

**IN THE SUPREME APPELLATE COURT GILGIT-BALTISTAN,
GILGIT.**

Before:-

**Mr. Justice Dr. Rana Muhammad Shamim, Chief Judge.
Mr. Justice Javed Iqbal, Judge.**

Civil Appeal No.27/2017

In

CPLA No. 89/2017.

Ministry of Kashmir Affairs and Gilgit-Baltistan Division Islamabad
& others. **Petitioners.**

Versus

Saeed Gul & another.

Respondents.

PRESENT:-

1. Mr. Asadullah Khan advocate alongwith Mr. Ali Nazar Khan Advocate-on-Record, Mr. Ali Akbar Khattak and Mr. Sudair Khattak, Deputy Secretaries, KA & GB Division at Islamabad for the petitioners.
2. Mr. Johar Ali Advocate-on-Record alongwith Mr. Saeed Gul respondent No.01 for the respondents.

DATE OF HEARING: - 13. 07.2018.

DATE OF DETAIL JUDGMENT: - 23.07.2018.

JUDGMENT.

Dr. Rana Muhammad Shamim, CJ..... This Appeal has been directed against the impugned order dated 28.02.2017 in Writ Petition No. 84/2016 passed by the learned Chief Court whereby the said Writ Petition filed by the respondents was allowed with the directions to the petitioners to appoint the respondents as Section Officers (BPS-17) in Gilgit-Baltistan Council Secretariat Islamabad. The petitioners being aggrieved by and dissatisfied with the said impugned judgment of the learned Chief Court filed this Appeal. This Court vide order dated 30.06.2017 granted leave to appeal.

Consequently, notices were issued to the respondents and the case was heard on 13.07.2018.

2. Briefly, the facts of the case are that the services of the respondents were posted/transferred to the Gilgit-Baltistan Council (referred herein as Council) on deputation as Section Officer BPS-17, from the Education Department Gilgit-Baltistan and National Database and Registration Authority (NADRA) respectively. Later on, the respondents submitted applications to the competent authorities to absorb their services in Gilgit-Baltistan Council on permanent basis which was declined by the authorities of the Council. Consequently, the petitioners feeling aggrieved from the refusal of their plea filed Writ Petition No. 84/2016 in the learned Chief Court contending therein that they are entitled to be absorbed in Gilgit-Baltistan Council against the posts held by them on deputation basis. Upon hearing, the Writ Petition of the respondents was allowed, hence, this petition for leave to appeal.

3. The learned Counsel for the petitioners submits that respondents in their petition have concealed the facts of their being posted in the Education Department Gilgit-Baltistan and National Database and Registration Authority (NADRA) respectively before deputed in Gilgit-Baltistan Council for a specific period. They cannot be absorbed on permanent basis only on the ground that they are the domiciled citizen of Gilgit-Baltistan and/or they are holding the said posts on deputation basis. Per learned counsel, the posts held

by the respondents are gazetted posts which can only be fulfilled on vacant posts by Federal Public Service Commission (FPSC) after conducting Competitive examination on the basis of all Pakistan quota. The respondents were posted in Gilgit-Baltistan Council on their application purely on political basis and they cannot be merged/adjusted. The respondent No.02 namely Sajid Wali is the employee of National Database and Registration Authority (NADRA) and he does not fall in the category of Civil Servant at all, therefore, his claim to be inducted on permanent basis is baseless and illegal. No Civil Servant of a Non-cadre post can be transferred/ posted or appointed /inducted to a cadre post which is meant for recruitment through Competitive Process by FPSC. The deputationists can only be inducted/absorbed by the Departments on need basis subject to fulfillment of essential legal codal/formalities without affecting the service rights of the existing line officers/officials. No individual can compel the department to get inducted himself/herself by violating the Service Rules. He submits that the learned Chief Court fell in error by allowing the Writ Petition on the basis of conceding statement of the learned Deputy Attorney General for Pakistan at Gilgit. It is time and again has held that counsel can concede only on facts but not on law. He further submits that the comments on behalf of the petitioners in the learned Chief Court was not approved by the competent authority but it was maneuvered by the respondents with the collusion & connivance with Gilgit-Baltistan

