

**IN THE SUPREME COURT OF PAKISTAN**  
**( Appellate Jurisdiction )**

**PRESENT:**

**MR. JUSTICE NASIR-UL-MULK, HCJ.**

**MR. JUSTICE AMIR HANI MUSLIM**

**MR. JUSTICE IJAZ AHMED CHAUDHRY**

**CIVIL APPEAL NO.404/2011**

(On appeal against the judgment dated 2.4.2011 passed by the High Court of Sindh, Karachi in CP.D-932/2009)

Ali Hassan Brohi

**Vs.** Province of Sindh thr. Chief Secy. and others

**CIVIL APPEAL NO.405/2011**

(On appeal against the judgment dated 2.4.2011 passed by the High Court of Sindh, Karachi in CP.D-932/2009)

Ali Azhar Baloch

**Vs.** Province of Sindh and others

**CIVIL APPEAL NO.407/2011**

(On appeal against the judgment dated 2.4.2011 passed by the High Court of Sindh, Karachi in CP.D-932/2009)

Abdul Ghani Jukhio

**Vs.** Province of Sindh, thr. Chief Secy. and others

**CIVIL APPEAL NO.409/2011**

(On appeal against the judgment dated 2.4.2011 passed by the High Court of Sindh, Karachi in CP.D-932/2009)

Syed Abid Ali Shah

**Vs.** Province of Sindh, thr. Chief Secy. and others.

**CIVIL APPEAL NO.411/2011 AND CMA. NO.4339/2013**

(On appeal against the judgment dated 2.4.2011 passed by the High Court of Sindh, Karachi in CP.D-932/2009)

Dr. Aftab Ahmed Mallah

**Vs.** Dr. Nasimul Ghani Sahito etc

**CIVIL APPEAL NO.412/2011 AND CMA. NO.4340/2013**

(On appeal against the judgment dated 2.4.2011 passed by the High Court of Sindh, Karachi in CP.D-932/2009)

Dr. Muhammad Ali

**Vs.** Dr. Nasimul Ghani Sahito etc

**CIVIL APPEAL NO.413/2011**

(On appeal against the judgment dated 2.4.2011 passed by the High Court of Sindh, Karachi in CP.D-932/2009)

Ahmed Hussain

**Vs.** Dr. Nasimul Ghani Sahito etc

**CIVIL APPEAL NO.495/2011**

(On appeal against the judgment dated 2.4.2011 passed by the High Court of Sindh, Karachi in CP.D-932/2009)

Rasool Bux Phulphoto

**Vs.** Province of Sindh thr. Chief Secy. and others

## **ATTENDANCE**

### **For the Appellant(s)**

(in CA.404 & 405/11) : Syed Iftikhar Hussain Gillani, Sr. ASC  
 (in CA.407/11) : Mr. Adnan Iqbal Ch, ASC  
 (in CA.409/11) : Mr. Asim Mansoor Khan, ASC  
 (in CA.411 & 412/11) : Mr. Hamid Khan, Sr. ASC  
 (in CA.413/11) : Mr. Abdul Rahim Bhatti, ASC  
 (in CA.495/11) : Miangul Hassan Aurangzeb, ASC

### **For Respondent(s)**

For Govt. of Sindh. : Sarwar Khan Add. A.G Sindh  
 Abdul Fateh Malik A.G. Sindh  
 Rafique Mustafa Shaikh,  
 Add. Secretary Services(S&GAD)  
 Ghulam Ali Bharmani,  
 Dy. Secretary Services(S&GAD)

CAs. 404, 405, 407, 409 & 411 TO 413/2011 : Ch. Afrasiab Khan ASC  
 3-13,15,16,18-25,27-41,43-49,  
 51 & 52:  
CA.495/2011  
 3-12,14,15,17-24,26-31,33-  
 40,42-48, 50,51

Date of hearings : 5<sup>th</sup>, 6<sup>th</sup>, 10<sup>th</sup> June, 2014,  
 15<sup>th</sup> to 17<sup>th</sup> & 21<sup>st</sup> to 24<sup>th</sup> October, 2014.

