

IN THE HIGH COURT OF SINDH, AT KARACHI

Present:

Mr. Justice Irfan Saadat Khan

Mr. Justice Adnan-ul-Karim Memon

C.P No. D- 8356/2018

Qamar Shahid Siddiqui.....Petitioner

Versus

The Province of Sindh & others.....Respondents

Date of hearing: 18.12.2018

Mr. Ashfaq-un-Nabi Qazi, Advocate for the Petitioner.

ORDER

The present instant petition has been filed impugning letters dated 09.8.2018 and 03.09.2018 issued by the Respondents No.2 & 4 respectively.

2. Brief facts of the case, as per the pleadings of the Petitioner are that, he is serving as Director in BPS-19 in the Provincial Institute of Teachers Education Sindh (PITE) and has challenged the letters dated 09.08.2018 and 03.09.2018, (available at pages-37 to 41 and 43 to 45), respectively, whereby the Respondent- School Education Department, Government of Sindh, proposed to repatriate the services of the Petitioner to his parent department i.e. Bureau of Curriculum and Extension Wing Sindh, Jamshoro, /Special Education. The Petitioner has premised his case that, initially he was appointed as High School Teacher (HST) in Special Education (BPS-15) in the year 1990; subsequently he was promoted to the post of Lecturer in BPS-17 in the year 1995, in the Bureau of Curriculum and Extension Wing Sindh, Jamshoro. Petitioner has submitted that in the year 2001, he made a request to the Secretary Education Department, Government of Sindh for his transfer from Government College of Special Education

Hyderabad to (PITE)-Nawabshah and his application was forwarded by the Secretary Education with favorable consideration and his request was acceded to by the Director General (PITE)-Nawabshah and accordingly he was relieved from Bureau of Curriculum and Extension Wing Sindh, Jamshoro and was posted as senior Instructor in PBS-18 on OPS basis at (PITE)-Nawabshah. Petitioner has submitted that he made another attempt to retain his post in his parent department, by moving applications to the Secretary Education, thereafter he was posted as Subject Specialist in BPS-18 at Directorate of Bureau of Curriculum and Extension Wing Sindh, Jamshoro on OPS basis vide notification dated 31.1.2007. Subsequently he was promoted to the post of Assistant Professor in BPS-18 vide notification dated 31.3.2008. Petitioner has submitted that his service was again transferred to (PITE) Vide letter dated 10.11.2008, thereafter he applied for his permanent absorption against the post of Senior Instructor in PBS-18 in (PITE) vide application dated 29.6.2009. Petitioner has claimed that the Director General (PITE) issued NOC for his permanent absorption in (PITE) vide letter dated 30.6.2009. Petitioner has heavily relied upon the recruitment rules notified on 28.7.2011 and submitted that his service was transferred in (PITE) Department of Government of Sindh, by way of transfer vide letter dated 6.6.2012 as provided under sub-rule 2 of rule 3 of the Sindh Civil Servant (Appointment, Promotion & Transfer) Rules, 1974. In support of his version, he further relied upon the notification dated 14.10.2014 issued by the Secretary Education Department of Government of Sindh.

3. Mr. Ashfaq-un-Nabi Qazi, learned counsel for the Petitioner has argued that the aforesaid letters issued by the Respondent-Department

are wholly misconceived and against the basic principle of law as enunciated by the Honorable Supreme Court of Pakistan in the case of ***Ali Azhar Khan Baloch & others versus Province of Sindh and others (2015 SCMR 456)***; that the Petitioner's services cannot be proposed to be repatriated to his parent department, as the Bureau of Curriculum of Education is part and parcel of Special Education Department, Government of Sindh under Sindh Government Rules of Business, 1986; that the impugned letters dated 09.08.2018 and 03.09.2018 are merely a communication between the Respondents No. 2 and 4, therefore, on the aforesaid plea, the services of the Petitioner cannot be repatriated from the Provincial Institute of Teachers Education Sindh (PITE). Learned counsel has attempted to give brief history of the matter that under the Education Policy - 1970, the Directorate of Education Extension and Specialized Services (In-Service Teachers Training and Education of Special Children) came into existence for the aims and purposes of Curriculum Development/Review of all subjects for classes-I to XII for the following purposes:-

