

IN THE HIGH COURT OF SINDH KARACHI

Before:

Mr. Justice Salahuddin Panhwar
Mr. Justice Adnan-ul-Karim Memon

C.P. No. D- 6243 of 2016

Mehtab Ahamed Siddiqui & another

Petitioners

Through : Mr. Ovais Ali Shah, advocate.

Respondent No.1 : Mr. Muhammad Nishat Warsi, DAG.
Through

Respondents No.2 & 3 : Mr. Omer Memon, advocate.
Through

Respondents No.4 to 7 : Mr. Umar Akhund, advocate
Through

Dates of hearing : **13.09.2021, 28.09.2021 & 11.10.2021**

Date of Order : **11.10.2021**

ORDER

ADNAN-UL-KARIM MEMON, J. Through this petition, the petitioners have prayed for issuance of a writ of quo warranto against the private respondents to vacate the offices presently they are holding in respondent-House Building Finance Company (HBFC), inter-alia, on the ground, that they were/are not qualified to hold their offices and their induction as Chief Financial Officer,(CFO) Head of Credit and Risk Management (HCRM) Head of Human Resource and Head of Internal Audit (HIA) in the year 2016 is unlawful, ultra vires of the Constitution, malafide and of no legal consequences more particularly in contradiction to the HBFC Rules and the Public Sector Companies (Corporate Governance Rules 2013) as amended up to 2017.

2. The precise case of the petitioners is that the services of the private respondents were hired by the responded-HBFC on deputation / secondment from Private Banks, which is unlawful and a violation of HBFC Employees Service Rules, vide appointment letters issued on various dates between January 2016 and April 2016. Initially in November 2014 and March 2015, respondents-HBFC advertised aforesaid posts, however, they could

not fetch candidates having qualification and experience for the said posts and subsequently on their own accord they hired the services of the private respondents on deputation / secondment under the terms and conditions set forth in their appointment letters. Petitioners being aggrieved by and dissatisfied with the aforesaid recruitments of the private respondents in HBFCL filed the Writ Petition No.2729/2016 before the learned Islamabad High Court, Islamabad, which was dismissed as withdrawn vide order dated 20.10.2016 on the premise that impugned letters of appointment in favour of the private respondents were passed by the authority at Karachi and the dominant cause accrued to the petitioners at Karachi. Thereafter, petitioners filed this petition before this Court on 16.11.2016.

3. Mr. Ovais Ali Shah, learned counsel for the petitioners emphasized that Rule 13 of the Public Sector Companies (Corporate Governance) Rules, 2013, provides that the Chief Financial Officer, Head of Credit and Risk Management, Head of Human Resource, Head of Internal Audit and Company Secretary of a public sector company defined in Rule 2(1)(g) of the said Rules shall be appointed by the Board of the said company, and the remuneration and other terms and conditions of their employment shall also be determined with the approval of the Board. He also emphasized that Under Rule 14(4) of the above Rules, no person shall be appointed on the said posts of a public sector company unless he possesses the qualification prescribed therein. Learned counsel further submitted that the private respondents are holders of Public Office as embodied under Article 199 (1) (b) (ii) of the Constitution; that they are not qualified to hold a public office of the CFO, HCRM, and HHR and HIA. As per the learned counsel, no advertisement was published and the private respondents do not fulfill the basic qualification required for the aforesaid posts; that no transparent procedure of inducting them was adopted, i.e. publishing an advertisement to gauge the talent pool available for such posts, filtering and then assessing the best candidates for the posts under the criteria laid down in the Public Sector Companies (Corporate Governance Rules 2013) as amended up to date; Per learned counsel the aforesaid process started in the year 2016 with

their induction, and was, therefore, person-specific based on political consideration, rendering the entire exercise colorable and tainted with nepotism and mala fide. Learned counsel added that because of the above Rules and the well-settled law discussed above, the private respondents do not have any vested right to seek contractual appointment; and, they have also not acquired any legal right from the appointment made by HBFC and accepted by them admittedly on contract, therefore, no corresponding legal duty was/is cast on HBFC to continue them, and thus Writ of Quo Warranto, as prayed for by the petitioners, can be granted. In support of his contentions, learned counsel for the petitioners, has relied upon SI No.27-A, 32-A(i) of Esta Code and argued that the appointment made on deputation could only be made if no person eligible and suitable for appointment is available in the concerned office. Learned counsel further relied upon the clause 3.1.9 of HBFCL Employees Service Rules and submitted that no appointment on deputation can be made.