## **JUDGMENT**

### **AMIR HANI MUSLIM, J.-**

### **C.A. No.413 of 2011**

Ahmed Hussain vs. Dr. Naseem ul Ghani Sahito  
 by Mr. Adbul Rahim Bhatti, ASC

1. Mr. Abdul Rahim Bhatti, learned ASC submitted that on 24.10.1994, the Appellant was appointed as Protocol Officer in BS-17 in CM Secretariat. The post of Protocol Officer falls outside the purview of the Public Service Commission and in 2007 the post was upgraded to BS-18. Thereafter, on 03.01.2009 he was

absorbed as Deputy Secretary in Provincial Secretariat Service (PSS) with backdated seniority.

2. The learned Counsel for the Appellant contended that the writ filed by the Respondent was not in the nature of quo-warranto. According to him, a writ of quo-warranto could not be filed on opaque technicalities. He next contended that the subject matter of the writ relates to the terms and contention of service, therefore, a writ in the nature of quo-warranto did not lie. In support of his contention, he has relied upon the case of **Khalid Mahmud Advocate v. Muhammad Yaseen** (1991 SCMR 1041). The learned counsel has contended that the view in the case of **Khalid Mahmud** (supra) has consistently been followed by this Court. He submitted that if a Civil Servant is aggrieved by an order of the Departmental Authority, he is required to file an Appeal before the Service Tribunal. According to him, the jurisdiction of the Service Tribunal cannot be bypassed by the Respondents claiming relief from the High Court under the garb of fundamental rights. He relied upon the case of **Khalid Mahmood Wattoo v. Government of Punjab** (1998 SCMR 2280) by submitting that a distinction has been drawn by this Court between the exercise of jurisdiction of the High Court under Article 199 of the Constitution and the bar placed on such an exercise by Article 212 of the Constitution. He contended that the Respondent could not have filed a Petition, which pertains to the term and condition of their service before the High Court. The learned Counsel has relied upon the case of **Muhammad Liaquat Munir Rao vs Shams ud Din and others** (2004 PLC (CS) 1328) and contended that a writ in the nature of quo-warranto could only be filed before the Tribunal and contended

that the issue pertaining to the terms and conditions could not be gone into by the High Court for want of jurisdiction, which falls within the purview of the Services Tribunal. He also cited case **Dr. Azim-ur-Rehman Khan Meo vs Government of Sindh** (2004 PLC (CS) 1142) in support of his contention.

3. The learned Counsel submitted that the judgment under review, should apply prospectively. He further contended that the judgment is discriminatory, as in some cases, the question of absorption has been saved by the High Court of Sindh under Rule 9-A. The learned Counsel submitted that the Petitioner was appointed under Rule 9(1) as he satisfied all the requirements of qualification, experience and Grade.

4. According to the learned Counsel, the appointment of the Appellant was made by the Competent Authority on following the codal formalities. He submitted that the Appellant could not be penalized for the act of the Government functionaries. He submitted that those officers, who have appointed the Appellant in violation of the rules may be proceeded against. Counsel relied upon the cases (1996 SCMR 1350), **Iqbal Hussain Sheikh and 2 others v. Chairman FBR** (2013 SCMR 281), **Fahd Asadullah Khan v. Federation of Pakistan** (2009 SCMR 412) and (2006 SCMR 678) to establish that if an order is passed by an authority erroneously or in violation of rules, it should firstly be determined which authority is responsible for the order. The learned Counsel has relied upon the case of **Dr. Nighat Bibi vs Secretary, Ministry of Health** (2009 SCMR 775) in support of his contention, wherein absorption was saved. He cited the case of **Najam Abbas vs Superintendent of**

**Police** (2006 SCMR 496) in support of his contention that no officer should be penalized for the act of functionaries.

