

# 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

Mr. Nazar Muhammad Leghari & Zakir Leghari advocates for respondent No.3 in C.P. No. D-6119/2021

Mr. Saqib Soomro, Ameer Ali, Ahmed Mujtaba, Shahid Korejo advocates for respondent No. 03 in C.P. No. D-6121/2021

Mr. Bhooromal, Law Officer to Secretary Services, Government of Sindh.

Mr. Muhammad Saleem Rajput, Secretary Services, Government of Sindh.

Date of hearing : 14.03.2023

Date of Judgment : 06.06.2023.

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

**ADNAN-UL-KARIM MEMON, J.** – Through these petitions, the petitioner Waheed Ali has prayed for issuance of writ of quo-warranto under Article 199 (1) (b) (ii) of the Constitution of the Islamic Republic of Pakistan, against the private respondents in all the petitions to vacate the public office presently they are holding.

2. It is urged that the private respondents were/are not qualified to hold the public office as their initial appointment of Assistant Commissioner (BPS-17) in

Executive Provincial Civil Service (“**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/is unconstitutional and their subsequent promotions are hit by Article 199 (1)(b) (ii) of the Constitution, 1973.

3. It is vigorously contended by the petitioner’s counsel that the appointments of private respondents have been made by the Chief Minister Sindh without advertisement and fulfilling codal formalities in violation of Articles 240 and 242 of the Constitution and this petition cannot be dismissed on the purported ground of laches for the reason that the laches does not attract in writ of quo-warranto, where the illegal appointment made in violation of the constitutional provisions has been challenged under Article 199(1) (b) (ii) of the Constitution. It has been argued that on the date when the petitioner seeking issuance of writ of quo-warranto was filed, all the private respondents were/are holding public offices; therefore, this court in exercise of Article 199 (2) (b) (ii) of the Constitution has the authority to record findings as to whether the appointment of private respondents to the public office has been made in consonance with the mandate guaranteed by the constitution. It is asserted that Rule 3(1)(i) of the Sindh Public Service Commission (Function) Rules 1990 (**Rules 1990**) provides that the Sindh Public Service Commission (“**SPSC**”) “shall”, subject to other provisions of Rules 1990, conduct tests for initial recruitment to civil posts connected with the affairs of Province in BS-16 to 22 except those specified in the Schedule; therefore, the appointments on the aforesaid posts ought to have been made by SPSC and 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 in BPS-17 against the language of the Sindh Civil Servants (Appointment, Promotion & Transfer Rules of 1974, (**APT Rules, 1974**) which were framed under the dictates of Sindh Civil Servant Act, 1973 (**SCS Act, 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. All the learned counsel for private respondents in unequivocal terms submitted that the private respondents were appointed under clause (b) of sub-rule (4) and clause (c) of sub-rule (5) of Rule-5 of the Rules, 1964, with the approval of Competent Authority i.e. Chief Minister, Sindh. Further, the private respondents had been appointed under Rule-5 of the Rules, 1990 and the said

Rule-5 had been omitted in the year 1997 vide Notification dated 18.02.1997. Further, the Government of Sindh has repealed the Rules, 1964 vide Notification dated 20.3.2018. The Supreme Court of Pakistan in its order dated 27.3.2018 has disposed of Criminal Original Petition No.231/2016 and dismissed Criminal Miscellaneous Application No.1055/2017 (non-compliance of Court order given in Civil Review Petition No.193/2013). Besides, the Supreme Court 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 CMAs No.6396/2016, 281-K/2015, 1411/2016 and 1412/2016, as the main matters stand decided/disposed of. The learned counsel further submitted that the private respondents have been appointed in accordance with law and some of them have passed the Departmental Examination and some of them have been exempted by the competent authority from appearing in the departmental Examination due to hardship. The learned counsel next argued that the issue of hardship has already been interpreted by this court and the competent authority has exercised the powers in the public interest as such no exception to that effect could be taken. Learned counsel added that these petitions are based on malafide and at the behest of some of their interested colleagues, just to knockout the private respondents from the present posts. The counsel argued that some of the private respondents are on the verge of retirement as such it would not be feasible to remove them from services under the writ of Quo Warranto at this belated stage, therefore, they prayed for dismissal of the captioned petitions with costs.

5. Learned A.A.G. 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 Rules 1990 read with rule 10(b) of the Sindh Civil Servants (Appointment, Promotion, and Transfer) Rules, 1974 (“**Rules 1974**”), without reference to the SPSC, hence they 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 dismissal of the petitions.

6. We have heard counsel for the parties and gone through the record with their assistance and considered the case law cited.

7. After hearing the parties, we find it appropriate to formulate the following points to reach a just conclusion:-

- i) Whether these petitions are maintainable under Article 199 (1)(b) (ii) of the Constitution of the Islamic Republic of Pakistan 1973.
- ii) Whether the private respondents could be exempted from appearing in the departmental examination of Collector Part I-and II and in case of no-qualifying the departmental examination still they are entitled to confirmation of service of Ex-PCS cadre post and could be granted promotion in the next rank under the law.
- iii) Whether Chief Minister is competent to allow the exemption to the private respondents from appearing in the departmental examination of Collector Part I-and II under the law.

