

IN THE HIGH COURT OF SINDH, AT KARACHI

Present: **Mr. Justice Irfan Saadat Khan**
Mr. Justice Adnan-ul-Karim Memon

C.P No.D-2659 of 2018

Petitioner : Khalid Hameed Hashmi through Mr. Muhammad Arshad Khan Tanoli, Advocate.

Respondents No.1,2&7 : Mr. Shahriyar Mahar, A.A.G a/w M/s. Humaira Jatoi & Shamin, internees of AG office.

Respondent No 3 to 6: Through Mrs. Azra Moqueem, Advocate and Ms. Maheen Ansari, Advocate.

Date of hearings : 27.11.2018.

J U D G M E N T

ADNAN-UL-KARIM MEMON, J:- Through this Constitution Petition, the Petitioner has called into question the order dated 02.04.2018 passed by the competent authority of Karachi Metropolitan Corporation (KMC), whereby he was relieved from the charge of Director, Land (Anti-Encroachment) South & Malir, KMC.

2. Upon query by this Court as to how the instant Petition is maintainable against the transfer and posting, Mr. Muhammad Arshad Khan Tanoli, learned counsel for the petitioner has argued that the impugned transfer order dated 02.04.2018 is based on malafide intention; that the Petitioner was not allowed to complete his tenure of posting, in violation of the dicta laid down by the Hon'ble Supreme Court of Pakistan in the cases of *Syed Mehmood Ahmed Naqvi Vs. Federation of Pakistan (PLD 2013 SC 195)* and *Zahid Akhtar Vs. Government of Punjab & others (PLD 1995 SC 530)*; that the Petitioner being eligible in all respect is entitled for completion of his minimum tenure of his posting as Director, Land (Anti-Encroachment) South & Malir, KMC; that the impugned

transfer order is violative of Section 24-A of the General Clause, Act and Article 10-A of the Constitution; that the impugned order does not reflect any reason of the transfer and posting of the Petitioner; that the transfer and posting of the Petitioner is based on victimization thus not sustainable in law; that the aforesaid act of the Respondent-KMC is against the basic principles of posting and transfer. Learned counsel argued that when the ordinary tenure of posting has been specified in law such tenure of posting is required to be respected; that the transfer and posting are to be made due to exigency of service and not otherwise; that the Petitioner was not heard before taking adverse inference against him; that the Commissioner-KMC is not competent to make transfer and posting of Grade 18 officers, thus the impugned order is nullity in the eyes of law. He added that in pursuance of the directives of the Secretary, Local Government Department, Government of Sindh, the Commissioner-KMC withdrew all transfer orders vide letter dated 02.11.2016, therefore, there was no justification for the Respondent-KMC to relieve the Petitioner from the charge of the Director, Land (Anti-Encroachment) South & Malir. Per learned counsel, as per recruitment rules notified vide Notification dated 05.05.2017, the competent authority is Government of Sindh and not Mayor-KMC or Commissioner-KMC to make transfer and posting of BPS-18 and BPS-19 Officers of KMC. Learned counsel, in support of his contention, referred to Rule 6 and 26 of Sindh Local Councils Employees (Service) Rules, 2017 and argued that the Sindh Civil Servants (Appointment, Promotion, and Transfer) Rules, 1974 are also applicable to the employees of Local Councils; that as per Rule-9(2) of the Sindh Civil Servants (Appointment, Promotion, and Transfer) Rules 1974,

the Minister concerned is competent authority to make transfer and posting of BPS-18 officers of KMC. He lastly prayed for allowing the instant petition.

3. Mrs. Azra Moqueem, learned counsel, representing Respondent-KMC has raised the question of maintainability of the instant petition and argued that transfer and posting is part of terms and conditions of service, therefore, the Petitioner is not entitled for a particular post at particular place. She further argued that as per Recruitment Rules-2017 as discussed *supra*, the Respondent-KMC had rightly issued the impugned order dated 02.04.2018 and there was no illegality or material irregularity in the impugned order. She further added that the competent authority of KMC has passed the order in accordance with law; therefore no adverse inference can be drawn, against the Respondent-KMC, in this regard. She lastly prayed for dismissal of the instant petition.

4. Mr. Shaharyar Mahar, A.A.G has argued that the Government of Sindh is the competent authority with regard to transfer and posting of the officials of Respondent-KMC serving in BPS-18 and above. He added that, without approval of the Government of Sindh, KMC is not competent to make transfers and postings of the aforesaid officials, in deviation from the Recruitment Rules-2017.

5. Be that as it may, we have already observed at Paragraph-14 of the judgment dated 13.04.2018 passed by this court in *C.P No.D-2949 of 2014 (Abdullah Mushtaq vs. Province of Sindh and others)* as under:-

“14. So far as the contention of the Petitioner with respect to his eligibility for promotion is concerned, record reflects that KMC is not

observing rules and procedure regarding transfer, posting and promotion of its officials, even promoting the officials to the higher posts, and not reverting them to their original posts. We have also noticed that the appointment orders are made by KMC on contractual basis on higher posts without approval of the Competent Authority as per law”.

