

IN THE HIGH COURT OF SINDH, KARACHI

Constitutional Petition No.D-2357 of 2009

Present:

Mr. Justice Syed Hassan Azhar Rizvi
Mr. Justice Adnan-ul-Karim Memon

Adial Shah & another
Petitioners through : Mr. Naveed Ali Khokhar, Advocate

Province of Sindh & others
Respondents through : Mr. Waqarullah Korejo Advocate and
Mr. Abdul Jalil Zubedi, Assistant
Advocate General, Sindh along with
Liaquat Ali Khaskheli, DEO
(Primary), Khairpur, Zahid Khentio,
DS Law and Muhammad Jamil
Khan, Senior Officer of School
Education Department.

Date of hearing : 21st December, 2017

ORDER

ADNAN-UL-KARIM MEMON, J.:-The captioned petition was disposed of vide order dated 14.6.2010 with the following observation: -

“It seems that the petitioner No.2 Hajan Shah claims entitlement to appointment as Naib Qasid/Chowkidar at Government Girls Primary School Lower Setharja, Taluka Sobhodero, District Khairpur on the basis of transfer of a plot of land to the Government of Sindh, Education Department for the purpose of construction of a school by his father Adial Shah, the petitioner No.1.

Learned AAG states that the appointment to the post has already been made and when termination took place, the person appointed filed a C.P. No.D-1759/2009 in this Court which was decided vide order dated 03.2.2010 pursuant to which termination notice was set aside and respondents were asked to provide hearing to the petitioners and then take action in accordance with the Rules. Learned AAG states that on proper verification of title of the petitioner’s father of the land in question and its transfer to the Education Department,

Government of Sindh, the petitioner No.1's son will be considered for appointment to the post of Naib Qasid/Chowkidar in terms of the advertisement and that this will be done within a period of three months. Petitioner counsel is satisfied with such statement of the learned AAG and states that the petition be disposed in its terms.

The petition in the above terms stands disposed of. The listed application is also disposed of."

2. On 04.7.2014, Petitioner filed an application [CMA No.18822/2014] under Article 204 of the Constitution of the Islamic Republic of Pakistan, 1973 read with Section 3 of the Contempt of Court Ordinance 2003, for initiating contempt proceedings against the Contemnors.

3. On 24.4.2015, alleged Contemnors filed concise statement, denied the allegations and stated that the Petitioner No.1 did not transfer his land in the name of Education Department on Form-VII since 2007 and was claiming appointment as a Plot Donor which is not justified as per past practice of the Department for such appointment and prayed for dismissal of the listed application on the ground that Petitioners did not fulfill the criteria as provided under the law. It is further asserted that the recruitment has been made through third party on merit basis and the said plot donation practice has been discontinued.

4. Mr. Naveed Ali Khokhar, learned counsel for the Petitioners has argued that Petitioner No.2's father namely Adial Shah alias Wadial Shah instructed Petitioner No.2 to apply for the post of Naib Qasid/Chowkidar in terms of advertisement dated 07.3.2005 published in daily 'KAWISH'. Petitioner No.2's father also gave an undertaking that he owned the land bearing Survey No.181, 02

Acres 25 Ghuntas, the same was handed over to Education department for establishing school on his land. He further averred that there is strength of 100 students along with 03 female teachers and that school is in running position; that the post of Naib Qasid and sweeper is lying vacant; that Petitioner No.2 is qualified as Matriculation from the Board of Intermediate & Secondary Education, Sukkur and is permanent resident of Village Setharja Taluka Sobhodero and qualified to be appointed for the said post; that they heard from the concerned authority of the Education Department that the person who had a piece of land can apply for the post against the vacancies in lieu of land. learned counsel for the Petitioner claimed that the petitioner No.2 was recommended for his appointment in lieu of plot at Government Girls Primary School lower Setharja Taluka Sobhodero, District Khairpur vide letter dated 18.3.2009, but the Respondents did not consider the request of the Petitioners, however, Petitioners complained for inaction on their part, but could not achieve the result; that after handing over the possession of the plot to the Government of Sindh Education & Literacy Department who are running the school for last about seven years, but they are avoiding to appoint Petitioner No.2 in lieu of the said plot as per plot donor policy; that the Respondents have appointed another Naib Qasid at the place of Petitioner No.2, in this way the Respondents have discriminated by recoiling from their commitment to provide a job of Naib Qasid to the Petitioner No.2 in lieu of plot; that the Respondents are issuing threats of dire consequences to the Petitioners not to demand the post of Naib Qasid/Chowkidar; that this Court vide order dated 14.6.2010

directed the Respondents to consider the Petitioner No.1's son for appointment to the post of Naib Qasid/Chowkidar in terms of advertisement. He further added that the Respondents have violated the directives issued by this Court vide order dated 14.6.2010; that the Respondents are not providing the post of Naib Qasid/Chowkidar to the Petitioner No.2 nor they are handing over the piece of land provided for running the school. He further contended that the Government of Sindh, Education & Literacy Department is neither owner of the property in question nor can keep the possession of the property of the petitioners for indefinite period without compensation; that the property in question has neither been mutated in the name of Government of Sindh nor they are owner of the property rather Petitioner No.1 is the owner of the subject land. He further added that the Respondents are detaining the land in question in violation of Articles 23 and 24 of the Constitution of Pakistan. He prayed for severe action against the Respondents for breaching their own commitment and retaining the property of the Petitioners without lawful authority and justification.