8. First and foremost is the issue of maintainability of the Petitions which needs to be decided. Primarily, 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. The condition precedent for issuance of writ of quo-warranto is that the office must be public and created by a statute or Constitution itself; there has been a contravention of the Constitution or a statute or statutory instrument by appointing such person to that office.

9. The Supreme Court in the recent judgment has held that for issuing a writ of quo-warranto the essential grounds are that the holder of the post does not possess the prescribed qualification; the appointing authority is not competent to make the appointment and that the procedure prescribed by law has not been followed. The burden of proof is then upon the appointee to demonstrate that his/her appointment is in accordance with law and rules. Thus the writ of quo-warranto can be instituted by a person though he may not come within the meaning of the word "aggrieved person".

10. In the present case it is emphasized by the petitioner that the Chief Minister Sindh was/is not competent under service laws to make appointment in BPS-17 without advertisement and fulfilling other codal formalities; that the posts of private respondents were illegally taken out of the purview of the SPSC to extend favor to the private respondents as they were not eligible to appear in the competitive process, therefore they approached the political figures to appoint them on Ex-PCS cadre post 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; that the private respondents do not possess the prescribed qualification and experience for the subject posts,

therefore, a writ in the form of quo-warranto needs to be issued against the private respondents.

11. Prima-facie the aforesaid grounds are sufficient to look into the propriety and legality of the apportionment, confirmation, and subsequent promotion of the private respondents to the public office. For the aforesaid reasons we hold that through these petitions the petitioner can approach this Court under Article 199 of the Constitution, consequently, these petitions are held to be maintainable.

12. While enquiring as to why the Chief Minister Sindh had made initial recruitments of Ex-PCS officers in BPS-17 on adhoc basis without publicity and properly advertising the vacancies and at times converting adhoc appointments into regular appointments without qualifying the departmental examination of Collector Part I & II. The answer to this proposition as put forward by the learned counsel for the private respondents is that they were already working on various posts as such there was no need to advertise the vacancies under the Rules 1964. Learned counsel contended that the private respondents were appointed in accordance with law; and after getting the appointment orders joined their service(s) as well as they are discharging their respective duties and during the period they were promoted as per their seniority and length of service, therefore, their appointment cannot be called in question by the stranger to the proceedings.

13. Admittedly, the appointment of the private respondents did not precede by the advertisement of the posts or sending of requisition to the SPSC to enable other eligible persons to be considered for recruitment against the vacant posts of Assistant Commissioner BPS-17. As this practice is prima-facie violation of fundamental rights as Article 18 of the Constitution guaranteed to every citizen freedom of profession.

14. Before discussing further on the issues, it is expedient to have a look at the recruitment rules of Ex-PCS officers. The appointment of Ex-PCS officers initially was made under West Pakistan Civil Service (Executive Branch) Rules, 1964. For convenience's sake the Rules, 1964, are reproduced as under:-

**The West Pakistan Civil Service  
(Executive Branch) Rules, 1964**

No.SO XVIII-1-81/57- In exercise of the powers conferred by clause (2) of the Article 178 and Article 170 of the Constitution of the Islamic Republic of Pakistan, the Governor of West Pakistan is pleased to make the following Rules regulating recruitment to the West Pakistan Civil Service (Executive Branch) and Prescribing conditions of services for the person appointed thereto, namely

Part I- General 1.

Short title commencement and application—(1) These rules may be called the West Pakistan Civil Service (Executive Branch) Rules, 1964.

(2). They shall come into force at once

2. Definitions- In these rules, unless the context otherwise required

3. The following expressions shall have the meaning hereby respectively, assigned to them that is to say

(a) —appointing authority means the authority specified in rule 4:

(b) —Attached Department: and Regional Office respectively mean and attached Department and a Regional Office, as defined in the Rules of Business of the Government of West Pakistan;

(c) —Commission means the West Pakistan Public Service Commission (d) — Government — means the Government of West Pakistan;

(e) —initial recruitment means appointed made otherwise than by promotion (or transfer from another service);

(f) —recognized university means any university incorporated by law in Pakistan or any other University which may be declared by Government after consultation with the commission to be a recognized University for the purpose of these rules;

(g) —Scheduled Castes means the castes, races or tribes or parts or group within castes, races or tribes, declared to be scheduled castes under any law in force in West Pakistan or so declared by Government for the purpose of these rules;

(h) —Service means the West Pakistan Civil Service (Executive Branch): and

(i) —Under-Developed Areas means Quetta and Kalat Divisions, Lasebella District of Karachi Divisoion, the Triabal Areas of Peshawar and Dera Ismail Khan Division and such other areas as Government may declare to be Under-Developed Areas for the purposes of those rules.

## Part II- RECRUITMENT

3. Number of posts—The Service shall comprise such posts as may be determined by Government from time to time.

4. Appointing Authority—Appointment to the service shall be made by Governor of West Pakistan.

## AMENDMENTS .

1. In rule 5, for clause (a) of sub rule (1), the following clause shall be substituted:-

(a) by initial recruitment on the recommendation of the Commission based on the result of a competitive examination conducted by it normally in December every year in accordance with Appendix \_ A‘:

b. after clause (b). the following new clause (c) shall be ended (c) A select list C‘ in Form-3 appended to these rules of persons who hold posts of Private Secretary to the Governor; Chief Minister, Ministers and Chief Secretary and who are graduates and are considered fit for appointment by transfer to the service.