4. Mr. Umar Akhund, learned counsel representing private respondents, has objected to the maintainability of the captioned petition and contended that the respondent-HBFCL has acted under the Human Resource Manual, rules and regulations of the company as such had not violated any fundamental rights of the petitioners. Learned counsel further contended that HBFCL Rules are non-statutory hence a Constitutional Petition under Article 199 is not maintainable. He further submitted that the private respondents were appointed as a result of transparent / lawful exercise / process carried out by the respondents-HBFCL in consultation with the State Bank of Pakistan; that the criteria and qualification as alleged by the petitioners to be existed for being recruited in respondent-HBFCL is not applicable in the case of private respondents. They were appointed on secondment in pursuance of Article 59-A of Article of Association of respondent-HBFCL; that they were granted exemption by the Security & Exchange Commission of Pakistan from the qualification requirement as provided under Rule 14 of the Corporate Governance Rules 2013 on account of the vast experience of nearly 30 years in the field of Finance and having other expertise. He relied upon copy of inquiry report by the fact finding committee.

He pointed out that since private respondents have already retired / completed their tenure of service, except respondent No.7 and he has no intention to seek extension in his secondment period after the same expires on 18.04.2022. He prayed for the dismissal of this petition.

5. Mr. Omer Memon, learned Counsel for the respondents-HBFC has adopted the arguments of learned counsel for the private respondents. At the outset, he submitted that the private respondents No.4 to 6 have completed their tenure of service and are no more in the service of HBFCL except respondent No.7 whose tenure is to be completed on 18.04.2022. Learned counsel referred to various Sections of the Human Resource Manual of HBFC and argued that HBFC was bound by any nomination made by the Board of Directors (Board) of a Public Sector Company; therefore, respondent No 7's appointment as a CFO of HBFCL was legally valid. He stated that the Board exercised its discretion that it thought fit at the relevant time and this Court has no jurisdiction to interfere with such discretion/decision-making power. He relied on Rule 4(4) of the Rules of 2013 to submit that while the CFO of the Board of a Public Sector Company is to be elected by the Board of such company, this does not apply where the CFO of the Board is appointed by the Government; besides; nonetheless the Board as is evident from the minutes dated 05.12.2017 of the 06/2017th Board meeting approved amendment regarding appointment on deputation. In support of his contentions, he relied upon the case of Sui Southern Gas Company Ltd, Karachi v. Imadad Ali Pathan and others (2020 SCMR 1259). He lastly prayed for the dismissal of this petition.

6. Mr. Muhammad Nishat Warsi, learned DAG, has supported the stance of the learned counsel for the petitioners on the analogy of qualification and experience of the private respondents in private sector companies rather than public sector companies.

7. We have heard the learned counsel for the parties and have perused the entire material available on record and the case-law cited at the bar.

8. From the foregoing factual background emanate the following question of law which will be addressed accordingly:-

Whether respondents No.4 to 7 were not eligible to be appointed as Chief Financial Officer, Head of Credit and Risk Management, Head of Human Resource and Head of Internal Audit of the respondent-HBFC in light of Public Sector Companies (Corporate Governance Rules 2013) as amended up to April 21, 2017?

9. Section 13 of Public Sector Companies (Corporate Governance Rules 2013), provides appointment and removal of Chief Financial Officer, Company Secretary, and Chief Internal Auditor as under:-

“Appointment and removal.-(1) The Board shall appoint a chief financial officer, a company secretary, and a chief internal auditor by whatever name called.

(2) The appointment, remuneration, and terms and conditions of employment of the chief financial officer, the company secretary, and the chief internal auditor of the Public Sector Company shall be determined with the approval of the Board.

(3) The chief financial officer, the company secretary, or the chief internal auditor of the Public Sector Company shall not be removed except with the approval of the Board.”

10. Rule 14 deals with the Role and qualification of the Chief Financial Officer as under:-

(1) The chief financial officer shall be responsible for ensuring that appropriate advice is given to the Board on all financial matters, for keeping proper financial records and accounts, and for maintaining an effective system of internal financial control.

(2) No person shall be appointed as the chief financial officer of a Public Sector Company unless he is,-

(a) a member of a recognized body of professional accountants with at least five years relevant experience, in case of Public Sector Companies having total assets of five billion rupees or more; or

(b) a person holding a master's degree in finance from a university recognized by the Higher Education Commission with at least ten years relevant experience, in case of other Public Sector Companies.

(5) No person shall be appointed to the positions of the chief financial officer and company secretary unless he is fit and proper for the position.

11. At this juncture, it is necessary to examine SI. No. 141 of the Civil Establishment Code (Esta Code) which contains the Policy

Guidelines for Contract Appointments for posts in Autonomous/Semi-Autonomous Bodies, Corporations, Public Sector Companies, etc. owned and managed by the Federal Government:-

“To regulate contract appointments in Autonomous/Semi-Autonomous Bodies, Corporations, Public Sector Companies, etc., owned and managed by the Federal Government, the Chief Executive has been pleased to lay down the following policy guidelines:-

(i) In the case of tenure posts, appointment to which is regulated by specific provisions of a law, rule, and policy instructions, contract appointments may be made in the manner prescribed in the applicable law, rules, and policy guidelines/directions issued by the Federal Government.

