

IN THE HIGH COURT OF SINDH, KARACHI

Before:

Mr. Justice Muhammad Junaid Ghaffar
Mr. Justice Adnan ul Karim Memon

C.P.No.D-5270 of 2023

(Aijaz Ali Vs. Province of Sindh & Others)

Petitioner through	M/s. Haider Waheed and Muhammad Asad Tola, advocates
Respondents No.1 to 3 through	Mr. Ali Safdar Depar, AAG along with Mir Muhammad Channa, Section Officer Prison, Home Department, Government of Sindh
Respondent No.4 through	Nemo
Respondent No.5 through	Mr. Muhammad Arshad Khan Tanoli, advocate
Date of hearing and short order	19.02.2024.
Date of Reasons	19.02.2024.

J U D G M E N T

Adnan-ul-Karim Memon, J. In this Constitutional Petition under Article 199 (i) (b) (ii) of the Constitution of Islamic Republic of Pakistan, 1973, the petitioner Eijaz Ali has challenged the Transfer and Posting of respondent No.5 as Inspector General of Prisons & Correction Service, Sindh, Karachi, BS-21 (**IGP**) on his Own Pay and Scale (**OPS**), vide Notification dated 13.10.2023 and subsequent Notification dated 01.11.2023, whereby respondent No.5 has been permanently transferred and posted as **IGP**.

2. The case of the petitioner in nutshell is that respondent No.5 is serving as Deputy Inspector General of Prisons & Correction Service, Sindh in BS-20 (**DIGP**) and now holding the post of IGP in violation of Recruitment Rules notified on 16.09.2022, whereby the post of IGP can only be filled by promotion amongst the DIGP on seniority cum fitness basis, whereas the respondent No.5 is junior to the other officers of Prison Department as per seniority list issued on 29.08.2023; and, his name is appearing at serial No.4. It is the case of the petitioner that respondent No.5 is not fit and proper person to hold the post of IGP in terms of Rule 8–A of the Sindh Civil Servants (Appointment Promotion and Transfer) Rules, 1974, (**APT Rules,1974**) which provides that if the post

reserved for promotion and the most senior civil servant belonging to the same cadre or service, is eligible for promotion but does not possess the specified length of service, then the competent authority may appoint him to that post on an acting charge basis. It is also the case of the petitioner that initially respondent No.5 was posted to look after the charge of the post of IGP as a stop-gap arrangement, till the posting of a regular officer, but subsequently, he was given permanent posting vide Notification dated 01.11.2023, which has triggered the cause to the petitioner to approach this court by calling in question the appointment of respondent No.5 on the ground that it was undue favor extended to him, which is against the basic spirit of law and dicta laid down by the Supreme Court in its various pronouncements.

3. Mr. Haider Waheed, learned counsel for the petitioner, has contended that the petitioner has filed this petition under Article 199 (i) & (b) (ii) of the Constitution of the Islamic Republic of Pakistan, 1973 like *Quo Warranto*, questioning the Notification dated 13.10.2023 and subsequent Notification dated 01.11.2023, whereby the respondent No.5 was posted against the post of Inspector General of Prisons & Correction Service, Sindh BS-21 in his Own Pay and Scale (**OPS**). His main ground is that as per Section 15 (1) of the Sindh Prisons and Corrections Services Act, 2019, (**Act, 2019**), the Appointing Authority to fill the post of IG Prison, Sindh is the Government of Sindh i.e. (**Cabinet**), which comprises elected Members of the Provincial Assembly, in terms of law laid down by the Supreme Court in the case of *Mustafa Impex*, reported as **PLD 2016 SC 808**, as such the Caretaker Chief Minister Sindh is not competent to appoint any official of Prison department to the post of IG Prison Sindh, under the Election Act,2017. Per learned counsel, the appointment on an acting charge basis can only be made on the recommendation of the Provincial Selection Board (**PSB**) in terms of Rule 8-A (5) of the APT Rules 1974. The learned counsel emphasized that respondent No.5 does not fulfill the criteria to hold the subject post as he lacks the qualifications and experience for the subject post; besides respondent No. 5 has not undergone the mandatory National Management Course (**NMC**) as per Recruitment Rules dated 16.09.2022. Per learned counsel respondent No.5 is not a senior most officer of the same cadre in BPS-20, as three other officers senior to him are available in the same cadre, however, they have been bypassed by the respondent department with malafide intention to extend favour to respondent No.5. He prayed for setting aside the impugned Notifications dated 13.10.2023 and 01.11.2023.

