sindh under Rule 5(iv)(b) and 5(c) of the West Pakistan Civil Service (Executive Branch) Rules, 1964 (**Rules-1964**) was unconstitutional and their subsequent promotions at times are hit by Article 199 (1)(b) (ii) of the Constitution, 1973.

2. It is vigorously contended by the learned counsel for the petitioner that the appointments of the private respondents on the aforesaid posts have been made by Chief Minister Sindh in violation of Articles 240 and 242 of the Constitution of the Islamic Republic of Pakistan, 1973. It is emphasized that the petition

cannot be dismissed on the purported ground of laches for the reason that laches is not attracted in the writ of quo warranto, where the illegal appointment in violation of Constitutional provision has been challenged before this Court under Article 199(1) (b) (ii) of the Constitution of the Islamic Republic of Pakistan, 1973. It has been argued that on the date when the writ of quo-warranto was filed, all the private respondents were holding public offices, therefore this court in the exercise of Article 199 (2) (b) (ii) of the Constitution has the authority to record findings as to whether the appointment of the private respondents to the public office has been made in consonance with the mandate granted by the constitution.

3. It is asserted that under Rule 3(1)(i) of the Sindh Public Service Commission (Function) Rules 1990 (**Rules 1990**), provides that the SPSC “shall”, subject to other provisions of the Rules 1990, conduct tests for initial recruitment to civil posts connected with the affairs of the Province in BS 16 to 22 except those specified in the Schedule, therefore the aforesaid posts ought to have been made through the competitive process of selection by the SPSC as such the Sindh Government and or the Competent Authority was/is not competent to bypass this mandatory requirement of law and substitute a parallel mechanism to appoint the private respondents BPS-17 against the language of the Rules of 1974, which were framed under the dictates of the Sindh Civil Servant Act of 1973 as mandated under Article 240 of the Constitution; and, this court can also issue directions to the private respondents to return the salaries and other benefits received by them during the period of their illegal appointments on such posts.

4. According to the learned counsel for the petitioner that Chief Minister Sindh was/is not competent under service laws to make the appointment in BPS-17 without advertisement and fulfilling other codal formalities as required under the law. The learned counsel has averred that the posts of private respondents were illegally taken out of the purview of the Sindh Public Service Commission (SPSC) to extend favor to them as they were not eligible to appear in the competitive process, therefore they approached the political figures in the Government of Sindh to appoint them on Ex-PCS cadre in BPS-17, which was a political favor, thus their appointment was/is without lawful authority and falls within the ambit of Article 199 (1)(b) (ii) of the Constitution of the Islamic Republic of Pakistan, 1973. The Learned counsel next argued that the private respondents do not possess the prescribed qualification and experience for the subject posts as such their applications were politically motivated and

erroneously entertained by the Chief Minister Sindh in the years 1991 and 1992, therefore, a writ in the form of quo warranto needs to be issued against the private respondents.

5. According to the learned counsel representing the private respondents that they were appointed under clause (b) of sub-rule (4) and clause (c) of sub-rule (5) of Rule-5 of the West Pakistan Civil Service (Executive Branch) Rules, 1964, with the approval of the Competent Authority i.e. Chief Minister, Sindh. Further, the private respondents had been appointed under Rule-5 of the Sindh Public Service Commission (Function) Rules, 1990 by taking the post from the purview of the Sindh Public Service Commission with the approval of the Competent Authority i.e. Chief Minister, Sindh; that Rule-5 of the Sindh Public Service Commission (Function) Rules, 1990 had been omitted in the year 1997 vide Notification dated 18.02.1997. Further, the Government of Sindh has repealed the West Pakistan Civil Service (Executive Branch) Rules, 1964 vide Notification dated 20.3.2018. The Supreme Court of Pakistan in its order dated 27.3.2018 has disposed of the Criminal Original Petition No.231/2016 and dismissed the Criminal Miscellaneous Application No.1055/2017 (noncompliance of Court order given in Civil Review Petition No.193/2013). Besides, the Supreme Court of Pakistan in its another order dated 27.3.2018 passed in Suo Moto Case No.14/2016 that the rules, vires whereof have been considered in this suo moto case, action stands repealed, therefore, these suo moto proceedings are dropped and disposed of; that the Supreme Court of Pakistan also disposed of the CMAs No.6396/2016, 281-K/2015, 1411/2016 and 1412/2016, as the main matters stand decided/disposed of. Learned counsel submitted that the private respondents passed Departmental Examination. They prayed for the dismissal of the captioned petitions.

6. Mr. Abdul Jalil Zubedi, learned AAG has submitted that the Chief Minister Sindh was empowered to appoint the private respondents as Assistant Commissioner in ex-PCS cadre under rule 5 of the Sindh Public Service Commission (Function) Rules 1990 read with rule 10(b) of the Sindh Civil servants (Appointment, Promotion, and Transfer) Rules, 1974, without reference to the Sindh Public Service Commission. As per learned AAG, the private respondents in all petitions were rightly appointed and promoted under the law and their appointment is protected by the judgment dated 06.09.2019 passed by this Court in the case of Niaz Hussain Abro and two others (CP No.3186 of 2011). He prayed for the dismissal of the petitions.

7. On 27.02.2023, when these matters were taken up for hearing, we observed that some of the private respondents were not in attendance though served, perhaps they have chosen to remain absent to defend their case, however, these matters were reserved after hearing the parties present in court.

8. While examining the case of the parties, some issues have cropped up, therefore, we have decided to fix these matters in court for rehearing with notice to all private respondents to appear in person with their service profile just to see whether they are at the verge of retirement or otherwise. The Secretary Services (SGA&CD) shall be present in court on the next date of hearing with the official service profile of the private respondents, and after hearing and examining the record, further order will be passed.

Adjourned to 14.3.2023 at 11. am.

JUDGE

JUDGE

Nadir*