5. Method of Recruitment—(I) Recruitment to the Service shall be made in the following manner :--

(a) by initial recruitment on the recommendations of the commission based on the result of a competitive Examination conducted by it in accordance with Appendix to these rules; or

(b) by promotion or by transfer. (amended vide notification of even No. dated : 27.09.1987).

(2) Fifty per cent of the vacancies in the service shall be filled by initial recruitment and the rest by promotion:

Provided that temporary vacancies may, at the discretion of government, be filled by promotion, and such appointment shall not be deemed to affect the ratio prescribed under this sub-rule.

(3) Vacancies to be filled by initial recruitment shall be filled in the following manner:--

(i) twenty percent of such vacancies shall be filled on merit from among candidates domiciled in any part of west Pakistan; provided that Government may, from time to time, by notification in official Gazette, increase the percentage of the vacancies to be filled under this clause; and

(ii) the remaining such vacancies shall be reserved for bona fide residents of the Zones specified in the Appendix B to these rules, in proportion to their population according to the census figures; provided that if no suitable candidate is available from the Zone to which a vacancy is allocated under this clause, the vacancy may be filled in to manner provided in clause (i).

(4) Vacancies to be filled by promotion shall be filled as follows:--

(a) 87 ½ percent of such vacancies shall be filled from among members of the regional sub-cadres of the West Pakistan Tehsildars/ Mukhtiarkars, Service whose names appear in Select List 'A' to be maintained in accordance with the provisions of clause (a) of sub -rule (5), in proportion to the strength of such sub-cadres.

(b) The remaining 12 ½ percent of such vacancies shall be filled from among persons whose names appear in Select List 'B' & 'C' to be maintained in accordance with clause (b) and clause (c) of sub rule (5) of this rule. . (amended vide notification of even No. dated : 27.09.1987).

(5) Government shall maintain:--

(a) a Select list 'A' in Form 1 annexed to these rules, which shall be prepared in consultation with the Board of Revenue of the Tehsildars, Mukhtiarkars and Naib-Tehsildars/ Head Munshis who are considered fit for promotion to the service; Provided that only Naib-Tehsildars / Head Munshis of outstanding ability and merit shall be considered fit for promotion to the service; and

(b) a Select list 'B' in Form 2 appended to these rules of persons who hold substantive posts of Superintendents, Personals Assistants / Assistants / Stenographers, working in the West Pakistan Secretariat, Attached Departments, Commissioners' Offices and Regional Offices, Public Relation Officers attached with the Governor, Chief Minister and Ministers and who are considered fit for appointment to the service. (amended vide notification of even No. dated : 27.09.1987).

(c) a select list "C" in the form-3 appended to these rules of persons who hold posts of private secretaries to the governor, chief minister, ministers and chief secretary and who are graduates and are considered fit for appointment by transfer to the service. . (amended vide notification No.SO(xi-REG) S&GAD) 2/G/4-76 dated : 27.09.1987.

(6) Selection of officers for being brought on the Select List referred to in sub-rule (5) shall be strictly on merit with particular reference to fitness for higher responsibilities.

7. No entry shall be made in the select lists to be maintained under the provision of sub rule (5) of this rule nor shall an entry appearing there in be removed or the order in which the names appear in a select list be altered without the previous approval of the commission.

(8) In making an appointment form among the persons whose names appear in a Select List to be maintained under the provisions of sub-rule (5), the order in which the names appear in the Select List shall, as far as may be followed.

(9) Promotion against the departmental quota shall be made first and the vacancy meant for initial recruitment shall be filled later.

6. Age- (I) No person shall be appointed to the Service by initial recruitment who is below 21 years or above 28 years of age . (amended vide notification even No. dated : 01.12.1983).

a) Where recruitment is to be made on the basis of a written examination on the 1st January of the year in which the examination is held: and

(b) in other cases, on the last date fixed for submission of applications for appointment.

Provided that –

(i) for a period of ten years from the coming into force of these rules, the upper age limit in the case of candidates from Scheduled Castes and Under- Developed Areas shall be 28 years

(ii) in the case of persons whose services under Government have been terminated for want of a vacancy, the period of service already rendered by them, shall, for the purpose of the upper age limit under this rules, be excluded from their age; and

(ii) in the case of persons serving in connection with the affairs of the Federation, who are domiciled in West Pakistan, and persons serving in connection with the affairs of the Province of West Pakistan with at least four years service As such, the upper age limit shall be thirty-five years.

(2) No person who is not less than forty-five years of age shall be appointed to the Service by promotion; Provided that Government may in deserving cases extend the age limit to fifty year;

7. Qualifications- (1) No person shall be appointed to the Service by the initial recruitment unless he is a Graduate from a recognized University.

(2) No person, not already into Government service, shall be appointed to the Service unless he produces a certificate of character from the principal academic officer of the academic institution last attended and also certificates of character from two other responsible persons, not being his relatives, who are well acquainted with his character and antecedents.

### PART III CONDITIONS OF SERVICE

Probation –(1) persons appointed to the Service against substantive vacancies shall remain on probation for a period of two years, if appointed by initial recruitment, and for a period of one year, if appointed otherwise. Explanation – Officiating service and service spent on deputation to a Corresponding or higher post may be allowed to count towards the period of probation.