4. Mr. Muhammad Arshad Khan Tanoli, learned counsel representing respondent No.5 has raised the question of the maintainability of this petition and argued that the directions sought by the petitioner to the Provincial Government to relieve respondent No.5 from the present place of posting where he has been transferred is beyond the mandate of Quo Warranto and fall within the power of this Court to issue a Writ of Mandamus and prohibition under Article 199 1(a)(i) of the Constitution, for which the petitioner is required to be an aggrieved person to seek such order as there is a difference of locus standi between the Writ of Quo Warranto and Mandamus. The learned counsel states at the bar that respondent No.5 has only been assigned to look after the charge of the post of IG Prison, till the regular appointment of IG Prison, with the approval of Caretaker Chief Minister Sindh; that petitioner has failed to make out a case for any violation of enforcement of his fundamental right to invoke the extraordinary Constitutional Jurisdiction of this Court. Learned counsel referred to the administrative Note vide Summary for the Caretaker Chief Minister dated 29.09.2023, initiated through Caretaker Home Minister Sindh for the posting of Inspector General of Prison (BPS-21) which had fallen vacant due to the retirement of Syed Anwar Mustafa BPS-20 officer of the prison department, since 27.09.2023. The learned counsel referred to Rule 2 (XIII) read with Rule 8 (iv) of the Sindh Government Rules of Business 1986 and submitted that the powers have rightly been exercised by the Competent Authority to appoint respondent No.5 regularly, after getting necessary permission from the Election Commission of Pakistan (ECP) in terms of provision of Elections Act 2017. Learned counsel also referred to the Counter Affidavit filed by respondent No. 5 to the main Petition and submitted that re-appointment to the post of IGP Prison is beyond the scope of Writ of Quo Warranto in terms of law laid down in the case of *Muneer Rao v Shamsuddin* reported in **2004 PLC CS 1328**. The learned counsel referred to Rule 249 (3) of Sindh Prisons and Corrections Service Rules 2019 (**Rules 2019**) and argued that Rules 2019 have the overriding effect of the Sindh Civil Servants Act 1973 and Rules framed thereunder as such the issue of posting of senior most officer of the same cadre in terms of Rule 8-A (5) of the APT Rules 1974, is not called for at this stage, as the subject post is to be filled on merits and not on seniority cum fitness basis. However, the respondent department managed the Notification dated 16.09.2022 and parallel structure/rules were framed in which certain conditions were prescribed for appointment to the post of IG Prison, based on Seniority-cum fitness, which is not only a violation of Rule 9 (2) of the Sindh Civil Servant Act 1973 but the same is Ultra-vires to Section 15 (1)

of Sindh Prisons & Service Corrections 2019 and Rule 14(1) of Sindh Civil Servants Promotion (BPS-19 to BPS-21) Rules 2022 (**SCSP Rules 2022**) whereby post falling in BPS-19 to BPS-21 and above are declared to be Selection Posts and criteria to fill the subject post in BPS-21 is based on merit, hence the Recruitment Rules framed vide Notification dated 16.09.2022 is not only disregarding the provision of Section 15 of the Ibid Act as well as Ultra-vires to Rule 14 of the Rules 2022. The learned counsel submitted that respondent No.5 has the requisite length of service and experience and he has participated in different training in the Country and abroad and is a suitable and fit person to hold the subject post on merit, as such the question of the posting the senior most officer on the subject post is tint of the imagination of the petitioner. He prayed for the dismissal of this petition.

