

IN THE HIGH COURT OF SINDH, AT KARACHI

Present:

Mr. Justice Aziz-ur-Rehman

Mr. Justice Adnan-ul-Karim Memon

C.P No. D-1159 of 2019

Allah Dino Petitioner

Versus

Province of Sindh & others Respondents

Date of hearing: 03.05.2019

Date of order: 03.05.2019

Mr. Rafiq Ahmed Kalwar, Advocate for the Petitioner.
Mr. Abdul Jalil Zubedi, Assistant A.G. along with
Mr. Shafi Muhammad Gilal and Arif Abdullah, Section
Officers, Food Department.

O R D E R

ADNAN-UL-KARIM MEMON, J: - The instant Constitution Petition, under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, has been filed by the Petitioner, seeking declaration to the effect that the issuance of the Notification bearing No.SOF (Admn-I) 5 (231)/2018 dated 06.11.2018, by the Respondent-Food Department, Government of Sindh, in favour of the Respondent No.3, whereby he was given look after charge for the post of Deputy Director Food (BS-18), Sukkur region, on Own Pay and Scale basis, is illegal and thus void ab-initio, on the premise that he is not entitled to hold the higher post under Rule 8-A (i) of Sindh Civil Servant (Appointment, Promotion & Transfer) Rules, 1974, being a District Food Controller [BPS-16] and without approval of the Departmental Promotion Committee, more particularly, the aforesaid assignment given to him is in

direct conflict with the decision rendered by the Honorable Supreme Court of Pakistan in the case of Province of Sindh & others v. Ghulam Fareed & others [2014 SCMR 1189].

2. The case of the Petitioner is that he owns agricultural land situated in Tehsil Pano-Aqil, District Sukkur and believes in fair distribution of Food Grain 'Bardana' amongst the *Khatedars* of the area. Basically, through the instant petition, the Petitioner has asked for issuance of writ of quo warranto against the Respondent No.3 to vacate the office of the Deputy Director Food, Sukkur Region in BPS-18 vide Notification dated 06th November, 2018, on the ground that the said post was for the officer of Scale-18, despite the fact that the Respondent No.3 being a BS-16 officer was given the said post without approval of the Competent Authority. Per Petitioner, the Respondent No.3 is facing the NAB inquiry in respect of corruption and corrupt practices. Besides that the posting of the Respondent No.3 as Deputy Director Food (BS-18) is in clear violation of the judgment of the Honourable Supreme Court of Pakistan in the case of Province of Sindh & others v. Ghulam Fareed & others [2014 SCMR 1189]. Petitioner being aggrieved by and dissatisfied with the aforesaid appointment and posting of the Respondent No.3 as Deputy Director Food, Sukkur Region has filed the instant petition on 19.2.2019.

3. Upon notice, the Respondent No.2 has filed para-wise comments and controverted the allegations leveled against the Department.

4. We have noticed that despite service, the Respondent No.3 has opted not to contest the matter.

5. Mr. Rafiq Ahmed Kalwar, learned counsel for the Petitioner has argued that the Respondent No.3 is a holder of public office as embodied under Article 199(1) (b) (ii) of the Constitution; that the

Respondent No.3 is not qualified to hold a public office of Deputy Director Food in BS-18; that the Respondent No.3 cannot be appointed on acting charge basis in BPS-17 and to hold the post of Deputy Director Food in BPS-18; that due to illegal distribution of food grain *Bardana* by the Respondent No.3, during his tenure of service, on political consideration, the Petitioner and other *Khatedars* of the area have suffered mental torture and agony; that his purported promotion on acting charge basis as Assistant Director Food in BPS-17 and holding the charge of the post of Deputy Director Food in BPS-18 is called in question under Article 199 (1) (b) (ii) of the Constitution of the Islamic Republic of Pakistan, 1973, being a holder of public office without lawful authority; that Respondent No.3, being an employee in BS-16 was not eligible for appointment as Deputy Director Food (BS-18) thus, impugned Notification is nullity in the eyes of law. In support of his contentions learned counsel referred Chapter 2 Part II of the Estacode to show that the appointment of Respondent No.3 on current charge basis is illegal and unlawful. He lastly prayed for issuance of writ in the nature of quo-warranto against the Respondent No.3 to meet the ends of justice. In support of his contentions, learned counsel for the Petitioner placed reliance upon the various documents attached with the memo of Petition.

6. On the contrary, learned AAG has referred the para-wise comments filed on behalf of the Respondent No.2 and raised the question of maintainability of the petition. He next argued that the Respondent No.3 was assigned the charge of the post of Deputy Director Food as a stopgap arrangement till posting of regular Deputy Director Food vide Notification dated 06.10.2016; that the appointment of Respondent No.3 was made by the competent authority which is in accordance with law. He added that due to shortage of officers in the respective grades, Respondent No.3 has

been appointed on current charge basis after observing all the codal formalities; that the Departmental Promotion Committee [DPC] in its meeting held on 21.12.2015, promoted the Respondent No.3 from the post of District Food Controller [BPS-16] to the post of Assistant Director Food [BPS-17] on acting charge basis vide Notification dated 08.1.2016; that the DPC in its meeting held on 01.3.2019, has cleared/recommended the Respondent No.3 for promotion to the post of Assistant Director Food [BPS-17] on regular basis; that the Petitioner has no *locus standi* to file the instant petition against the Respondent No.3. He, therefore, prayed for dismissal of the petition.

