

Order Sheet

IN THE HIGH COURT OF SINDH KARACHI

Constitutional Petition No. D –2862 of 2013

Date

Order with signature of Judge

Present :

1. Mr. Justice Ghulam Sarwar Korai
2. Mr. Justice Nadeem Akhtar

1. For Katcha Peshi :
2. For Hearing of Misc. No.20254/2013 :

Date of hearing : 30.07.2013.

Petitioner : Syed Abid Ali Shah through
Mr. Zamir Ghumro, Advocate.

Respondent : Province of Sindh and another through
Mr. Saifullah, A.A.G.

ORDER

NADEEM AKHTAR, J. – Through this Constitutional Petition, the petitioner has impugned the Notification dated 02.07.2013 issued by the Chief Secretary, Government of Sindh, wherein it is stated that, in pursuance of the judgment dated 12.06.2013 passed by the Hon'ble Supreme Court of Pakistan in Criminal Original Petition No.89/2011 and other cases and with the approval of the competent authority, the absorptions of 35 officers / officials in Services, General Administration and Coordination Department, listed in the impugned Notification, have been withdrawn *ab initio*, relieving them to report to their parent Departments / Organizations. The name of the petitioner is mentioned in the impugned Notification at serial No.8.

2. In the petition, the petitioner has given in detail the complete background of his service career. The gist of the petitioner's service career, as narrated by him in the petition, is that he was inducted as a Management Trainee in Hydry Industries on 09.02.1976 when the said entity was under the management and

control of the Board of Management Sindh, established by the Government of Sindh, to manage the nationalized Ghee Industries in the Province of Sindh. In October 1976, the Board of Management Sindh was dissolved and was merged into Ghee Corporation of Pakistan, established by the Government of Pakistan. Resultantly, all the employees of the dissolved Board of Management Sindh became the employees of Ghee Corporation of Pakistan, which was placed under the control of the Ministry of Industries and Production, Government of Pakistan. The services of the petitioner were requisitioned on 16.08.1997 by the Government of Sindh from the Government of Pakistan. On 04.10.1997, the Ministry of Industries and Production, Government of Pakistan, approved the proposed deputation of the petitioner, and consequently, the services of the petitioner were placed on deputation at the disposal of the Government of Sindh. On 24.10.1997, the Government of Sindh issued a Notification whereby the petitioner was allowed to be placed on deputation for a period of three years with immediate effect until further orders.

3. From 1997 till August 1999, the petitioner served in various departments of the Government of Sindh on postings. Vide Notification dated 14.01.1999, the services of the petitioner were placed at the disposal of the Population Welfare Department, and vide another Notification dated 14.01.1999, the petitioner was “posted” in the Population Welfare Department, Government of Sindh, as Additional Secretary (BS-19). Vide Notification dated 09.08.1999, “adjustment” of the petitioner was allowed in BS-19 in the Population Welfare Department, Government of Sindh, with immediate effect. Subsequently, a Corrigendum was issued on 16.08.1999 to the Notification dated 09.08.1999, whereby the petitioner was “permanently adjusted” in the Population Welfare Department, Government of Sindh. Thereafter, a formal Notification dated 18.08.1999 was issued, whereby the services of the petitioner were “permanently adjusted / absorbed” in the Population Welfare Department, Government of Sindh, as Additional Secretary (BS-19). In view of his said permanent adjustment / absorption, the petitioner was transferred and absorbed along with the post in PSS Cadre vide Notification dated 18.01.2003, issued by the Chief Secretary, Government of Sindh.

4. The petitioner has stated that the Population Welfare Department was finally declared as a provincial department and its employees as provincial civil servants in the year 2001 through Ordinance XXXII of 2001. It has also been stated by the petitioner that as a result of his “permanent adjustment / absorption” in the Population Welfare Department, Government of Sindh, on 18.08.1999, his services in the Ghee Corporation of Pakistan came to an end

vide an office order issued on 03.09.1999 by the Ghee Corporation of Pakistan, and he ceased to be an employee thereof with effect from 18.08.1999.