- i) **training of In-Service and Pre-Service teachers up to elementary level;**
- ii) **Research Studies regarding proposals for the betterment of schooling teachers and relevant fields and Assessment of Achievement of Teachers and Students in Sindh.**

He next argued that under the Education Policy 1972-1978, the nomenclature of the said directorate was changed into the Bureau of Curriculum and Extension Wing Jamshoro Sindh and the administrative control of all Elementary Teacher Training Institutions of Sindh was placed thereunder, having been declared as attached department of the Sindh Secretariat, with the Director of Curriculum and Extension as its head; that during 1988, it was declared as Research Organization of the pre-divided Education Department, Government of Sindh and in the

year 2005 control of three (3) colleges of pre-divided Education Department was also entrusted to the aforesaid Bureau. He has next submitted that after the passage of 18th Constitutional Amendment, powers have been delegated to the provinces to review/develop their own curriculum and its related activities, hence the Bureau of Curriculum and Extension Wing Jamshoro Sindh has now been transformed into the Directorate of Curriculum, Assessment and Research, which is also one of the attached department of School Education Department, Government of Sindh, therefore the service of the Petitioner is liable to be retained within the wings of Education department, Government of Sindh, thus the proposal as put forwarded by the Respondent-department is illegal which is based on malafide intention, just to knockout the Petitioner from the present posting in PITE.

4. We have raised a query to the learned Counsel for the Petitioner as to how the instant petition is maintainable against his repatriation to his parent department, as proposed by the department, which is in compliance of the orders passed by the Hon'ble Supreme Court of Pakistan in the case of **Ali Azhar Khan Baloch (2015 SCMR 456)** relied by the counsel himself. He in reply to the query submitted that the services of the Petitioner are not required to be repatriated to his parent department as he was legally transferred in PITE, in pursuance of the recruitment rules notified on 28.7.2011, which empowers the Sindh Government to make appointment by transfer in PITE under the aforesaid Rules. He next submitted that the Respondents have granted approval for his appointment by transfer in PITE, in accordance with the law; therefore, there is no illegality or irregularity in his transfer and

posting; that the Petitioner belonged to one of the wing of Education Department, Government of Sindh and met the eligibility criteria to be appointed by transfer/ absorbed in PITE; that under Sindh Civil Servants (Appointment, Promotion & Transfer) Rules, 1974, the appointment by transfer and absorption is permissible; that the Petitioner possess the qualification required for the post on which he was appointed on regular basis and was rightly promoted by the order of the Competent Authority; that after his transfer he has acquired sufficient experience to retain his present position; that the Petitioner has not blocked the promotion of any individual in PITE. He next submitted that the posts for Special Education was under the administrative control of the defunct Bureau vide notification dated 24.02.1994; thereafter, the Petitioner had served in the institution for five years and after fulfillment of the requisite qualification and experience, he was duly promoted as Lecturer in BS-17 vide notification dated 11.04.1995, in accordance with the Recruitment Rules, 1994, whereby the appointment of Lecturer in BPS-17 was prescribed. He next argued that while the Petitioner was serving in the Government College of Special Education, Hyderabad, he acquired better qualification i.e. Masters in Education and subsequently, he applied for his transfer within the Bureau i.e. from Government College of Special Education, Hyderabad to PITE vide application dated 07.07.2001, which was duly forwarded by the Bureau to the Respondent No. 2 vide letter dated 12.07.2001. He next submitted that the Petitioner was transferred within the defunct Bureau i.e. from Special Education Wing to PITE vide notification dated 23.07.2001, and the Petitioner was posted against an existing vacancy of Senior Instructor in (BPS-18) on his own pay and grade vide posting order dated 25.07.2001. Learned Counsel next added that the Petitioner

