

Judgment Sheet
IN THE HIGH COURT OF SINDH KARACHI

Before:

Mr. Justice Muhammad Shafi Siddiqui
Mr. Justice Adnan-ul-Karim Memon

Constitutional Petition No. D -5196 of 2017

SESSI United Staff Union Sindh (CBA) (registered) and another
Versus
Province of Sindh and 05 others

Date of hearing : 16.02.2021

Date of announcement : 23.02.2021

Khawaja Izhar-ul-Hassan and Mr. Irshad Ali, advocates for the petitioners.
Mr. Abdul Sattar Pirzada, advocate for SESSI a/w Dr. Saadat Ahmed Memon,
Director Procurement SESSI.

Mr. Fida Hussain, advocate for applicant/intervener.

Mr. Ali Safdar Depar, Assistant Advocate General Sindh.

JUDGMENT

ADNAN-UL-KARIM MEMON, J. - Through this petition, the petitioners, in pith and substance have called in question the public notice dated 25.6.2017 issued by the respondent-Sindh Employees' Social Security Institution ('SESSI') in daily "Jang" and "Dawn" newspapers. Per petitioners, their attempt to induct workers into SESSI through defective advertisements was/is unconstitutional, illegal, without jurisdiction, malafide, void ab-initio, and of no legal effect.

2. Khawaja Izhar-ul-Hassan, learned counsel for the Petitioner-Union, contended that the respondent-institution issued a public notice in daily "Jang" and "Dawn" on 25.6.2017 for recruitment of various posts in SESSI. Per learned counsel all the vacant posts in SESSI were required to be filled through the competitive process, however, the respondent- institution in deviation of law started recruiting the candidates of their own choice through respondent-Candidate Testing Service (CTS) irrespective of engaging a credible third party i.e. IBA, Bahria University, Iqra University, Cadet Colleges, or NTS, etc. Learned counsel further contended that Candidate Testing Service (CTS) / respondent No.6 is not a well-known testing agency and it has no branch across Pakistan except one in Islamabad and its office is situated on approximately eight square feet area. He further submitted that respondent No.6 has no past track record of examining such a large scale. Even the

website of respondent No.6 is not functional. He further argued that respondent No.6 is not credible, reputable, and competent to conduct examinations/tests as mentioned in the advertisement as referred to above on such a large scale. Learned counsel has also referred to clause -11 of the Office Order issued on 20.11.2003 page 167 issued by the Director, Administration SESSI for appointments of sons/daughters whereby 40% quota of sons and daughters was allowed but respondent- institution turned a deaf ear toward the genuine demand of the petitioner-union. He asserted that their abortive attempt to induct workers into SESSI through defective advertisement was/is unconstitutional, illegal, without jurisdiction, malafide, void ab-initio, and of no legal effect. He emphasized that recruitment in BS-1 to 11 ought to be made based on deceased quota without public notice; that 50% of the available posts are to be filled through promotion; that on 50% of the posts available for direct recruitment, 40% thereof are to be filled based on son/daughter quota provided in the agreement between SESSI and Petitioner No.1; and, on the balance available seats meant for direct recruitment is required to be made through the competitive process. He further averred that the charging of Rs.500 from the candidates by the service provider was/is unconstitutional; and, the respondents are liable to refund the amount to the respective candidates. He lastly prayed for allowing the instant petition as prayed.

3. Mr. Abdul Sattar Pirzada learned counsel representing respondent-institution has raised the question of maintainability of the instant petition and argued that the subject petition is liable to be dismissed as there was transparency in the recruitment procedure of the said respondents on the aforesaid posts purely on merit without any favoritism or otherwise, therefore no fundamental rights of the petitioners have been infringed. However, he has candidly proposed that the respondent-institution is ready and willing to initiate the recruitment of vacant posts from BPS-1 to BPS-15 afresh, under the Recruitment Rules notified vide Notification dated 30.12.2006, through a credible third party i.e. Institute of Business Administration (IBA) or any other reputable institute.

4. This proposal is acceptable to the petitioners, subject to the condition mentioned in the prayer clauses, with the further assertion that the appointments made in SESSI in the intervening period are required to be annulled by the respondent-institution.

5. We have heard the learned counsel for the parties on the subject recruitment in SESSI under the Recruitment Rules notified vide Notification dated 30.12.2006 and perused the material on record.

6. First, we deal with the issue of the viability of the instant petition under section 199 of the Constitution. We are of the view that the grievance of the petitioners does not relate to the terms and conditions of service, but they have sought relief of transparency in the recruitment process initiated by Sindh Employees' Social Security Institution; and, as per the profile of the Sindh Employees' Social Security Institution, which reveals that it is a statutory body established under the Provincial Employees' Social Security Ordinance, 1965 now Act, 2016; and, is a Public Sector statutory entity; and performing functions in connection with the affairs of the Province under Article 199 (1) (a) (ii) read with Article 199 (5) of the Constitution, therefore the instant petition is maintainable to be heard and decided on merits.