7. We queried from the learned AAG that when a Civil Servant against whom a case of corruption has been registered by the Anti-corruption police and is under adjudication before the competent Court of law can be promoted to a higher rank on acting charge basis, during the pendency of such criminal case. He in reply to the query has argued that NAB, Sindh forwarded a complaint against Respondent No.3 for his involvement in illegal distribution of Food Grain *Bardana* as well as in corruption vide its Letter dated 06.7.2018, however, the Additional Director Food of the Respondent-Department cleared him from the charges; that the criminal case arising out of FIR No.11 of 2011 of Anti-Corruption Jacobabad was lodged against the Respondent No.3 and later on the Department cleared him from the allegations.

8. We posted another question to him as to how the Respondent No.3 being a junior officer was assigned the duty of higher post in BS-18, he replied that the Respondent No.3 has not been posted as Deputy Director Food [BPS-18] on OPS basis; that he has been promoted to the post of Assistant Director [BPS-17] against an existing vacancy in the light of Rule 8-A (i) of Sindh Civil Servants

(Appointment, Promotions & Transfer) Rules, 1974; that the DPC in its meeting held on 01.3.2019, has cleared / recommended three Assistant Directors Food [BPS-17] for promotion to the post of Deputy Director Food [BPS-18] and the same have been forwarded to the competent authority for approval. He lastly prayed for dismissal of the instant petition.

9. We are not satisfied with the assertion of the learned AAG on the aforesaid pleas, for the simple reason that where a civil servant is accused of subversion, corruption or misconduct, the authorized officer may require him to proceed on leave or, with the approval of the authority, suspend him, provided that any continuation of such leave or suspension shall require approval of the authority after every three months under Sindh Civil Servants (Efficiency and Discipline) Rules, 1973 and if no action is taken against the delinquent official on the aforesaid charges, the department has to account for that departmental negligence, which is serious in nature, cannot be ignored and condoned. We may observe here that the competent authority is/was not under obligation to promote a Civil Servant against whom prima facie evidence was available showing his involvement in the serious charges of misconduct, on the aforesaid issue. Our view is supported by the decision rendered by the Hon'ble Supreme Court of Pakistan in the case of Mst. Iffat Nazir vs. Government of Punjab and others [2009 SCMR 703].

10. We have heard learned counsel for the parties on the issue of maintainability of the instant petition under Article 199 of the Constitution.

11. The post of Deputy Director Food BPS-18, which is a Public Office, therefore, falls within the purview of sub-clause (1) (b) (ii) of

Article 199 of the Constitution, which permits the High Court to issue a “Writ of Quo-warranto” requiring a person within its territorial jurisdiction of the Court holding or purporting to hold a Public Office to show under what authority, he claims to hold that Office. It is also clear that, while acting under Clauses (b) (ii) of Article 199 of the Constitution, the High Court, if satisfied, could declare that the Holder of Public Office is not entitled to such office. The aforesaid Office, being a Public Office and for that reason is amenable to the writ jurisdiction of this Court under Article 199 of the Constitution. We are fortified by the said comments of the Honourable Supreme Court of Pakistan in the case of Salahuddin and 2 others v. Frontier Sugar Mills and Distillery Ltd. Takht Bhai and 10 others [PLD 1975 SC 244] on the issue. It is well settled law that the person invoking the jurisdiction under Article 199 of the Constitution of Pakistan is not required to fulfill the stringent conditions required for bringing himself within the meaning of an aggrieved person. But, any person can move this Court and challenge the usurpation or unauthorized occupation of a Public Office by an incumbent on the ground that he is not qualified to hold public office. The issue of *locus standi* is insignificant. Besides, the proceedings in the instant petition are of quo warranto which are not strictly adversarial in nature.

12. The only question involved in this matter, is as to whether the Respondent No.3, being a junior officer in BPS-16/17 can hold the charge for the post of Deputy Director Food in BPS-18 on OPS basis and the same is within the parameters of law?

13. It would be advantageous to first examine the relevant law governing the subject. For this purpose, we will have to advert to Chapter 2 Part II of the ESTACODE, 2010 Edition at Sl. No.117 (at P.190) pertaining to "Appointment" which reads as under:-

**“Sl. No. 117
‘Current/Additional Charge and Acting
Charge Appointments’”**

14. According to the existing instructions as set forth in ESTACODE, all appointments by promotion in higher posts are to be made through regular selection process i.e. with the approval of the Central Selection Board/Departmental Promotion Committee and the authority competent to make appointment to the grade in which the vacancy exists. However, in those cases where a vacancy in a higher post occurs for less than two months and it is considered impossible for good reasons to make arrangements for day to day work of that post to be carried on otherwise the current charge of the duties of that post may be given temporarily, with the approval of the authority competent to make appointments to the said post, to the most senior officer in the cadre present at the place or in the organization where the vacancy may have occurred if he is otherwise fit and eligible for promotion.

