

Order Sheet
**IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD**

CP No. D- 656 of 2019
CP No. D- 133 of 2021
CP No. D- 344 of 2021 ✓

BEFORE :

Mr. Justice Adnan-ul-Karim Memon
Mr. Justice Adnan Iqbal Chaudhry

Date of hearing : 02.11.2021
Date of decision: 11.11.2021

Petitioners: Present in person

Respondents: through M/s. Parkash Kumar, Masood Rasool
Babar & Abdullah Khan Leghari Advocates along
with Mr. Faizan Bhatti, Legal Officer.

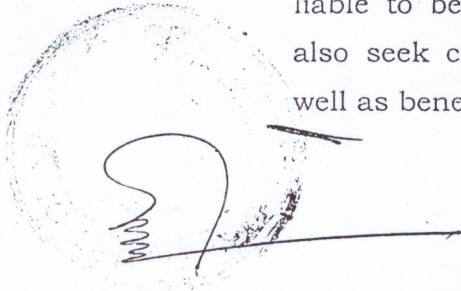
Mr. Ashfaq Nabi Qazi, Assistant Attorney General

Mr. Allah Bachayo Soomro, Addl. A.G.

ORDER

ADNAN-UL-KARIM MEMON, J: - The captioned constitutional petitions contain the same facts and law points, therefore, are being decided by this common order.

2. In principle the petitioners in CP No. D- 656 of 2019 are seeking enforcement of the judgments passed by Honorable Supreme Court rendered in the case of Contempt Proceedings against Chief Secretary, Sindh and others (2013 SCMR 1752) and Ali Azhar Khan Baloch vs. Province of Sindh and others (2015 SCMR 456) on the ground that the respondent-university is still retaining the services of its employees either on contract basis after retirement, deputation basis, on higher posts in own pay and scale, by giving them out of turn promotion, and by awarding them up-gradation, thus they are liable to be removed/reverted to their original position. Petitioners also seek contempt proceedings against the delinquent officials as well as beneficiaries.



3. The petitioner in CP No. D- 133 of 2021 who is also petitioner No.2 in CP.No. D- 656 of 2019 and the petitioner in CP. No. D- 344 of 2021 have prayed as under:-

- i. Direct the respondent No.09 and 10, for awarding fundamental and equal rights of petitioner including seniority, appointment/promotion, and other financial and professional benefits, since his appointment, of 01.08.2012, is facilitated to all other staff as per Constitution of Islamic Republic of Pakistan. ELSE, all illegal orders of promotion and appointments along with the change of cadre may kindly be canceled to avoid discrimination with the petitioner
- ii. Direct the respondent Nos. 1-6 for the transparent inquiry to probe the matter of the financial corruption, malpractices and misuse of powers in illegal appointments unlawful promotions and cadre change of near dears and family friends since 2007 including all internal appointments' by Respondent 07 to 09 being illegal, unlawful, unconstitutional, malafide, discriminatory, and arbitrary, in violation of rules and against principles of natural justice, equity, and fairness.
- iii. To call the respondent No. 01 to 03 personally and direct them to withdraw and de-notify the notification of acting Vice-Chancellor for Respondent No.09 and others unlawful and others unlawful cadre change and out of turn promotions made by respondent No.09, in the light of directions of Supreme Court in criminal original petition No.193/2013 of Pakistan during the course of hearing dated 07.03.2016. The CEAD may be placed in his actual position as per Reserved Rules 1997.
- iv. To restrain the respondents from taking any coercive action against the petitioner, including dismissing/ suspending, forcibly retirement, and any other relief(s) till the pending decision of present petition, which this Honourable Court may deem fit and appropriate under the law and circumstances of the case.

4. The petitioners through the instant petitions have raised their voice of concern concerning the negation of their fundamental rights, being employees of Center of Excellence in Arts & Design (CEAD) Mehran University of Engineering & Technology at Jamshoro. Petitioners have averred that the eligible employees, who are entitled to be appointed or promoted on merits are being ignored/victimized under the policy of respondent Nos. 7, 9 & 10; and, on the contrary, the persons who do not fulfill the merit criteria are being appointed, promoted and elevated through special favor in the respondent-university in violation of law; consequently, so many employees have been appointed, elevated, promoted who have no qualification and experience at all rather they are inter-se relatives (sons/ daughters/nephews) of high-rank officials serving in Mehran University of Engineering & Technology (MUET), therefore, the petitioners have filed these petitions in the larger interest of public for enforcement of their fundamental rights guaranteed under the Constitution.

