

IN THE HIGH COURT OF SINDH KARACHI

Before :

Mr. Justice Nadeem Akhtar

Mr. Justice Adnan-ul-Karim Memon

Constitutional Petition No. D –591 of 2018

Okash Khalid Memon & 04 others V/S Province of Sindh and 02 others

Dates of hearing : 21.01.2020 & 06.02.2020.

Date of judgment : 18.02.2020.

Mr. Ali Asadullah Bullo, advocate for the petitioners.

Mr. Ali Safdar Depar, Assistant Advocate General.

J U D G M E N T

ADNAN-UL-KARIM MEMON, J. – Prime grievance of the petitioners is that Recruitment Rules, framed for the post of Secretary (BPS-17), District Regional Transport Authorities (‘DRTA’) and notified on 13.7.2011, provide no room for posting of outsiders, but the respondents in deviation of aforesaid rules are posting the officers of other cadre against the post of Secretary (BPS-17), DRTA.

2. We have noticed that the post of Secretary (BPS-17), DRTA, is to be filled in the following manner:-

S.NO.	NAME OF POST	METHOD OF APPOINTMENT	QUALIFICATION AND EXPERIENCE	AGE LIMIT MIN-MAX
1.	2.	3.	4.	5.
1.	Secretary (BPS-17)	i. By promotion from amongst the Superintendents (BPS-16), with at least three years’ service in Provincial Transport Authority; or ii. By transfer.		
2.	Secretary (BPS-17) District Regional Transport Authorities	I. Fifty percent by initial appointment; and II. Fifty percent by promotion from amongst the Superintendent (BPS-16) with at least three years’ service in Provincial Transport Authority and District Regional Transport Authorities; or III. By transfer	Graduate at least in 2 nd Division from a recognized University.	

It has been emphatically pointed out that even with this limited prospect, individuals from other departments / cadres are being transferred to fill the post

of Secretary, DRTA. Per learned counsel, appointment of the aforesaid post by way of transfer is not in conformity with the principles of natural justice.

3. Learned Assistant Advocate General has opposed this petition on the ground that under Rule 3(2) of the Sindh Civil Servants (Appointment, Promotion and Transfer) Rules, 1974, ('**Rules,1974**') the government is competent to appoint any civil servant by way of transfer, as such there is no illegality in the recruitment rules.

4. We queried from learned AAG that when the Recruitment Rules provide that the post of Secretary (BPS-17), DRTA is to be filled, fifty percent (50%) by initial appointment and fifty percent (50%) by promotion, then how the same post can be filled by transfer from other departments of Government of Sindh. He replied that the department has made certain appointments and postings in accordance with policy and rules and always posted experienced and technical officers in the interest of departmental work. In support of his contentions, he replied upon Section 10 of the Sindh Civil Servants Act, 1973, and argued that every civil servant shall be liable to serve anywhere within or outside the Province in any post under Government, Federal Government, or any Provincial Government or local authority, or corporation or body set up or established by any such Government. He next submitted that law provides that appointment to the aforesaid post can be made by promotion or transfer subject to qualifications and other conditions applicable to the post as laid down by the department concerned in consultation with the Services, General Administration and Coordination Department. He referred to Rule 6-A to 8 of the Rules, 1974, and argued that in exigency of service the post of Secretary, DRTA, can be filled amongst the officers of Provincial Administrative Service (PAS), Ex-PCS and Provincial Secretariat Service (PSS). He has lastly prayed for dismissal of this petition.

5. We have heard learned counsel for the parties at length and have also examined the material available on record.

6. This is a simple case of interpretation of the word 'by transfer' used in the Recruitment Rules dated 13.7.2011. In order to appreciate the contentions of learned AAG and the petitioners' counsel as to whether the competent authority is empowered under Rule 9(1) of the Rules, 1974, to appoint civil servants from different departments of Government of Sindh to the Provincial Transport Service Cadre, it may be observed that the term 'transfer' used in Rule 9(1) has been interpreted by the Honorable Supreme Court in the cases reported as

Contempt Proceedings against Chief Secretary, Sindh and others, 2013 SCMR 1752, and *Ali Azhar Baloch and others vs. Province of Sindh and others, 2015 SCMR 456*, and held that 'the appointment by transfer can only be ordered if a civil servant is eligible and qualifies for his transfer under Rule 3(2) of the Rules of the department to which he is to be transferred, read with Rules 4, 7 and 8 of the Rules, which prescribe conditions laid down for such appointments by transfer to such posts ; that a civil servant who is to be appointed by transfer has to appear before the Departmental Promotion Committee or the Provincial Selection Board which will consider his eligibility, qualification and such other conditions applicable to the post as laid down in the recruitment rules of the department to which his transfer is to be ordered ; that Rule 9(1) speaks of appointment by transfer to be made from amongst the persons holding appointments on regular basis mentioned in column-2 of the table given under the Rule. Therefore, the word 'person' as used in Rule 9(1) would relate to the officers, who are civil servants and mentioned in column-2 of the table given under Rule 9(1). The word 'person' could not be given an ordinary meaning beyond the scheme of the Act and Rules of 1974'.

7. The Honorable Supreme Court further held that 'Rule 9(1) does not empower the Government or Selection Authority defined under the Act to appoint a civil servant or any other person by transfer to any other cadre, service or post without his eligibility, qualifications and the conditions laid down under Rules 3(2), 4, 6, and 8 of the Rules. Section 8 of the Act makes class of civil servants for proper administration and such class is not interchangeable at the whims of the Selection Authorities and/or the Government to extend favors to their blue eyed. There is no discretion given under Section 5 of the Act to appoint any person in Civil Service against a Civil Post in the manner other than prescribed by the Rules. There is neither procedure nor mechanism provided under the Act or the Rules to treat appointment by transfer as absorption in the transferee department. Rule 9(1) 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. The term 'transfer' has to be interpreted in its common parlance and is subject to the limitations contained in Rules 3, 4, 6, 7 and 8 of the Rules, 1974. Any appointment by transfer under Rule 9(1) has to be for a fixed term, and, on completion of such term, the Civil Servant has to join back his parent department. The word 'appointment' used in the Rule 6(A) cannot be equated with the word 'initial appointment' used in the Act which excludes appointment by transfer and promotion. Therefore, restricted meaning has to be given to the expression 'appointment by transfer';

that rule 9(1) does not permit transfer of non-civil servant to a non-cadre post or to a cadre post. It is well-settled now that 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 ; that 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, 1974.

8. Much emphasis has been laid that the post of Secretary, DRTA, can be filled by the officers of other cadres. We have also noticed that the six (06) posts of Secretary (BPS-17), RTA, and one post of Secretary (BPS-17), PTA, do fall within the ambit of cadre schedule in respect of posts to be filled by officers of PAS, Ex-PCS and PSS. As such, the aforesaid post can only be filled as per Recruitment Rules and subject to eligibility and entitlement, and not otherwise for the simple reason that Provincial Transport Department is a separate cadre and Recruitment Rules are already in the field. The said rules are framed in consultation with the Services, General Administration and Coordination Department, Government of Sindh in pursuance with sub-rule (2) of Rule 3 of the Rules, 1974. In view of the above, we do not agree with the contentions raised on behalf of the petitioners, therefore, the petition is dismissed with no order as to costs.