while serving in PITE, the Recruitment Rules, 1994 were modified vide notification dated 24.07.2004, whereby criterion for the post of Subject Specialist/Assistant Professor/Head Master in Special Education BS-18 was set at naught; that the Respondent No. 2 finalized the seniority list for the Special Education Wing of defunct Bureau dated 19.01.2005, wherein the name of the Petitioner was listed at Serial No. 35. He next added that by issuance of the impugned letters, the Petitioner has grave apprehension that his services may be transferred to his parent department, which will be in violation of law; therefore, he has approached this court. He lastly prayed for setting aside the aforesaid letters.

5. We have heard learned Counsel for the Petitioner on the issue of maintainability of the instant Petition and have perused the material available on record. Today, the learned counsel for the Petitioner has shown urgency in the matter and argued the entire case on merits.

6. In the first place, we would like to examine the issue of maintainability of the instant Petition under Article 199 of the Constitution, on the issue of appointment by way of transfer as provided under Rule 9(I) of the Sindh civil Servants (APT) Rules, 1974 .

7. The question which agitates the controversy at hand is as to whether the petitioner can be appointed by way of transfer under Rule 9(I) of the Sindh Civil Servants (APT) Rules, 1974, in the Provincial Institute of Teachers Education?

8. To answer the aforesaid question, we seek guidance from the decision rendered by the Honorable Supreme Court of Pakistan in the case of ***Ali Azhar Khan Baloch & others versus Province of Sindh and others (2015 SCMR 456)***. Rule 9(I) of the Sindh Civil Servants APT Rules,

1974 does not confer permanent status to a Civil Servant on his appointment by transfer nor does it contemplate his absorption in the transferee Department as a consequence of his appointment. There is neither procedure nor mechanism provided under the Act or the Rules to treat appointment by transfer as absorption in the transferee department.

9. We have noticed that the Rule 9(I) cannot be used as a tool to allow horizontal movement of a Civil Servant from his original cadre to another cadre against the scheme of the Act and the Rules of 1974. The term 'transfer' has to be interpreted in its common parlance and is subject to the limitations contained in the Rules 3, 4, 6, 7 & 8 of the Rules, 1974. Any appointment by transfer under Rule 9(I) has to be for a fixed term and on completion of such term, the Civil Servant has to join back his parent department.

10. We have seen that the Petitioner was initially appointed as Mosque School Teacher (BPS-07) in the year, 1987 and was appointed by way of promotion as High School Teacher (Special Education) in BPS-15 vide letter dated 26.5.1990, subsequently he was promoted to the post of Lecturer in BPS-17 vide letter dated 11.4.1995 in the Bureau of Curriculum and Extension Wing Sindh, Jamshoro. In the year 2001, he made a request to the Secretary Education Department, Government of Sindh for his transfer from the Government College of Special Education Hyderabad to (PITE)-Nawabshah vide letter dated 7.7.2001, which application was forwarded by his parent department to the Secretary Education, with favorable consideration vide letter dated 12.7.2001 and his request was acceded to by the Director General (PITE)-Nawabshah vide letter dated 25.7.2001 and accordingly he was relieved from the

Bureau of Curriculum and Extension Wing Sindh, Jamshoro vide letter dated 1.8.2018 and was posted as Senior Instructor in PBS-18 on OPS basis in (PITE)-Nawabshah. He also made another attempt to retain his lien/ post in his parent department by moving applications dated 17.11.2003 and 3.11.2006 to the Secretary Education as his seniority was maintained by the parent department vide seniority list dated 19.1.2005. Thereafter he was transferred and posted as Subject Specialist in BPS-18 at the Directorate of Bureau of Curriculum and Extension Wing Sindh, Jamshoro on OPS basis vide notification dated 31.1.2007. Subsequently, he was promoted to the post of Assistant Professor in BPS-18 vide notification dated 31.3.2008. Again he managed to get his service transferred to (PITE) Vide letter dated 10.11.2008. Finally, he applied for permanent absorption against the post of Senior Instructor in PBS-18 in (PITE) vide application dated 29.6.2009. The Director General (PITE) issued NOC for his permanent absorption in (PITE) vide letter dated 30.6.2009.

