

**IN THE HIGH COURT OF SINDH, AT KARACHI**

Present:

Mr. Justice Muhammad Iqbal Kalhoro

Mr. Justice Adnan-ul-Karim Memon

**C.P No.D-69 of 2017**

Syed Muhammad Arif and another.....Petitioners

Versus

Province of Sindh and others.....Respondents

**C.P.No.D-1017 of 2017**

Muhammad Rashid and 93 others .....Petitioners

Versus

Province of Sindh and others.....Respondents

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**Date of hearing: 12.04.2017**

Dr.Rana Khan, Advocate for the Petitioners.

Mr.Abdul Jaleel Zubedi, A.A.G.

M/s Usman Tufail Shaikh and Mr. Khurram Ghayas, Advocates for the Respondent No.3.

Mr. Zakir Hussain Khaskheli, Advocate for Respondent No.4.

**JUDGMENT**

**ADNAN-UL-KARIM MEMON,J:-** In both the above mentioned Petitions similar points of law and facts are involved, hence the same are disposed of by this common judgment.

2. Petitioners have impugned the Notification dated 21.09.2016 whereby they have been relieved / repatriated to their parent department that is Karachi Development Authority (hereinafter called K.D.A). The reason assigned by the competent authority in the said impugned Notification is that the Honorable Supreme Court of Pakistan passed directives vide order dated 01.08.2016 on CMA No. 243/2016 in C.P No.108-K of 2014 to repatriate the officers/officials absorbed in Malir Development Authority (hereinafter called M.D.A) to their parent department. The Petitioner's claim is that they were initially appointed in KDA in different cadres at different times. It is further averred that the competent authority decided to absorb 270 staff members of KDA in MDA by creation of new posts in the annual budget of MDA for the year 1999-2000. Consequently, a Notification dated 27.01.2000 was issued by the competent authority and the Petitioners were absorbed accordingly. In view of Notification the Petitioners claim they are permanent employees of MDA and not KDA therefore, their lien still exists there. Petitioners further asserted that their posts were abolished and were absorbed in MDA in the year 2000 by the Respondent No.1.

3. Para wise comments were filed by the Respondent No.1, 3 and 4. All controverted the stand taken by the Petitioners except Respondent No. 3.

4. Dr. Rana Khan, the learned counsel for the Petitioners has vigorously argued that in pursuance of decision taken by the Governor of Sindh in the Meeting held on 03.01.2000, 270 (two

hundred and seventy) staff members of KDA associated with Scheme No. 25-A (Shah Latif Town) and Scheme No.45 (Taiser Town) were transferred and absorbed in MDA against the available vacancies with budgetary allocation. Subsequently the posts of the Petitioners in KDA were abolished hence, their repatriation is not justified. Learned counsel further contended that the Respondent No.1 by misconception of law and facts repatriated the Petitioners in KDA without looking into the policy that the posts on which the Petitioners were working were abolished and Petitioners were declared surplus employees under Rule 9-A of (Appointment, Promotion, Transfer) Rules 1974 (hereinafter called APT Rules). In support of her contentions, the learned counsel referred to various paragraphs of the judgments of the Hon'ble Supreme Court passed in the case of Cr. Original Petition No.89/2011, contempt proceedings against Chief Secretary (2013 SCMR 1752) and the case of Ali Azher Khan Baloch v. Province of Sindh (2015 SCMR 456) and argued that the petitioners have a right to remain in MDA as permanent employees and repatriation of the petitioners is wholly misconceived. Learned counsel added that the Petitioners have not been paid their salaries since their repatriation in KDA and they are running from pillar to post to have their fundamental rights enforced. Learned counsel further argued that some of the Petitioners have retired from service and are not given their retirement benefits and other dues in sheer violation of law. Learned counsel further argued that the decision rendered in the case of Muhammad Ayub Fazlani (2017 PLC CS 362) is binding upon this Court. In support of her stand learned counsel relied

upon the case of *Multiline Associates v. Ardeshir Cowasjee and others* (1995 SCMR 362). Learned counsel concluded that the lien of the Petitioners still exists in MDA and cannot be extinguished by efflux of time. In support the learned counsel has relied upon the case of *Mazhar Ali v. Federation of Pakistan* (1992 SCMR 435). During the course of arguments we asked learned counsel to satisfy as to how this Court can exercise jurisdiction when the Petitioners have been repatriated in compliance of orders of Hon'ble Supreme Court. In reply to the said query, the learned counsel for the petitioners, while referring to various documents available in the file particularly a Letter dated 01.11.2016 of Secretary, Karachi Development Authority addressed to the Respondent No.1, argued that after establishment of MDA, two Schemes that were transferred to MDA along with Petitioners with all funds / pension contribution of the Petitioners and the posts against which the Petitioners were posted were deleted from budget of KDA. Per learned counsel KDA has recently been revived to its previous position. The learned counsel argued that the Petitioners had been declared surplus employees and were adjusted in accordance with law as such their repatriation in KDA is against the basic spirit of Judgment of Hon'ble Supreme Court passed in Cr.Org. Petition No.89/2011 (supra). The learned counsel relied upon paragraph No. 126 of the said judgment and argued that the issue of absorption has already been settled by the Hon'ble Supreme Court therefore, the respondent No.4 while misconceiving the facts and law issued the impugned Notification.