**C.A. No.404, 405 of 2011**

Ali Hassan Brohi (CA404/2011)  
 Ali Azhar Baloch (CA.405/2011) v. Province of Sindh etc  
 by Syed Iftikhar Hussain Gillani, Sr.ASC

5. The learned Counsel contended that he is in complete agreement with the judgment striking down the legislative instruments, however, the Sindh Government has misled this Court, and the Court believed the submissions made and passed the order. The Counsel submitted that this petition challenges para No.175 of the judgment under review.

6. The learned Counsel contended that on 19.09.1989, the Appellant Ali Hassan Brohi was appointed in BS-18 as Director in Ministry of Sports and Tourism, Government of Pakistan. After 5 years, on 02.03.1994, the Government of Sindh requisitioned his services on deputation in BS-18. On 07.11.1995, he was absorbed as Deputy Secretary in Provincial Secretariat Service (PSS).

7. The learned Counsel contended that the issue before the Court relates to the legality of initial absorption of the Appellant. He submitted that this Court assumed jurisdiction in the matter under Article 184(3) of the Constitution, to examine the vires of the legislative instruments, therefore, this Court could not strike down the provisions which were not challenged before it. He further contended that the judgment should be applied prospectively.

8. The learned Counsel submitted that the instruments struck down were enacted to protect absorptions, however, the job

of the Court is to strike down the instruments and not to deal with the cases of absorptions that have already taken place. He next contended that the date of 1994 was not in the mind of the author judge and there is no proof as to how the AG Sindh arrived at this cut off date. Counsel submitted that the constitutional duty of this Court ends the moment the law is struck down and what happens afterwards would not be the concern of this Court. The Counsel placed reliance on the case of (PLD 2013 SC 829) in support of his contention that the judgment has to be prospective.

9. The learned Counsel next referred to the Sindh Civil Servants (Regularization of Absorption) Act, Act 17 of 2011, and submitted that the cut off date of 1994 is arbitrary, based on the statement made by the learned AG Sindh. All illegal absorptions should be declared invalid, and not only those made post-1994. The Counsel contended that the Provincial Government has misled the Court and out of 1161 employees who were absorbed, in the similar manner, the action has only been taken against 278 Officers.

### **C.A. No.495 of 2013**

Rasool Baksh Phulpoto v. Province of Sindh  
by Mr. Miangul Hassan Aurangzeb, ASC

10. The Counsel submitted that the Appellant has retired five months ago but his pension has been stopped. He contended that when the judgment under review was pronounced, the Appellant was MD of Pakistan Housing Authority and had been appointed in the Federal Government on deputation.

11. The Counsel contended that, in 1973, he was appointed as a teacher in the Directorate of Technical Education,

Government of Sindh in BS-16. In May 1988, he was transferred and posted as Additional Private Secretary to CM Sindh in BS-16. He next contended that on 26.06.1988, the Federal Government requisitioned his services and he was sent on deputation as PS to Federal Minister Housing. The Appellant applied for the position of Deputy Director, Directorate of Special Education, a fresh appointment on ad hoc basis in BS-18. Then, in 1990, he was selected as Additional DG, Peoples Works Program and was transferred to the Local Government in the same grade. The Counsel contended that the department was devolved to the provinces, thus he became surplus. Thereafter, the CM Sindh wrote a letter to the Establishment Division stating that the Appellant has been absorbed w.e.f 25.05.1991 in the Sindh Government. The Counsel submitted that the Appellant was duly regularized in Provincial Government but has been reverted to the Federal Government under the impugned judgment and is not receiving any pension.

**C.A. No.407 of 2011**

Abdul Ghani Jukhio v. Province of Sindh  
by Mr. Adnan Iqbal Ch., ASC

12. The learned Counsel submitted that on 22.11.1989, the Appellant was appointed as PRO in Directorate of Sindh Kachi Abadi Authority (SKAA) in BS-16. In 1995, he was appointed PRO to Minister Population Welfare in SKAA and the post was upgraded to BS-17 in May 1994. On 18.02.1996, he was appointed PS to Minister for Excise on deputation. He subsequently came back to his parent department from 1997 to 1999 as PRO. On 01.09.1997, he was promoted to BS-18 and was then appointed as Deputy