11. From perusal of record, it transpires that the Respondent-Department has opined in the impugned letters that the Petitioner had misrepresented himself as Senior Instructor in (BS-18) instead of Assistant Professor in (BPS-18), while sending his proposal for appointment by transfer. Thereafter, the Petitioner was appointed by transfer as Senior Instructor in (BS-18) in PITE on 06.06.2012; that after five days of his joining, he requested for insertion of his name in the seniority list showing in remarks column that his date of appointment in PITE as 11.06.2012.

12. As per profile of the Provincial Institute of Teacher Education (PITE) which is a non-statutory body and had been created to develop and

implement certificate and diploma courses of short duration for practicing teachers, to design training centers for preparing master trainers, to undertake and promote action research in teaching methods, lesson planning and on development and effective use of teaching, learning materials, in order to assist the Education and Literacy Department, Government of Sindh in formulation of educational policies as well as short term and long term plans ensure and evaluate the quality of all initial Teacher Education and Continuing Professional Development, maintain linkages with Provincial, National and International Institutions. We have also noticed that the Petitioner's appointment by transfer from the post of Assistant Professor (BS-18), Special Education Department to the post of Senior Instructor (BS-18) in PITE, directly falls within the four corners of the judgment passed by the Hon'ble Supreme Court of Pakistan in the case of *Ali Azhar Khan Baloch supra*.

13. The Hon'ble Supreme Court has clearly observed that Rule 9(1) does not confer permanent status on a Civil Servant regarding his appointment by transfer nor it contemplates absorption in the transferee department as a consequence of his appointment.

14. Record reflects that the Petitioner is holding look after charge of the Director General in BPS-20 of the Provincial Institute of Teachers Education Sindh, Shaheed Benazirabad and he is proposed to be repatriated to his parent department i.e. Special Education Department in his original cadre i.e. Assistant Professor (BS-18), which is correct approach of the Respondent-Department.

15. Much emphasis has been laid on the Recruitment Rules notified on 28.07.2001. As per the Petitioner, the same provides protection to him

with regard to appointment by transfer as Senior Instructor (BS-18). An excerpt of the same is reproduced as under:-

Government of Sindh
Education and Literacy Department
Karachi, dated, the 28th July, 2001

NOTIFICATION

NO. SO(G-III)E&L/PITE/RR/4-34/9: In compliance of sub rule (2) of rule-3 of the Sindh Civil Servants (Appointment, Promotion and Transfer) Rules, 194 and in consultation with the Services, General Administration and Coordination Department, Government of Sindh, the method, qualifications and other conditions for appointment in respect of the posts in the Provincial Institute of Teachers Education (PITE) Sindh, District Shaheed Benazirabad, mentioned in column-2 of the table below shall be as laid down in columns 3, 4 & 5 thereof:-

S. No.	Name of Post with BS	Method of Appointment	Qualification and Experience for Initial Appointment	AGE LIMIT MIN MAX
1	2.	3.	4.	5.
1.	Director General (BS-20)	By promotion from amongst the Directors or Associate Professor (BS-19) having atleast (17) seventeen years' experience in BS-17 or (12) twelve years' experience in (BS-18) and above in the Provincial Institute of Teachers Education, Sindh, on seniority-cum-fitness basis.		
2	Director (BS-19)	By promotion from amongst Senior Instructors (BS-18) or Education Technologist (BS-18) or Deputy Directors (BS-18) on seniority cum merit basis having atleast (12) years experiences in (BS-17) and above.		
3	Senior Instructors (BS-18) Male or Female	i) Forty percent by initial appointment; AND ii) Sixty percent by promotion from amongst the Lecturers (BS-17) in the relevant subject having at least five years' experience in (BS-17) as such on seniority-cum-fitness basis; OR By transfer having minimum two years' experience as Senior Instructor (BS-18)	Master Degree in the subject with M.Ed and M.A (Education) both atleast in Second Division from a recognized university with at least five years' experience in the public sector institution of organization recognized by Government of Sindh	30 45