5. Mr. Usman Tufail Shaikh, learned counsel for Respondent No.3/KDA supported the stance taken by the learned counsel for the Petitioners. He referred to comments of Respondent No. 3 and added that the Respondent No. 1 was apprised of the difficulties in taking financial burden of employees of MDA. He further argued that concrete suggestions were given to the Respondent No. 1 particularly with respect to two Schemes which were transferred to MDA. He argued that in the month of May 2016 KDA was revived under the law therefore the Respondent No. 3 under the circumstances will not be able to overcome the issue of repatriated employees of MDA and financial implications.

6. Mr. Zakir Hussain Khaskheli, learned counsel for the Respondent No.4/MDA has raised the preliminary question of maintainability of the instant petitions on the ground that the Hon'ble Supreme Court has already directed the Director General, MDA to repatriate the officials absorbed in MDA to their parent department. He next contended that the parent department of the Petitioners is KDA. Learned counsel further submitted that Respondent No.1 vide office Letter dated 27.02.2017 directed the KDA to adjust officers / officials repatriated to KDA in pursuance of orders of the Hon'ble Supreme Court. In the said Letter Respondent No.1 further directed that if any short fall in respect of payment of salaries and pensions of the repatriated officers/officials is raised, the same may be processed to the Department for further necessary action but the petitioners are avoiding to join KDA for the reasons best known to them. He

further stated that the KDA is Autonomous Authority of Government of Sindh cannot refuse the repatriated officials / officers from joining, which is in accordance with the orders passed by the Hon'ble Supreme Court. Learned counsel emphasized that in case of refusal by KDA the same shall be treated violation of the orders of the Hon'ble Supreme Court and appropriate action can be taken against the delinquent officials in accordance with law. The learned counsel next contended that the Petitioners were not appointed for the particular Scheme-25-A (Shah Latif Town) and Scheme-45 (Taiser Town) therefore, the Petitioners absorption is illegal and in violation of law. Learned counsel next contended that since the Petitioners were never declared surplus employees of KDA therefore, they cannot claim benefit of Rule 9-A of APT Rules 1974. The learned counsel concluded that total 137 employees from MDA were repatriated to their parent department through Notification dated 21.09.2016 but, the Petitioners have wrongly mentioned the figure of 98 employees. Learned counsel relied upon the two Orders dated 02.02.2016 and 01.08.2016 passed by the Hon'ble Supreme Court in C.P No.108-K of 2014 and in SMC No.16 of 2011 respectively.

7. During the course of arguments, learned counsel for the Respondent No. 4 invited our attention to Statement dated 22.03.2017 (available at page 15 of the file) accompanied by photocopy of application for becoming party, filed by the Petitioners at Serial No.7, 11,27,30,37 and 86 in C.P. No.D-1017 of 2017, in Criminal Original Petition No.6/2016 arising out of C.R.P

No.32-K of 2015 in CMA No.376-K/2014 in Suo Moto Case No.16/2011. The learned counsel further agitated that in both the proceedings identical questions have been raised by the Petitioners. In support of the case the learned counsel relied upon the case of Criminal Original Petition No. 89 of 2011, (supra) and case of Ali Azhar Khan Baloch (supra) and various other orders passed by the Hon'ble Supreme Court on the issue involved in these petitions.

8. Mr. Abdul Jalil Zubedi, learned AAG has adopted the arguments of learned counsel for Respondent No. 4. Learned AAG has further submitted that as per Notification dated 04.10.2016, total 98 employees of KDA (BS-12 and above) were adjusted in MDA including the Petitioners. He has further submitted that at the time of transfer of two Schemes vide Notification dated 27.01.2000, the employees absorbed in MDA without fulfilling mandatory conditions as provided under the Sindh Government Rules of Business, 1986, and in violation of Rules and Regulations. Per learned AAG the absorption of the Petitioners was not legal and has been declared unlawful by the Hon'ble Supreme Court of Pakistan in the case referred to by the learned counsel for Respondent No.4. He has next submitted that this Court has no jurisdiction to entertain the instant Constitution Petitions because the Hon'ble Supreme court has already taken cognizance on the identical issue. Learned counsel further argued that the Government of Sindh has acted on the basis of orders passed by the Hon'ble Supreme Court. So-far-as the impugned Notification

dated 21.09.2016 is concerned, the learned AAG representing Respondent No.1 upon instructions has assured to resolve the issue of Salary / pension benefits of the Petitioners in accordance with law. Learned AAG concluded that the Petitioners have remedy to approach the Hon'ble Supreme Court in review and not to this Court.

