

IN THE HIGH COURT OF SINDH KARACHI

Before:

Mr. Justice Aftab Ahmed Gorar
Mr. Justice Adnan-ul-Karim Memon

C.P. No. D-146 of 2022

Syed Zafar Ali Shah
Petitioner through : Syed Farhan Ali Shah and Saif Sohail Yunus,
advocates

Respondents 1,2 & 4
through : Mr. Ali Safdar Depar, AAG along with
Ghulam Ali Birhmani, Additional Secretary (Services),
SGA&CD and Abdul Jabbar Shahani, Deputy
Secretary (Law-II) SGA&CD and Mumtaz Ali Shah
respondent No.3

Respondent No.3
through: : Mr. Nisar Ahmed Bhanbhro, advocate

Date of hearing
& order : **17.03.2022**

ORDER

Petitioner has called in question vires of the notifications dated 14.6.2021, 26.10.2021, and 15.02.2022 whereby respondent No.3 was promoted to the post of Senior Headmaster (BS-19) and posted as District Education Officer (Primary) BS-19 Naushahro Feroze on an additional charge basis, *inter alia*, on the ground that he has been unlawfully accommodated to the post of District Education Officer, in violation of the orders passed by the Hon'ble Supreme Court of Pakistan. It is contended that the post of District Education Officer (Primary) BPS-19 could only be filled under the recruitment rules and not otherwise; that the Hon'ble Supreme Court of Pakistan has already held that the posting on acting charge / additional charge on OPS is illegal; that Senior Headmaster BPS-19 cannot be posted as District Education Officer (Primary) under the recruitment rules notified on 14.3.2018. Per learned counsel, the respondents have misused the powers and authority, thus they are liable to be accounted for under the service law.

2. We asked the learned Counsel to satisfy the maintainability of the instant petition on the ground that transfer, posting, and promotion falls within the terms and conditions of service and writ of quo warranto is not available to the public-probono, in service matter.

3. Syed Farhan Ali Shah, learned counsel for the petitioner, has replied to the query and has attempted to justify the stance of the petitioner on the subject issues and argued that the Constitutional jurisdiction is conferred on this Court in terms of clause (1) (b) (ii) of Article 199 of the Constitution to look into the vires of administrative actions of the Government of Sindh in transfer, posting, and promotion matters if the same is outside the

domain of the respondents and against the basic spirit of law and judgments passed by the Honorable Supreme Court, therefore the writ of quo warranto, which is, of course, is now obsolete and now substituted by a prohibitory order and this court has to inquire from a person the authority of law under which he purports to hold a public office under the garb of transfer and posting and holding a post which is not permissible under the law. He next submitted that the writ of quo warranto is primarily inquisitorial proceedings and not adversarial for the reason that a relator need not be a person aggrieved but also that while a person is holding a public office without any legal warrant, he is taxing public exchequer besides causing injury to others who may be entitled to the said office. Therefore, keeping in view the nature of such proceedings, this Court can undertake such an inquiry, including examination of the entire relevant record. He further argued that a writ of quo warranto should be encouraged to keep a check on executive authorities. He prayed to set aside the impugned notification dated 15.02.2022 to the extent of posting of respondent No.3 as Deputy /District Education Officer (Primary) (BS-19) Naushahro Feroze. In support of his contentions, he relied upon the cases of Irshad Hussain v. Province of Sindh through Secretary and 6 others, **2020 PLC (CS) 1411** and Munawar Ali Pathan v. Province of Sindh through Chief Secretary and 2 others, **2011 PLC (CS) 785**, Ali Azhar Khan Baloch and others v. Province of Sindh and others, **2015 SCMR 456** and unreported order dated 28.01.2020 passed by this Court in Suit No.1243 of 2015.

