IN THE HIGH COURT OF SINDH AT KARACHI

BEFORE:
Mr. Justice Muhammad Shafi Siddiqui
Mr. Justice Adnan Iqbal Chaudhry

C.P. No. D-756 of 2017

S.M. Kaleem Makki
Versus
Province of Sindh & others

Date of Hearing:	02.10.2019 & 07.10.2019
Petitioner:	Through Mr. Ali Almani Advocate.
Respondents No.1 to 3:	Through Mr. Shaharyar Mehar, Assistant Advocate General.
Respondent No.4:	Through Mr. Karam Dad Khan Tanoli Advocate.
Respondents No.5:	Nemo.

J U D G M E N T

Muhammad Shafi Siddiqui, J.- Petitioner has challenged a notification of 20.01.2017 whereby he was forced out of his tenure post and was directed to report to Industries & Commerce Department.

2. Brief facts of the case are that on 28.06.2016 a notification for petitioner was issued appointing him as Managing Director at Sindh Technical Education & Vocational Training Authority (STEVTA) for a period of three years w.e.f. date of issuance of notification. The said notification was followed by impugned notification dated 20.01.2017 by Chief Secretary removing him (petitioner) as being Managing Director STEVTA.

3. The impugned notification was challenged on the grounds such as the issuing authority was not competent under section 8(4) of Sindh Technical Education & Vocational Training Authority Act, 2009 (Act of 2009) whereby STEVTA came into being; that the Government of Sindh

does not mean Chief Secretary or Chief Minister in terms of latest pronouncement in the case of Mustafa Impex v. Government of Pakistan reported in PLD 2016 SC 808 and Karamat Ali v. Federation of Pakistan reported in PLD 2018 Sindh 8; the subject notification impugned was not issued in pursuance and in compliance of Section 8(4) of the Act of 2009; it does not refer to any complaint or recording of reasons for removing the petitioner and that it was without providing any opportunity of hearing.

4. Although the facts may not be relevant for the purposes of deciding the present lis but it appears that the petitioner began his career as Project Director (Quality Control & Marketing Center) SSIC i.e. Sindh Small Industries Corporation Hyderabad. He was later transferred to Karachi in the Directorate of Export. Petitioner in pursuance of a notification for right sizing of the department categorized in the surplus pool w.e.f. 01.07.2000, including others, available for disposal of Services, General Administration & Coordination Department, Government of Sindh SGACD. Consequently the charge was released by petitioner on 30.06.2000 and on 29.11.2002 by a notification he was absorbed as Additional Secretary in the Industries Department w.e.f. 01.12.2002 in Basic Pay Scale 19, which was followed by his promotion to BPS-20.

5. It was at this point of time when a petition was filed in the year 2009 challenging appointment and absorption of petitioner in cadre post. Though on 02.04.2011 the referred petition was dismissed by a Bench of this Court, however against such dismissal on 12.06.2013 Hon'ble Supreme Court allowed the appeal and petitioner was directed to be absorbed in a non-cadre post. Consequently respondent No.1 issued a recalling notification of absorption of petitioner and he was directed to report to Surplus Pool of SGACD which he did. Petitioner made a request

for his appointment to any non-cadre post in BPS-20, claiming to be in compliance of Hon'ble Supreme Court decision.

6. In pursuance of contempt application concerning his repatriation to original department SSIC petitioner informed on 02.04.2015 that the Hon'ble Supreme Court never directed him to be repatriated to his original department SSIC. The notification of 27.05.2015 thus declared SSIC as petitioner's parent department, which was not challenged as it was followed by a notification dated 03.07.2015 appointing him as MD of STEVTA. However, since it was not routed through Selection Committee, the process was scrapped followed by advertisement inviting applications. Petitioner along with others applied and petitioner was short listed. In was followed by summary approved by Chief Minister. Notification was then issued on 28.06.2016 appointing him as MD of STEVTA for three years.

7. It was thus the issue of notification that appointed petitioner as Managing Director of STEVTA for a period of three years which, per learned counsel, is still alive for its consequential effect now. The main grievance of the petitioner thus is a notification of 20.01.2017 whereby his services were though claimed to have been transferred but in fact contract was terminated as he was sent to Industries & Commerce Department as an officer of SSIC, being his parent department. It is claimed that the said notification be declared as unlawful on the grounds mentioned above and the consequential relief to be followed. In substance the gist of arguments of learned counsel for petitioner is to declare the impugned notification as illegal whereby he was removed as M.D. of STEVTA and if it is so, he would be entitled to salary and back benefits as being a Managing Director of STEVTA.