5. Petitioners have added that they were appointed on clerical posts on contract basis and were ignored for regularization, however, subsequently not promoted to next rank, except for once; per petitioners, during such period so many employees who were junior to them and were not qualified were appointed/ promoted based on undue favoritism and influence of high-ups of university, ignoring the seniority and educational qualification; the petitioners have quoted several persons in the memo of petition some of whom have been promoted / appointed, and the cadres of some of them have been changed and according to the petitioners they are nearer and dearer to the high officials of the university; besides above the petitioners have also pointed out other illegalities and irregularities rampant in the university and lastly they have prayed as above.

6. Primarily, the main grievance of the petitioners is against the employees of respondent-university, who are holding the public office, therefore, fall within the purview of Sub-Clause (1)(b)(ii) of Article 199 of the Constitution, which permits this Court to issue "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 of law he/she claims to hold such office.

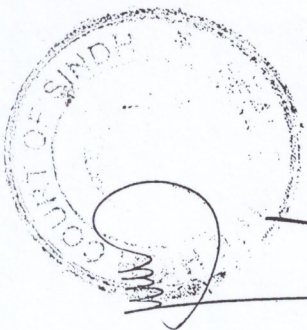
7. In pith and substance, the petitioners have called in question the out-of-turn promotions, out of cadre postings, on OPS basis, person-specific up-gradations made in favor of various employees of respondent-university and other various individuals, in violation of the dictum laid down by the Honorable Supreme Court in the case of Contempt Proceedings against Chief Secretary, Sindh and others (2013 SCMR 1752) and Ali Azhar Khan Baloch vs. Province of Sindh and others (2015 SCMR 456). The Honorable Supreme Court in the aforesaid cases has held that the practice/concept of out-of-turn promotions is unconstitutional, being against Fundamental Rights as enshrined in the Constitution of the Islamic Republic of Pakistan, 1973.

8. We have heard the petitioners who are present in person and the counsel(s) representing the respondents on the issue of absorption, deputation, out of turn promotion, person-specific up-gradation, out of cadre postings, appointment by transfer, and posting on OPS basis.



9. The assertions made by the petitioners have been refuted by the counsel for respondents on the ground that the aforesaid issues of absorption, deputation, out of turn promotion, person-specific upgradation, out of cadre postings, appointment by transfer, and posting on an OPS basis were/are not hit by the judgment passed by Hon'ble Supreme Court rendered in the case of Ali Azhar Khan Baloch as discussed supra. They have prayed for dismissal of the petitions on the premise that the petitioners have come before this Court for a fishing expedition, thus no relief could be granted to them under the law.

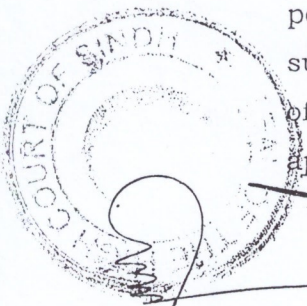
10. Be that as it may, the practice of appointment on an OPS basis has always been discouraged by this Court, as it does not have any sanction of law, besides it impinges the self-respect and dignity of the Civil / Public Servants who are forced to work under their rapidly and unduly appointed fellow officers junior to them. Discretion of nature, if allowed to be vested in the Competent Authority, will offend valuable rights of the meritorious Civil / Public Servants besides blocking promotions of the deserving officers. In this respect the law empowers the Competent Authority to appoint a Civil / Public 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 / Public Servant eligible for promotion does not possess the specific length of service, the appointment of the eligible officer may be made on acting charge basis after obtaining approval of the appropriate Departmental Promotion Committee/Selection Board. This acting charge appointment can neither be construed to be an appointment by promotion on regular basis for any purposes including seniority, nor does it confer any vested right for regular appointment. In other words, an appointment on current charge basis is purely temporary in nature or a stopgap arrangement, which remains operative for a short duration until a regular appointment is made against the post. It is crystal clear that there is no scope of appointment of Civil / Public Servant on an OPS basis except that for certain exigencies appointment on an acting charge basis can be made, subject to conditions contained in the relevant Rules. In our view, posting/transferring a Civil / Public servant on his pay and scale (OPS) is not legally permissible. Our view is supported by the decisions rendered by the Honorable 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).