6. We have considered submissions of the parties at length, on the issue of transfer and posting. Admittedly, the Petitioner is an employee of Respondent-KMC; therefore he is not a civil servant. It is a well settled law that the transfer and posting falls within the ambit of expression “*terms and conditions of service*” and the Petitioner cannot claim a vested right on a particular post at a particular place. Therefore, the forum chosen by the Petitioner by invoking the Constitutional Jurisdiction of this Court under Article 199 of the Constitution is not proper under the law. The case law relied upon by the learned counsel for the Petitioner is not relevant to the facts and circumstances of the present case. In our view, the service of the Petitioner is not a tenure service/post to attract the dicta laid down by the Hon’ble Supreme Court of Pakistan in the case of Aneeta Turab as discussed *supra*. Beside that transfer and posting is prerogative of concerned competent authority, therefore no fundamental right of any employee is involved in the matter of his movement within the department under the law.

7. Reverting to the plea taken by the learned counsel for the petitioner that the Petitioner is a regular employee of BPS-18 of KMC, therefore his transfer and posting could have been made by the competent authority and not otherwise, and he was not provided an opportunity of hearing before passing of the order dated 02.04.2018. In our view, this assertion of the petitioner is wholly misconceived, as there is no cavil to the proposition that the principle ‘*audi-alteram-partem*’ has always been considered to be

embedded in the statute even if there is no implied or expressed provision because no adverse action can be taken against anyone yet at the same time the principle could not be treated to be of universal nature. Because before invoking / applying the said principle one has to specify the infringement of a vested right. The second plea of the Petitioner that the Commissioner-KMC withdrew all transfer orders vide letter dated 02.11.2016, suffice it to say that the order dated 02.11.2016 clearly indicates that the Respondent-KMC issued general transfer and posting order of its employees, prima facie this was not a person specific transfer and posting, but several employees of KMC serving in BPS-18 and BPS-19 were directed to report to their duties at their place of posting, Government of Sindh intervened in the matter on the premise that the transfer and posting of officers in BPS-19 could not be made by the Commissioner-KMC, which was later on withdrawn. On the above proposition of law, the principle has already been settled by the Hon'ble Supreme Court of Pakistan in the case of *Peer Muhammad Vs Government of Balochistan & others* (2007 SCMR 54). In the present case, Petitioner has failed to establish that he has a vested/fundamental right to remain on particular post. Therefore, argument that the Petitioner was not heard before issuance of impugned order is of no importance.

8. Since the parties have much emphasized on the issue of competency of the Government of Sindh and KMC with regard to transfer and posting of the officials serving in BPS-18 and BPS-19 in Respondent-KMC, in this regard, we would like to shed light on the legal aspect of the case.

9. At this stage, we may observe that West Pakistan Municipal Committees Service Rules, 1969 which govern service of KMC

employees, the Rules of 1969 were framed in exercise of powers conferred under Section-29 and Section-121 of Municipal Administration Ordinance, 1960. However, the said Ordinance, 1960 was repealed by Sindh Peoples Local Government Ordinance, 1972, but the rules framed there under were saved vide Section 4 of Sindh Peoples Local Government Ordinance, 1972 and that Sindh Peoples Local Government Ordinance, 1972 was repealed by Sindh Peoples Local Government Ordinance, 1979, but Service Rules of 1969 were saved vide Section 120 (2) (a) of the Ordinance, 1979.

10. We have noticed that Sindh Peoples Local Government Ordinance, 1979 was repealed by Sindh Local Government Ordinance, 2001, but the Rules already in force/field were saved under Section-196 of Sindh Local Government Ordinance, 2001; which was also repelled vide Sindh Local Government Act, 2013; but under Section 160 of the Act, 2013, the 1969 Rules were saved.

11. We have perused the West Pakistan Municipal Committees Service Rules, 1969 which provides as under: -

“3. Constitution of the Service:

(1) for every Municipal Committee there shall be a Municipal Service to be known by the name of the Municipal Committee concerned.

(2) Each service shall consist of such cadres, classes and grades, and each cadre, class and grade of Service shall consist of such number of posts as may be specified by the Municipal Committee concerned with the approval of the Government.

(3) Members of one cadre of service shall not be liable to appointment to a post borne on any other cadre of the Service.

8. Method of Recruitment:

(1) Vacancies in the different classes and grades of a Service shall be filled by –

(a) initial recruitment; or

(b) transfer of a person in the service of Government, are subject to the provisions of Article 44(5) of the

Basic Democracies Order, 1959 of a Local Council or any other Municipal Committee; or

(c) by promotion on the basis of seniority subject to fitness from among the members of the service in the next below grade or class; or

(d) selection on merit from among members of the Service in the next below grade or class, seniority being considered only in the case of officials of practically the same standard of merit.

(2) The Municipal Committee shall determine by which of the method specified in sub-rule (1), the vacancies in various posts shall be filled.

(3) Vacancies to be filled by initial recruitment shall be reserved for bonafide residents of the Municipality.”

12. We have also noticed that in exercise of powers conferred by Section-138 of Sindh Local Government Act-2013, the Sindh Government vide notification dated 5.5.2017 framed recruitment Rules called as “Sindh Local Councils Employees (Service) Rules, 2017” for employees of the Council wherever they may be and have laid down method of recruitment and qualification prescribed for various posts including transfers in different branches of Councils.

13. Perusal of Rule 20 (3) Sindh Local Councils Employees (Service) Rules, 2017 makes it clear that the transfer and posting of officers of the council working in basic pay scale 19 and above shall be subject to the approval of the Government. Prima-facie the decision taken by the KMC vide order dated 2.4.2018 is administrative decision, which does not call for interference at our end.

14. In the light of aforesaid provision of law, this petition is misconceived and is accordingly dismissed along with listed application.

JUDGE

JUDGE

Karachi Dated: -30.11.2018.