Council Staff/officials. He submits that the learned Deputy Attorney General for Pakistan at Gilgit is not a Post Office but he must have argued and give his independent point of view on legal propositions as to whether the respondents who were on deputation in another department/authority in lower grades can be transferred on their own applications as per rules laid down in the ESTACODE. Whereafter, they can be absorbed/ merged in Gilgit-Baltistan Council on higher grade in BPS-17. The learned Deputy Attorney General for Pakistan at Gilgit failed to perform his duties as law officer of the Federation. He prays that the impugned order passed by the learned Chief Court may graciously be set aside being passed contrary to the law and facts of the case. While saying so he relied upon a case law of the Hon'ble Supreme Court of Pakistan reported as 2013 SCMR 1752.

4. On the other hand, the learned counsel for the respondents contends that respondents applied for induction /absorption as Section Officer on the basis of appointment by transfer being the citizen of Gilgit-Baltistan against the quota allocated for Gilgit-Baltistan in terms of 5th Schedule of The Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009. The said application of the respondent was declined by the petitioners. They were discriminated as they had already inducted/absorbed many officers of Inland Revenue from KPK in Gilgit-Baltistan Council i.e. in the office of Accountant General Gilgit-Baltistan

through appointment by transfer/posting. Both the said Departments are attached department of Gilgit-Baltistan Council. The respondents have not been treated equally amongst equals, hence, they were constrained to file the Writ Petition in the learned Chief Court which upon hearing was rightly allowed. Per learned Counsel, the said Writ Petition has not only been allowed on the basis of No Objection by the learned Deputy Attorney General for Pakistan at Gilgit but the petitioners in their Para-wise comments have also admitted that they have inducted/absorbed many other officers/officials on permanent basis. Mr. Sadher Khattak, Deputy Secretary, Gilgit-Baltistan Council who was posted/transferred from the Office of Accountant General KPK to the Council and his services have been inducted on permanent basis later on. Similarly, one Mr. Mehdi Hussain Employee of Pakistan Meteorological Department Islamabad has also been transferred/posted as UDC BPS-09 in the Department of Inland Revenue Gilgit-Baltistan Council. He contends that the impugned order is a consent order and no appeal can be filed against such consent decree/order. He prays that the impugned order passed by the learned Chief Court may pleased be maintained by dismissing the appeal filed by the petitioners.

5. We have heard the learned counsels for the respective parties at length, perused the material on record, gone through the impugned order dated 28.02.2017 in Writ Petition No. 84/2016

passed by the learned Chief Court and the case law referred by the learned counsel for the petitioners. The perusal of the record transpires that the services of the respondents were transferred from the Education Department Gilgit-Baltistan and National Database and Registration Authority (NADRA) respectively on transfer/deputation basis. Later on, the respondents made request for induction of their services into permanent footing which was declined by the competent authorities of the Gilgit-Baltistan Council. The respondents claimed for absorption/induction on permanent basis in lieu of their deputation/transfer as they are citizens of Gilgit-Baltistan and had vested right to be adjusted on permanent basis in Gilgit-Baltistan Council. The competent authorities have to deal with their cases as per law and Service Rules. In view of the prescribed Service Rules/law even otherwise such powers cannot be exercised by the competent authorities arbitrarily except in accordance with law. As per Estacode that a person, who is transferred or appointed on deputation, must be a Civil 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 transfer or deputation in Government must have matching qualifications and expertise in the field with required experience. In absence of these conditions, the Government department cannot appoint/absorb or adjust anyone by transfer or

deputation to the Civil Servant without process of law and Service Rules. The case of Mr. Sudher Khattak and of Mr. Mehdi Hassan etc are not before us as such we do not want to discuss and comment their cases being past and closed chapter.