8. In support of first issue that embarked upon the alleged removal by the Chief Secretary, learned counsel submitted that the Chief

Secretary issued notification without the approval of the Cabinet which was inevitable in terms of the judgment in Mustafa Impex v. Government of Pakistan reported in PLD 2016 SC 808. He further submitted that the Mustafa Impex's case was followed by a Division Bench of this Court in the case of Karamat Ali v. Federation of Pakistan reported in PLD 2018 Sindh 8, in which, while considering the tenure post of the Inspector General of Police appointed by provincial government, learned Division Bench extended the principles applied in the Mustafa Impex case to the said case and found provincial government to have deviated with the spirit of interpretation of Hon'ble Supreme Court.

9. Learned Assistant Advocate General however argued that the case of Mustafa Impex is not applicable as present case does not relate to any fiscal matter and promulgation of legislation. It is argued that Mustafa Impex never approved a case where cabinet approval is required for any other executive action, except those mentioned in the judgment. However, alternatively learned Assistant Advocate General has made an attempt to place on record ex post facto approval of 05.10.2019 in relation to a decision taken on 20.01.2017.

10. We have heard the learned counsel and perused the material available on record.

11. Petitioner has made an attempt to narrow down the controversy to a notification under challenge whereby petitioner was removed as being Managing Director of STEVTA, however the appointment of petitioner cannot be isolated without discussion. His initial appointment as being Managing Director was also by a notification of 28.06.2016, which is available at page 407 issued by the Chief Secretary Sindh followed by impugned notification of removal on 20.01.2017. What sparked in between aforesaid two dates is a judgment pronounced in the case of Mustafa Impex (Supra). The appeals in the case

of Mustafa Impex were decided on 18.08.2016. After detailed deliberation in paragraph 84 Hon'ble Supreme Court sum up the issues involved therein as under:-

> *"84. We may now summarize our conclusions:--*
>
> *(i) The Rules of Business, 1973 are binding on the Government and a failure to follow them would lead to an order lacking any legal validity.*
>
> *(ii) The Federal Government is the collective entity described as the Cabinet constituting the Prime Minister and Federal Ministers.*
>
> *(iii) Neither a Secretary, nor a Minister and nor the Prime Minister are the Federal Government and the exercise, or purported exercise, of a statutory power exercisable by the Federal Government by any of them, especially, in relation to fiscal matters, is constitutionally invalid and a nullity in the eyes of the law. Similarly budgetary expenditure, or discretionary governmental expenditure can only be authorized by the Federal Government i.e. the Cabinet, and not the Prime Minister on his own.*
>
> *(iv) Any Act, or statutory instrument (e.g. the Telecommunication (Re-Organization) Act, 1996) purporting to describe any entity or organization other than the Cabinet as the Federal Government is ultra vires and a nullity.*
>
> *(v) The ordinance making power can only be exercised after a prior consideration by the Cabinet. An ordinance issued without the prior approval of the Cabinet is not valid. Similarly, no bill can be moved in Parliament on behalf of the Federal Government without having been approved in advance by the Cabinet. The Cabinet has to be given a reasonable opportunity to consider, deliberate on and take decisions in relation to all proposed legislation, including the Finance Bill or Ordinance or Act. Actions by the Prime Minister on his own, in this regard, are not valid and are declared ultra vires.*
>
> *(vi) Rule 16(2) which apparently enables the Prime Minister to bypass the Cabinet is ultra vires and is so declared.*
>
> *(vii) Fiscal notifications enhancing the levy of tax issued by the Secretary, Revenue Division, or the Minister, are ultra vires. (it is clarified, in passing, that this court has in the past consistently held that a*

greater latitude is allowed in relation to beneficial notifications and that principle still applies).

(viii) In consequence of the above findings the impugned notifications are declared ultra vires and are struck down."

12. Although the aforesaid judgment of Hon'ble Supreme Court dealt with fiscal and legislative matter and bypassing of Rule 16(2), subsequently the judgment in the case of Karamat Ali (Supra) has enlarged the view wherein, while considering the Section 4 of the Police Act, the Division Bench of this Court ruled that appointment of Inspector General by the provincial government could only mean provincial cabinet and that a decision to be taken by provincial government, cannot take place elsewhere in the executive branch. The decision itself must be that of provincial cabinet. The relevant paragraphs of the judgment are as under:-