5. Learned AAG has adopted the arguments of the learned counsel representing respondent No.5 and referred to Rule 8-A of the Sindh Civil Servant (Appointment, Promotion and Transfer Rules 1974 and submitted that the competent authority can appoint the officer to the subject post on an acting charge basis for six months and there is likely hood that the permanent officer shall be appointed by way of promotion in terms of Recruitment Rules as such there is no illegality in the appointment of the respondent No.5 by way of transfer as IG Prison Sindh till further orders.

6. At this stage, we confronted the learned counsel for the respondents with the recent judgment rendered by the Supreme Court in the case of *The Province of Sindh through Chief Secretary & others Vs Ghulam Shabbir and others* **2023 SCMR 686** wherein it is held that to stretch or continue acting charge or ad-hoc arrangement on OPS for an extensive period is highly destructive and deteriorative to the civil service structure. Besides making the appointments on acting charge basis includes the consideration by the appointing authority in the public interest to fill a post reserved under the 1974 APT Rules for departmental promotion and if the most senior civil servant belonging to the cadre or service concerned, who is otherwise eligible for promotion, does not possess the specified length of service, the authority may appoint him to that post on acting charge basis. On the aforesaid point learned AAG has submitted that some minor irregularities, if any, in the appointment of respondent No.5 on the subject post were not sufficient for the issuance of a Writ of Quo Warranto against respondent No.5. He prayed for the dismissal of this petition.

7. We have heard the learned counsel for the parties and have perused the entire material available on record and the case law cited at the bar.

8. The objection regarding the jurisdiction of this Court as raised is misconceived and is hereby discarded, for the reason that the petitioner has mainly challenged the appointment of respondent No.5 regarding his qualification to hold the post, in violation of Recruitment Rules as discussed supra, and arbitrariness of the respondent department in posting him as IG Prison Sindh in BS-21. Secondly, so far as fitness to hold the Selection Post is concerned, the same can be filled on merits and the officer fit in all respects can be appointed as IG Prison Sindh; and in such circumstances, the Sindh Service Tribunal (SST) has no jurisdiction over the question of determination of “fitness” of a Civil Servant, however, the question of eligibility is different from the question of fitness which is not the case in hand. So far as the Writ of Quo Warranto is concerned, it is established law that any person can lay information to the court regarding a public office being illegally occupied. The person laying such information shall not necessarily be aggrieved. However, at the same time, we are cognizant of the fact that there is much difference between the Writ of Quo Warranto and Mandamus. Mandamus also differs from writs of prohibition or certiorari in its demand for some activity on the part of the body or person to whom it is addressed, for the performance of public duty and commands the person to whom it is addressed to perform some public or quasi-public legal duty, which he has refused to perform, and the performance of which cannot be enforced by any other adequate legal remedy. In such a situation party should be an aggrieved party having no other adequate and efficacious remedy. On the aforesaid proposition, we are guided by the decision of the Supreme Court in the case of Secretary Finance and Others Vs Ghulam Safdar **2005 SCMR 534**.

9. Having dilated upon the maintainability of the Petition, and to appreciate whether such a direction sought by the petitioner could be issued while exercising powers of Writ of Quo Warranto or mandamus/prohibition, it would be important to refer to Article 199 of the Constitution of Islamic Republic of Pakistan, 1973. The perusal of Article 199 (b)(ii) of the Constitution shows that a person performing duties in connection with affairs of the Province could be required to show under what authority he is holding a particular public office and for that purpose, the petitioner therein may not be required to be an aggrieved person, however, in the instant matter the directions sought by the petitioner were not merely confined to the afore-referred aspect of the matter rather the same include the issuance of directions like the Writ of Mandamus and prohibition against the respondent No.5 requiring him to show his fitness

to hold the promotion post in BS-21 without fulfilling the criteria as outlined in the recruitment rules as the matter of appointment of the post of Inspector General of Prison Sindh (BPS-21) is governed under the Recruitment Rules notified vide Notification dated 16.09.2022, which reads as under:-

