

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
Constitutional Petition No. D -2839 of 2017

Order with signature of Judge

1. For hearing of CMA No.26501 of 2020 (12(2)) :
2. For hearing of CMA No.26502 of 2020 (Stay) :
3. For hearing of CMA No.26075 of 2018 (Contempt) :

Dated: 19.01.2021

Mr. Ali Asadullah Bullo, advocate for the petitioners.
Mr. Faizan Hussain Memon, advocate for applicants.
Mr. Ali Safdar Depar, AAG along with
M/s. Muhammad Ali Shaikh, Additional Secretary (Law) and Ghulam Ali
Birhmani, Addl. Secretary (Services-II), SGA&CD.

ORDER

While dismissing this petition vide judgment dated 21.05.2018, bench found various discrepancies in the recruitment process of Head Master/Head Mistress in BPS-17 initiated by the Education & Literacy Department, Government of Sindh; and, directed the Chief Secretary Sindh to scrutinize the recruitment process strictly under the Recruitment Rules notified on 14th October 2014 for the aforesaid post within two months. Subsequently, after a delay of considerable time, such compliance report dated 13.11.2020 was submitted on behalf of the official respondents with the analogy that the aforesaid process was flawed under the law.

2. The applicants being aggrieved by and dissatisfied with the aforesaid report filed the listed applications under section 12(2) CPC bearing CMA Nos.26501/2020,26502/2020 and prayed for staying the matter on the sole ground that the judgment dated 21.05.2018 passed by this court was obtained by the petitioners by misrepresenting the facts and the official respondents had also misled the court at the time of passing the judgment; and, they were not arrayed as the party in the proceedings; and, the judgment was procured behind their back thus they were condemned unheard on the subject issue, even on merit they are well qualified to hold their respective posts.

3. We have heard Mr. Faizan Hussain Memon learned counsel for the applicants on the listed applications bearing CMA No.26501/2020 (12(2) CPC) and CMA No.26502 of 2020 at some length and have gone through the contents

of the application. It is imperative to determine as to whether any fraud has been committed with this court as agitated by the Applicants? To go ahead with the aforesaid proposition, it is expedient to have a look at section 12(2) CPC, which speaks of the principle that if a Decree, Order or Judgment is obtained by Fraud, misrepresentation; though the term Fraud, is not defined in Civil Procedure code. But in the simplest sense means “Deception intended to result in financial or personal Wrongful gain”. Through the listed applications serious allegations have been leveled by the applicants against the Petitioners and official respondents, for committing fraud upon this court through misrepresentation of facts, for which thorough probe needs to be required, in our view in Constitutional Petition no factual controversy can be looked into and the only pure question of law can be dilated upon. On the aforesaid proposition, we are fortified with the decision rendered by the Honorable Supreme Court in the case reported in (2008 SCMR 236). Prima facie, this application is misconceived for the reason that this Court vide judgment dated 21.5.2018 simply directed the Chief Secretary Sindh to scrutinize the recruitment process initiated by the respondent-school education department for the post of Head Master/Head Mistress in BPS-17 strictly under recruitment rules.

4. Compliance report in pursuance of the judgment dated 21.05.2018 was submitted before this Court on 13.11.2020, wherein the Scrutiny Committee in its report unanimously opined that the post of Head Master/Head Mistress in BPS-17 is a sanctioned/ budgetary post which was/is required to be filled through competitive process i.e. Sindh Public Service Commission (SPSC). Prima-facie the competent authority favored the applicants/beneficiaries to accommodate them; and, the aforesaid appointments were made on contract basis by circumventing the recruitment rules notified on 14.10. 2014, which provides that the post of Head Master/Head Mistress in BPS-17 was to be filled by 80% by initial appointment through Sindh Public Service Commission and 20% by promotion from amongst the various category of teachers having 7 years’ service in BPS-16. Prima-facie it appears from the record that the recruitment process was compromised from various aspects i.e. in qualification, experience, and age after closing date for applying for the job without amendment in the recruitment rules, in violation of The Sindh Civil Servant (Appointment, Promotion, and Transfer) Rules 1974 and provisions of Sindh Public Service Commission Function Rules 1990. At this juncture, we have noticed that the competent authority bypassed the basic spirit of law while framing the

recruitment rules for the subject post by introducing the word “except contract” It is important to note that when the recruitment rules for any sanctioned/budgetary post are framed, no appointment can be made on the contract basis. The contract appointment is basically for the specified period and the contract employee, whose period of contract employment expires by efflux of time, carries no vested right to remain in the employment of the employer and the Courts cannot force the employer to reinstate or extend the contract of the employee. Primarily the contract appointment is alien under the Sindh Civil Servants Act, 1973, and rules framed thereunder. Principally such conduct on the part of official respondents is deplorable and was deprecated vide order dated 16.11.2020, compelling this Court to direct the Chief Secretary to implement the judgment passed by this Court in letter and spirit, expeditiously, preferably within two (02) weeks and to submit compliance report to this Court.