9. We have considered the submissions of the learned counsel for the parties and perused the material available on record and case laws cited at the bar.

10. The pivotal question before us is as to whether this Court can entertain the instant Constitution Petitions under Article 199 of the Constitution. To address this question we seek guidance from order dated 1.08.2016 of the Hon'ble Supreme Court passed on CMA No.243/2016 in C.P. No.108-K of 2014 repatriating 98 officers/officials working in MDA to their parent department that is, KDA. Paragraph 11 of the order (supra) is reproduced as follows:-

*“The Secretary Local Government Sindh states that Sohail Ahmed Khan, who was previously DG MDA was appointed, therefore, in terms of Judgments of this Court reported as Contempt proceedings against the Chief Secretary, Sindh (2013 SCMR 1752) and Ali Azhar Khan Baloch vs. Province of Sindh (2015 SCMR 456), he shall be denotified and shall report back to his parent department. He, however, shall be entitled to the seniority with his batch-mates as determined by the judgments of this Court referred to hereinabove. Likewise, any other official/officer working on deputation or otherwise absorbed in the MDA shall immediately report back to his parent department, failing which the DG MDA and the Secretary, Local Government, who is the administrative head of the MDA shall be exposed to contempt proceedings besides the beneficiary, who is still continuing in the MDA.” (Emphasis Added)*



11. The basic concept of Rule 9-A of APT Rules, 1974, is that a person who has been rendered surplus on account of abolition of a post of the Government or any autonomous body or on account of permanently taking over the administration of such autonomous body wholly or partially by the Government may be appointed to any post in any Department of the Government with the following conditions:

- (i) Such persons possesses each qualifications as are laid down under rule 3(2), for appointment to such post;
- (ii) Such person shall be appointed to a post of equivalent or comparable Basic Scale and if such post is not available, then to a post of lower Basic Scale;
- (iii) Seniority of such person in the new cadre shall be reckoned from the date of appointment in that cadre; and
- (iv) Previous service, if not pensionable, shall not count for pension and gratuity unless Government directs otherwise].”

12. Next we take up the question as to whether the post of the Petitioners were abolished before their absorption in the light of Rule 9-A. The term ‘abolition of post’ is not defined in the Sindh Civil Servant Act 1973, however, this expression is used in Rule 9-A of APT Rules 1974. On this question the Hon’ble Supreme Court has held in paragraph No.139 in the case of Ali Azhar Khan Baloch (supra) that:

“A department can only abolish a post with the concurrence of the S&GAD. Abolition of a post is permissible in case, if the department requires restructuring, reform or to meet exigency

of services in public interest. The department can abolish a post for justiciable reason. Therefore, in future if a post has to be abolished within the Department and/or within the statutory body or organization controlled by the Sindh Government, the Department shall seek concurrence from the S&GAD coupled with the reasons justifying abolition".(Emphasis Added)

13. The Petitioners claim that on account of abolition of their posts they were absorbed in MDA through Notification dated 27.01.2000. For convenience the said Notification is reproduced as under:

GOVERNMENT OF SINDH  
HOUSING AND TOWN PLANNING  
DEPARTMENT  
Karachi dated the January 27, 2000

NOTIFICATION

No.SO(G)HTP/Gen/2-207/2000. WHEREAS Scheme No.25-A (Shah Latif Town) and Scheme No.45 (Taiser Town) of Karachi Development Authority (KDA) stood transferred to Malir Development Authority (MDA) vide this Department's order No.SO-IV, (HTP)3-2/95 dated 10.01.1996.

NOW, THEREFORE, in pursuance of the decision taken by the Governor, Sindh in the meeting held on 03.01.2000, 270 (two hundred and seventy) staff members of KDA, as per attached list associated with above said Schemes are transferred and absorbed in MDA with immediate effect, against the available vacancies or by creation of new posts after accounting for existing posts in the annual budget of MDA for the year 1999-2000. Consequently all the posts fallen vacant in KDA, on transfer of the staff, stand abolished.

The seniority of staff so absorbed in MDA shall reckoned with effect from the date of regular appointment, in KDA with due protection of Inter-se-Seniority in their respective cadres.

The transferees shall be treated at par with the employees of MDA for pay, G.P Fund, Pension etc.