Director Coordination in SKAA. On 16.12.2002, he was appointed Town Municipal Officer in S&GAD and was reverted to his parent department in 2003 as Deputy Director Administration. Thereafter, in 2004, he was appointed Director, Field Office of SKAA in BS-19. On 31.01.2007, the Appellant was promoted to BS-19 and on 30.04.2007, he was appointed EDO Jamshoro in Ex PCS cadre. The Counsel contended that on 18.11.2008, the Appellant was absorbed as Additional Secretary in Provincial Secretariat Service (PSS) in BS-19 and his name was placed at the bottom of the seniority list. On 07.03.2011, he was appointed Secretary Mines and Minerals in BS-20.

13. The Counsel submitted that the Appellant is not posted anywhere and his lien with the SKAA has been terminated. He contended that the Appellant is not a beneficiary of any legislative instruments which protect absorptions. These statutes were limited to protect the officers who were on deputation and were subsequently absorbed under the statutes and the Appellant's absorption does not fall under it.

14. The learned Counsel submitted that absorption of the Petitioner is valid not only under Rule 9-A but under Rule 9(1) as well and the appointment procedure provided in these Rules was duly followed. He contended that the Appellant was a Civil Servant since his first appointment and service Rules of SKAA were not framed at that time. He contended that there are two parallel structures: one is the Civil Services and the other posts in connection with affairs of the Province. He contended that he Sindh Kachi Abadi Act was meant for both these servants and if those in Civil Services are allowed to move laterally to Government



departments, those holding posts in relation to affairs of the province should also be allowed to do the same.

15. He next contended that section 26 of the Composition and Cadre Rules of 1954 allows for appointment by transfer of private persons as well. He further contended that Section 7(2)(a) of Public Service Commission Act, 1989, envisages movement from Government Service to Civil Service and he relied on **Hadi Buksh v. Sindh** (1994 PLC (CS) 924) to submit that such movement has been endorsed by this Court. He lastly contended that in **Nemat Ullah Butt v. Government of Punjab** (1988 SCMR 1453), this Court held that there is nothing in the Act that prevents Government from creating additional, separate cadres for Government servants after absorption.

#### **C.A. No.409 of 2011**

Syed Abid Ali Shah vs. Province of Sindh  
by Mr. Asim Mansoor Khan, ASC

16. The Counsel submitted that in 1976, the Appellant was appointed as Management Trainee in the Board of Management, Sindh for nationalized Ghee Industries. On 16.8.1997, he was appointed as Managing Director at Maqbool Co. Ltd. when the Sindh Government requisitioned his services. On 24.10.1997, the Appellant was sent on deputation for 3 years to the Ministry of Industries and Production. On 15.11.1997, he was appointed Cane Commissioner in BS-19. Then on 05.04.1998, he was transferred as DG, Bureau of Supply and Prices, Sindh. Subsequently, on 15.11.1998, he was repatriated to Ghee Corp. and on 14.01.1999, his services were placed at the disposal of Population Welfare department (PWD). On 18.01.1999, he was

appointed as Additional Secretary, PWD and on 09.08.1999, he was absorbed in PWD in relaxation of rules. Then, on 30.09.1999, Ghee Corp. relieved him but, on 18.12.1999, the Government sent a notification for repatriation of the Appellant. However, on 21.12.1999, the Secretary, Sindh Government, submitted that the Appellant has been absorbed therefore he cannot be repatriated.

17. The Counsel submitted that under an amendment to section 8 of the governing statute, the employees of PWD were declared Civil Servants. At the time of the judgment, the Appellant was appointed Secretary Livestock in BS-20. Counsel contended that he was de-notified on 02.07.2013 and repatriated to Ghee Corp. even though he had been merged in the Government of Sindh in PSS and Ghee Corp. was declared defunct. The Appellant retired one year after de-notification on 01.06.2014.

