

Service Case: Contract Employees - 3 member

CERTIFICATE OF THE COURT BY READER

176

C.P.No. 5387/2018

Qurban Ali & Ors. vs Province of Sindh & Ors.

SINDH HIGH COURT

Composition of Bench.

Single/D.B.

Mr. Justice Muhammad Karim Khan Agle

Mr. Justice Omar Sini

Mr. Justice Shamsuddin Abbasi

Dates of hearing: 23 & 30th Sept, 2018

Decided on 08-10-18

(a) Judgment approved for reporting.

Yes
No

KJR

CERTIFICATE

Certified that the judgment */Order is based upon or enunciates a principle of law */decides a question of law which is of first impression/distinguishes/over-rules/ reverses/explains a previous decision.

*Strike out whichever is not applicable.

NOTE:—(i) This slip is only to be used when some action is to be taken.

(ii) If the slip is used, the Reader must attach it to the top of the first page of the judgment.

(iii) Reader must ask the Judge writing the Judgment whether the Judgment is approved for reporting.

(iv) Those directions which are not to be used should be deleted.

SGP., Kar.—L (iii) 1459—5,000—6.93—T.S.S.

IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR.

C. P. No.D- ³¹⁷⁰ of 2013.

28-10-2013
[Signature]
 28/10

1. Qurban Ali S/O Arbab Ali Channa,
2. Saleem Ahmed S/O Noor Muhammad Samoo,
3. Shoukat Ali S/O Muhammad Moosa Mallah,
4. Aurangzeb S/O Haji Ali Hassan Tunio,
5. Zulifqar Ali S/O Rahmatullah Khaskheli,
6. Mazhar Ali S/O Shamsuddin Sial,
7. Akhlaque Hussain S/O Muhammad Liaque Solangi,
8. Misri Khan S/O Jumo Khan Bhurt,
9. Chanesar S/O Allah Obhayo Hullio,
10. Shahid Hussain S/O Qadir Bux Bhatti,
11. Muhammad Arshad S/O Bashir Ahmed Kamboh,
12. Ashfaque Ahmed S/O Qurban Ali Dehraj,
 Mithal Khan son of Khair Mohammad Panhwar.
 All R/O Taluka Mehrabpur & Kandiaro,
 District Naushehro Feroze.....Petitioners

VERSUS

1. P.O. Sindh, through Chief Secretary,
 New Sindh Secretariat Karachi.
- Secretary, Fisheries & live stock,
 Government of Sindh, Barrack No.90,
 Opposite Sindh Assembly Building Karachi,
3. — Secretary, Planning & Development Department,
 Government of Sindh, Karachi,
4. — Director General Fisheries,
 Government of Sindh, at Barracks
 No.50, Pakistan Secretariat Karachi,
5. — Director Research & Development Fisheries
 Department, Government of Sindh,
 At Barrack No.50. Pakistan Secretariat Karachi,

28/10/13
 DISPATCHER
 Office of the
 Director General Sindh
 High Court Building
 Sukkur

6. ✓ Director Fisheries Inland, Thandi Sarak
Hyderabad,
7. ✓ Director Fisheries, Sindh, Hatcheries and Training,
Government of Sindh, Hyderabad,
8. ✓ Section Officer (General) Fisheries & Live Stock
Department Government of Sindh Karachi..... Respondents

**CONSTITUTION PETITION UNDER ARTICLE 199
OF THE CONSTITUTION OF ISLAMIC REPUBLIC
OF PAKISTAN 1973.**

That petitioners named above respectfully begs to submit as under:-

1. That the petitioners are respectable and law abiding persons and they resides at above mentioned address.
2. That on 16-11-2009 the petitioner No.1 was appointed as Pump Operator (BPS-3), on 1-9-2009 the petitioner No.2 was appointed as Plumber (BPS-3), on 1-10-2009 the petitioner No.3 was appointed as Fisher Man / Laboror (BPS-1), on 1-9-2009 the petitioner No.4 was appointed as Electrician (BPS-7), on 1-8-2009 the petitioner No.5 was appointed as Chokidar / watchman (BPS-1), on 12-12-2009 the petitioner No.6 was appointed as Fisherman / Labourer (BPS-1), on 1-9-2009 the petitioner No.7 was appointed as Naib Qasid (BPS-1), on 1-9-2009 the petitioner No.8 was appointed as Chowkidar/Watchman (BPS-1), on 10-2-2010 the petitioner No.9 was appointed as Lab Attendant (BPS-1), on 1-9-2009 the petitioner No.10 was appointed as Fisherman / Labourer (BPS-1), on 29-9-2009 the petitioner No.11 was appointed as Fisherman / Labour (BPS-1), on 01-10-2009 the petitioner No.12 was appointed as Generator Operator (BPS-9) in Fisheries department for the period of 1 year on temporarily basis. Photostat

