

Order Sheet
IN THE HIGH COURT OF SINDH KARACHI
Constitutional Petition No. D –7450 of 2018

Before:

Mr. Justice Nadeem Akhtar

Mr. Justice Adnan-ul-Karim Memon

Imran Ahmed Khanzada and another

Versus

Province of Sindh and 03 others

Dates of hearing : 23.1.2020, 25.2.2020, 9.3.2020, 19.3.2020, 27.10.2020,
and 18.11.2020

Date of judgment : 04.12.2020.

M/s. Malik Naeem Iqbal, Faizan Hussain Memon, and Sandeep Mallani,
advocates for the petitioners.

Mr. Ali Safdar Depar, Assistant A.G Sindh.

Mr. Shahab Usto, advocate for respondent No.4.

J U D G M E N T

ADNAN-UL-KARIM MEMON, J. In this *lis*, the petitioners have sought the following relief(s) :

- I. *Direct the Respondent No.4 to show authority of law under which she is holding her office of Director I.T. in Sindh Police Department, and in case of her failure to do so, issue writ of quo warranto against her declaring the office of Director I.T. vacant forthwith.*
- II. *Declare that impugned notification dated 09.06.2009, appointing the Respondent No.4 as Consultant, impugned notification dated 04.10.2016 and impugned notification dated 18.07.2017, regularizing her as Director I.T. in Sindh Police Department are illegal, unlawful, unconstitutional, against merit, malafide, arbitrary, discriminatory and in violation of principles of natural justice, equity and fairness and set-aside the same forthwith.*

2. The relevant facts as per record are that respondent No.4 was initially appointed as Project Manager / Senior Web Developer in the Information and Technology Department, Government of Sindh, vide office order dated 08.08.2005. Subsequently, on the requisition of the Police Department, she was appointed as Consultant (BPS-18) on contract basis for two (2) years for the Mega Information Technology (I.T.) Project of the Sindh Police vide notification dated 09.06.2009 and her contract was extended for a further period of two (02) years with effect from 07.10.2011. Subsequently, she was appointed as Project Director (BS-18) on a contract basis for two (02) years vide notification dated 07.10.2011. The Hon'ble Supreme Court in its decision dated 22.03.2013 in Suo-Motu Case No.16/2011 took cognizance of the appointment of respondent

No.4 and directed the Sindh Government to create an independent post of Project Director Information Technology (BPS-18) for her, which was sanctioned vide order dated 19.11.2013 for the remaining period with effect from 01.07.2013 to 06.10.2013, and subsequently, the Finance Department issued corrigendum dated 16.04.2014 for the post of Director I.T. (BS-18) available at page 91 of the comments of respondent No.4. However, her contractual service was extended with effect from 07.10.2013 till the decision of the Scrutiny Committee No.3 with regard to regularization of her services vide notification dated 17.04.2015. Finally, her services were transferred and regularized as Director Information Technology (BPS-18), Sindh Police, Home Department, Government of Sindh, under Section 3 of the Sindh (Regularization of Adhoc and Contract Employees) Act, 2013, (**'the Act of 2013'**) vide notification dated 04.10.2016, and subsequently, another notification dated 18.7.2017 was issued by giving retrospective effect to her regularization with effect from 25.03.2013, which action on the part of respondents is assailed by petitioners in the instant petition.

3. Malik Naeem Iqbal, learned counsel for the petitioners, has argued that respondent No.4 was initially appointed as a Consultant in BPS-18 for Mega I.T. Project in the Police Department for two (02) years, but her services were regularized vide impugned notification dated 04.10.2016 as Director I.T. in BPS-18. He further argued that respondent No.4 could not be regularized on the post of Director I.T. when she was not holding the said post on the date of purported regularization ; respondent No.4 is holding a public office in violation of Article 199(1)(b)(ii) of the Constitution of the Islamic Republic of Pakistan, 1973; and, respondent No.4 (BS-18 officer) is not qualified and eligible to hold the post of Director I.T. (BPS-18). He lastly prayed for issuance of writ of quowarranto against respondent No.4 as her initial appointment as Consultant and subsequent regularization against the regular post of Director I.T. were based on political consideration in violation of Articles 4, 18, 25 and 242 of the Constitution of the Islamic Republic of Pakistan, 1973, and the Sindh Civil Servants Act, 1973.