4. Mr. Nisar Ahmed Bhanbhro, learned counsel for respondent No.3, has contended that Public Interest Litigation is an instrument of the administration of justice to be used properly in proper cases. The present petition is not a “bona fide” public interest litigation, but should be more appropriately termed as political interest litigation; hence, the petition is not maintainable. He further argued that the petitioner was/is not the aggrieved person and none of his service rights were violated and he had also no locus standi or cause of action to file the constitutional petition; that the qualification and experience of the person under attack in quo warranto is to be judged on the date of issuance of such writ meaning thereby that in case of age, qualification and experience is acquired pending action under quo warranto then keeping such change, quo warranto may not be issued. Learned counsel also took the plea that Writ of quo warranto would not be a remedy for a person to air his private vengeance. He further stressed that the post of Head Master, Senior Head Master fall within the executive cadre and these posts are of Grade 17, 18 & 19; that the Head Master under the law can be appointed as Taluka Education Officer and Senior Head Master as District Education Officer as the case may be; that the appointment of respondent No.3 as Taluka Education Officer was made in accordance with law; that the respondent No.3 was promoted to Grade 18 and posted as Deputy District Officer Education in accordance with law; that the petitioner being alien a non-civil servant cannot challenge his promotion under writ jurisdiction; that the respondent No.3 has been appointed on merit and there is no favoritism involved in the said appointment; that look after charge was assigned to the respondent No.3 as stop gap arrangement which is permissible under the rules as he was the Senior Most Officer available in the District; that the respondent No.3 has been promoted to the post in Grade 17, 18 & 19 in accordance with law and the promotion of respondent No.3 has not been

challenged by any of the employees serving in the same grade. He next argued that Article 212 of the Constitution ousts the jurisdiction of this Court in respect to the terms and conditions of Civil Servants. The ouster clause under Article 212 of the Constitution is a Constitutional command, which restricts the jurisdiction of this Court under Article 199 of the Constitution on the subject which squarely falls within the exclusive domain of the Tribunals. The expression “terms and conditions” includes promotion matters.

5. Mr. Ali Safdar Depar, learned AAG, assisted by Ghulam Ali Birhmani, Additional Secretary (Services), has supported the stance of the learned counsel representing the private respondent and raised the question of the maintainability of the instant petition.

6. We have examined the case in the light of the arguments of the learned counsel and have carefully perused the record of the case and the judgments relied on by the learned counsel.

7. We have examined this case minutely as to whether the private respondent meets the qualification for the posts of District Education Officer (Primary) BS-19 Naushahro Feroz, or otherwise. For convenience sake, an extract of the office orders dated 26.09.2017, 14.06.2021 & 26.10.2021 are as under:

“Karachi dated 26th September 2017

NOTIFICATION

No.SO(S-I)M-1693(M)/2014: Syed Mumtaz Ali Shah, Head Master (BS-17), awaiting posting (Personal ID-10716149 CNIC-4530191718717), is hereby posted as Taluka Education Officer (Primary) Male Mehrabpur District Nashaharo Feroze, with immediate effect, until further orders.”

“Karachi dated 14th June 2021

NOTIFICATION

No.SO(S-I)M/713/2019: With the approval of Competent Authority, Mr. Mumtaz Ali Shah (BPS-18) Deputy District Education Officer (Primary) Naushahro Feroze is hereby allowed look after charge of the post of District Education (Primary) (BPS-19) Nashaharo Feroze, with immediate effect, until further orders.”

“Karachi dated 26th October 2021

NOTIFICATION

No.SO(B&F)SELD/DDO-P/Mumtaz-Ali.Shah/DEO/N-F/2021-22: Mr. Mumtaz Ali Shah, Deputy District Education Officer (Admin/Primary) Naushahro Feroze (BS-18) is hereby declared as Drawing & Disbursing Officer (DDO) for operating non-development funds of Cost Centre **“NK0382-DEO (Primary) Naushahro Feroze”** during current financial year 2021-22 and onwards, with immediate effect, until further orders.

2. *The above officer/DDO will collect all records/physical assets and balance account from the relieving officer/Previous DDO under intimation to School Education & Literacy Department.*

3. *It may be ensured that Drawing & Disbursing Officer (DDO) shall complete all the legal & codal formalities before utilization of non-development funds (Salary + Non-Salary Component) and in accordance with accounts procedure of Finance Department.”*

8. At this juncture, learned Counsel for the private respondent has submitted that the private respondent is qualified and experienced to hold the subject posts, having the requisite Degree and experience in the relevant field. In this regard, he referred to the counter-affidavits and relied upon the service profile of the private respondent, and submitted that the instant petition is based on personal vengeance as depicted from the memo of the petition, as such, he wants to settle his score with the private respondent.