IN THE HIGH COURT OF SINDH AT KARACHI

C.P. No.D-5397 of 2019.

Present:

Mr. Justice Mohammad Karim Khan Agha

Mr. Justice Omar Sial.

Mr. Justice Shamsuddin Abbasi.

Petitioners: Qurban Ali and others through Mr. Ghazanfar Ali Jatui, Advocate.

Respondents: The State through Mr. Abdul Jaleel Zubedi, Assistant Advocate General a/w Mr. Muhammad Aslam Ansari, Director of Fisheries.

Dates of hearing: 23.09.2019 and 30.09.2019

Date of announcement: 07.10.2019

ORDER

Mohammad Karim Khan Agha, J. This full bench has been formed by the Hon'ble Chief Justice of this court in order to answer a question of law arising out of two opposing orders passed by two separate Division Benches of this court.

2. In essence, the Fisheries Department Government of Sindh (GOS) appointed 87 persons on contract to carry out an improvement scheme being the "Strengthening and improvement of fish and shrimp hatcheries in Sindh" in 2009-2010 whose contracts were renewed from time to time. The contract employees were finally terminated by an Order dated 19-09-2013 by the Director General Fisheries Sindh GOS with the approval of the competent authority due to non allocation of funds in the aforesaid development scheme (the impugned order).

3. Some of these terminated workers filed a petition at the Sindh High Court Karachi seeking the striking down of the impugned order and their reinstatement and regularization of their services. The bench heard the case and through order dated 26-02-2016 whilst relying on the case of **Dr. Iqbal Jan V Province of Sindh** (2014 PLC (CS) 1153, the Sindh (Regularization

of Ad hoc and Contract Employees) Act 2013 and the fact that the GOS had already established a scrutiny committee to consider the eligibility of petitioners for regularization under the Sindh (Regularization of Ad hoc and Contract Employees) Act 2013 ordered that the petitioners be considered for regularization by the GOS (the Karachi order)

4. A little later on some other petitioners who had also been affected by the impugned order filed a petition before the Sindh High Court at Sukkur essentially seeking the same relief as the petitioners who had filed petitions before the Karachi Bench as discussed above. The Karachi order unfortunately was not brought to the attention of the High Court Division Bench hearing similar petitions in Sukkur. The Sindh High Court Sukkur Division bench took a different view of the matter and through order dated 21-04-2015 the High Court Bench at Sukkur in effect dismissed their petitions on account of jurisdiction. Namely, that since the petitioners were civil servants the High Court could not consider their matter since it fell within the exclusive domain of the Service Tribunal (the Sukkur order)

5. Thus, on the same issue of whether the petitioners who had been appointed as aforesaid on contract by the Fisheries Department GOS could be regularized two different opposing orders had been handed down by this Court.

6. Hence, this larger bench has been formed to decide as a matter of law as to how the petitioners in this instant petition should be treated in the above circumstances.

7. Learned counsel for the petitioners contended that the Sukkur order was per incuriam and that the Karachi order had correctly applied the law. This was because in the Sukkur order it had erroneously found that the petitioners were civil servants and thus were subject to the Service Tribunal when in fact they were not civil servants and their petitions should have been decided by this court in its constitutional jurisdiction. He further submitted that the case of **Dr. Iqbal Jan** (Supra) as cited in the Karachi order had clinched the issue of how contract employees should be treated in terms of the Sindh (Regularization of Ad hoc and Contract