SD/-  
ANAZAR HUSSAIN ZAIDI  
SECRETARY TO GOVERNMENT OF SINDH

14. On perusal of the Notification (supra), we find that Rule 9-A of APT Rules, 1974 was not resorted to when the posts of the Petitioners were purportedly abolished. We are of the view that this Rule can only be attracted when a person has been rendered

surplus on account of abolition of a post he was holding in any office or department of the Government or any autonomous body or on account of permanently taking over the Administration of such autonomous body wholly or partially by the Government. Whereas, per Notification only two schemes i.e. Scheme No.25-A (Shah Latif Town) and Scheme No.45 (Taiser Town) of Karachi Development Authority (KDA) were transferred to the MDA along with staff members. The Hon'ble Apex Court in Cr. Org. Petition 89 /2011(supra) has already dilated upon the scope of Rule 9-A of APT Rules 1974.

15. It would be seen that under what circumstances, the person can be declared surplus employee and may be absorbed in another department of Government of Sindh. This aspect of the case is addressed and settled in the judgment of the Hon'ble Supreme Court (supra) that without concurrence of S&GAD the posts cannot be abolished.

16. We are of the view that in absence of such Notification of Government of Sindh declaring the Petitioners to be surplus employees, the Petitioners cannot be said to be surplus employees, as the Administration of KDA was not taken over by the Government of Sindh. Further, there is no such Notification on record which may show that the Petitioner's posts were abolished and they were declared surplus employees before their absorption in MDA. The Petitioners failed to demonstrate that they meet the criteria and test laid down by the Hon'ble Apex Court in Crl. Original Petition No.89/2011 in Paragraph 126 (Supra).

17. It is apparent that the Respondent No.1 submitted compliance Report by repatriating the officials working on deputation or absorbed in MDA to the parent department as directed in the order dated 01.08.2016 passed by the Hon'ble Supreme Court.

18. In so far as the plea taken by the learned counsel for the Respondent No. 4 that an Application filed by the Petitioner No. 7, 11, 27, 30, 37 and 86 in C.P. No.D-1017 of 2017 for becoming party in Criminal Original Petition No.6/2016 arising out of C.R.P No.32-K of 2015 in CMA No.376-K/2014 in Suo Moto Case No.16/2011 before the Honorable Supreme Court is concerned we observe that no record is available as to what was the fate of the said application. Therefore, we do not intend to comment on this aspect of the matter.

19. In our view, once the Hon'ble Supreme Court has passed order dated 01.08.2016 in the terms that any official working on deputation or otherwise absorbed in the MDA shall immediately report back to his parent department this Court has no justification to take contrary view of the same. In this context the Hon'ble Apex Court in the order dated 27.09.2016 passed in Cr.Org Petition No.106 to 111 of 2016 has held as follows:-

*“Once the employees were de-notified in compliance with the judgments of this Court, the employees aggrieved have to approach this Court in review instead of obtaining interim orders from the Sindh High Court.”(Emphasis Added)*

20. The similar view was also taken earlier in the order dated 02.02.2016 passed by the Hon'ble Supreme Court in CMA No.243/2016 as follows:

*“It has been observed in the Judgment reported as Ali Azhar Khan Bloch (supra) that once the officer is denotified by the Sindh Government pursuant to the Judgment and /or orders of this Court no Court including the High Court can pass an order suspending such notification. If an officer who was denotified has any grievance he has to approach this Court by filing review, therefore, any order of the High Court either interim or otherwise will not come in the way of said Government.”(Emphasis Added)*

21. In so far as the plea taken by the learned counsel for the Petitioners with reference to Letter dated 01.11.2016 is concerned, the Respondent No.1 has refuted the claim of the Petitioners vide Letter dated 27.02.2017 and apprised Respondent No.3 to allow the repatriated officers to join KDA with certain assurance to resolve the issue of their salaries. Even otherwise the above specified letter has lost its effectiveness after Order dated 01.8.2016 passed by Honorable Supreme Court on the issue involved in the present proceedings. We have noted that in above mentioned letter dated 27.2.2017 Respondent No.1 has directed the Secretary (KDA) to pay salaries and pensioners' benefits of the repatriated officers.

22. Reverting to the plea taken by the learned counsel for the Petitioners that lien of the Petitioners still exists in MDA, we take a look at the definition of word 'lien' defined in Sindh Civil Service Regulation, vol.1 (Rules) as follows:

*“Lien means the title of a Government servant to hold subsequently either immediately or on the termination of a*

*period or periods of absence a permanent post including a tenure post to which he has been appointed subsequently”.*

23. In our view only the Government servant can hold the lien on the post whereas, the petitioners are public servants and not civil servants, therefore, the question of existence of their lien in the autonomous body/authority does not arise.

24. The case laws cited by the learned counsel for the Petitioners including the case of Muhammad Ayub Fazlani (supra) are on different footing and distinguishable from the facts and circumstances of the present case.

25. We are of the view that the only remedy available to the Petitioners is to approach the Hon'ble Apex Court in Review and not this Court under Article 199 of the Constitution. Consequently, both the Constitution Petitions merit no consideration and are dismissed with no order as to cost.

JUDGE

JUDGE