6. We have also perused the relevant portions of Estacode i.e. SI No. 26, Explanation of term “Deputation” SI No. 27 of Government Servants-period of deputation, SI No. 27-A delegation of power in regard to deputation of Government Servants, SI No. 27 B deputation of Government Servant, SI No. 28 absorption of appointment. Which are reproduced as under:-

“Quote”

SI. 26. Explanation of the Term “Deputationist”.

Deputation in Pakistan:- C.R.R. 77: An officer is said to be in on deputation when he is detached on special temporary duty for the performance of which there is no permanently or temporary sanctioned appointment.

According to the practice in vogue, a government servant begins to be regarded as a “deputationist” when he is appointed or transferred, through the process of selection, to a post in a department or service altogether different from the one to which he permanently belongs, he continues to be placed in this category so long as he holds the new post in an officiating or a temporary capacity but cease to be regarded as such either on confirmation in the new post or on reversion to his substantive post.

SI No. 27. Deputation of Government Servants-period of Deputation.

Maximum period of deputation: in continuation of Establishment Divisions Circular D.O. letter No. 4/I/84-R-I (A) /20-11-1986 (Annex), conveying the directives of the Prime Minister requiring the period of appointment to be clearly specified in each case

of contract, secondment or deputation, the following policy is laid down for deputation of Government Servants:-

- i. The normal period of deputation for all categories of Government Servants would be three years. This would be extendable by two years with the prior approval of the competent authority.
- ii. All cases of initial deputation of Government Servants holding posts in BPS-17 and above would be referred to the Establishment Division for approval of the competent authority. The initial deputation in the case of Government Servants holding posts in BPS-16 and below would be approved by the Secretary of the administrative concerned/head of the department not below BPS-21.
- iii. The competent authority to grant extension in deputation beyond the initial period of three years, would be as below:-
 - a. Government Servants in BPS-1 & 2. Head of the Department.
 - b. Government Servants in BPS 3 to 16 Secretary of the Admin. Ministry/Head of the Department not below BPS-21.
 - c. Government Servants in BPS 17 to 19 Secretary of the Admin. Ministry concerned.
 - d. Cases of Government Servants in BPS-20 & above would be referred to Establishment Division.
- iv. On the completion of the maximum period of five years, both the borrowing and the lending organizations should ensure immediate repatriation of the deputationist.
- v. In case it is not possible to repatriate a person to his parent organization for compelling reasons, the case should be referred to the Establishment Division before the expiry of the maximum period of five years fully explaining the circumstances due to which immediate repatriation is not possible and measures taken to obtain or groom a replacement as early as possible.
The above policy would also be applicable to transfer on Foreign Service in terms of FR 9(7) and rules contained in Chapter XII of the fundamental Rules.
Ministers/Division are requested to bring these instructions to the notices of their attached departments/subordinate offices/corporations and autonomous bodies etc.
The existing instruction on this subject issued vide Estt. Divisions O.M No. 1/28/75-D.II (CV), dated 04.11.1980 (SI No. 28) and O.M. No 22/47/82-R-3, dated 12.04.1983 stand modified to the above extent.

SI No. 27-A

Delegation of power in regard to deputation of Government Servants.

In order to ensure expeditious proceeding of cases of deputation, the Chief Executive has been pleased to delegate to the Secretaries of administrative Ministers/Divisions and heads of attached departments and subordinate officers not below BPS-21. Powers to approve initial deputation of officers up to BPS-19 belonging to cadres and posts under their administrative control for a period of three years. The above powers are subject to observance of the following guidelines:-

- i. Where a post proposed to be filled in reserved under the rules departmental promotion appointment on deputation may be made only if the department certifies that no eligible person is available for promotion or the eligible person is found unfit for promotion by the appropriate DPC/Selection Board. In such cases deputation may be approved till such time a suitable person becomes available for promotion.
- ii. In case of posts reserved for initial recruitment, appointment on deputation may be made only as temporary arrangement, pending joining of the nominee of the FPSC, and subject to the condition that such appointment shall be made only after a requisition has been placed with the FPSC.
- iii. In cases where a post is tenable through appointment by Deputation the normal period of deputation should be three years and no extension beyond three years may be allowed without prior approval of the Establishment Division.
- iv. No officer should be sent on deputation unless he has completed three years service in his parent department after return from an earlier deputation.