Employees) Act 2013 and that the petitioners in this petition were entitled to the same treatment as the petitioners in the Karachi order as they were a part of the same batch of petitioners who had been terminated by the impugned order. Namely, be considered by the scrutiny committee for regularization. In support of his contentions he placed reliance on **Begum Nusrat Ali Gonda v. Federation of Pakistan and others** (PLD 2013 Supreme Court 829), **Ikram BEI and 524 others v. National Bank of Pakistan through President and another** (2005 SCMR 100), **Board of Intermediate and Secondary Education, Faisalabad through Chairman and others Tanveer Sajid and others** (2018 SCMR 1405), **Ali Azhar Khan Baloch and others v. Province of Sindh and others** (2015 SCMR 456), Sindh Civil Servants Act 1973, Sindh Civil Service Tribunal Act 1973 and Sindh (Regularization of Ad hoc and Contract Employees) Act 2013.

8. On the other hand learned AAG has initially argued that this court cannot hear this petition as the instant petition had already been dismissed on merits vide order of this court dated 08-08-2016.

9. On merits he argued that the Sukkur order had been correctly decided and ought to take preference over the Karachi order although he conceded that the petitioners were not civil servants. He further submitted that by an order dated 17-09-2019 another Divisional Bench of this court had very recently dismissed the petition of similarly placed petitioners in the same batch as the current petitioners in the impugned order to be regularized and as such the instance petitions should also be dismissed. In support of his contentions he has placed reliance on the unreported case of this court of **Qurban Ali and another V Government of Sindh** dated 17-09-2019 and the Sukkur order which in his view had correctly enunciated the law on this matter as opposed to the Karachi order.

10. We have heard the arguments of the learned counsel for the petitioner's as well as learned AAG and have considered the relevant law including the cases cited at the bar.

11. Turning to the issue of maintainability. We have reviewed the file and note that order dated 08-08-2016 did dismiss this petition however the

order was passed in the absence of the petitioners. Even otherwise the order wrongly recorded that this court did not have jurisdiction to entertain the same (as we shall come to later in this order) and in our view the order cannot be termed as one on merit. More importantly, by order dated 11-05-2017 this court restored this petition back to the position it was at when it was dismissed by order dated 08.08.2016. It is to be noted that the Asst. AG was present on the date when the petition was restored and that he made no objection to the same and that order was not appealed which has now attained finality. This issue was also not raised on the last 11 dates of hearing by the AAG. It is also by now well settled that the law requires matters to be decided on merits as opposed to technicalities and as such we find this preliminary objection to the maintainability of the petition to be misconceived and find the petition at least so far as the restoration application is concerned to be maintainable. Whether this court has jurisdiction to hear this matter under Article 199 of the constitution we will now attend to.

12. At the outset we have considered the case of **Qurban Ali** (supra) as relied upon by the respondents and have noted that although this case relates to the same batch of employees as the petitioners who also challenged the impugned order this petition was not decided on merits. Instead it had been dismissed on account of laches since the petitioners had approach this court over 3 years after the impugned order came into force. This is not the case in the instant petition which was filed promptly on 28-10-2013 and as such is not hit by laches.

13. The first issue before us appears to be whether this court has jurisdiction to hear this petition. In our view this will turn on whether the contract employees can be regarded as civil servants or not. If the petitioners fall into the category of civil servants then this court will have no jurisdiction to hear the same and the case of the petitioners will have to be taken up by the Sindh Service Tribunal as per Article 212 of the Constitution. If the petitioners are not civil servants then this court will have jurisdiction to determine the matter under its constitutional jurisdiction under Article 199 keeping in view the facts and

circumstances of this particular case and Article 25 of the Constitution. Although the respondents have conceded that the petitioners are not civil servant we shall by way of abundant caution still consider and determine this issue.

14. Article 212 of the Constitution provides as under:-

212. Administrative Courts and Tribunals (1) Notwithstanding anything hereinbefore contained the appropriate Legislature may by Act [provide for the establishment of] one or more **Administrative Courts or Tribunals to exercise exclusive jurisdiction** in respect of -

(a) matters relating to the terms and conditions of persons who are or have been in the service of Pakistan, including disciplinary matters;

(b) matters relating to claims arising from tortuous acts of Government, or any person in the service of Pakistan, or of any local or other authority empowered by law to levy any tax or cess and any servant of such authority acting in the discharge of his duties as such servant; or

(c) matters relating to the acquisition, administration and disposal of any property which is deemed to be enemy property under any law.