(2) If the work or conduct of a member of the service during the period of probation has in the opinion of the appointing authority, not been satisfactory, the appointing authority may, notwithstanding that the period of probation has not expired, dispense with his services, if he has been appointed by initial recruitment and if he has been appointed otherwise, revert him to his former post, or if there be no such post dispense with his services.

(3) On completion of the period of probation of a member of the Service, the appointing authority may, subject to the provisions of sub-rules (4) confirm him in his appointment, or if his work or conduct has, in the opinion of such authority, not been satisfactory. (a) in case he has been appointed by initial



recruitment dispense with his services; or (b) in case he has been appointed otherwise, revert him to this former post and if there be no such post dispense with his services; or (c) extend the period of probation by a period not exceeding two years in all and during or on the expiry of such period pass such order as it could have passed during or on the expiry of the initial probationary period.

Explanation I- If no orders have been made by the day following the completion of the initial probationary period, the period of probation shall be deemed to have been extended.

Explanation II- If no orders have been made by the day on which the maximum period of probation expires, the probationer shall, subject to the provisions of the sub-rule (4) be deemed to have been confirmed in his appointment from the date his probation was last extended or may be deemed to have been so extended.

(4) No person shall be confirmed in the services unless he successfully completes such training and passes such departmental examinations as may be proscribed by Government from time to time.

(5) If a member of the Service fails to complete successfully any training or pass any departmental examination prescribed under sub-rule (4) within such period or in such number of attempt as may be prescribed by Government, the appointing authority may. (a) in case he has been appointed by initial recruitment dispense with his service; and (b) in case he has been appointed otherwise, revert him to his post, and if there be no such post, dispense with his services.

9. Seniority—(1) the seniority inter se of the members of the service in the various grades thereof shall be determined.

(a) in the case of members appointed by initial recruitment accordance with the order of merit assigned by the commission; provided, that person selected for the service in an earlier selection shall rank senior to the persons selected in a later selection; and

(b) in the case of members appointed otherwise, with reference date of their continuous appointment therein provided if the date of continuous appointment in respect of more officers is the same the older officer, if not junior to the younger officer or officers in the next below grade shall rank senior to the younger officer or officer.

Explanation I-- If junior officer in a lower grad is promoted to a high grad temporarily in the public interest even though continuing later permanently in the higher grade, it would not adversely affect the interest of his seniors in the fixation of his seniority in that grade. Explanation II—If a junior officer in a lower grade is promoted to a higher grade by superseding a senior officer and subsequently that officer is also promoted, the officer promoted first shall rank senior to the officer promoted subsequently. Explanation III—A junior officer appointed to a higher grade shall be deemed to have superseded a senior officer only if both the junior and the senior officer were considered for the higher grade and the junior officer was appointed in preference to the senior officer.

(2) The seniority in the various grade of the service of members appointed by initial recruitment vis-à-vis those appointed otherwise shall be determined as under:-

(a) in case both other officer appointed by initial recruitment and the officer appointed otherwise have been appointed against substantive vacancies, or both have been appointed against temporary vacancies, with reference to the date of appointed by initial recruitment and to the date of continuous appointment against such vacancy in the case of the officer appointed otherwise. Provided that if the two dates are the same, the officer appointed otherwise shall rank senior to the officer appointed by initial recruitment.

(b) In case the officer appointed by initial recruitment has been appointed against a substantive vacancy and the officer appointed otherwise has been

appointed against a temporary vacancy, the officer appointed by initial recruitment shall rank senior the officer appointed otherwise, and

(c) in case the officer appointed otherwise is appointed against a substantive vacancy and the officer appointed by initial recruitment; is appointed against a temporary vacancy, the officer appointed otherwise shall rank senior to the officer appointed by initial recruitment.

10. Absorption of lawyer Magistrates etc—Notwithstanding anything elsewhere contained in these rules, but subject to the provision of Rule 8, the Governor of West Pakistan may— (a) absorb in the service in such manner as he may determine such person, as at the time of the coming into force of these rules, are holding the posts of Additional City Magistrates and Deputy Collector in Karachi and lawyer Magistrate elsewhere in the province, and whom he considers suitable for such absorption; and (c) assign the person so absorbed suitable seniority in the service, which shall not in any case be earlier than their respective dates of appointment as Additional City Magistrates, Deputy Collectors or lawyer Magistrates, as the case may be. (d) Provided that the condition as to pay and superannuation of such persons shall not be varied to their disadvantage.

11. Liability to transfer and serve – Member of the Service shall be liable— (a) to transfer anywhere in West Pakistan; (b) to serve in any Department of Government or any local authority or statutory body set up or established by Government

12. General Rules – In all matters not expressly provided (or in these rules, members of the Service shall be governed by such rules as have been or may hereafter be framed by Government and made applicable to them).

13. Relaxation—Any of these rules may, for reasons to be recorded in writing, be relaxed in individual cases if Government is satisfied that a strict application of the rule would cause undue hardship to the individual concerned; Provided that wherever such relaxation involves a question on which consultation with the commission is mandatory, the commission shall be consulted before the relaxation is made.