5. Upon notice the Respondent No.3 has filed concise statement and denied the allegations.

6. Mr. Waqarullah Korejo, learned counsel for the Respondents has referred to his concise statement and argued that in the year 1994, the Petitioner No.1 donated the land of 08 Ghuntas from Survey No.181, Deh Setharja Lower Taluka Sobhodero, District Khairpur to School Education and Literacy Department, Government of Sindh for establishing primary school for girls in

his village. Learned counsel further added that there was no Girls' school existing in the village. He relied upon the Photostat copy of affidavit of Petitioner No.1 and stated that this is the documentary proof that Petitioner No.1 agreed to donate a piece of land for the above purpose without compensation, but now he is recoiled from his commitment as the post of Naib Qasid/Chowkidar could not be given to the son of Petitioner No.1 on the premise that the Honourable Supreme Court of Pakistan in the case of Hameedullah and 9 others vs. Headmistress, Government Girls School, Chokara District Karak and 5 others [1997 SCMR 855] observed that donation of land for construction of school in consideration of employment, such agreement being illegal and invalid, thus, not enforceable under the law and the Petitioners could not be provided the job against the plot in view of the judgment rendered by the Honourable Supreme Court as discussed supra. During the course of arguments we inquired from the learned counsel for the respondents that under what law and authority the Respondents can retain the property of Petitioner No.1 without compensation as the same has not been mutated in their name which is violation of Articles 23 and 24 of the Constitution of Pakistan, learned counsel in reply to the query of the Court has stated at the bar that the Petitioner No.1 has donated the plot for establishing primary school in the said village free of cost without any coercion, therefore, the government has not compelled the Petitioner No.1 to hand over the same, but on his own accord and willingness he did so. He further added that so far as job of Naib Qasid/Chowkidar is concerned, the same commitment could have been fulfilled if there would not have been the directions of the Honorable Supreme

Court in this regard; that due to compelling circumstances the job could not be provided to the Petitioner No.2 in lieu of the plot donor policy which has been declared nullity in the eyes of law. He further added that the Petitioner has instituted present proceedings against the Respondents after 15 years of donation of land and claimed job of Naib Qasid for his son, therefore, the case of Petitioners falls within the doctrine of laches that the instant petition was disposed of by this Court vide order dated 14.6.2010 in terms of verification of title of land in question of Petitioner No.2's father and its transfer to the Education Department, Government of Sindh, then the Petitioner No.1's son will be considered for appointment to the post of Naib Qasid /Chowkidar. Learned counsel for the Respondents added that by order dated 09.11.2015, passed by the Honorable Supreme Court of Pakistan in Civil Appeals No.19-K to 50-K of 2015, the principle has been laid down that the appointments in lieu of plot donation is illegal as a their right is not enforceable before the Court of law. He next contended that the ratio of the judgment of the Honorable Supreme Court in the case of Hameedullah (supra) indicates with regard to policy of making appointment against the land grant amounts to the sale of public office for property which is against the constitution and law applicable to public office but it is not conducive to interest that "if the agreement between the School Education & Literacy Department and Petitioners was in the nature of sale of a public office, consideration being the transfer of land, sale of public office cannot be a legal transaction which is completely illegal and against the public policy, therefore, such an agreement is hit by Section 23 of the Contract Act, which make it

void as the agreement amounting to sale of public office is void and illegal, specific performance thereof cannot be granted. Learned counsel for the Respondents further added that the Petitioners cannot claim the remuneration of the aforesaid land. He further added that under Section 21 of the Specific Relief Act specifies the contract which cannot be specifically enforced Section 21(g), which provides that "A contract, the performance of which involves the performance of a continuous duty extending over a period longer than three years from its date." In this context, learned counsel has further argued that in the instant case, the obligation casted upon the School Education & Literacy Department to perform continuously a particular duty for a period longer than three years from the date of agreement, the same cannot be specifically enforced. He lastly prayed for dismissal of listed application.

7. We have heard the learned counsel for the parties on the listed application.

8. A perusal of the order dated 14.6.2010 shows that upon consent of the learned AAG that the Petitioner No.2 will be considered for appointment to the post of Naib Qasid/Chowkidar in terms of the advertisement and this will be done within a period of three months. This commitment has not been implemented and compelling the Petitioners to file application for enforcement of the order dated 14.6.2010.

9. We have perused the judgment passed by the Honorable Supreme Court of Pakistan in the case of Hameedullah and others as discussed supra and have also gone through another unreported order dated 09.11.2015 passed by the Honorable

Supreme Court in the case of Government of Sindh & others vs. Long Khan Rajpar & others and excerpt of the same is reproduced hereunder: -

“4. From the aforestated observations it is clear that the agreement between the Government and the appellant was in the nature of sale of a public office, consideration being the transfer of land, Sale of public office cannot be a legal transaction, It is completely illegal and against public policy. Therefore, such an agreement is hit by section 23 of the Contract Act, which makes it void. As the agreement amounting to sale of public office is void and illegal, specific performance thereof cannot be granted.