(2) Notwithstanding anything hereinabove contained, where any Administrative Court or Tribunal is established under clause (1), no other court shall grant an injunction, make any order or entertain any proceedings in respect of any matter to which the jurisdiction of such Administrative Court or Tribunal extends:

Provided that the provisions of this clause shall not apply to an Administrative Court or Tribunal established under an Act of a Provincial Assembly unless, at the request of that Assembly made in the form of a resolution, Parliament by law extends the provisions to such a Court or Tribunal.

(3) An appeal to the Supreme Court from a judgment, decree order or sentence of an Administrative Court or Tribunal shall lie only if the Supreme Court, being satisfied that the case involves a substantial question of law of public importance, grants leave to appeal.

15. In the case of **Ali Azhar Khan Baloch v. Province of Sindh and others** (2015 SCMR 456) it was held as under at page 521 paragraph-149:-

"149. Article 212 of the Constitution ousts the jurisdiction of High Courts and civil Courts in respect of the matters pertaining to terms and conditions of civil servants. In other words, the

provisions of Article 212 do not confer a concurrent jurisdiction to civil Courts, High Courts and Tribunals. The ouster contemplated under the said Article is a Constitutional command, and, therefore, of necessity restricts the jurisdiction of civil courts and High Courts on the subject, which squarely falls within the exclusive domain of Tribunals." (bold added)

16. The Preamble to the Sindh Civil Servants Act 1973 reads as under;

**"THE SINDH CIVIL SERVANTS
ACT, 1973
(SINDH ACT NO. XIV OF 1973)**

Karachi, the 5th December, 1973

AN ACT

*to regulate the appointment of persons to, and the
terms and conditions of service of persons in,
the service of Pakistan in connection with
the affairs of the Province of Sindh*

Preamble. -

Whereas it is expedient to regulate by law, the appointment of persons to, and the terms and conditions of service of persons in, the service of Pakistan in connection with the affairs of the Province of Sindh and provide for matters connected herewith or ancillary thereto:

It is hereby enacted as follows:-

1. Short title, application and commencement. 1 (1) This Act may be called the Sindh Civil Servants Act, 1973.

(2) *It applies to civil servants wherever they may be.*

(3) *It shall come into force at once.* (bold added)

17. S.2 (b) of the Sindh Civil Servants Act 1973 defines a "civil servant" as under:

(b) *"civil servant" means a person who is a member of a civil service of the Province or holds a civil post in connection with the affairs of the Province, but does not include-*

(i) *a person who is on deputation to the Province from the Federation or any other Province or authority; or*

- (ii) *a person who is employed on contract, or on work-charged basis, or who is paid from contingencies; or*
- (iii) *a person who is "worker" or "workman" as defined in the Factories Act, 1934 (XXV of 1934), or the Workmen's Compensation Act, 1923 (VIII of 1923).*
- (bb) *deputation" means the posting of a person in accordance with sub-section (1) of section 10-A;*

18. The preamble to the Sindh Service Tribunals Act, 1973 reads as under:-

**"THE SINDH SERVICE TRIBUNAL
ACT, 1973
(SINDH ACT NO. XV OF 1973)**

Karachi, the 5th December, 1973

AN ACT

*to provide for establishment of Service Tribunals
to exercise jurisdiction in respect of matters
relating to the terms and conditions of
service of civil servants.*

Preamble. -

Whereas it is expedient to provide for the establishment of Administrative Tribunals, to be called Service Tribunals, to exercise exclusive jurisdiction in respect of matters relating to the terms and conditions of service of civil servants, and for matters connected therewith or ancillary thereto:

It is hereby enacted as follows:-

1. Short title, commencement and application. (1) *This Act may be called the Sindh Service Tribunal Act, 1973.*

(2) *It shall come into force at once.*

(3) *It applies to all civil servants wherever they may be.* (bold added)

19. S.2 (a) of the Sindh Service Tribunals Act 1973 which has been promulgated as mentioned above in order to deal with matters relating to the terms and conditions of service of **civil servants**, and for matters connected therewith or ancillary thereto defines a "civil servant" at S.2(a) as under;