14. Delegation—Government may delegate all or any of its powers under these rules, to any officer subordinate to it.

15. Power of Government to safeguard right of Government Servants— Whenever in the application of these rules, the terms and conditions of service of any person serving in connection with the affairs of the Province of West Pakistan as guaranteed by any law for the time being in force, are likely to be adversely affected, the Governor of West Pakistan shall make appropriate orders to safeguard the constitutional and legal rights of such persons.”

15. To elaborate on the aforesaid issues, let us have a glance at the method of recruitment to the post of Assistant Collector / Commissioner (BPS-17) in the Ex-PCS. The Rules 1964, as amended provides that the Ex-PCS cadre post shall be filled as under:-

(i) 50% by initial appointment through Sindh Public Service Commission.

(ii) 43.75% by promotion from amongst the Mukhtiarkar (BPS-16)

(iii) 6.25% by nomination from amongst the persons who hold substantive post of Superintendent / Personal Assistant / Stenographer working in Secretariat / attached departments / Commissioner Offices / Regional Offices and Public relation officers / Private Secretary attached with the Governor, Chief Minister, Ministers, and Chief Secretary.

16. Rule 8(4) & 8(5) of the Rules 1964 provides passing of the necessary departmental examination for confirmation of service. The appointment letters of

the private respondents explicitly show that they had to pass the departmental Examination, of Collector Part I and II, however, we have been informed that some of the private respondents have not bothered to appear in the departmental examination as earlier directed in the case of Niaz Hussain the reasons assigned by them that the competent authority had exempted them to appear in the departmental examination. Prima-facie, this is hardly ground not to comply with the terms and conditions of the services as contained in the appointment letters of the private respondents within the stipulated period, which explicitly show as under:-

**“you will undergo training at the Provincial Services Academy Peshawar and to pass Assistant Collector Departmental Examination (Part-I & II) within 15 months of the date of your appointment as Assistant Commissioner”**,

17. However, the services of the private respondents were confirmed as Assistant Commissioner in BPS-17 on Regular Basis in the year 1992 with effect from the date of assuming the charge of the post; even some of them without qualifying the departmental examination which was/is mandatory for confirmation of Ex-PCS cadre post, and in the intervening period they were promoted to BPS-20/21.

18. Prima-facie, this discretion exercised by the competent authority in their favour is against the principles laid down by the Supreme Court in the cases of Criminal Original Petition No.89 of 2011 (2013 SCMR 1752) and Suo-Moto Case No.19 of 2016 (2017 SCMR 683), in a later case, the Supreme Court was not satisfied with regard to the appointment of the private respondents made by the then Chief Minister Sindh and directed the Secretary, Services, General Administration & Coordination Department (SGA&CD) to examine whether the appointment of respondent Danish Saeed in C.P No.D-6120/2021 and promotion to them were in accordance with law and applicable rules and regulations and direction was issued to the Government of Sindh to submit the report for further orders. However, the respondents have not placed on record any further order passed by the Supreme Court in terms of the ratio of the aforesaid case. An excerpt of paragraph 6 of the judgment in Suo Moto Case No.19 of 2016 is reproduced as under: -

“Paragraph 5.....Paragraph 6 ---The Secretary Services, General Administration & Coordination Department (hereinafter “Services”) is directed to examine whether Mr. Danish Saeed’s appointment and promotion were in accordance with law and applicable rules/regulations and to submit report in this regard within sixty days for our perusal in Chambers, whereafter if required further orders may be passed in Court.”

19. The Supreme Court in the case of *Criminal Original Petition No.89 of 2011 (2013 SCMR 1752)* directed that the nominations made by the Chief Minister over the quota given by Rule 5(4) (b) of the Rules, 1964, are without lawful authority and directed Sindh Government to formulate a mechanism for such appointments in future. The relevant paragraph No.110 of the judgment is reproduced as under:-

“110. We may observe that nominations of Assistant Commissioners by the Chief Minister after exhausting his quota shall affect the seniority of the incumbents who will pass the P.C.S. exams on merits and appointed as Assistant Commissioners till 2017. Therefore, all the aforesaid officers inducted in excess of the quota shall be relegated to their original positions. In future, the Sindh Government shall formulate mechanism for nomination of such appointments by transfer to the post of Assistant Commissioner (BS 17) in Ex. PCS cadre.”

20. Touching to the second proposition that the private respondents were inducted in the service on a permanent basis without passing the competitive examination and they also failed to pass / qualify the Departmental Examination for Assistant Collector Part-1 and II for their confirmation in service on a regular basis. Primarily, the qualification and experience of the Ex-PCS cadre post cannot be relaxed/waived as there is no provision in the 1964 Rules to authorize the competent authority to relax the qualification / experience of the Ex-PCS cadre post. However, in deviation of recruitment rules and law, the competent authority allowed the exemption to the private respondents by waiving the aforesaid condition and by relaxing the rules, which is apathy.

21. Adverting to the contentions of the private respondents that by virtue of section 5 of the Rules, 1990, the Chief Minister was empowered to specify posts that could be filled, without reference to the Commission. Primarily, the said Rule was enforced at the relevant point of time having been subsequently omitted vide Notification No. SOR-I (S&GAD) 5/1-97 dated 18.2.1997. The said Rule 5 of the Rules, 1990 empowered the Chief Minister, Sindh to take the post out of the purview of the Commission. However, in the instant cases, such powers appear to have been exercised in person-specific cases just to accommodate them to avoid appearing in the competitive process.