9. Be that as it may, we are only concerned with the maintainability of this petition under Article 199 (1) (b) (ii) of the Constitution, 1973, therefore we deem it fit and proper to have a glance at the service profile of private respondent, which is as under:

“Respondent No.3 was appointed as Higher School Teacher in 1988, he was promoted in BPS-17 in 2012 and in BPS-18 in 2018 and in BPS-19 as Senior Headmaster vide notification dated 19.01.2022 and was posted as District Education Officer (Primary) (BPS-19) Nashahro Feroze, vide notification dated 15.02.2022.”

10. In principle appointments, posting, removals, and promotions must be made under the law and the rules made thereunder; where no such law or rule exists and the matter has been left to discretion, such discretion must be exercised in a structured, transparent, and reasonable manner and in the public interest. The impugned notifications stipulate that the junior officer of BPS-19 was posted/transferred in "own pay and scale" and out of cadre posting was given to respondent No.3 as District Education Officer (Primary), Naushahro Feroze. The Honorable Supreme Court in the case of *Province of Sindh v. Ghulam Fareed* 2014 SCMR 1189, was held, that posting/transferring a civil servant on his pay and scale (OPS) is not legally permissible:

"11. We have inquired from the learned Additional Advocate-General to show us any provision of law and or rule under which a Civil Servant can be appointed on a higher grade/post on OPS basis. He concedes that there is no specific provision in the law or rule which permits appointment on OPS basis. He, however, submitted that in exigencies the Government makes such appointments as a stop-gap arrangement. We have examined the provisions of the Sindh Civil Servants Act and the Rules framed thereunder. We do not find any provision which could authorize the Government or Competent Authority to appoint [of] any officer on higher grade on "Own Pay and Scale Basis". Appointment of the nature that, too of a junior officer causes heart burning of the senior officers within the cadre and or department. This practice of appointment on OPS basis to a higher grade has also 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."

11. The rule position is that the District Education Officer in School Executive Service at District level is in BPS-20 and the subject post is to be filled amongst the District Education Officer (Primary) (BPS-19) and District Education Officer (Elementary, Secondary, and Higher Secondary) (BPS-19) vide recruitment rules notified on 23.07.2014.

S.#	Name of posts with BPS	Method of appointment	Minimum Academic Qualification/ Necessary experience for initial appointment	Age Limit	
				Min.	Max
1.	(i) Director of School Education (Primary) BPS-20. (ii) Director of School Education (Elementary, Secondary & Higher Secondary) BPS-20. (iii) Additional Director (Primary) BPS-20. (iv) Additional Director (Elementary, Secondary & Higher Secondary) BPS-20	(i) 50% by promotion from amongst District Education Officers (BPS-19)/Deputy Director (BPS-19) belonging to School Executive Service cadre having at least 17 years service in School Administration in BPS-17 and above and have completed mandatory Training through PITE, University or any Institution on the approved panelist. (ii) 50% by transfer from amongst cadre officers of PAS/Secretariat/PCS (ex-PCS/PSS).			

2.	<p>(i) District Education Officer Primary (BPS-19)</p> <p>(ii) District Education Officer (Elementary, Secondary & Higher Secondary) (BPS-19)</p> <p>(iii) Deputy Director (BPS-19), Directorates of School Education (Primary/Elementary, Secondary & Higher Secondary)/Admn. Co-curricular Activities / Quality Assurance/Planning & Development</p>	<p>(i) 50% by promotion from Deputy District Education Officers (BPS-18) / Assistant Directors (BPS-18), having at least 12 years service in School Administration in BPS-17 and above and have completed mandatory Training through PITE, or any Institution on the approved panelist.</p> <p>(ii) 50% by transfer from amongst cadre officers of PAS/Secretariat/PCS (ex-PCS/PSS).</p>		
4.	<p>(i) Taluka Education Officer (male/female) (BPS-17) Primary/Elementary, Secondary & Higher Secondary.</p> <p>(ii) Assistant Education Officer (BPS-17) Admn/Co-curricular Activities (male/female) Quality Assurance (male/female)</p>	<p>(i) 50% by initial appointment through competitive examination by Sindh Public Service Commission.</p> <p>(ii) 50% by transfer from amongst cadre officers of PAS/PCS (ex-PCS/PSS)</p>	M.A & M.Ed. both at least in 2 nd Division from a recognized University	25-30