SI No. 27-B

Deputation of Government Servants.

Reference Establishment Division O.M. No. 1/28/75-D.II/R-3/R.I, dated 18.2.1987 (SI No. 27) as amended vide OM of same No. dated 11.04.2000 (SI No. 27-A) on the above subject. The term "Deputation as defined by the Supreme Court of Pakistan vide PLD 1981 SC 531 means that a Government Servant begins to be regarded as "deputationist" when he is appointed or transferred through the process of selection to a post in a department or service altogether different the one to which he permanently belongs, he continues to be placed in this category so long as he holds the new post in an officiating or a temporary capacity but ceased to be regarded as such either on confirmation in the new post or on reversion to his substantive post.

According to the judgment of Federal Service Tribunal in appeals No. 39 & 40 (R) (CS)/2003 (M/s) Liaqat Ali Choudhry and others versus Federation of Pakistan, upheld by the Supreme Court of Pakistan, as interpreted by the law, justice and Human Rights Division, all the incumbents who are deputed to work in an agency foreign to the

service to which they belong, are entitled to draw Deputation Allowances.

In view of the position stated above, the Finance Division have issued orders/instructions vide their O.M. No. F.5 (8) R-2/2007 stating that deputation allowance may be granted to all officers/officials of ministries/divisions/departments who have been transferred and posted on deputation basis or under section 10 of Civil Servants Act 1973, to a post in a department or service altogether different from the one to which they permanently belong.

In view of the above Ministries/Divisions are advised that henceforth notifications/orders issued by them regarding the deputation of their officers/officials to a department/office altogether different from the one which they actually belong must invariably states that:

- i. The incumbent will be entitled to deputation allowance.
- ii. The period of deputation shall be three years extendable by two years, with the approval of the competent authority.

SI. No. 28.

Deputation period-absorption of deputationists.

In constitution of Establishment Division O.M. of even No. dated 10.1979 (Annex), it is stated that:

- i. The normal deputation period, for all categories/grades of Government Servants shall be three years extendable for another two years with prior permission of the Establishment Division. A Government Servant shall not, however, remain on deputation to another Government organization or an autonomous body/corporations etc for more than five years.
- ii. If a person is on deputation to a government organization, and has complete the maximum tenure of five years, he must revert or be reverted by the borrowing office to his parent/lending organization of the expiry of that period, otherwise, the audit office concerned shall not make payment of salary and allowances to him beyond the date of expiry of five years, unless specifically authorized by the Establishment Division.
- iii. If a person is on deputation to an autonomous organization/corporation etc, and has completed the maximum tenure of five years, it will obligatory for that person to report back to his parent/lending organization on the expiry that period irrespective of his being relieved by the borrowing corporation/body etc, failure to report back unless specifically authorized otherwise by the Establishment Division will be construed as "misconduct" and make him liable to disciplinary action under the Government Servant (Efficiency and Discipline) Rules, 1973.
- iv. In case a deputationist is proposed to be absorbed permanently in the borrowing office (either a Government Organization or a Corporation Etc), such a proposal shall be initiated by the borrowing office atleast six months before the expiry of the deputation period of the deputationist concerned. Such a proposal, with the written

consent of the deputationist, shall be made by the borrowing office to the lending office (or Parent office of the deputationist) which shall convey its decisions (if necessary, in consultation with the Establishment Division) to the borrowing office as well as the deputationist, by the expiry of the terms of his deputation. In the event of non acceptance of the proposal, the individual shall revert back to his parent office as indicated at (2) and (3) above.