4. On the other hand, Mr. Shahab Usto, learned counsel for respondent No.4, raised the question of the maintainability of the Petition. He referred to the para-wise comments filed on behalf of respondent No.4 and argued that the appointment of respondent No.4 was made under the directives of Hon'ble Supreme Court given in Suo-Moto Case No.16/2011 against an independent post of Director I.T. (BPS-18) in accordance with her qualification, experience,

and outstanding performance. The learned counsel has referred to Section 3 of the Act of 2013 and contended that respondent No.4 is a highly qualified I.T. professional and possesses a first-class degree in computer science and also completed her M.Phil. degree in computer science and there was/is always an exception available in the service rules ; respondent No.4 was appointed in accordance with the recommendation of Scrutiny Committee No.3 ; and, the burden of proof was upon the petitioners to demonstrate as to which of their fundamental rights had been infringed, but they failed to point out an infraction of any of their fundamental rights to such relief under quo-warranto. The counsel for respondent No.4 further contended that the entire case of the petitioners is based on fraudulent and misleading facts. He next argued that the petitioners have no *locus standi* to file this petition because they are not aggrieved persons. He emphasized that the petition is based on disputed question of facts. He further contended that the petitioners are politically motivated and have not come to this Court with clean hands, as respondent No.4 had lawfully taken action against the officials of I.T. Department of Police including the petitioners, and as such the present petition is a counterblast to the said lawful action taken by respondent No.4. The colleagues of the petitioners filed Constitutional Petition bearing No. D-4329 of 2019 before this Court for allowing uniformed officials of the Sindh Police in I.T. Cadre which was allowed vide order dated 11.03.2020, and the Provincial Government impugned the aforesaid judgment before the Honorable Supreme Court where the matter is pending. It is further contended that the petitioners have not challenged the vires of the Act of 2013, hence they are barred from challenging the consequential / beneficial effect emanating from the enforcement of the said Act. He stressed that this Court has applied the Act of 2013 in several cases protecting the rights of the adhoc / contractual employees. It is next contended that respondent No.4 did not suffer from any inherent disqualification to hold a public office or to warrant removal from such office. The counsel averred that a writ of quo-warranto is not available to one set of Civil Servants against another set of Civil Servants. Per learned counsel, the petition, having been filed after a delay of 9 years, is hit by the doctrine of laches. He emphatically stated that writ of quo warranto would not be a remedy for a person to settle his personal vengeance. He finally concluded his submissions by emphasizing that petitioners have no case at all hence prayed for dismissal of the captioned petition with a heavy cost.

5. Mr. Ali Safdar Depar, learned Assistant A.G Sindh, has supported the stance of learned counsel representing respondent No.4. Per learned AAG respondent No.4 was initially appointed on contract basis on a project post as the said project was funded and taken over by the Sindh Government by allocating regular provincial budget for operating it permanently by attaching it with the Home Department of the Sindh Government. Therefore, the services of respondent No.4 would not be affected by the issuance of impugned notification under Section 3 of the Act of 2013.