11. The above discussion leads us to an irresistible conclusion that the appointment/posting of Civil / Public Servant on OPS/ additional/ acting charge basis, is violative of law and public interest, thus the competent authority of respondent-university is directed to comply with the ratio of the decisions passed by the Honorable Supreme Court in the cases of Province of Sindh & others v. Ghulam Fareed & others [2014 SCMR 1189] and Khan Muhammad vs. Chief Secretary Baluchistan and others (2018 SCMR 1411) in its letter and spirit and avoid making the transfer and posting on own pay scale in future, however, subject to conditions as enumerated in the aforesaid judgments of the Hon'ble Supreme Court and revert all employees to their original position forthwith if they have earned the benefits on OPS/additional/acting charge basis.

12. Coming to the term appointment by transfer; and, if there is an appointment by transfer from other departments on deputation in the respondent-university the same is required to be undone under the law. The concept of appointment by transfer is known to service jurisprudence. A power to appoint includes a power to revoke an appointment, and so also a power to make an appointment includes a power to make an appointment by transfer, subject to satisfying the requirements of recruitment rules for the subject post. So far as the appointment by transfer is concerned, the normal rule under the service jurisprudence is that a person working on one post can be transferred to another, provided, the post is in the same rank; and, scale of pay, and the transferee must have the matching qualification and conditions laid down in the initial appointment. In certain services even appointment by transfer to a higher post is permissible; however, this depends upon the provision in the service rules. In a case where a person working on lower post is appointed by transfer to a higher post, then every eligible person has a right to be considered. Thus, a person working on a lower post cannot claim that he has an indefeasible right to be appointed by transfer to a higher post to the exclusion of every other eligible candidate. However, subject to his/her fulfilling the conditions of eligibility along with that of the eligible persons who may offer their candidature for the appointment.

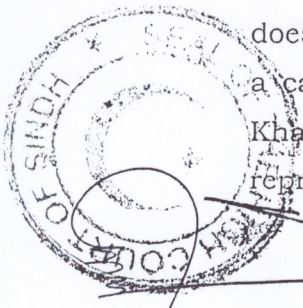


13. Besides deputation is defined in the ESTA CODE 2009 Edition Chapter-III on page 385, Part-II at Page 426 ref. The procedure provided under the ESTA CODE requires that a person, who is transferred and appointed on deputation, must be a Government servant, and such transfer should be made through the process of selection. In the present case, the Secretariat has to establish the exigency in the first place, and then the person who is being transferred/placed on deputation in the secretariat must have matching qualifications, expertise in the field with the required experience. In absence of these conditions, the competent authority of respondent-university cannot appoint anyone by transfer on deputation and out of cadre.

14. At this juncture, petitioners have submitted that several persons who were initially appointed as Naib Qasid / on lower post have been assigned the work of higher grade in violation of law. Since the Hon'ble Supreme Court has already decided the subject issue involved in the present proceedings and the respondents are bound to adhere the dicta laid down by the Hon'ble Supreme Court in the aforesaid judgments even they were appointed on lower posts and have been assigned the work of higher grade. At this stage Mr. Masood Rasool Babar, has explicitly stated that the competent authority of respondent university has already complied with the directives of the Hon'ble Supreme Court as well as orders passed by this court, therefore, no further action is required on their part; however, the petitioners have filed statement and refuted the claim of the learned counsel for the respondent university.

15. In the light of the foregoing legal status of the term deputation, which explicitly recognizes the appointment on deputation under the terms and conditions as set forth under the aforesaid provision of law, however, it does not speak about the permanent absorption of a person in the service of Secretariat of respondent-university, controlled by the Provincial Government and employees therein are not civil servants.