SI NO. 29

Deputation Not a Method Appointment.

Reference Establishment Division O.M. No. 1/28/75-D.II/R-3/R.I, dated 18.2.1987 (SI No. 27), wherein the normal period of the deputation for all categories of Government Servants had been fixed as three years, extendable by another two years with the prior approval of the competent authority. Under the said instruction Secretaries of the Ministries/Divisions concerned were authorized to grant extension in deputation period beyond the initial period of three years in respect of Government Servants holding posts BPS-17 to BPS-19.

It has been observed, however, that there is growing tendency to resolve to postings through deputationist despite the fact that deputation is not a normal prescribed method of appoint as under the Civil Servants (appointment, Promotion and Transfer) Rule 1973, three methods of appointments are required to

be made either by promotion or by initial appointment or by transfer. The Method of appointment to post is also described in the Recruitment Rules. Filling up the posts through deputation, if not provided so in the recruitment Rules, leads to following adverse implications:-

- (i). in case of promotion posts, the promotions of departmental personnel are delayed/stopped.
- (ii). In case the post is required to be filled through initial appointment, quota of a particular province is affected.

In order to bring the deputation policy in conformity with the present policy of postings and transfers circulated vide Establishment Division's O.M. No. 10/10/94-R-2, dated 22.03.1994, (SI No. 3) and also to discourage the increasing tendency of posting through deputation, it has been decided that, in future, the deputation period will be limited to three years only. A maximum two years extension in the deputation period will be considered only in exceptional cases, in the public interest, and with the prior approval of the Establishment Division in all cases Government Servants in BPS-17 and above. The extension cases shall be forwarded to the Establishment Division atleast six months before the expiry of the three-year deputation period and with proper justification for the proposal. However, no deputation proposals will be entertained which will adversely affect the method of appointment to the post as laid down in the recruitment rules. Accordingly all such proposals must invariably be accompanied by a formal assurance signed by atleast the joint Secretary (Admin) to that affect.

Ministries/Divisions are requested to also bring these instructions to the notice of their Attached Department, Subordinate Offices, Corporations, Autonomous Bodies, etc, under their administrative control, for guidance/strict compliance. It may pleased be noted that arrangements have been made in consultation with the Auditor General's Office whereby payment of emoluments etc, to those on deputation will be stopped forthwith, immediately following the completion of the three years deputation period, unless the Establishment Division's prior approval has been obtained and conveyed to the concerned Audit Circle.

The existing instructions on this subject issued vide Establishment Division O.M. No. 1/28/75-D.II/R-3/R.I, dated 18.2.1987 (SI No. 27), stand modified to the above extent.

“Unquote”

7. The learned counsel for the petitioners also referred Office Memorandum No. 1/59/2013-Lit-IV dated 31.01.2014 issued by the Government of Pakistan, Cabinet Secretariat Establishment Division which is reproduced as under:-

“Quote”

**GOVERNMENT OF PAKISTAN
CABINET SECRETARIAT,
ESTABLISHMENT DIVISION**

No. 1/59/2013-Lit-IV.

Islamabad 31.01.2014.

OFFICE MEMORANDUM.

Subject:- **CRL. ORIGINAL PETITION NO. 89/2011 CMA 309-K/2012, CMA 310-K/2012, CRL. MAS-42-K/2012, 80-K/2012, 87-K/2012, 13-K/2013, CMA-2453/2013, CRL.MAS.29-K/2013, CMA-131-K/2013, CRL.MAS-185-K/2012, 225/2013, 226/2013, 227/2013, CMAS.244-K TO 247-K/2013, 257-K & 258-K/2013, CRL-MA. 263/2013, CRLMA.282 IN CRL.ORIGINAL PETITION NO. 89/2011 (2013/SCMR/1752).**

The undersigned is directed to say that the Hon'ble Supreme Court of Pakistan had passed judgment on 12.06.2013 on the subject petition clubbed with a number of other petitions and had ordered that a copy of this Judgment be sent to all the Chief Secretaries of the Provinces as well as the Establishment Secretary with the directions to streamline the service Structure of Civil Servants in line the principle in line with this judgment.