16. We have noticed that certain conditions have been imposed in the aforesaid Rules that a person, who possesses the minimum educational qualifications, experience or comparable length of service prescribed for a post shall be eligible for appointment to the said post. It means

that only a Civil Servant as defined under the Sindh Civil Servant Act, 1973, who fulfills the conditions as discussed supra, can be considered suitable to be promoted as Senior Instructor in BPS-18 in PITE, which does not mean permanent transfer. Record does not reflect that before his purported appointment by transfer he was holding the post of Senior Instructor in BPS-18 on permanent basis rather he was on OPS which does not give right to claim permanent appointment under the law as his promotion was made to the post of Assistant Professor in BPS-18 vide notification dated 31.3.2008. The question arises as to how the Respondent-Department posted him as Senior Instructor in BPS-18 in PITE, thereafter claimed appointment by transfer against the aforesaid post vide notification dated 06.06.2012 by taking advantage of Recruitment Rules notified on 28.7.2011 (available at page-123), which requires serious attention to be looked into by the Respondent-Department in its entirety.

17. In view of the forgoing, we are clear in our minds that the Competent Authority has no unbridled powers to appoint by way of transfer any person in another department, without fulfilling the conditions as set forth in the aforesaid Rules. We are of the view that the appointment by transfer can only be ordered if the Civil Servant is eligible and qualifies for his transfer under the aforesaid rules to which he is to be transferred, under the law, which prescribes the condition as laid down for such appointments by transfer to such posts. A Civil Servant who is to be appointed by way of transfer has to appear before the Departmental Selection Committee, which will consider his eligibility, qualification and such other conditions applicable to the post as laid down under the Recruitment Rules of PITE to which his transfer

is to be ordered. We, after going through the Rules, 1974 and Recruitment Rules of PITE, are clear in our minds that the Recruitment Rules as pointed out do not empower the Sindh Government or Selection Authority, as defined under the aforesaid Rules, to appoint a Civil Servant by transfer to any other cadre, service or post without eligibility, qualification and conditions laid down under the Rules discussed supra. The aforesaid Rules do not confer permanent status to a Civil Servant on his appointment by transfer nor does it contemplates his absorption in the transferee Department as a consequence of his appointment. There is neither any procedure nor a mechanism provided under the Act or the Rules to treat appointment by way of transfer as absorption in the transferee department. Rules cannot be used as a tool to allow horizontal movement of a Civil Servant from his original cadre to another cadre against scheme of the Act and the Rules of 1974 nor could the Act or Rules be used to condone eligibility of the Civil Servant, while appointing by transfer. The term 'transfer' has to be interpreted in its common phraseology/parlance and is subject to the limitations contained in the Rules discussed supra. Any appointment by transfer under the Rules has to be for a fixed term and on completion of such term a Civil Servant has to join back his parent department. The word 'appointment' used in the Rule cannot be equated with the word 'initial appointment' used under the aforesaid Rules, which excludes appointment by transfer and promotion, therefore restricted meaning has to be given to the expression 'appointment by transfer'. For the aforesaid reasons, we are clear in our minds that Rules do not permit transfer of a non-Civil Servant to a non-cadre post or to a cadre post. The Hon'ble Supreme Court in the case of Ali Azhar Khan Baloch supra had recorded the following findings, which are reproduced as under:--

"No Civil Servant of a non-cadre post can be transferred out of cadre to be absorbed to a cadre post which is meant for recruitment through competitive process. A Civil Servant can be transferred out of cadre to any other department of the Government subject to the restrictions contained under Rule 9(1) of the Rules of 1974."