5. Another ground which has been pressed is that such agreement cannot be specifically performed. Section 21 of the Specific Relief Act specifies the contracts which cannot be specifically enforced. Section 21(g) provides as follows:-

"S.21, The following contracts cannot be specifically enforced:--

(g) A contract, the performance of which involves the performance of a continuous duty extending over a period longer than three years from its date. "

The principle involved in this section is that where under a contract the obligation is cast upon a person to perform continuously a particular duty for a period longer than three years from the date of the agreement, the same cannot be specifically enforced, In the present case the agreement seems to be in C perpetuity for all times to come, generation after generation. It casts an obligation on respondents Nos.1 to 4 to appoint the appellant or his nominee against a class IV post and this process shall continue till such time the school is in existence. Such an agreement which has cast a duty of performance for a period longer than three years cannot, therefore, specifically be enforced.

6. The learned counsel while referring to Munawar Khan (supra) contended that the appellant is entitled to a margin of preference as it is available of those who make such grant, Such observation has been made in the said judgment, but it is restricted with the condition that amongst all the candidates' eligibility, suitability and fitness are equal, It is only on this condition that the donor or his nominee as compared to other candidates if equally eligible, suitable and fit for the post, may be given preference. In such circumstances, the appointing authority may use the discretion in favour of the donor,

but such preference will not be in performance of the agreement, There is nothing in evidence on record to show that the appellant was equally eligible, suitable and fit for the post as compared to respondent No.5, The appointment is to be based on merits and if on merits the donor or his nominee is at par with other candidates, only then preference can be given to him. By the observation referred hereinabove, the donor or his nominee is not vested with any right to claim the post.”

10. We have perused the *Iqrarnama* attached along with concise statement of the alleged Contemnors which was reduced into writing on 18.10.1994 whereby the Petitioner No.1 agreed to handover a piece of land to the Government of Sindh for establishing Primary School (Girls) without any compensation as well as without any pressure or coercion. Record reflects that the instant petition was filed on 26.10.2009 with the following prayer:-

“a. It is, therefore, respectfully prayed that this Honorable Court may be pleased to issue the direction to respondents to issue the offer/appointment posting orders to Petitioner No.2 from date of acceptance of terms and Conditions/Delivery of plot for providing aforesaid job.

b. To direct the respondents for Honoring the terms and conditions as decided as per advertisement/affidavit on stamp paper in letter and spirit identified by the Mukhtiarkar or handed over the land to owner with all benefits and mesne profits.

c. To direct the respondents for awarding salaries and other benefits from the date of opening of School or delivery of the plot with all back benefits.

d. To direct the Respondent No.3 not to harass the petitioners on the various pretexts and on flimsy grounds for booking in false cases and abduction threats.”

11. We have also gone through the disposal order of the instant petition dated 14.6.2010. This Court considered every aspect of the case and only observed that the Petitioner No.1's son will be considered for appointment to the post of Naib Qasid/Chowkidar in terms of advertisement. As per concise statement of the Respondents, they have taken plea that in the light of order dated 09.11.2015 passed by the Honorable Supreme Court of Pakistan in Civil Appeal No.19-K to 50-K of 2015 as discussed supra, the Respondents cannot consider the case of Petitioners for the appointment against Plot Donation Policy as the same cannot be enforced.

12. In view of the guideline provided by the Honorable Supreme Court in the case of Hameedullah & 9 others (supra), we are of the considered view that the controversy involved in the present proceedings as to whether in lieu of providing land for the purpose of School building/Education, its owner can claim appointment of one nominee from his side in BPS-01/02 as of legal right enforceable under the law?

13. The above aspect of the case of has elaborately been discussed/dealt with by the Honorable Apex Court in the case of Hameedullah and 9 others vs. Head Mistress, Government Girls School, Chokara (supra). Learned counsel for the Petitioners was confronted with this position of the case that in view of the judgment passed by this Honorable Supreme Court a job to the Petitioners cannot be given in lieu of a piece of land which

amounts to sale of job, thus, is against the public policy. Learned counsel for the Petitioners tried to convince this Court that the commitment made by the Respondents before this Court ought to be enforced as the Respondents have retained a piece of land of the Petitioners without any justification under the law.

14. We have carefully considered the facts of the present case in the light of ratio of judgment in the case of Hameedullah and 9 others (supra) and are of the considered opinion that it is applicable with full force to the facts of the present case.

15. *Prima facie*, the reasons assigned by the alleged Contemnors in their concise statement are justified, thus, does not call for further action on the listed application, however, we may observe that a piece of land which was given by the Petitioner No.1 for Primary School (Girls) which is being claimed by the Petitioners through the listed application cannot be entertained at this stage and it is for the Petitioners to take appropriate remedy as provided under the law.

The listed application [CMA No.18822/2014] is accordingly dismissed.

JUDGE

JUDGE