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2(a) "**civil servant**" means a person who, is or has been a member of the Civil Service of the Province or, holds or has held a civil post in connection with the affairs of the Province, and for the purpose of any proceeding under this act includes a person who is or has been, dismissed, discharged, removed or retired from such service or post as a consequence of the order of the departmental authority, **but does not include -**

- (i) a person who is on deputation to the Province from the Federation or any other Province or authority; or
- (ii) a person who is employed on contract, or on work charged basis, or who is paid from contingencies; or
- (iii) a person who is a "worker" or "workman" as defined in the Factories Act, 1934 (xxv OF 1934), or the Workmen's Compensation act, 1923 (VIII OF 1923),

(aa) "**Corporation**" means a Corporation or Institution set up or established by a Provincial enactment.(bold added)

20. Thus, based on our consideration of the above law we have no doubt in our minds that the petitioners who are contract employees are **not** civil servants and as such we can consider their petition in our constitutional jurisdiction under Article 199 of the Constitution based on the particular facts and circumstances of this case **and** Article 25 of the Constitution.

21. We are fortified in our conclusion since in the case of **Ali Azhar Khan Baloch** (supra) when the Supreme Court directed this court to go through the suits and petitions filed before this court in connection with service matters and to determine whether the matter ought to be placed before the Service Tribunal or be dealt with by this court vide order dated 17th March, 2015, it was held by a Division Bench of this court after considering the issue that this petition fell within the jurisdiction of this court in the following terms:-

"The petitioners claim to be contract employees, hence are not civil servants. This bench has scrutinized this petition in the light of judgment dated 05.1.2015, passed in Civil Review Petition No.193 of 2013 etc. (Ali Azhar Khan Baloch v. Province of Sindh & another) and need not to be transferred to the Sindh Service Tribunal. Let the matter be placed before the bench of this Court for its decision on merits."(bold added)

Sd/-
Chief Justice

Sd/-
Judge

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22. Turning to the question of per incuriam.

"Per incuriam" is defined in Blacks law dictionary as under:

"Per incuriam, adj, (of a judicial decision) **wrongly decided, usu. because the judge or judges were ill-informed about the applicable law.**

As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some features of the decision or some step in the reasoning on which it is based is found on that account to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided per incuriam, must in our judgment, consistently with the stare decisis rule which is an essential part of our law, be of the rarest occurrence. Rupert Cross & J.W. Harris, Precedent in English Law 149 (4th ed. 1991)." (bold added)

23. In HRC No.40927-S of 2012 **Application by Abdul Rehman Farooq Pirzada** (PLD 2013 SC 829) which was examining the entitlement of superior court judges who had served more than two years but less than 5 years to be entitled to a pension and whilst holding a judgment of the Supreme Court which had held such entitlement after two years to be per incuriam the supreme court considered in detail the meaning of per incuriam at Para-94 in the following terms

Majority view "94. Now taking up the issue of applicability and effect of this judgment after the implementation of judgment under challenge, so as to see whether it should have prospective or retrospective applicability, **the first thing to be noted is that in our short order dated 11-4-2013 we have declared that the law enunciated in the judgment under challenge is "per incuriam".** The fallout of such declaration is that it is a judgment without jurisdiction, thus, for all intent and purposes not to be quoted as precedent, rather liable to be ignored. A useful discussion on the concept and import of "per incuriam" finds place in the case of Sindh High Court Bar Association (supra), which reads as under:--

"(ii) MAXIM "PER INCURIAM".

37. 'Incuria' literally means "carelessness". In practice per incuriam is taken to mean per ignoratum and ignored if it is rendered in ignoratum of a statute or other binding authority.

38. What is meant by giving a decision per incuriam is giving a decision when a case or a statute has not been brought to the attention of the court and they have given the decision in ignorance or forgetfulness of the existence of that case or that statute or forgetfulness of some inconsistent statutory provision or of some authority binding on the court, so that in such cases some part of the decision or some step in the reasoning on which it was based was on that account demonstrably wrong, so that in such like cases, some part of the decision, or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong. See Nirmal Jeet Kaur's case (2004 SCC 558 at 565 para 21), Cassell and Co. Ltd.'s case (LR 1972 AC 1027 at 1107, 1113, 1131), Watson's case (AELR 1947 (2) 193 at 196, Morelle Ltd.'s case (LR 1955 QB 379 at 380), Elmer Ltd.'s case (Weekly Law Reports 1988 (3) 867 at 875 and 878), Bristol Aeroplane Co.'s case (AELR 1944 (2) 293 at page 294) and Morelle Ltd.'s case (AELR 1955 (1) 708).