22. The Counsel for the private respondents submitted that the private respondents having been initially appointed to their respective posts under the aforesaid law, no exception can be taken to that effect. Prima-facie there is no absolute discretion to the competent authority to discriminate amongst the candidates by accommodating blue-eyed individuals and ignoring the aspiring candidates. The Supreme Court vide order dated 24.2.2015 in the case of *Chief Secretary, Sindh versus Riaz Ahmed Massan and another (2016 SCMR 1784)* held that after the constitutional dispensation in 1973, **the Chief Minister has no power to nominate and promote any Civil Servant by relaxing Executive**

**Branch Rules, 1964.** It was further observed that the rules conflict with various provisions of the Constitution and to examine vires of the rules, notice was issued to the Additional Advocate General, Sindh with direction to place on record the list of such persons who were promoted by the competent authority without qualifying the required examination and the same was done so. **Emphasis added.**

23. From the aforesaid rule position it is obvious that no person shall be confirmed in Ex-PCS service unless he completes such training and passes such departmental examinations as may be prescribed by the government from time to time within such period or in such number of attempt as may be prescribed by the government, the appointing authority may either in case he has been appointed by initial recruitment dispense with his service; or in case he has been appointed otherwise, revert him to his post, and if there be no such post, dispense with. In this case, the services of the private respondents were not dispensed with rather they were promoted to higher ranks, in violation of recruitment rules and without lawful justification.

24. The Supreme Court in the case of Ali Azhar Khan Baluch case **2015, SCMR, 456** at paragraphs No. 211 and 212 has held that Ex-PCS officers were not entitled to continue in their Offices. The relevant portion of the judgment is as under:-

“211. The petitioners claim to have been nominated by the Chief Minister as Assistant Commissioners under Rule 5(4) (b) of the West Pakistan Civil Service (Executive Branch) Rules, 1964. The grievance of the petitioners is that on account of paras 102 to 111 of the judgment under review, their nominations were withdrawn and they were reverted back to their parent Departments. We have already dealt with this issue in the aforesaid paras. During the hearing of the Review Petition, we have noticed that no mechanism has been provided for nomination of the officers. It is the sole discretion of the Chief Minister to recruit/nominate an employee to the post of Assistant Commissioner in exercise of powers under Rule 5(4) (b) of the Rules of 1964. **The discretion to exercise the powers needs to be structured by framing policy, which should encourage merit. On query from the learned Additional Advocate General, Sindh as to how the employees are chosen from different Departments for nomination as Assistant Commissioners; he, on instructions, informed the Bench that no policy has been framed and it is the sole discretion of the Chief Minister.**

These Rules are not meant to ignore transparency in nomination as such appointments are made by bypassing the regular procedure provided for appointment of a Civil Servant in BS-17. **We have noticed that most of these appointments were made amongst the employees, who have been excluded from the purview of the Public Service Commission. Therefore, in absence of policy for nomination to the post of Assistant Commissioner, blue eyed of the high ups will get these jobs.** We, therefore, direct the Sindh Government to frame a transparent policy for nomination of these officials, which could ensure that meritorious employees of the Departments mentioned in the Rules of 1964, could be nominated on merits, after proper scrutiny.

212. **The petitioners were found in excess of the quota as per the list provided to us by the Sindh Government and, therefore, for the reasons already recorded by us in the judgment under review, they were not entitled to continue in their Offices. These Review Petitions having no merit are, accordingly, dismissed.**”

**Emphasis added.**

25. It is an admitted position that terms and conditions of service of Ex-PCS cadre officers were/ are governed under the aforesaid recruitment. It is a settled

principle of law that the departmental rules provide for the procedure of recruitment to the vacant post, no other procedure can be adopted as has been done in the present case by granting exemptions not to sit in the departmental examination by executive order by taking advantage of Rule 13 of Rule 1964 and by showing the case of hardship.

26. Prima-facie, there is no concept of hardship in qualifying for the Departmental Examination. Therefore, the competent authority has exercised the jurisdiction without lawful justification by allowing the private respondents to be promoted to the next rank, and we have also reservations against the confirmation of the service of the private respondents who had not qualified for the departmental examination of Collector Part-I and II within the stipulated period.

27. Since sufficient time has lapsed and still some of the respondents have not qualified for such examination, therefore, in the absence of qualifying for the departmental examination, no promotion could have been allowed to the private respondents. The officers who claim to have passed the departmental examination of Collector Part-I & II need to be verified by the SPSC and after scrutiny and verification, the matter be referred to the competent authority for appropriate orders.

28. Adverting to the arguments of learned AAG that the Government is entitled to grant exemption in hardship cases and it is essentially an administrative matter falling within the exclusive domain of the competent authority and the interference with such matters by this Court is not warranted as no vested right of the outsider is involved in the matter of exemptions, and this Court has no jurisdiction to strike down the appointment of private respondents.

29. We are not in agreement with the submissions made by learned AAG for the reason that it is not the sole prerogative of the Government to discriminate amongst the candidates by categorizing them by way of nomination and other sets of candidates to go for the competitive process under the garb of policy decision as portrayed and this court can interfere if the policy is capricious and non-informed by reasons, or arbitrary, offending the basic requirement of the Constitution and law. Reliance is placed on *Dr. Akhtar Hassan Khan and others v. Federation of Pakistan and others* (2012 SCMR 455). Moreover, such exemption is against the recruitment rules, as discussed supra besides it is also against the basic principles of law.