(ii) For projects which have a limited life

(iii) For posts other than those mentioned at (i) and (ii) above contract appointments should be made only subject to fulfillment and observance of the following conditions:

(a) Where the nature of a particular job/vacant position requires contract appointment for a specific period, standing instructions should be issued by the administrative Ministry/Division concerned, after consultation with the Chairman of the Board of Directors/Board of Governors, specifying such posts and the parameters governing appointment on contract basis against such posts.

(b) **Vacancies should be advertised in the leading national and regional newspapers.**

(c) Selection should be made through regularly constituted Selection Committees/Boards.

(v) The contract appointment, where justified, may be made for a period of two years initially, on standard terms including termination clause of one month's notice or one month's pay in lieu thereof. Extension may be made on a two-yearly basis.

12. So far as the maintainability of the instant petition is concerned, the Hon'ble Supreme Court in the following cases has settled the proposition with regard to powers of this Court under Article 199(1) (b) (ii) of the Constitution.

i) Salahuddin and 2 others v. Frontier Sugar Mills and Distillery Ltd., Takht Bai and 10 others' [PLD 1975 SC 244].

ii) N-W.F.P. Public Service Commission through Chairman and another v. Dr. Samiullah Khan and 2 others [1999 SCMR 2786].

- iii) Hafiz Hamdullah v. Saif Ullah Khan and others' [PLD 2007 SC 52].
- iv) Capt. (R) Muhammad Naseem Hijazi v. Province of Punjab through Secretary Housing and Physical Planning and 2 others' [2000 PLC (C.S.) 1310]
- v) Qazi Hussain Ahmed, Ameer Jamaat-e-Islami Pakistan and others v. General Pervaiz Musharraf, Chief Executive and others' [PLD 2002 SC 853].
- vi) Malik Nawab Sher v. Ch. Muneer Ahmed and others' [2013 SCMR 1035].
- vii) Selling of National Assets Including PIA At Throwaway Price (2019 SCMR 1952).
- viii) Syed Mubashir Raza Jaffri and others v. EOBI and others (2014 SCMR 949).
- ix) Muhammad Arshad Sultan v. Prime Minister of Pakistan (PLD 1996 SC 771).
- x) Lal Khan v. EOBI and others (2010 PLC CS 1377).
- xi) Zubair v. Federation of Pakistan and others (2016 PLC CS 259).
- xii) Sheikh Maqbool Elahi and others v. Khan Abdul Rehman Khan and others (PLD 1960 SC 266).
- xiii) Salahuddin and 2 others v. Frontier Sugar Mills & Distillery Ltd and others (PLD 1975 SC 244).
- xiv) KDA and another v. Wali Ahmed Khan and others (1991 SCMR 2434).
- xv) Hafiz Hamdullah v. Saifullah Khan and others (PLD 2007 SC 52).
- xvi) Muhammad Rafi and another v. Federation of Pakistan and others (2016 SCMR 2146).
- xvii) Nighat Yasmin v. PIAC and others (2004 SCMR 1820).
- xviii) Syed Mubashir Raza Jafferi and others v. Employees Old Age Benefits Institutions (EOBI) (2014 SCMR 949).
- xix) Ali Azhar Khan Baluch Province of Sindh (2015 SCMR 456).
- xx) Human Rights Case No.3654 of 2018 in the matter regarding appointment of Managing Director Pakistan Television Corporation

13. In the light of the above-discussed precedent law, it is obvious that the object of a writ in the nature of quo warranto is to determine whether a person is holding a 'public office' legally. The High Court having regard to the test quoted with approval by the Hon'ble Supreme Court in the case of Salahuddin and 2 others v. Frontier Sugar Mills supra at the first instance has to ascertain whether or not the person against whom a writ has been sought holds a 'public office'. The petitioner doesn't need to show that

he/she is an 'aggrieved person'. The bona fides of the petitioner may be relevant but not a determinant factor to exercise discretion under Article 199(1)(b)(ii) of the Constitution. The jurisdiction vested in a High Court in respect of a writ of quo warranto is inquisitorial. The High Court has to consider whether the person who holds a public office fulfills the necessary qualifications prescribed under the relevant law and that the legal provisions relating to appointment have not been violated. The jurisdiction vested in this Court being discretionary may, therefore, be exercised in an appropriate case despite being satisfied that the person who has brought the matter may be having a personal interest, or his bona fides may appear to be suspect. Technicalities or minor irregularities would not render an appointment to a public office invalid.