5. Today, learned AAG has filed a fresh compliance report dated 18.01.2021. The stance of the learned AAG is that the committee viewed the recruitment process, suffering from various defects and legal flaws, thus suggested for four months to initiate the recruitment process afresh through competitive process i.e. Sindh Public Service Commission. In the meanwhile, he prayed for the retention of incumbents Head Masters/Head Mistresses on their respective posts on the ground that there is an order in operation obtained by concealment of facts of the case. We do not appreciate the request of four months extension in the light of order and reason assigned.

6. He referred to the order dated 05.01.2021 passed by the learned Division Bench of Circuit Court Hyderabad in C.P. No. D-160/2020 (page 43 of compliance report), whereby the official respondents were directed not to take coercive action against the incumbents Head Masters/Head Mistresses so far as their regularization of service is concerned. There is no overlapping of any legal proceeding. Of course had they remained in employment, they would have enjoyed such proceeding of regularization, however we refrain ourselves to dilate upon such proceedings. The root cause of their appointment was not the subject matter of later proceedings and these proceedings would take over the current issue of recruitment which is alien to the proceeding of later petition No.160/2020.

7. This stance of the learned AAG is also devoid of substance on the ground that the learned Division Bench of Circuit Court, Hyderabad was not assisted properly by the petitioners in the subject petition at the time of obtaining interim order; and, even judgment passed by this Court on 21.05.2018 was not referred/cited by them, which was earlier, to assist the Court on the subject issue, even otherwise the aforesaid Recruitment Rules depict that the post of Head Master/Head Mistress in BPS-17 can be filled through the competitive process and by promotion on seniority-cum-fitness basis with certain qualification and experience. Prima-facie, we do not see any logic in the decision of the competent authority vide minutes of meeting dated 6.1.2021, firstly allowed the Education Department to take the aforesaid posts out of the purview of Sindh Public Service Commission and to fill the same on contract basis and thereafter leave the applicants/beneficiaries to approach this court for regularization of their service, which tantamount to circumvent Rule 3(i) and 4 (i) of Sindh Public Service Commission Function Rules 1990 and judgment passed by this court.

8. Mainly under The Sindh Civil Servants (Appointment, Promotion, and Transfer) Rules, 1974, the subject post of Head Master/Head Mistress in BPS-17 could be filled only through the SPSC, 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 an 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.

9. We have also scrutinized the fresh compliance report dated 19.01.2021 submitted on behalf of the Secretary (Services) Government of Sindh in pursuance of the order dated 21.05.2018 passed by this Court, wherein it is admitted that the recruitment process for the subject appointments suffered from legal flaws and consequently when the very question of their appointment/recruitment is flawed how could further proceeding of their regularization would lie as pointed out. Prima-facie the fall out the effect of

such recruitment is obvious. In our view, to save the education of the children, learned AAG and the officials present in Court request that to fill these vacancies they may be given a reasonable time so that lawful recruitment process is initiated afresh to comply with the judgment passed by this Court in letter and spirit. Prima-facie the competent-authority made recruitments against the subject posts on contract without adopting the codal formalities as required under the law. Therefore, the competent authority is directed to ensure that no such appointment is made in the future that may violate the law settled by the Hon'ble Supreme Court regarding the appointment, etc. During arguments we have been apprised that fresh recruitment rules have been notified and the respondent department shall act strictly in accordance with the law to fill the subject posts through the competitive process. If this is the legal position of the case, they are directed to allow the incumbents Head Masters/Head Mistresses to participate in the said process without discrimination, subject to all just exceptions as provided under the law and complete the same process within two months strictly in pursuance of law and to submit the compliance report to this Court on the next date of hearing, failing which stern action shall be taken against the alleged contemnor on the next date of hearing.

10. For the aforesaid reasons, we do not find merit in the listed applications bearing CMA No.26501/2020 and CMA No.26502/2020, which are accordingly dismissed.

11. These are the reasons of our short order dated 19.01.2021 whereby we have dismissed the listed applications bearing CMA No.26501/2020 and CMA No.26502/2020.

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