**C.A. No.411 of 2011**

Dr. Aftab Ahmad Malah v. Dr. Naseem ul Ghani  
by Mr. Hamid Khan, Sr. ASC

18. The learned Counsel contended that in the year 2000, the Appellant Dr. Aftab was appointed Dental surgeon in BS-17 in the Ministry of Health. On 05.09.2008, he was promoted as Senior Dental Surgeon in BS-18 on the recommendations of committee and with approval of the competent authority. On 07.10.2008, he was transferred and posted as Deputy Secretary in BS-18 in the Health Department, Government of Sind. Subsequently, on 18.11.2008, he was absorbed and inducted in PSS cadre in the same grade and his name was placed at the bottom of the seniority list.

19. The Counsel contended that competitive examination is not the only channel available for induction of officers, citing Rule 9(1) as an example.

**C.A. No.412 of 2011**

Dr. Muhammad Ali v. Dr. Naseem ul Ghani  
by Mr. Hamid Khan, Sr. ASC

20. The Counsel contended that the Appellant holds a degree of MSc Economics from Bradford University and in Sept. 2003, he received a Doctorate in Business Administration from Florida. He attended National Management Course from NIPA, Lahore and courses at Royal Institute of Public Administration, London.

21. The Counsel contended that on 18.06.1981, the Appellant was appointed as Staff Officer in BS-17 in Agriculture Development Bank of Pakistan (ADBP) and was promoted as Assistant Director ADBP in BS-18. In 1993, he was promoted as Joint Director in BS-19 and in 2001, the post was upgraded to Director. In 2002, Governor of Sindh recommended the Appellant for absorption in the Provincial Government as Secretary Food and Cooperatives. On 12.07.2004, he was posted as Additional Secretary in BS-19 in CM Secretariat on deputation. On 18.02.2005, he was appointed as Special Secretary (BS-20) Implementation in CM Secretariat, w.e.f 17.7.2004 and on 14.03.2006, he was absorbed in PSS. The Counsel contended that at the time of the judgment, the Appellant was on deputation to the Federal Government as Joint Secretary, Drug Regulatory Authority in BS-21. On 20.03.2013, he was promoted to BS-21 on the recommendations of the Provincial Selection Board. The

learned Counsel contended that on 21.12.2006, he was relieved by ADBP due to his absorption in the Provincial Secretariat.

22. The learned Counsel submitted that the subject matter of the writ petition pertains to the terms and conditions of service, therefore, the jurisdiction of the High Court is barred under Article 212 of Constitution, read with section 4 of Sindh Service Tribunal Act. By filing a writ of quo-warranto, a question relating to terms and conditions of service can only be determined by the Tribunal.

23. The learned Counsel submitted that the Learned Judges of High Court of Sindh ignored Rule 9(1). He contended that the appointment of Dr. Aftab Malah was validly made under Rule 9(1) and that of Dr. Muhammad Ali was also validly made under section 24, as their services were requisitioned with the approval of the competent authority. Counsel submitted that appointment of Dr. Aftab Malah satisfied all three conditions laid down under Rule 9(1) and that Rule 6A relates to promotion and not appointment by transfer. Counsel submitted that lateral movement is permitted but it is governed by certain rules, which have been followed.

24. The learned Counsel contended that their remedy lies before the Service Tribunal, and not before the High Court; and this judgment goes beyond the jurisdiction of the High Court. While placing reliance on **Superintendent Engineer Highways v. Muhammad Khurshid** (2003 SCMR 1241), Counsel submitted that exclusive jurisdiction pertaining to terms and conditions of service lies with the Tribunal. He next contended that in **Managing**

**Director v. Ghulam Abbas** (2003 PLC (CS) 796), it was held that Service Tribunal could hear matters of absorption.

25. The Counsel contended that a writ of quo warranto is not available to one set of Civil Servants against another set of Civil Servants. He submitted that if a colleague is allowed to challenge another colleague's appointment, there would be no end to this; there will be anarchy in the Civil Service structure. He placed reliance on **Dr. Azeem ur Rehman v. Government of Sindh** (2004 SCMR 1299) and contended that if an appointment has been made and there is something wrong with such appointment, the Tribunal is the appropriate forum to challenge it.