15. To appreciate further on the issue of OPS, we have inquired from the learned AAG to show us any provision of law and or rule under which a Provincial Civil Servant can be appointed on OPS basis. He concedes that there is no specific provision in Sindh Civil Servants Act or rule which permits appointment on OPS basis. He, however, submitted that in exigencies, the Government makes such appointments as a stopgap arrangement.

16. This practice of appointment on OPS basis has always been discouraged by this Court, as it does not have any sanction of law, besides it impinges the self-respect and dignity of the Civil Servants who are forced to work under their rapidly and unduly appointed fellow officers junior to them. Discretion of the nature, if allowed to be vested in the Competent Authority, will offend valuable rights of the meritorious Civil Servants besides blocks

promotions of the deserving officers. In this respect, Rule 8-A of the Sindh Civil Servants (Appointment, Promotion and Transfer) Rules, 1974, empowers the Competent Authority to appoint a Civil Servant on acting charge and current charge basis, it provides that if a post is required to be filled through promotion and the most senior Civil Servant eligible for promotion does not possess the specific length of service, appointment of eligible officer may be made on acting charge basis after obtaining approval of the appropriate Departmental Promotion Committee/Selection Board.

17. We have also noted that Sub-Rule 4 of the afore-referred Rule 8 further provides that appointment on acting charge basis shall be made for vacancies lasting for more than 6 months and for vacancies likely to last for less than six months. This acting charge appointment can neither be construed to be an appointment by promotion on regular basis for any purposes including seniority, nor it confers any vested right for regular appointment. In other words, appointment on current charge basis is purely temporary in nature or stopgap arrangement, which remains operative for short duration until regular appointment is made against the post. It is crystal clear that there is no scope of appointment of a Civil Servant on OPS basis except resorting to the provisions of Rule 8-A, which provides that in exigencies appointment on acting charge basis can be made, subject to conditions contained in the Rules.

18. The impugned notification stipulates that the Respondent No.3 was posted/transferred in his "own pay and scale". In our view, posting/transferring a civil servant on his own pay and scale (OPS) is not legally permissible. Our view is supported by the decisions rendered by the Honourable Supreme Court in the case of Province of Sindh & others v. Ghulam Fareed & others [2014

SCMR 1189] and *Khan Muhammad vs. Chief Secretary Baluchistan and others* (2018 SCMR 1411).

19. We have also examined the stance of the Respondent-Department. In our view, the reasoning as put forwarded is not tenable in law for the simple reason that if the officer is not possessing requisite qualification and experience to qualify for regular appointment/promotion in a department, then Rule 8(A) as discussed supra empowers the competent authority to appoint the civil servant on acting charge basis and current charge basis, and if a post is required to be filled through promotion and the most senior civil servant eligible for promotion does not possess the specific length of service, appointment of eligible officer may be made on acting charge basis after obtaining approval of the appropriate DPC.

20. In the present case, we have noticed that the Respondent No.3 was facing criminal proceedings arising out of FIR No.11 of 2011 lodged by ACE Jacobabad; charge sheet was submitted before the competent Court in the aforesaid case on 19.2.2014. Record further reflects that NAB inquiry was initiated against the Respondent No.3 on the following allegations: -

(i) He was promoted as Assistant Director Food despite the existence of senior ones who were denied the promotion.

(ii) He was posted as Deputy Director Food Sukkur on O.P.S. where regular Deputy Directors were available and sitting idle at the headquarters.

(iii) He has earned a lot of money through illegal means.

(iv) Three sons and one relative of Mr. Mahar were appointed as Food Inspector at Sukkur Region.

(v) Three sons and relative were involved in mal-practice at Sukkur.

21. A careful perusal of the above factual as well as rule position explicitly show that in case where the appointing authority is satisfied that no suitable officer is available to fill the post and it is

expedient to fill the same, it may appoint to that post on acting charge basis the most senior officer otherwise eligible for promotion in the cadre or service as the case may be.

22. The record does not reflect that the Respondent No.3, who was holding the aforesaid post on acting charge basis was senior most officer to all other officers in the cadre and moreover it is quite evident that even in his case, holding the acting charge under the aforesaid circumstances, shall not confer any vested right for regular promotion.

23. The above discussion leads us to an irresistible conclusion that the appointment/posting of Respondent No.3 as Deputy Director Food in BS-18, Sukkur Region on OPS/look after charge basis is clearly violative of law and public interest as a result thereof the instant petition is allowed and the posting of Respondent No.3 on the aforesaid post is declared as without lawful authority, consequently Notification bearing No. SOF (Admin-I) 5 (231)/2018 dated 06.11.2018 issued by the Respondent-Department is set aside. The post of Deputy Director Food BS-18 Sukkur Region is hereby declared as vacant which shall be filled by the competent Authority forthwith in accordance with law. Resultantly, the pending Application[s] are disposed of. Let a copy of this order be communicated to the Chief Secretary, Sindh for information and compliance.

JUDGE

JUDGE