16. For the aforesaid reasons, we are clear in our minds that law does not permit the transfer of a Civil Servant to a non-cadre post or 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 a 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."

17. In the light of the 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 V/s Province of Sindh (2015 SCMR 456) have been complied with by the official respondents on the premise that the absorption, out of turn promotion, appointment by transfer out of cadre, reemployment after retirement and person specific upgradation, acting charge on OPS, assigned to work charge and posting out of cadre were declared nullity in the eyes of law. 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 stipulated period and can be repatriated at any time to his parent department more particularly in the light of aforesaid decision of the Honorable Supreme Court. Reference is also made to the case of Dr. Shafi-ur-Rehman Afridi V/s CDA, Islamabad through Chairman and others (2010 SCMR 378).

18. The Hon'ble Supreme Court has declared the following practice of the respective departments of Federal / Provincial Governments / autonomous / organizations bodies as illegal:

-A civil servant, who after passing the competitive exam in terms of the Recruitments Rules on merits, loses his right to be considered for promotion when an employee from any other organization is absorbed without completing or undertaking a competitive process with the backdated seniority and is conferred the status of a Civil servant in complete disregard of recruitment rules.

(ii). Absorption of a non-Civil Servant conferring on him the status of a Civil Servant and likewise absorption of a Civil Servant from non-cadre post to a cadre post without undertaking the competitive process under the recruitment rules. A government servant and such transfer should be made through the process of selection. The borrowing Government has to establish the exigency in the first place and then the person who is being transferred/placed on deputation in Government must have the matching qualification, expertise in the field with the required experience.

(d). An employee holding a post under any authority or corporation, body or organization established by or under any provincial or Federal Law or which is owned or controlled by Federal or Provincial Government or in which Federal Government or Provincial Government has controlling share or interest could not be conferred the status of a civil Servant.

(e). It is a settled principle of law that if the right of promotion is not blocked by re-employment then such powers can be exercised, then too in exceptional cases for a definite period. Besides it violates the fundamental rights of the serving Civil Servants on account of such rehiring on contract are deprived of their legitimate expectancy of promotion to a higher cadre, which is violative of the provisions of Articles 4, 9 & 25 of the Constitution.



(f) The absorption and out of turn promotion will also impinge on the self-respect and dignity of the civil servants, who will be forced to work under their rapidly and unduly promoted fellow officers, those who have been inducted from other services/cadres regardless of their (inductees) merit and results in the competitive exam (if they have appeared from an exam at all), hence, are violative of the Articles 14 of the Constitution.

(g) The principle of locus poenitentiae is the power of receding till a decisive step is taken but is not a principle of law that order once passed becomes an irrecoverable and past and closed transaction. If the order is illegal, then perpetual rights cannot be gained based on an illegal order.

(h) any backdated seniority cannot be granted to any absorbee and his inter-se-seniority, on absorption in the cadre shall be maintained at the bottom as provided under the Rules regulating the seniority.

19. To reiterate the proposition further the Hon'ble Supreme Court in the case of Muhammad Ali V/s Province of KPK (2012 SCMR 673) has held inter alia that the principles of good governance required every appointment in government service to be made under the relevant rules and on completion of codal formalities. Additionally, in the case of Syed Mubashir Raza Jaffari V/s Employees Old-Age Benefits Institution (2014 SCMR 949), it has been held inter alia that appointments to public offices were to be made strictly under the applicable rules and regulations. Recently, the Hon'ble Supreme Court in the case of Dr. Shamim Tariq V/s International Islamic University, Islamabad (2020 PLC (C.S.) 499) held as follows:-

“Adherence to the statutory rules and procedures for the selection of public jobs is the only surest method to objectively select the best out of the best from a competing lot; it is rooted into the fundamentals of equal opportunity, equal treatment, and equal protection; any deviation therefrom would rock the bottom of the Republic, resting upon equiponderance. State authority in every sphere of life is a sacred trust to be exercised fairly and justly by the functionaries to accomplish the purposes assigned to them by law; it is their bounden duty to do right to all manner of people, without any distinction. It is most important that the right people are selected for official positions to serve the Republic as it is imperative to survive and sustain into today's competitive World; deviation would be treacherously seditious. Constitutionally recognized principle of equal opportunity is strengthened by divine affirmation, upheld and followed by every modern constitution of the day.”