39. The ratio of the aforesaid judgments is that once the Court has come to the conclusion that judgment was delivered per incuriam then Court is not bound to follow such decision on the well known principle that the judgment itself is without jurisdiction and per incuriam, therefore, it deserves to be overruled at the earliest opportunity. In such situation, it is the duty and obligation of the apex Court to rectify it. The law has to be developed gradually by the interpretation of the Constitution then it will effect the whole nation, therefore, this Court, as mentioned above, is bound to review such judgments to put the nation on the right path as it is the duty and, obligation of the Court in view of Articles 4, 5(2) read with Articles 189 and 190 of the Constitution."(bold added)

AND page-994 and 995 at para-4, which reads as under:

Minority view but in full agreement with the majority view on the meaning of per incuriam "4. The aforesaid legal position explains and highlights the true magnitude and the supremacy of this Court in regard to the dispensation of justice in the country and the enunciation and the declaration of the law by it. As the law laid down by the (apex) Court, and the order(s) passed by it, being the paramount and ultimate in nature, has to be imperatively and mandatorily followed, obeyed and adhered to by all the concerned. Reading Articles 189 and 190 conjointly, and while keeping in view the scheme of the constitution, the very purpose, the pivotal position and the status of this Court (prescribed above), it is expedient that correct law should be pronounced by the apex Court. And pursuant to the above object and due to the venerated position of this Court, the Court is cumbered with, inviolable responsibility, and a sacred duty, to interpret, declare and enunciate the law correctly, so that it should be followed, obeyed and adhered to purposively and in letter and spirit, by all the other organs of the State (including all other Courts in Pakistan)

strictly inconsonance with the true aim of the aforementioned Articles. It may be pertinent to mention here, that any invalid enunciation of law, shall contravene and impugn the very character, and attribute(s) of this Court and such bad/wrong law shall cause drastic adverse effects on the socio-economic, political, geographical, ethnic, cultural aspects and dynamics of the nation, the society, the people at large and the State in presentee or in futuro. In the above context, reference can also be made to Article 4 of the Constitution which enshrines (inter alia) an inalienable right of every citizen to be dealt with in accordance with the law, obviously this shall mean the law that is, correctly laid down by this Court. As it is a cardinal principle of justice, that the law should be worn by the Judge in his sleeves and justice should be imparted according to the law, notwithstanding whether the parties in a lis before the Court are misdirected and misplaced in that regard. Therefore, if any law which has been invalidly pronounced and declared by this Court, which in particular is based upon ignorance of any provisions of the Constitution, and/or is founded on gross and grave misinterpretation thereof; the provisions of the relevant law have been ignored, misread and misapplied; the law already enunciated and settled by this Court on a specific subject, has not been taken into account, all this, inter alia, shall constitute a given judgment(s) as per incuriam; and inconsistent/conflicting decision of this Court shall also fall in that category. Such decision undoubtedly shall have grave consequences and repercussions, on the State, the persons/ citizens, the society and the public at large as stated above. Therefore, if a judgment or a decision of this Court which is found to be per incuriam (note: what is a judgment per incuriam has been dealt with by my brother i.e in majority view).....

The question, however, shall be as to how this duty should be discharged and the object of correcting the wrong law, and setting it (the law) right should be achieved. One of the obvious ways of doing so is, when a party to the lis seeks review of the wrong judgment in terms of Article 188 of the Constitution. But what, if that remedy is not availed for any reason, or even if availed by the concerned, is discarded by the Court (again by committing another wrong). Whether thereafter, such a wrong decision on the point of law, cannot be remedied and interfered with, revisited or set aside at all or in other words, even if a judgment which is patently per incuriam, infinitely should be left outstanding, allowing it to become the liability of this Court and our legal/judicial system, for all future times. And the (this) Court and the system should be fettered by it, and held as a captive thereto, leaving it intact to pervade and permeate serious prejudice in perpetuity to the persons/ citizens of the country and even the State, compelling them, to be dealt with by a wrong/invalid law, despite it having come to the notice of the Court, through any means whatsoever, that such decision suffers from patent and gross vice, and it is vividly a judgment per incuriam by all references.