**GOVERNMENT OF SINDH
HOMR DEPARTMENT
KARACHI, DATED the 16th September, 2022**

NOTIFICATION

NO. HD/SO/PRS-d/ii-200/2021: In PRUSUANCE OF SUB-RULE (2) OF RULE 3 OF THE Sindh Civil Servants (Appointment, Promotion and Transfer) Rules 1974 and in consultation with the Regulation Wing of Services General Administration & Coordination Department, Government of Sindh, the method, qualification, experience and other conditions for appointment in respect of the post of Inspector General of Sindh Prison (BPS-21) IN THE Sindh Prisons & Corrections Service, Home Department, Government of Sindh, mentioned in columns-2 of the table given below, shall be laid down as per column 3,4 and 5 thereof:-

SR. NO.	NAME WITH POST WITH BPS	METHOD OF APPOINTMENT	QUALIFICATION & EXPERIENCE	AGE LIMIT Min- Max
1	Inspector General of Prison of Sindh (BPS-21)	By promotion from amongst the DIG Prisons (BPS-20) having at least twenty-two years' service in BPS-17 and above with successful completion of mandatory training viz. National Management Course (NMC) at the National Institute of Management (NIM) on seniority cum fitness basis.		

10. On examining the rules, it is found that the post of Inspector General of Prison of Sindh (BPS-21) is 100% promotion post and can be filled by way of promotion from amongst the DIG Prisons (BPS-20) having at least twenty-two years of service in BPS-17 and above with successful completion of mandatory training viz. National Management Course (NMC) at the National Institute of Management (NIM) on seniority cum fitness basis.

11. We have before us the seniority list wherein the name of respondent No.5 is placed at Sr. No.4. It has also been informed that respondent No.5 lacks twenty-two years of service in BPS-17 and above with successful completion of mandatory training viz. National Management Course (NMC) at the National Institute of Management (NIM) as prescribed under the rules. If this is the position of the case, the grant of higher appointments to junior officers against senior posts amounts to accelerated promotion, as has been done in the present case, as respondent No.5 without the recommendation of PSB, has been directly posted as IG Prison (BPS-21), which is a promotion post.

12. In view of the above facts and circumstances of the case, we hold that the respondent department is required to appoint a qualified person to the post of IG Prison BPS-21 as per Recruitment Rules and not otherwise.

13. On the issue of OPS, the Supreme Court in the case of the Province of Sindh and others Vs. Ghulam Fareed and others (2014 SCMR 1189) while dealing with OPS posting not only discouraged such practice but also noted that only in exigencies the Government makes such appointments as a stop-gap arrangement whereas in the present case, recruitment rules are already in the field but the respondent-department deemed it fit to post the respondent No.5 as IG Prison Sindh on OPS which act on the part of respondents is against the law and dicta laid down by the Supreme Court in the case of “Khan Muhammad Vs. Chief Secretary, Government of Balochistan Quetta and Others” (2018 SCMR 1411).

14. For what has been discussed above, the impugned notifications dated 13.10.2023 and 01.11.2023 are struck down; the petition asked for is accordingly allowed with the direction to the competent authority to fill the post of Inspector General of Prison of Sindh (BPS-21) under Recruitment Rules within one month from the receipt of this judgment. In the intervening period, the respondent department shall strictly follow Rule 8-A of the Sindh Civil Servant (Appointment, Promotion and Transfer) Rules 1974, while making the appointment of the senior most officer of the same cadre, as stop-gape arrangement, on the subject post.

15. These are the reasons for our short order dated 19.02.2024, whereby we allowed the petition, an excerpt, whereof is reproduced as under:-

“Arguments heard. For reasons to be recorded later and subject to what is set out therein by way of amplification or otherwise, this petition is allowed and the two impugned Notifications dated 13.10.2023 and 01.11.2023 are hereby set aside.”

JUDGE

JUDGE

Shafi