26. The learned Counsel submitted that when they filed a writ of quo warranto, the Petitioners were bound to show as to how they were aggrieved, which they have failed to do. The learned Counsel contended that these writ petitions were hit by the principle of laches. Dr. Aftab Malah was transferred in 2008 and Dr. M. Ali was appointed in 2006, while these petitions were filed in May 2009. He placed reliance on the case reported as (2012 SCMR 280).

27. The learned Counsel referred to section 24 of the Civil Servants Act. The Counsel contended that the Appellant was highly qualified and talented and there is always an exception available in the Rules. The Counsel next contended that the principle of locus poententiae is attracted as the appointment was validly made, he was qualified and the appointment had taken effect, and he placed reliance on **Sarosh Haidar v. Muhammad Javaid** (PLD 2014 SC 338). He further relied on the case reported as (PLD 1969 SC 407)

where it was held that the matter relating to salaries was against law but since it had taken effect, it could not be taken back.

28. The learned Counsel submitted that the High Court could not consider Rule 9(1) since appointment could also be made under it. The learned Counsel relied on **Raunaq Ali's case** (PLD 1973 SC 236) in which a distinction was made between acts done without jurisdiction and those done improperly or with some irregularity. The Counsel contended that appointments have been made and have taken effect. In such instances, jurisdiction should be exercised very carefully. He also relied on **Muhammad Hussain Munir v. Sikandar** (PLD 1974 SC 139). The Counsel lastly submitted that legal principles laid down by this Court must operate prospectively and he placed reliance on (2009 SCMR 1169).

29. The learned Counsel, Ch. Afrasiab Khan, contended that the cutoff date of 1994 was not determined in vacuum and was based on data. The notification, dated 02.11.1994, at para. 6 of the Sindh High Court judgment, stated that 10% of appointments shall be made by transfer from other departments. This is why the learned AG Sindh submitted the date of 1994. Furthermore, the appointments placed on record before the Court were those made in 1994 and onwards, that is why the judgment relates to the appointments made after 1994.

30. The Counsel next contended that the judgment should operate retrospectively as there are at least four conclusive judgments of this Court in support of this point, including **Dr. Mobashir Hassan's case.** (supra).

31. The Counsel lastly contended that the nomenclature of the legislative instruments which were challenged manifestly admit in their content that all absorptions were illegal, that is why it was called “Regularization of Absorption”. Regularization is only done of that which is wrong, illegal and void.

32. Mr. Sarwar Khan, learned Addl. Advocate General while referring to para. 2 of the judgment of the High Court, has contended that there was no absorption in PSS group prior to 1994. He next submitted that his contentions are the same which were made before the High Court, and are given in para. 25 of the judgment.

33. We have heard the learned Counsel for the Appellants and have perused the record. The Appellants were absorbed on different dates in Sindh Government. During the pendency of the Appeals, the issue of absorption in service, post and cadre was agitated in Constitution Petition No.71 of 2011 and other Petitions, which were heard and decided by the judgment dated 12.6.2013, whereby the ‘absorption’ has been declared unconstitutional, therefore, these Appeals will have no bearing which have been preferred against the judgment of the High Court of Sindh dated 2.4.2011 in CP.D-932/2009 (*Dr. Nasimul Ghani Sahito vs. Province of Sindh etc*) in which the learned High Court while examining the scope of Section 24 of the Act has held that the authority was not authorized, in law, to absorb the Appellants in different cadres, service or posts. Since we have already decided the issues raised in these Appeals in the aforesaid judgment, review of which has also been dismissed, holding that absorption can neither be ordered under Section 24 of the Sindh Civil Servants Act 1973, nor under

Rule 9(1) of the Sindh Civil Servants (Appointment, Promotion and Transfer) Rules, 1974, and is violative of the fundamental rights of the Civil Servants, consequently, these Appeals have lost their significance and are accordingly dismissed.

**Approved for reporting**

Sohail/Saeed/\*\*

Announced in open Court on 05.01.2015 at Karachi.