20. Furthermore, after referring to the law laid down in the case of Ali Azhar Khan Baloch vs. Province of Sindh (2015 SCMR 456), it was held as follows:-

“8. The quintessence of the paragraphs reproduced above is that the appointments made on deputation, by absorption or by transfer under the garb of exigencies of service in an outrageous disregard of merit impaired efficiency and paralyzed the good governance and that perpetuation of this phenomenon, even for a day more would further deteriorate the state of efficiency and good governance.”

21. In the case of Sudhir Ahmed V/s The Speaker, Balochistan Provincial Assembly (2017 SCMR 2051), the Hon'ble Supreme Court held that since under the Baluchistan Provincial Assembly

Secretariat (Recruitment) Rules, 2009, the post of Liaison Officer could not be filled except by promotion of an Assistant Liaison Officer with 5 years of service, the appointment to the said post by deputation or by absorption being against the law could not be maintained.

22. 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. On the aforesaid issues, we are fortified with the recent decision dated 05.10.2018 rendered by the Hon'ble Supreme Court of Pakistan in the case of Criminal Review Petition No.207 of 2016 in Criminal Original Petition No.89 of 2011. The Hon'ble Supreme Court has held as under: -

"3. The case of the petitioners in Criminal Original Petitions No. 62/2016 & 69/2017 is that they were directly appointed employees of NH&MP; that most of the officials were hired from different departments and the petitioners are deprived of their legitimate right of seniority and that most of the deputationist lacked the requisite qualification and experience. According to them this Court in the above said judgment has canceled all absorptions/appointments by transfer and deputations but the department has partially implemented the said judgment. Hence, they pray that contempt of court proceedings be initiated against the respondent Authority. 4. So far as the case of the petitioners in Criminal Review Petition No. 207/2016 is concerned, we have perused the judgment under review. The respondent Department on the recommendation of the Departmental Committee has repatriated the petitioners on the ground that their induction was without the recommendations of the Departmental Induction Committee, which to our mind is unexceptionable. No ground for review is made out. Criminal Review Petition No. 207/2016 is accordingly dismissed."

23. In the light of the foregoing, this petition is allowed with the direction to the competent authority of respondent-university to repatriate all the deputationists to their original position/parent department, as if they were never sent on deputation and or absorbed. However, the serving officials will be entitled to their original seniority in their parent department and issue of lien will not come in their way strictly in the light of the directions of Hon'ble Supreme Court of Pakistan in its judgments rendered in the cases of Contempt proceedings against the Chief Secretary, Sindh (2013 SCMR 1752) and Ali Azhar Khan Baloch V/s Province of Sindh (2015 SCMR 456) and observations made in the preceding paragraphs. The competent authority of the respondent university is directed to submit a compliance report through Additional Registrar of this Court within one month. The period of one month shall commence from the date of announcement of this order. Respondents are further directed to implement the aforesaid judgments of Hon'ble

Supreme Court in its letter and spirit; and, the question of reemployment of retired employees shall also be taken care of by the competent authority if their case falls within the ratio of the aforesaid judgments passed by the Hon'ble Supreme Court of Pakistan. In the meanwhile the competent authority shall take into consideration the promotion issue of the petitioners as well as other officials / officers of the respondents university if they have requisite length of service and qualification for promotion. The aforesaid exercise shall be undertaken within two months.

24. The petition stands disposed of along with the pending application(s) in the above terms.

Sd/- ADNAN-UL-KARIM MEMON,
JUDGE.

Sd/- ADNAN IQBAL CHAUDHRY,
JUDGE.

Announced by us.

Sd/- MUHAMMAD IQBAL KALHORO,
JUDGE. 11. 11. 2021.

Sd/- ADNAN-UL-KARIM MEMON,
JUDGE.

CERTIFIED TO BE TRUE COPY

(Muhammad Iqbal Memon)
Assistant Registrar
High Court of Sindh,
Circuit Court, Hyderabad.