6. Malik Naeem Iqbal, learned counsel for the petitioners, exercising his right of rebuttal, has argued that the mere fact that the petitioners are employees of I.T. Cadre of the Police Department cannot be considered as a disqualification to file a writ of quo-warranto for the reason that the main averments are about the ineligibility of respondent No.4 and violation of the law. He averred that the essential grounds for issuing the writ of quo-warranto are that holder of the post does not possess the prescribed qualification ; the appointing authority is not competent to make such appointment and that the procedure prescribed by law has not been followed ; and in this regard, the burden of proof is on the appointee who has to demonstrate that his / her appointment is in accordance with law and rules. Having explained his case, he further contended that this Court should not dismiss the instant petition merely on the prospect of the petitioners will gain some benefit at the end, which even otherwise is not true. He refuted the claim of respondent No.4 about the point of laches and argued that laches do not apply to such writs and that the petitioners do not have to be aggrieved parties to file such a writ as the cause of action is a recurring one ; and, unlawful holding of public office is a continuing wrong and the said wrong may be called in question by anyone at any time. He emphasized that a Constitutional petition in the nature of a writ of quo-warranto is maintainable under Article 199 of the Constitution against a holder of a public office if she/he is/was disqualified or does not possess or has lost his/her qualification to hold the office in question.

7. We have heard learned Counsel for the parties and have perused the material available on record with their assistance. The prime questions involved in the present proceedings are :

- I. Whether respondent No.4 can hold the charge for the post of Director I.T. in BPS-18 under the law?
- II. Whether respondent No.4's case falls within the ambit of Section 3 of the Sindh (Regularization of Adhoc and Contract Employees) Act, 2013?

8. It is an admitted position that the post of Director I.T in BPS-18 is a Public Office post which falls within the purview of Article 199(1)(b)(ii) of the Constitution, which permits the High Court to issue a “Writ of Quo-Warranto” requiring a person within the territorial jurisdiction of the Court holding or purporting to hold a Public Office to show under what authority, he/she is holding that office. It is also clear that, while exercising jurisdiction under the above Article, the High Court, if satisfied, could declare that holder of a Public Office is not entitled to hold such office. The aforesaid office, being a Public Office, and for that reason is amenable to writ jurisdiction of this Court under Article 199 of the Constitution. On the aforesaid proposition, we are fortified by the case of Salahuddin and 2 others v. Frontier Sugar Mills and Distillery Ltd. Takht Bhai and 10 others, **PLD 1975 SC 244**. It is a well-settled law that a person invoking the jurisdiction of this Court under Article 199 of the Constitution is not required to fulfill the stringent conditions required for bringing himself within the meaning of an “aggrieved person”. But, any person can move this Court and challenge usurpation or unauthorized occupation of a Public Office by any person on the ground that he/she is not qualified to hold that public office. As such, the question of *locus standi* is of no significance. On the aforesaid proposition, we are fortified by the cases of Syed Noorul Hasan vs. The Secretary, Ministry of Industries Government of Pakistan, Islamabad, and others, **1987 SCMR 598**, Sarwar Ali Khan vs. Chief Secretary to Government of Sindh, **PLD 1994 SC 233**, Dr. Azeem ur Rehman v. Government of Sindh, **2004 SCMR 1299**, Pakistan Tobacco Board and another vs. Tahir Raza and others, **2007 SCMR 97**, Province of Sindh and others vs. Ghulam Fareed and others, **2014 SCMR 1189**.

9. On merits, we have also examined the stance of respondent No.4. In our view, the reasoning as put forward by respondent No.4 with regard to her appointment as Director (I.T.) in BPS-18 is not tenable in law for the simple reason that her appointment on the post of `Project Director` (I.T.) was made under the directives of the Hon’ble Supreme Court contained in the order dated 22.3.2013 in Suo-Motu Case No.16/2011 (PLD 2013 S.C 443) and not Director (I.T). Therefore, we need not dilate upon this issue any further. Paragraphs 18 and 45 of the above judgment are reproduced here for the sake of convenience and ready reference :

“18. As regards, case of Ms. Tabassam Abbasi, Project Director, IT is concerned, though she has been appointed on contract against a vacant post of Superintendent Police (SP, BPS-18) and allowed to draw salary equal to the post of SP by abolishing three posts of constables, her appointment too is not in accordance with

law because against this post, a DSP in regular service is required to be promoted as SP. For such a position the Police Department or Government of Sindh may create a post of Project Director, IT Department and instead of accommodating her against the post of a police officer, she may be declared holder of an independent post against the budgetary provision of the Police Department. The Chief Secretary may, if feasible, create a separate post of Project Director, IT in the Police Department and this post will not be converted into any other post of regular police service nor the incumbent shall be posted against anyone of the sanctioned post of police department.