The answer is "No". In my candid view the approach to leave such a decision to stay intact shall be ludicrous and shall lead to drastic effects as indicated above. Rather in such a situation this Court, having special position in our judicature (judicial system as highlighted above) shall have the inherent, intrinsic and inbred power (jurisdiction) vested in it, (a) to declare a judgment per incuriam; (b) decline to follow the same as a valid precedent, (c) and/or to set it aside. For the exercise of jurisdiction in that regard and for the discharge of the duty as mentioned earlier, it is absolutely irrelevant and immaterial vide (via) which source it (decision) has come to the notice of the Court. The Court once attaining the knowledge of such a blemished and flawed decision has the sole privilege, to examine the same and to decide about its fate, whether it is per incuriam or otherwise. In this context, it may be mentioned, for example, if while hearing some case, it is brought to the attention of the Court by the member(s) of the Bar; or during the hearing of any matter, the Court itself finds an earlier judgment to be per incuriam; or if a Judge (Judge of this Court) in the course of his study or research, comes across any judgment which in his view is per incuriam or if any information through the Registrar of the Court is passed on to the honourable Chief Justice of the Court or to any other Judge (of this Court), by any member of the Bar, or the member of the civil society (any organization/group of the society) that a judgment is per incuriam (note: without the informant having any right or locus standi of hearing or the audience, until the matter is set out for hearing in the Court and the Court deems it proper to hear him), the Court in exercise of its inherent suo motu power and the duty mentioned above (emphasis supplied) shall have the due authority and the empowerment to examine such a judgment, in order to ascertain and adjudge if the law laid down therein is incorrect or otherwise. And if the judgment is found to be per incuriam, it shall be dealt with accordingly. In such a situation (as earlier stated) it shall not be of much significance, as to who has brought the vice of the judgment to the notice of the Court or through which channel it has reached there. **Rather, the pivotal aspect, the object, the concern and the anxiety of this Court should be to examine the judgment and if it is per incuriam to set the law right with considerable urgency".** (bold added)

24. Taking guidance from the above definition of per incuriam we are of the considered view that the Sukkur order at the time it was passed was per incuriam because it has erroneously decided that the petitioners being contract employees were civil servants and thus not subject to the jurisdiction of this court because it has failed to follow the correct principles of law which had **already** been laid down in the case of **Dr. Iqbal Jan** (Supra) in connection with whether or not contract employees were civil servants or not which case a long with the **earlier**

Karachi order dated 26-02-2015 was decided **before** the Sukkur order but on account of a lack of proper assistance unfortunately neither the aforesaid case nor the Karachi order were brought to the attention of the High Court at Sukkur while passing the Sukkur order which lead to it erroneously interpreting the law because the latest case law and relevant legal principles had not been placed before it for its consideration which would have otherwise been binding on it and necessitated under the Constitution the High Court at Sukkur following such Division Bench precedents of this court.

25. Since we have found the petitioners **not** to be civil servants and that we have jurisdiction to proceed with and decide this case based on the particular facts and circumstances of this case the question arises as to what the next step should be keeping in view Article 25 of the Constitution.

26. It is true that the law has moved on since 2013 when this petition was filed in respect of how contract employees should be dealt with under the law. For example, in the case of **State Oil Company Limited V Bakht Siddique** (2018 SCMR 1181) it was held by the supreme court that outsourced contractual employees based on the facts and circumstances of the case were entitled to be regularized as they had enjoyed long service, were fulfilling the same functions as regular employees and the outsourcing was in effect a sham mechanism devised simply to deny the contractual employees of regularization. On the other hand in the case of **Qazi Munir Ahmed V Rawalpindi Medical College and Allied Hospital** (2019 SCMR 648) it was held by the Supreme Court that the remedy of contractual employees if terminated was to file a civil suit for damages and not for reinstatement before this court. Perhaps the former case is distinguishable from this instant petition in that it referred to indirect contractual employees (outsourced) and the latter case referred to employees who were formerly civil servants who received contractual extensions after retirement whereas the instant petitioners fell into neither of these two categories and concerned regularization as opposed to reinstatement under a specific Act and neither of the aforesaid supreme

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court cases based upon their own particular facts and circumstances were confronted with a situation which may have been in violation of Article 25 of the Constitution.