18. In the light of above discussion, we are only concerned as to whether the decisions rendered by the Honorable Supreme Court of Pakistan in the case of Contempt proceedings against the Chief Secretary, Sindh (2013 SCMR 1752) and Ali Azhar Khan Baloch vs. Province of Sindh (2015 SCMR 456) have been complied with by the official respondents on the premise that the absorption of all the employees working in different departments of the Government of Pakistan were declared nullity in the eyes of law, thus the status of the Petitioner became deputationist only and in our view, a deputationist could not be treated as an aggrieved person, because he has no vested right to remain on a post as deputationist forever or for a stipulated period and can be repatriated at any time to his parent department more particularly in the light of aforesaid decisions of the Honorable Supreme Court. Reference is also made to the case of Dr. Shafi-ur-Rehman Afridi vs. CDA, Islamabad through Chairman and others (2010 SCMR 378).

19. Reverting to the claim of the Petitioner that he meets the qualification to be retained in PITE is concerned, suffice it to say that when the Hon'ble Supreme Court has set the criteria of absorption in paragraphs No.132 & 136 of the Judgment, therefore, we have no hesitation to hold that the appointment of the Petitioner in PITE by way of transfer/permanent absorption is against the dicta laid down by the Hon'ble Supreme Court of Pakistan in the aforesaid judgments.

20. We are not satisfied with the assertions of the learned Counsel for the Petitioner that there is any provision of appointment by way of transfer in another cadre, which is prohibited under the directives issued by the Hon'ble Supreme Court of Pakistan, since the Recruitment Rules clearly reflect that Senior Instructor can be appointed 40% by initial appointment and 60% by promotion from amongst the Lecturers in BPS-17 having certain experiences or by transfer having minimum experience of two years as Senior Instructor, which does not mean that the appointment can be made by transfer as permanent absorption for the simple reason that 100% quota is to be filled first and if in case vacancy is still available only then the Competent Authority can appoint a person by way of transfer on deputation for certain period, having qualification and experience for the post. Since the Petitioner was not qualified to be appointed by way of transfer in the light of the notification dated 28.07.2011, therefore, no premium is to be given to the Petitioner to claim benefit of this notification.

21. In the light of forgoing, we are of the considered view that the Petitioner cannot be allowed to be absorbed in PITE. We are clear in our minds that no department can be allowed to absorb any employee of another department/cadre except with certain exceptions as set forth by the Honorable Supreme Court of Pakistan in the cases referred to above.

22. Since the Competent Authority has opined in compliance of the orders passed by the Hon'ble Supreme Court in Cr. Org. Petition No.89/2011 and recommended that the Petitioner/absorbee should be repatriated to his parent department, we are of the considered view that the Respondent-Department has rightly recommended for the

repatriation of the Petitioner, therefore, we have no reason to order for retaining the services of the Petitioner in PITE or any other department except his parent department.

23. While going through the record we have found serious discrepancies in the service record of the Petitioner regarding his appointment, promotion and absorption in different departments (Sindh Education Department, Government of Sindh), which needs attention by the Respondents No.1, who may scrutinize the service record of the Petitioner and determine as to whether the Petitioner's promotion and appointment by way of transfer/ absorption was made as per the directions of the Hon'ble Supreme Court in its judgment rendered in the case of Ali Azhar Khan Balouch (supra) or not and whether the findings of the Hon'ble Supreme Court have been adhered to in their letter & spirit and submit compliance report through MIT-II of this Court within two months' time from the date of communication of this order. Let a copy of the order be sent to the Respondent No.1 for information and compliance.

24. The Petition is found to be wholly misconceived, hence the same stands dismissed in limine along with the listed application(s).

Karachi:
Dated: 18.12.2018

JUDGE

JUDGE

Faisal Mumtaz/PS