30. The submissions made by learned counsel for respondents to contrary effect cannot be accepted for the reason that there is no concept of exemption from qualifying the Departmental Examination of Assistant Collector Part-I and II. The consequence for not qualifying the required examination as per Rule 8(4) of Executive Branch Rules, 1964 is that the Civil Servant, so appointed shall not be confirmed to the post unless he/she qualifies prescribed departmental examination of Collector Part-I & II.

31. This Court vide order dated 08.03.2023 directed Secretary Services (SGA&CD) to submit the service profile of private respondents. The Secretary Services (SGA&CD) submitted the Service profile of private respondents which ex-facie shows that some of the private respondents have not qualified the departmental examination of Collector Part-I and II. Secretary also informed that the private respondents shall retire from service as under: -

Sr. No.	Name	Date of birth	Year of retirement
1	Makhdoom Shakeel uz Zaman	12.10.1963	2023
2	Danish Saeed	01.10.1964	2024
3	Saeed Ahmed Awan	26.09.1964	2024
4	Chiraghuddin Hing+oro	01.01.1967	2027
5	Imtiaz Ali Shah	11.03.1968	2028

32. Since we have already decided the similar issue in C.P. No. D-3816 of 2011 and C.P. No. D-713 of 2013 vide judgment dated 06.09.2019 whereby we have directed the private respondents to qualify for the departmental examination of Collector Part I-and II; however, some of the private respondents still hold the post without qualifying the departmental examination of Collector Part I and II, and even though they have been promoted to next grade to circumvent the judgment passed by this Court. The directions contained in the aforesaid judgment shall also follow and the competent authority shall take disciplinary action forthwith. The relevant portion of the judgment dated 06.09.2019 passed by this Court is reproduced as under:-

“30. Let us take second proposition/issue agitated by the learned Counsel for the petitioners with regard to grant of exemption from departmental examination. In this regard, the Rule 13 of West Pakistan Civil Service (Executive Branch) Rules, 1964 clearly spell out the following legal position. An excerpt of the aforesaid rule is reproduced as under:-

“13. Relaxation—any of these rules may, for reasons to be recorded in writing, be relaxed in individual cases if Government is satisfied that a strict application of the rule would cause undue hardship to the individual concerned.”

During the course of arguments, we have been informed that the aforesaid rule has been deleted vide Notification dated 30.06.2009. Be that as it may, in our view, in law there is no concept of exemption from departmental examinations, which are meant to make the Revenue Officers conversant with the relevant rules to accomplish assignment which they have to undertake in field. No blanket cover can be given by the Competent Authority which breeds incompetence in the Revenue Offices. The exemption granted

by the Chief Minister, Sindh tantamount to undue favour, as a result of which, the Government business is bound to suffer. In the similar circumstances while dealing the matters of Revenue Officers, the Hon'ble Supreme Court of Pakistan vide order dated 26.5.2016 in Civil Petitions No.76-K and 77-K of 2015 observed at paragraph 6 with direction to the Senior Member Board of Revenue Sindh to ensure not to assign field postings to any Mukhtiarkar who has been granted exemption from passing the Examinations of RQ-I and RQ-II.

31. Before parting with this judgment, we observe that on the aforesaid principles, direction of the Honorable Supreme Court is in field and applies to the serving private respondents if they have not already undergone such Departmental Examination of Assistant Collector Part-I & II.

**32. Now taking up the issue of hardship in granting exemptions to individual cases under Section 24 of the Sindh Civil Servants Act, 1973 as pleaded by the respondents. The Honorable Supreme Court has settled the aforesaid proposition on the premise that the Competent Authority under Section 24 of the Sindh Civil Servants Act, 1973 can grant benefit to an individual if it considers it just and equitable, without offending and impairing the statutory rights of other Civil Servants/Employees. The exercise of powers under Section 24 of the Act, 1973 by the Competent Authority in cases of the private respondents travelled beyond the scheme of the Act, 1973, framed under the mandate of Articles 240 read with Article 242 of the Constitution, 1973. However, the Competent Authority can exercise powers under Section 24 of the Act, 1973 by relaxing rules, if there is a vacuum in law, but such powers cannot be exercised under the garb of the term "Relaxation of Rules" with the intent to bypass the mandate of law for extending favour to a person or an individual, offending and impairing the statutory rights of other Civil Servants. The authority conferred under Section 24 of the Act, 1973 is confined to hardship cases, without negating the vested rights of the other Civil Servants and/or causing prejudice to their interests. In our view, qualification, experience for the subject post cannot be waived under the law.**

33. We have noticed that Rule 8(4) of Executive Branch Rules, 1964 explicitly provide that no person shall be confirmed in the service unless he successfully completes such training and passes such departmental examinations as may be prescribed by Government from time to time and Rule-5 (supra) further provides that if a member of the service failed to complete successfully any training or pass any departmental examinations prescribed under Sub-rule (4) within such period or in such number of attempt as may be prescribed by Government, the appointing authority may. (a) in case he has been appointed by initial recruitment dispense with his service and (b) in case he has been appointed otherwise revert him to his post and if there be no such post dispense with. The aforesaid legal position clarifies that in absence of the qualification of serving private respondents for the aforesaid posts, who have not qualified the departmental examination earlier as required under the law, this court cannot waive the qualification and experience for the subject post and endorse their point of view as agitated by them in the present proceedings. However, the competent authority can grant exemption in hardship case, but exemption from appearing in the qualifying examination can be categorized in hardship case.