45. Thus, in view of the above discussion and observations, it is ordered as follows:-

- a) -----
- b) -----
- c) -----
- d) *The Government of Sindh may create an independent post of Project Director, IT in Police Department as it has already been observed in the para supra.”*

10. The order of the Honorable Supreme Court as discussed supra indicates that appointment of respondent No.4, who was appointed as Superintendent of Police on contract basis, was erroneous as the I.T. Department was a wing of the police establishment, but it was held to be distinct from regular uniform police by the Hon’ble Supreme Court. Therefore, the Honorable Supreme Court had directed to post respondent No.4 as Project Director of I.T. independently instead of Superintendent of Police.

11. *Prima-facie*, the petitioners have not challenged the qualification or eligibility of respondent No.4 against the post of Project Director I.T. as discussed *supra*. In principle, the issue challenged is confined to the transfer and posting of respondent No.4 as Director I.T. and her purported regularization for this post. It is an admitted position that instead of creating a post of Project Director I.T. on permanent basis as directed by the Hon’ble Supreme Court, a post of Director I.T. was created, by means of a corrigendum, by the Sindh Government in the same pay scale with similar job description and posted respondent No.4 on it. Therefore, the impugned posting of respondent No.4 on the post of Director I.T., instead of Project Director I.T., was not only illegal but also in violation of the direction of the Hon’ble Supreme Court. Accordingly, her impugned regularization as Director I.T. was also illegal. Even otherwise, it is well-settled law that for placement in a regular pay scale, the claimant has to be a regular appointee through the regular process of recruitment, and an employee appointed on a temporary / contract basis cannot claim the regular pay scale. We also have reservation with regard to the requisition of services of

respondent No.4 made by the then Provincial Police Officer Sindh, Karachi, from Information Technology to Police Department on contract vide summary floated to the Chief Minister Sindh dated 13.04.2009.

12. In the context of regularization under the Act of 2013, it may be observed that under The Sindh Civil Servants (Appointment, Promotion and Transfer) Rules, 1974, the subject post of Director I.T. in BS-18 could be filled only through the competitive process after advertisement, which was not followed in the instant case. In Ali Azhar Khan Baloch and others v. Province of Sindh and others, **2015 SCMR 456**, the Hon'ble Supreme Court was pleased to hold, *inter alia*, that the Sindh Government and/or the Competent Authority cannot bypass this mandatory requirement and substitute a parallel mechanism to appoint a person in BS-16 to BS-22 against the said Rules ; Article 242 of the Constitution provides the mechanism for appointment for a civil servant through Public Service Commission ; the Sindh Government through executive or legislative instruments cannot withdraw any post from the purview of the Public Service Commission ; and, the Sindh Government shall make all the appointments in BS-16 to BS-22 through Public Service Commission. In view of this well-settled legal position, the impugned regularization of respondent No.4 under the Act of 2013 is not sustainable.

13. As a result of the above discussion, we conclude that the impugned posting of respondent No.4 on the post of Director I.T., instead of Project Director I.T., was not only illegal but also in violation of the direction of the Hon'ble Supreme Court. Accordingly, her impugned regularization as Director I.T. was also illegal. During the course of hearing, it was stated by learned counsel for respondent No.4 that she will have no objection if she is allowed to retain the post of Project Director I.T. instead of Director I.T. as both the said posts fall under the same pay scale i.e. BPS-18.

14. Accordingly, both the impugned Notifications dated 04.10.2016 and 18.07.2017 issued by the Sindh Government, being in violation of the clear command of the Honorable Supreme Court, are hereby set aside, with the direction that respondent No.4 shall be treated and deemed to be the Project Director I.T. (BPS-18) in the Police Department of the Government of Sindh for all legal intent and purposes. The petition is disposed of in the above terms with no order as to costs.

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