5. Mr. Zamir Ghumro, the learned counsel for the petitioner, submitted that, in the case of the petitioner, the respondents have misinterpreted the judgment delivered on 12.06.2013 by the Hon'ble Supreme Court in Criminal Original Petition No.89/2011 and other cases ("**the judgment**"), as the case of the petitioner does not fall in any of those cases in which appointments, transfers, absorptions, deputations, backdated or out of turn seniority, etc., have been declared as illegal and void *ab initio*. He contended that through the impugned Notification, the petitioner has been relieved from his present service by the Government of Sindh, and he has been directed to report to his parent department. It was urged that the parent department of the petitioner ; namely, Ghee Corporation of Pakistan, terminated the service of the petitioner with effect from 18.08.1999, when he was permanently adjusted / absorbed by the Government of Sindh in the Population Welfare Department ; and, the said parent department does not exist anymore. The learned counsel argued that the petitioner could not be repatriated to his alleged parent department in view of the above reasons. He submitted that the petitioner was / is not serving on deputation, nor was he absorbed in the Government of Sindh in an illegal manner. He particularly emphasized that the petitioner was permanently adjusted / absorbed in the Government of Sindh way back in August 1999 through proper channel and with the approval of the competent authority. Lastly, it was contended that the petitioner was condemned unheard, as the impugned Notification was issued by the respondents without affording any opportunity of hearing to him.

6. The learned A.A.G. supported the impugned Notification, and submitted that the petitioner's name has been rightly mentioned therein in view of the judgment. He prayed for the dismissal of the petition.

7. We have heard the learned counsel for the parties and have also examined the record available before us. The record shows that, vide Notification dated 09.08.1999, the petitioner was "**allowed adjustment**" in the Population Welfare Department, Government of Sindh, "**in relaxation of rules**". The record further shows that prior to his said "**adjustment**", the petitioner was serving in the Government of Sindh on "**deputation**" having been sent there by the Government of Pakistan from the Ghee Corporation of Pakistan. It is on record that the petitioner was "**permanently adjusted**" in the said Department vide Corrigendum dated 16.08.1999 to the Notification dated 09.08.1999, and then he was "**permanently adjusted / absorbed**" in the said department vide Notification

dated 18.08.1999. Thereafter, vide Notification dated 18.01.2003, the petitioner was “absorbed” as Additional Secretary (BS-19) in the Sindh Secretariat with immediate effect. The above position is not disputed as the petitioner himself has admitted that his services were “absorbed” in the Government of Sindh. In this context, we deem it necessary to reproduce here the relevant portion of paragraph 175 of the judgment :-

“175. We further hold and declare that benefit of ‘absorptions’ extended by the Sindh Government since 1994, with or without backdated seniority, are declared ultra vires of the Constitution, as the learned Additional Advocate General has made a statement during hearing that the impugned validation instruments has granted legal cover to the employees / civil servants, who were absorbed since 1994.”

(Emphasis added).

8. We have no doubt in our minds that the above declaration given by the Hon’ble Supreme Court squarely applies to the instant case, as the petitioner was admittedly in the service of the Federal Government and his services were absorbed in the Sindh Government admittedly after 1994. Therefore, in view of the judgment delivered by the Hon’ble Supreme Court, the petitioner has ceased to be an employee of the Sindh Government and he is liable to be repatriated to his parent department. The impugned Notification for repatriation of the petitioner to his parent department / organization, does not suffer from any legal defect or infirmity. The parent department / organization of the petitioner has ceased to exist, therefore, his services stand repatriated to the Federal Government for adjustment in any department / organization of the Federal Government in accordance with law.

This petition and the listed application are disposed of in the above terms.

Judge

Judge

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“126. From the above discussion, the aforesaid legislative instruments on the issue of absorption are liable to be struck down being

violative of Constitutional provisions referred to hereinabove, therefore, we hold as under:-

- (i) That the Sindh Government can only appoint a person by absorption by resorting to Rule 9A of the Rules of 1974.*
- (ii) Sind Government cannot order absorption of an employee who is a non-civil servant, however, an employee of an autonomous body can be absorbed in Sindh Government subject to conditions laid down under Rule 9-A of the Rules of 1974.*
- (iii) Sindh Government cannot absorb a civil servant of non-cadre post to any cadre which is meant for the officers who are recruited through competitive process.*
- (iv) 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.*
- (v) 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. A civil servant can be transferred out of cadre to any other department of the government subject to the restrictions contained under Rules 9 (1) of the Rules of 1974.*
- (vi) The legislature cannot enlarge the definition of "civil servant" by appointing a non-civil servant through transfer on the basis of absorption conferring him status of civil servant pursuant to the impugned legislation which is violative of the scheme of civil service law as provided under Articles 240 and 242 of the Constitution."*