14. The HBFCL is a body corporate company; owned and controlled by the Federal Government thus the appointments made in HBFCL falls within the ambit of the Public Sector Companies (Corporate Governance) Rules, 2013. Primarily, these rules are applicable to HBFCL. Rule 2-A of the Rules 2013 requires the appointment of CEO and Directors of Public Sector Companies. For the purpose of the instant matter we intend to confine ourselves to the appointment process of the posts as called in question in the instant petition; and, to that effect Rule 14 deals with the Role and qualification of the Chief Financial Officer. No person shall be appointed as the Chief Financial Officer of a Public Sector Company unless he is a member of a recognized body of professional accountants with at least five years relevant experience, in case of Public Sector Companies having total assets of five billion rupees or more; or a member of a recognized body of professional accountants with at least five years relevant experience, in case of Public Sector Companies having total assets of five billion rupees or more; or a person holding a Master's degree in Finance from a University recognized by the Higher Education Commission of Pakistan with at least ten years relevant experience, in case of other Public Sector Companies.

15. The Hon'ble Supreme Court of Pakistan has held in number of cases that suitability and eligibility of a candidate is to be

ascertained through an objective procedure and appointment thereof needs to have a nexus with the object of a job. This principle was laid down by the Hon'ble Supreme Court in the case of Muhammad Yaseen v. Federation of Pakistan (PLD 2012 SC 132). Paragraph 36 of the above judgment is reproduced as under:-

“36. To test the validity of the appointment process in the case, it would be useful to adopt a test based on the following consideration;

- a) Whether an objective selection procedure was prescribed;
- b) If such a selection procedure was made, did it have a reasonable nexus with the object of the whole exercise, i.e. selection of the sort of candidate envisages in section 3 of the Ordinance;
- c) If such a reasonable selection procedure was indeed prescribed, was it adopted and followed with rigour, objectivity, transparency and due diligence to ensure obedience to the law.”

16. In the aforesaid context, it is germane to look at the **Audit Report** submitted by the learned counsel for the petitioner through a statement dated 22.03.2018, “**on accounts of HBFCL for the period January 1, 2016 to December 31, 2016**”, which prima-facie shows that there was grave illegalities in appointment of the private respondents. The audit department was of the view that management of HBFCL has misconstrued Article 59-A of the Articles of the Association and appointed private respondents from Private Sector on secondment / deputation in the Public Sector Company, having no experience in public sector companies and in contravention of the Government of Pakistan Rules on deputation and appointment. Furthermore, the appointment was made without advertisement and on secondment by the management of the HBFCL is also clear violation of clause 3.7.1.1 and 3.1.9 of its HR Manual. There is no policy regarding appointment on secondment in HBFCL. The relevant pages of the Audit Report are 497 to 545. Prima-facie, the management of HBFCL made an abortive attempt by making amendment on 21.02.2018 in clause 3.1.9 of HR Manual to circumvent the audit para as discussed supra.

17. Thus, to cut the long story short, the respondent-HBFCL and private respondents have nothing with them to defend these

palpable illegalities in the process of appointments as discussed in detail in the preceding paragraphs. We are of the considered view that the appointment of private respondents were made in violation of Section 14 of the Public Sector Companies (Corporate Governance Rules 2013). Our view is supported by the decisions of the Hon'ble Supreme Court rendered in the case of Syed Mubashir Raza Jaffari and others v. The Employees Old Age Benefits Institutions (EOBI) (2014 SCMR 949) and Selling of National Assets Including PIA At Throwaway Price (2019 SCMR 1952) and Human Rights Case No.3654 of 2018 (2019 SCMR 1).

18. For the above reasons, the petition is allowed and it is declared that private respondents were not eligible to be appointed as Chief Financial Officer,(CFO) Head of Credit and Risk Management, Head of Human Resource and Head of Internal Audit of the respondent-HBFC. The appointments of the private respondents made by the respondent-HBFCL vide notifications, dated 05.01.2016, 12.01.2016 and 19.04.2016, violated the qualifications and criteria prescribed under Section 14 of Public Sector Companies (Corporate Governance Rules 2013) and the legal provisions in respect of such an appointments were illegal, void, and without legal effect and are hereby set aside.

19. The Competent Authority of HBFCL is directed to forthwith initiate the process for selection of an eligible person to be appointed against the aforesaid public office / posts in HBFC, inter alia, having regard to the principles and law laid down by the Hon'ble Supreme Court in the aforesaid cases. The aforesaid exercise shall be completed within sixty days (60 days) from the date of announcement of this judgment.

20. These are the reasons of our short order dated 11.10.2021, whereby we have allowed the instant petition.

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Shahzad Soomro