7. The issue involved in the present proceedings is related to general recruitment of vacant posts from BPS-1 to BPS-15 in respondent-SESSI; and, since no appointments have been made in pursuance of subject advertisement as such no findings could be given on merits. However, it is essential to have a glance at the method of recruitment to the post in BPS-5 and above in respondent-SESSI.

8. To dilate upon the legal position of the case, we have gone through the Sindh Employees' Social Security Institution (Revised) Service Regulations, 2006, notified vide Notification dated 30.12.2006. The method of recruitment in SESSI is explicitly given in Section 5 of the regulations, which provides that the recruitment to the service shall be made by the method specified in column 4 of Appendix-A in respect of each post; and a proviso (2) of regulation 5 further provides that the appointment by initial recruitment and promotion to the posts in BS-5 and above shall be made on the recommendations of respective Selection Board/Department Promotion Committee. However, it is further clarified that the initial recruitment to the posts specified in Appendix-"A" shall be made on merit according to rural/urban quota at the ratio of 60:40 respectively. The aforesaid regulation also provides that the vacancies of posts in BS-1 to 4 specified in Appendix-"A" to be filled by initial recruitment shall be made from amongst the residents of the Region of the Directorate/Circle/Hospital where the vacancies occur; and, subject to the provisions of Clauses (3) & (4) any member of service, regardless of his rank and age shall be eligible for

appointment by initial recruitment to any vacancy in service provided he possesses the qualifications prescribed for such post in column 3 of Appendix-“A”.

9. In the light of foregoing, in principle the posts are only of two kinds one is called temporary post which is always a time-bound post, and the post which is not time-bound is always treated as a permanent post and there is no concept of any contract post in service jurisprudence; and, in the service regulations of SESSI there is no post which can be termed as contract post as a separate cadre; and, there is no procedure whatsoever which provides appointment by way of contract, therefore, the government of Sindh/commissioner SESSI is bound to ensure that every appointment in the basic scales is to be made, in their departments, under the regular mode of appointment/service and not otherwise; that is why the Honorable Supreme Court has deprecated the practice of appointments on the contract basis. On the aforesaid proposition, we are guided by decisions of Honorable Supreme Court rendered in the cases of Government of Baluchistan v. Dr. Zahida Kakar and 43 others, 2005 SCMR 642. ii. Dr. Mubashir Ahmed v. PTCL through Chairman, Islamabad, and another, 2007 PLC CS 737. iii. Abid Iqbal Hafiz and others v. Secretary, Public Prosecution Department, Government of the Punjab, Lahore, and others, PLD 2010 Supreme Court 841 iv. Federation of Pakistan v. Muhammad Azam Chattha, 2013 SCMR 120 v. Muzafar Khan & others V/S Government of Pakistan & others, 2013 SCMR 304 vi. Abdul Wahab and others v. HBL and others, 2013 SCMR 1383 vii. Chairman NADRA, Islamabad through Chairman, Islamabad and another v. Muhammad Ali Shah and others, 2017 SCMR 1979 viii. Qazi Munir Ahmed Versus Rawalpindi Medical College and Allied Hospital through Principal and others, 2019 SCMR 648 ix. Raja Iviz Mehmood and another v. Federation of Pakistan through Secretary M/o Information Technology and Telecommunication and others, 2018 SCMR 162 x. Maj. (R) Syed Muhammad Tanveer Abbas and other connected Appeals, 2019 SCMR 984. xi. Unreported order dated 13.03.2019 passed by the Hon’ble Supreme Court in C.P. No.2792/2018 and other connected petitions xii. Province of Punjab through Secretary Agriculture Department, Lahore, and others Vs. Muhammad Arif and others, 2020 SCMR 507. xiii. Miss Naureen Naz Butt vs Pakistan International Airlines and others, 2020 SCMR 1625, xiv. Water and Power Development Authority v. Irtiqha Rasool Hashmi and another, 1987 SCMR 359. xv. Secretary, Ministry of Defence, Rawalpindi and others v. Muhammad Miskeen, 1999 SCMR 1296.

10. Since the vires of Sindh Employees' Social Security Institution (Revised) Service Regulations, 2006, are not under challenge, therefore, the ratio of regulations is fully applicable for recruitment through initial appointment, in our view, public employment is a source of livelihood; therefore, no citizen shall be discriminated in the said matter under the law. However, we reiterate our view that the initial recruitment on the posts from BPS-1 to 15 shall be made through the competitive process on merit and not otherwise.

11. Adverting to the proposition suggested by the learned counsel for the petitioners that all the appointments made by the respondent-institution in the intervening period are required to be scraped, we do not accept this version of the petitioners for the reason that those employees are not before this court thus we cannot pass any omnibus order behind their back, however, if at all the petitioners are aggrieved against such appointments they are at liberty to avail their remedy before the competent forum under the law, subject to all just exceptions as provided under the law. Even otherwise this in substance is not the subject of the instant petition.