It was expected that aforementioned judgment was down loaded by all ministries/Divisions for compliance. However, for the sake of convenience the following guidelines /principles are highlighted:-

The Hon'ble Court has declared the following practices 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 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.

- (iii). Introduction of any validation law in the nature of multiple or parallel legislation on the subject of service law.
- (iv). Benefit of "Absorptions" extended since 1994 with or without backdated seniority are declared ultra vires of the constitution.
- (v). The re-employment /re-hiring of the retired Civil Government servants being violative of the constitution are declared nullity.

The apex Court of Pakistan has further held that:-

- (a). Non-Civil Servant can be transferred and appointed by way of deputation to any cadre. The procedure provided under ESTACODE has been approved by the Supreme Court of Pakistan in the case of Muhammad Arshad Sultan.
- (b). No civil Servant of a non-cadre can be transferred out of cadre to be absorbed to a cadre post which is meant for recruitment through competitive process.
- (c). The procedure provided under ESTACODE requires that a person who is transferred and appointed on deputation must be a govt servant and such transfer should be made through the process of selection. The borrowing Govt has to establish the exigency in the first place and then the person who is being transferred/placed on deputation in Govt must have matching qualification, expertise in the field with required experience.
- (d). An employee holding a post under any authority or corporation, body or organization established by or under nay 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 status of a Civil Servant.
- (e). It is settled principle of law that if the right of a promotion is not blocked by re-employment then such powers can be exercised , then too in exception 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 for exam at all), hence, are violative of the Article 14 of the Constitution.
- (g). Principle of locus Poententiae is the power of receding till a decisive step is taken but it is not a principle of law that order once passed becomes irrecoverable and past and

closed transaction. If the order is illegal then perpetual rights cannot be gained on the basis of 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.

All Ministries/Divisions and Department/ Organization under them are requested to comply with the judgment of the apex court in letter and spirit.

--Sd--

**Muhammad Shakeel Malik
Joint Secretary**

All Ministries/Divisions.

“UNQUOTE”

9. In pursuance of the aforementioned case law and Office Memorandum thereto relied upon by the learned counsel for the petitioners, admittedly, the respondent No.01 has not gone through the process as laid down in the said judgment and/or as provided under relevant service rules/law. He was an Assistant in lower grade in Education department Gilgit-Baltistan cannot be merged or adjusted in higher grade. Neither his qualifications & experience are matching with the criteria fixed for the post of Section officer (BPS-17) nor his appointment has been made through the process of selection. He has got no vested rights to be absorbed/inducted in lieu of his transfer or on deputation on his own application. Likewise, the respondent No.02 namely Sajid Wali son of Nusrat Wali, being an employee of an Authority on deputation does not even fall in the definition of a Civil Servant; hence, his transfer/posting on deputation & his subsequent absorption/adjustment is illegal. In our considered view, the

transfer of both the respondents in Gilgit-Baltistan council whereafter their absorption/adjustment in BPS-17 is illegal, void ab-initio and without lawful authority. The impugned order passed by the learned Chief Court is not sustainable being passed contrary to the Service Rules & Law. The case law referred by the learned counsel for the petitioner is applicable.

10. In view of the above discussions, this appeal was allowed by setting aside the impugned order dated 28.02.2017 passed in Writ Petition No. 84/2016 by the learned Chief Court vide our short order dated 13.07.2018. These were the reasons for the said short order passed by this Court.

11. The appeal is allowed in above terms.

Chief Judge.

Judge.