"66. When the position in this Province is considered, the first point to note is that the statutory power to appoint the Inspector General vests in the Provincial Government in terms of section 4 of the Police Act. That, for reasons already stated, means and can only mean the Provincial Cabinet. Thus, at the Provincial end, the decision to appoint (or to remove and replace an incumbent) cannot be taken elsewhere in the executive branch and their endorsed or approved by the Cabinet. The decision itself must be that of the Provincial Cabinet. Secondly, in this Province the post has associated with it a specific term as given in the 1986 Rules. We emphasize that this is the law of the land insofar as this Province is concerned. It is simply not permissible for the Provincial Government to disobey and flout this requirement in an almost cavalier fashion and "surrender" the services of the incumbent for the time being to the Federation as and when it pleases. And equally, it is not permissible for the Federation to disregard this requirement and disrespect provincial law, by recalling its officer at any time it deems fit, on the ground that his appointment and service was "till further orders" or at the pleasure of the Federal Government. Therefore, in the appointment of the Inspector General the real question is not whether it is the Federal or the Provincial Government that is to

prevail. The exercise has always to be a collaborative effort.…

67. What of the situation where either the Provincial or the Federal Government wish to remove an officer during the term of office? Here, the law enunciated by the Supreme Court in the Anita Turab case would apply. The relevant portion, para 22(ii), is again reproduced for convenience: "When the ordinary tenure for a posting has been specified in the law or rules made thereunder, such tenure must be respected and cannot be varied, except for compelling reasons, which should be recorded in writing and are judicially reviewable". Thus, if the Provincial Government (here meaning the Provincial Cabinet) seeks to surrender the incumbent to the Federation or otherwise remove him from the post, then the decision must be taken at a duly convened meeting of the Cabinet, and the agenda circulated for the same, which must set out the compelling reasons for which it is proposed to remove him. Proper notice must be given to the incumbent Inspector General and the relevant papers provided to him so that he can make a representation and, if he so desires, attend the Cabinet meeting to explain his position. If the decision is taken to remove or surrender the incumbent then the reasons for the same must be fully and duly recorded in the minutes of the meeting. The decision, along with the relevant record, must be transmitted to the Federal Government to which also the incumbent may make representations. The Federal Government must properly apply its mind to the situation. If it disagrees with the Provincial Government, namely that the stated circumstances or reasons are not compelling, then the incumbent cannot be removed or surrendered to the Federation. It is only if the Federal Government concludes that the circumstances or reasons are compelling that the incumbent can then be removed and/or surrendered to the Federation. And of course, as held by the Supreme Court, the entire exercise would be subject to judicial review. Furthermore, while the exercise is being carried out, neither the Provincial nor the Federal Government (either unilaterally or even acting together) can remove, surrender, recall or replace the incumbent, whether by way of an "interim" measure or otherwise. It must also be kept in mind that any replacement would not follow automatically at the behest or desire of the Provincial Government. This is so because once the post is vacated it must then be filled in as a collaborative effort in the manner as indicated above."

13. The arguments of learned Assistant Advocate General that case of Mustafa Impex is distinguishable on the count that it only relates to fiscal and legislative issue, is thus not appealable and lost venom. After the judgment in the Karamat Ali case, no room is left to distinguish the judgment of the Hon'ble Supreme Court in Mustafa Impex case that it only extends to fiscal and legislative matters. Both petitioner and AAG laid emphasis and backed their cases on the two pronouncements and its retrospective and prospective effect. We need to settle one thing; does law take effect when it was interpreted or does it take effect from the date of its promulgation?

14. The STEVTA came into being through Sindh Technical Education & Vocational Training Authority Act, 2009 and the appointment of Managing Director effected under section 8(4) of ibid Act, the term of which is defined/stipulated as three years. The same is reproduced as under:-

> *"**8. Appointment of the Managing Director.**---(1) There shall be a full-time Managing Director of the Authority appointed by the Government on such terms and conditions as it may determine.*
>
> *(2) ...*
>
> *(3) ...*
>
> *(4) The Managing Director shall have a term of three years and shall be eligible for reappointment for more than one term on the basis of his performance; provided that the Government on a complaint regarding the performance of the Managing Director or otherwise reduce his term or as the case may be terminate his services.*
>
> *(5) .."*

15. The dates of the notification and the judgments as relied upon by the Counsel are very crucial. The notification whereby the petitioner was appointed as M.D of STEVTA was issued on 28.6.2016 whereas he was removed as M.D. STEVTA on 20.1.2017. The judgment in the Mustafa Impex came on 18.8.2016 (two months after the appointment), however

on the day when the judgment of Mustafa Impex was announced it was silent as far as its retrospective and prospective effects are concerned. The notifications and the Ordinance which were the subject matter of Mustafa Impex were declared ultra vires since they were not accorded and routed through the Federal Cabinet. The clarity about the prospective effect of the judgment of Mustafa Impex came in the case of Pakistan Medical & Dental Council vs. Muhammad Fahad Malik (2018 SMCR 1956) when in para 24(a) the Hon'ble Supreme Court observed that the judgment of the Supreme Court unless declared otherwise operates prospectively and such amended Ordinance (Which was subject matter of PMDC's case) were not hit by Mustafa Impex case. This judgment came on 12.1.2018.