12. Taking advantage of the present development, it may be observed that as per the Sindh Civil Servants (Appointment, Promotion, and Transfer) Rules, 1974, the posts in basic scales shall be made on the recommendations of the Departmental Selection Commission after the vacancies in the basic scales have been advertised in the newspapers. Provided further that such appointment shall be made after fulfillment of formalities as required in the recruitment rules and holding interview, for the post applied for; and, the candidate must possess the educational qualifications and experience and be within age limit as laid down for that appointment. Provided further that the vacancies shall be filled on the provincial basis on the merit and regional or district quota as determined under the law. However, the posts in basic scales 3 to 5 in offices which serve only a particular region or district shall be filled by appointment of the person domiciled in the region or district concerned, whereas the posts in basic scales 1 and 2 shall ordinarily be filled on the local basis, only through the competitive process. The subject of issuance of domicile is itself very fragile and raw hence required deliberation in an appropriate case. So far as basic scales 16 and above are concerned, we take guidance from the judgment passed by the Hon'ble Supreme Court of Pakistan in the case of 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 the 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.

13. Last but not least, we have noticed that the appointment of Testing Agency/respondent No.6 was not through the competitive process as required under the law, resultantly the candidates were erroneously burdened with Rs.500/- for submitting their respective applications for the subject appointments, without realizing that these were/are public appointments and it was for the respondent-SESSI to take initiative for making recruitments through the Selection Committee, rather through the third party contractor/respondent No.6; and, Rs.500/- was unnecessarily extracted from the public at large for each application, as such the aforesaid amount is liable to be refunded to the individuals in their accounts by the respondents. The provincial Government shall ensure refund of such amount to every individual without fail in three months' time.

14. Coming to the prayer clauses (e) to (g) of the memo of the petition, it is for the petitioner-union to take resort of the concerned Labour Court subject to all just exceptions as provided under the law. So far as prayer clause (h) is concerned, the same has become infructuous in the light of findings of this Court on the subject issue.

15. Before parting with this order, we may observe that the appointment in the public office can only be made through the competitive process on merit as provided under the recruitment rules and not otherwise as discussed supra. It is well-settled law that appointments in public office are to be made strictly under applicable rules and regulations without any discrimination and in a transparent manner. Thus, all appointments in the public institution must be based on a process that is substantially and tangibly fair and within the parameters of its applicable rules, regulations, and bylaws. However, if the candidate has applied based on such admissible quota under the law he can be accommodated subject to his qualification for the post under the dicta laid down by the Honorable Supreme Court of Pakistan on the subject issue. On the aforesaid proposition, our view is supported by

the following cases decided by the Hon'ble Supreme Court of Pakistan (1) Muhammad Yaseen v. Federation of Pakistan, PLD 2012 SC 132, Muhammad Ashraf Tiwana v. Pakistan, 2013 SCMR 1159, Tariq Azizuddin: in re, 2010 SCMR 1301, Mahmood Akhtar Naqvi v. Federation of Pakistan, PLD 2013 SC 195, Contempt Proceedings against Chief Secretary Sindh and others, 2013 SCMR 1752 and Syed Mubashir Raza Jafri and others v. Employees Old-age Benefits Institution (EOBI), 2014 SCMR 949.

16. In the light of the above discussion, primarily the purpose of filing of this petition is adequately served on the premise that the respondent-institution has to make recruitment to every post applied by the candidates on open merit by invoking Rules and regulations notified on 30.12.2006.

17. In view of the consensus reached between the parties, we deem it appropriate to dispose of this petition in the following terms:

a) All the appointments in the respondent-institution must be based on the process that is substantially and tangibly fair and within the parameters of its applicable rules and regulations, as well as based on minority/differently-abled quota reserved for those employees, through the competitive process on merits and not otherwise. The said exercise shall be undertaken by the competent authority of the respondent-institution within two months from the date of receipt of this order.

b) The Government of Sindh, from onwards shall ensure that the recruitment to every post from BPS-1 to BPS-15, applied by the candidates, in any department of Government of Sindh be made through the competitive process on open merit with the budgetary sanction, on regular basis (except the posts to be filled in the time-bound projects/with tenurial limitation posts) by invoking the Sindh Civil Servants Act, 1973 and rules framed thereunder as well as the relevant recruitment Rules and regulations already notified by the respective departments.

c) In the future, the Government of Sindh/respondents shall also avoid public appointments, having permanent status, on a contract and ad-hoc basis (except the posts provided under Rules 18 to 20 of the Sindh Civil Servants (Appointment, Promotion, and Transfer) Rules 1974.

18. For all the above-mentioned reasons, we allow this petition along with all pending application(s) to the extent of above observations.

Let a copy of this order is communicated to the Chief Secretary, Government of Sindh, Secretary Labour Department, Government of Sindh, and the Commissioner Sindh Employees' Social Security Institution for compliance.

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