34. We, for the aforesaid reasons direct the Respondent No. 1/Chief Secretary, Sindh to scrutinize the service record of the serving private Respondents, who have not qualified earlier the Departmental Examination of Assistant Collector Part-1 and II and determine whether or not they have been legally promoted, and whether or not in their promotion, the directions of the Hon'ble Supreme Court in its judgment rendered in the cases of Criminal Original Petition No.89/2011 and Ali Azhar Khan Baloch (supra) and principle settled with regard to exemption in qualifying departmental examination vide order dated 26.5.2016 in Civil Petition No.76-K and 77-K of 2015, at paragraph No.6 (supra) have been adhered to or not and submit compliance report through MIT-II of this Court within a period of two months, which shall commence from the date of communication of this judgment to the Respondent No. 1/Chief Secretary/Sindh, who is further directed to implement the aforesaid judgments and order passed by the Hon'ble Supreme Court on the subject issue in letter and spirit.

35. Before parting with this judgment, we may observe **that if the serving private respondents, who have not qualified the Departmental Examination of Collector Part-I and II, they are required to undergo the said examination process, if the said exercise is not undertaken earlier, as required under the law, within a period of six months from the date of receipt of the Judgment of this court and after**



**announcement of their respective results, the same be placed before the competent authority for appropriate order, however if they fail to appear in the said examination or if earlier failed, the competent authority shall take prompt action in accordance with law.**

36. The petitions stand disposed of in the above terms.” **Emphasis added.**

33. The aforesaid decision was assailed before the Supreme Court of Pakistan in CP No.4105 of 2019, 1406 of 2019, 4144 of 2019, 4145 of 2019, 4410 of 2019 and 443 of 2019 vide order dated 12.05.2022, which is as under:

**“C.P. No.4105 & 4106 OF 2019:-**

Learned AOR for the petitioners says that he has instructions to withdraw these petitions. Both the petitions are dismissed as withdrawn.

**C.PS No.4433 & 4410 of 2019:-**

Learned counsel for the petitioners submits that the grievance of the petitioners No. 1&2 stands redressed, therefore, the petition is not pressed to their extent. So far as petitioner No.3 is concerned his appeal is pending before the Tribunal and directions be issued for expeditious disposal whereas, petitioner No.4 has made a representation to the Chief Minister. Per ASC in case directions are issued for expeditious disposal of the appeal before the Tribunal and representation before the Chief Minister, he would not press these petitions. Petitions are dismissed as not pressed. We expect that representation as well as case of the petitioner would be decided as early as possible.

**C.Ps No.4144 & 4145 OF 2019:-**

Learned counsel for the petitioners says that the impugned judgment stands implemented and the petitioners have approached the Service Tribunal. He does not wish to press this petition but seek a direction for expeditious disposal of grievance petition before the Service Tribunal. These petitions are dismissed as withdrawn. Leave declined. We expect that the grievances of the petitioners, before the Tribunal would be decided as expeditiously as possible.”

34. It appears that favorable orders were obtained by the officer(s)/beneficiary (ies) in representation / departmental appeal from the Chief Minister Sindh.

35. We are clear in our mind that judicial orders of this court containing directions to pass the Collector Part I-II examination within six months through SPSC cannot be nullified.

36. In our view, in law, there is no concept of exemption from departmental examination of Collector Part I-II which is meant to make the revenue officer conversant with the relevant rules to accomplish assignments that they have to undertake in the field. No blanket cover can be given by the competent authority which breeds incompetence in revenue offices.

37. The aforesaid judgment holds the field, and non-compliance of directions, prima-facie may expose the delinquent officials to contempt proceedings in terms of Article 204 of the Constitution. In the intervening period, the promotion so obtained by the beneficiary (ies) from the date of the initial appointment is against the law and declared nullity in the terms of the principles laid down by the Supreme Court in the aforesaid cases.

38. The issue of hardship as claimed by some of the private respondents/beneficiaries has already been set at rest by the Supreme Court of Pakistan as discussed supra; and even some of the private respondents have failed to show any hardship issue with them from appearing in the Departmental Examination of Collector Part-I & II, though the chance was given to them in earlier round of litigation, however they failed to avail or remained unsuccessful to qualify the subject examination, therefore, no further indulgence could be given to them.

39. In view of the above facts and circumstances, we direct the competent authority to recall the promotion of the officers who have not qualified the departmental Collector Part I-II examination in terms of the ratio held in the judgment dated 06.09.2019 passed by this Court and upheld by the Supreme Court. The Competent Authority/Chief Secretary, Sindh shall submit a notification of the Ex-PCS officers/beneficiaries by recalling their promotion from the date of their initial appointment, forthwith.

40. For the aforesaid reasons, these petitions are disposed of in the above terms along with the listed applications. Copy of this order shall be transmitted to the Chief Secretary Sindh for compliance.

**JUDGE**

**JUDGE**

Nadir\*