16. It is the general principle of jurisprudence that the law takes its effect from the date of promulgation and "interpretation of the said law" cannot be subjected to the doctrine of retrospective effects unless expressed specifically in the judgment, therefore, Mustafa Impex's case is to be applied prospectively, in general. It is the existence of law at the relevant time that counts, which may have been interpreted at a later date. Since the deficiency in the appointment notification as far as Provincial Cabinet is concerned, is not questioned no challenge could be thrown.

17. The principle we derive from the conclusion of the aforesaid three judgments is that Mustafa Impex only invalidates those actions retrospectively which were impugned in that lis and not all others, so by virtue of aforesaid principle the notification for the appointment of the petitioner is saved whereas it set a mechanism for future course i.e. issuance of impugned notification. By applying the principle that we derived from the aforesaid Judgments, the removal cannot be sustained. As reproduced above Section 8(4) of STEVTA Act requires that the M.D.

shall be appointed for a term of three years and shall be eligible for re-appointment for more than one term on the basis of performance provided that the Government on a complaint regarding performance of the M.D. or otherwise reduce the term as the case may be and terminate services. The impugned notification was issued by the Chief Secretary Sindh without any reference to Cabinet's approval as it requires Government's approval, which is defined in the above referred judgments.

18. There is yet another aspect of the matter that the impugned notification is absolutely silent as to the requirement of Section 8(4) of the STEVTA i.e. neither any complain is alleged in the impugned notification nor is there any matter that concerns the performance of the petitioner. Rule 11(a) of Sindh Government Rules of Business, 1986 is pari materia to Rule 16(2) of the Rules of Business, 1973. Therefore as in the case of Business Rules, 1973, there cannot be any waiver of reference to Cabinet and pass order as deem fit by the Chief Secretary. Similarly the post facto approval which was filed by the learned AAG at the time of conclusion of his arguments is not appealable to our mind as it is the wisdom of members of the relevant Cabinet which may form a view but such view cannot be taken over by a subsequent Cabinet while issuing post facto approval. It is, thus, an alien process which was apparently presented by the learned AAG. We do not approve such scheme of post facto approval particularly in the circumstances of the case.

19. We have noticed that this petition was primarily filed for declaration that petitioner's parent department is surplus pool of SGA&CD and the petitioner further sought declaration that the impugned notifications are illegal without any lawful authority. In the alternative the petitioner sought directions against respondent No.1 to decide the

submissions of petitioner dated 28.11.2016 and 22.12.2016 on their merits and in accordance with law and lastly the petitioner requested that till disposal of this petition the impugned notification dated 20.1.2017 “to the extent” it directs the petitioner to report to Industries & Commerce Department as officer of respondent NO.5 be suspended. The substance of the petition was that he cannot be subjected to report to Industries and Commerce Department of Sindh Small Industries Corporation. His primary grievance, as can be seen, was not that he was removed but he cannot be sent to the Industries & Commerce Department of Sindh Small Industries Corporation. Thus, the petitioner himself narrowed down the gravity of grievance to the extent that he may not be subjected to Industries & Commerce Department, Sindh Small Industries Corporation and should have been sent to surplus pool of SGA&CD. We have noticed that during pendency of this petition he retired from service on 17.12.2018. There was enough period available either to amend the petition or amend the relief as deemed fit or at least to move an application in this regard to claim salary of the unexpired period as being Managing Director. Though the subject matter of this petition is quite different and distinct as the petitioner has agitated that the petition is pending since February, 2017 and there was no fault of the petitioner in ending contractual period which was ended on 28.6.2019. Neither from the date of his retirement nor from the cut of date 20.6.2019, that ended the contractual period, the petitioner cared to move an interlocutory application for any consequential effect of such declaration, regarding salary of unexpired period.

20. Though the paramount relief claimed in the petition has virtually become infructuous and it can only be for academic purpose, we do not feel to express ourselves insofar as the claim of alleged salary as being Managing Director of STEVTA is concerned. The scope of this petition is

now left only to an extent of notification of 20.01.2017 and we declare such removal as unlawful by allowing petition. The petitioner, if so advised, may pursue his case for recovery of the alleged salary.

21. We may, however point out that learned AAG, while he concluded his arguments, has offered salary to the petitioner as being civil servant of BPS-19 and not as s Managing Director of STEVTA.

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

Dated: **Judge**

Judge