12. From the above rule position, it is crystal clear that respondent No.3 was initially appointed as Higher School Teacher (BPS-16) and lastly as a Senior Headmaster. The record does not reflect that he was never appointed as Taluka Education Officer (Elementary, Secondary, and Higher Secondary) to claim the post of Deputy District Education Officer. Both are in different cadres, prima facie, HST/Senior Headmaster cannot be appointed as Taluka Education Officer for the reason that the appointment of Taluka Education Officer has been given under the recruitment rules as discussed supra; even the cadre of Headmaster cannot be merged in another administrative cadre.

13. From the above, it appears that Senior Headmaster (BPS-19) could not be posted as District Education Officer (Primary) as the post of District Education Officer (Primary) could only be filled 50% by promotion from amongst Deputy District Education Officers (BPS-18) and 50% by transfer from amongst cadre officers and the respondent No.3 is not a cadre officer.

14. The post of Taluka Education Officer (Primary) / Elementary, Secondary, and Higher Secondary is required to be filled 50% by initial appointment through competitive examination by Sindh Public Service Commission and 50% by transfer from amongst cadre officers. The record does not reflect that respondent No.3 was ever appointed as Taluka Education Officer as such Senior Headmaster is not required to be posted as Deputy / District Education Officer (Primary).

15. During the arguments, we have been informed that respondent No.3 had never been appointed/promoted to the post of Deputy District Education Officer (BPS-18) (Primary); and, his assignment to look after the day to day affairs of the office of the

District Education Officer (Primary) was/is also an erroneous decision on the part of respondent-Education & Literacy Department, Government of Sindh.

16. Primarily, mere posting of respondent No.3 as Taluka Education Officer (Primary) in 2017 does not envisage that he was appointed on the subject post and could be promoted as Deputy District Education Officer; and, then was allowed to look after the charge of District Education Officer (Primary), therefore, the respondent No.3 was entitled to hold the post of Deputy/District Education Officer (Primary) being Headmaster /Senior Headmaster.

17. The record reflects that respondent No.3 was lastly promoted to the post of Senior Headmaster School Education and Literacy Department on regular basis vide notification dated 19.01.2022, thus his posting as Taluka Education Officer and Deputy / District Education Officer (Primary) (BPS-18/19) was without lawful authority, thus declared nullity in the eyes of law.

18. We, in the circumstances of the case, by following the ratio of the judgments passed by the Hon'ble Supreme Court of Pakistan in the cases of *Khalilullah Kakar v. Provincial Police Officer* 2021 SCMR 1171, *Khan Muhammad v. Chief Secretary Government of Baluchistan, and others* 2018 SCMR 1411 and *Ali Azhar Khan Baloch v. Province of Sindh* 2015 SCMR 456 direct the Sindh Government to adhere to all the principles as laid down by the Honorable Supreme Court on the subject issue of transfer and posting of officers on administrative posts.

19. The Government of Sindh shall ensure to appoint the Gazetted Officer as Headmaster/Headmistress in every Government School in the province of Sindh as per recruitment rules, who shall have the powers of Drawing and Disbursing; and no junior officer/HST (BPS-16) shall be posted in the Government School, as Incharge.

20. As a result, the petition is allowed in terms that the competent authority / Chief Secretary Sindh is directed to look into the affairs of Education & Literacy Department, Government of Sindh, and fix responsibility upon the delinquents who allowed respondent No.3 to enjoy the posting as Taluka Education Officer (Primary) in 2017 and then as Deputy / District Education Officer (BPS-18/19) in 2021. The aforesaid exercise shall be undertaken within (01) month after hearing all concerned.

21. Let a copy of this order be transmitted to the Chief Secretary, Sindh, and Secretary Education and Literacy Department of Government of Sindh for information and compliance.

JUDGE

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