27. In our view **most importantly** based on the particular facts and circumstances of the case before us we must be cognizant of Article 25 of the Constitution and is a fundamental right which guarantees that persons in the same class/category should be treated in the same manner in accordance with law without any discrimination. Thus, since in the Karachi order persons who were in the **same batch** of contract employees (**and who were in exactly the same position as the petitioners in this petition**) and who also had their contracts terminated by the impugned order had their cases referred to the scrutiny committee to consider whether under the relevant criteria as laid down in **Dr.Iqbal Jan's case** (Supra) they should be regularized under the Sindh (Regularization of Ad hoc and Contract Employees) Act 2013 we hereby direct the Government of Sindh to place the case of the petitioners in the instant petition who are in the **same batch** of petitioners as in the Karachi order (**and who were in exactly the same position as the petitioners in this petition**) before a scrutiny committee which shall consider and decide whether the petitioners should be regularized based on the relevant criteria as laid down in **Dr.Iqbal Jan's case** (Supra) under the Sindh (Regularization of Ad hoc and Contract Employees) Act 2013 within two months of the date of this order as no discrimination is permitted under Article 25 of the Constitution between those in the **same batch** of the petitioners in the Karachi order as there is no *intelligible differentia (which distinguishes persons or things that are grouped together from those who have been left out)* between the two sets of petitioners both of whom were sailing in the same boat. In this respect reliance is placed on the case **I.A. Sherwani V Government of Pakistan** (SCMR 1991 1041). This is more so since if the Karachi order which was passed **before** the Sukkur order had been brought to the attention of the High Court at Sukkur based on the case of **Multilines V Ardeshir Cowasjee** (PLD 1995 SC 43) the High court at Sukkur would have been bound to follow it and the petitioners in this petition and the Sukkur order would have been granted similar relief as

their batch mates in the Karachi order back in 2013. It is by now settled that litigants should not be made to suffer on account of the lapses of the courts which are not their fault. We also note that the Sindh (Regularization of Ad hoc and Contract Employees) Act 2013 is also still in the field and if we were to deny the opportunity of the petitioners to become regularized under this Act despite their timely petitions we would in effect be making this Act redundant in their case which this court has no power to do.

28. As such the case of the petitioners should be sent to the scrutiny committee for regularization and if regularized shall be regularized from the date of the decision of the scrutiny committee if it is in their favor. It is made clear that this order is applicable to only those petitioners in the **same batch** of petitioners in the Karachi order on account of Article 25 of the constitution. A copy of this order shall be sent by the office immediately to the Chief Secretary Government of Sindh for information and compliance.

29. It may be noted here that when the GOS appealed the case of **Dr.Iqbal Jan** (Supra) to the Supreme court which concerned the regularization of Dr's on contractual basis the supreme court in its order dated 08-01-2015 recorded that the GOS through its Advocate General undertook to implement the directions in **Dr.Iqbal Jan's case** (Supra) in both letter and spirit and on his undertaking the supreme court disposed of the GOS's appeal with the directions that the GOS shall fully implement the Judgment in **Dr.Iqbal Jan's case** (Supra) within one month of the date of its order in the following terms;

Order

"The learned Advocate General, Sindh says that the Government of Sindh would not press this Petition and the impugned judgment of the Learned High Court shall be implemented in letter and spirit. The Respondents lady Doctors, who are present in Court, have no objection to such statement of the Learned Advocate General, Sindh.

In these circumstances, this petition is disposed of as not pressed.
The Government of Sindh shall fully implement the impugned

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judgment of the Learned High Court in letter and spirit within a period of one month from today." (bold added)

30. Keeping in view that the Karachi order was not challenged before the Supreme Court and was complied with in terms of **Dr. Iqbal Jan's case** (Supra) we can see no reason why the GOS should take exception to this order whereby similarly placed people within the same group and class are to be treated equally and in the same manner as per Article 25 of the Constitution.

31. The above petition stands disposed of in the above terms

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