

**HIGH COURT OF SINDH, CIRCUIT COURT AT
HYDERABAD**

C.P No.D-1769 of 2021

[Dr. Arshad Ali Lodhi versus Province of Sindh & Ors]

DATE ORDER WITH SIGNATURE OF JUDGE

BEFORE:-

Mr. Justice Adnan-ul-Karim Memon
Mr. Justice Adnan Iqbal Chaudhry

Petitioner : Through Mr. Sarmad Hani advocate
Respondent No.4 : Through Mr. M. Yousuf Leghari advocate
Respondent No.5 : Through Mr. Kamaluddin advocate
Province of Sindh : Through Mr. Abdul Jalil A. Zubedi, Addl: A.G
Date of hearing : 14.12.2021
Date of Decision : 24.12.2021

J U D G M E N T

ADNAN-UL-KARIM MEMON, J.- The petitioner has challenged the Notification dated 26.11.2020, whereby, respondent No.4 has been re-appointed as Executive Director, Sindh Institute of Ophthalmology and Visual Sciences, Hyderabad (**SIOVS**).

2. Mr. Sarmad Hani, learned counsel for the petitioner contends that SIOVS was established by Sindh Institute of Ophthalmology and Visual Science Act 2013 (**Act, 2013**) and before this same was working as Eye Hospital Hyderabad, attached with Liaquat Medical College, as Department of Ophthalmology. He next contends that after enactment of the Act, 2013 the services of the officials/officers, already serving in the Ophthalmology Department of Liaquat Medical University, were transferred to SIOVS and accordingly vide Notification dated 22.07.2013, the respondent No.4, who was serving as Professor Ophthalmology Department of Liaquat Medical University, was posted/appointed Director SIOVS. He further contends that per Notification dated 03.12.2020 the respondent No.4 stood retired with effect from 31.12.2020 on attaining the age of superannuation; however, before his retirement an amendment was made in the Act, 2013 on December 2019, and vide impugned Notification dated 26.11.2020 the respondent No.4 has been re-appointed as Executive Director SIOVS from 01.01.2021 to 31.12.2024, followed by Notification dated 08.05.2021, whereby, previous retirement



Notification of respondent No.4 has been superseded. He argued that the re-appointment of respondent No.4 is based on malafide, ulterior motives, and gross violation of the law. He next argued that Chief Minister has no power to re-appoint respondent No.4 as Executive Director SIOVS, as Act 2013 *ibid* has no provision of re-appointment. He emphasized that respondent No.4 was appointed in a statutory body without any advertisement violates the rights of other citizens under Article 27(1) of the Constitution; that the spirit of the said Article applies with equal force to the appointment made in a statutory body like SIOVS owned and controlled by the Sindh Government; that this Court cannot hold such an appointment to be legal and proper on the ground that there was no need to issue the public notice as the incumbent was reappointed on the subject post. Learned counsel asserted that the appointment of respondent No.4 without an advertisement to the office of Executive Director SIOVS under the Act 2013 *ibid* cannot be allowed to continue in such office by this Court on the ground of violation of the right to equality guaranteed under Article 25 of the Constitution. He further argued that the re-appointment of respondent No.4 has been made, which violates the dicta laid down by the Hon'ble Supreme Court in its various pronouncements. He, therefore, prayed that impugned Notification dated 26.11.2020 may be declared as void-ab-initio, illegal, malafide, and based on ulterior motives. In support of his contentions, he relied upon (i) **2020 PLC (CS) 1331**, (ii) **1997 SCMR 1043**, (iii) **1996 SCMR 1349**, (iv) **2013 PLC (CS) 1147**, (v) **2003 SCMR 291**, (vi) **2016 PLC (CS) 896**, (vii) **PLD 2014 SC 389**, (viii) **2013 SCMR 642**, (ix) **2005 SCMR 186**, (x) **PLD 2006 SC 472**, (xi) **PLD 2011 SC 277** & (xii) **2011 SCMR 582**.

3. Mr. M. Yousuf Leghari learned counsel for respondent No.4 raised question regarding maintainability of this petition with the assertion that alternate and adequate remedy is available to the petitioner before Civil Court, as the factual controversy is existing between the parties and further the petitioner is not an aggrieved person within the meaning of Article 199 of the Constitution. He, however, while arguing the case, submits that respondent No.4 was reappointed by the Board constituted under Act, 2013 in its 7th meeting held on 27th September 2021, which was duly affirmed by the Chief Minister, as such no question of public notice arise at all. He next submits that it is not a settled norm that no one can



be re-appointment; in this regard, he quoted the example of Dr. Adeeb Rizvi and Dr. Rahim Bux Bhatti, who according to him, are still serving in their respective Departments even after their retirement. He further submits that the Chief Minister, being the Executive of the Province has the authority to issue the impugned notification on the recommendation of the Board. He lastly submits that appointment of respondent No.4 has been made under the law instead of in violation of dicta laid down by Hon'ble Supreme Court, therefore, the petition in hand is liable to be dismissed. In support of his contentions, he has relied upon (i) **2004 SCMR 1299**, (ii) unreported judgment dated 27.10.2021 passed by Hon'ble Supreme Court in **Civil Petition No.404-K of 2019** & (iii) unreported order dated 28.10.2021 passed by a Division Bench of this Court in C.P No.D-2007 of 2019.

4. Mr. Abdul Jalil A. Zubedi, learned Additional A.G has adopted the arguments advanced by learned counsel for respondent No.4 and further added that Section 11 of the Act *ibid* authorizes the Board to re-appoint the Executive Director of SIOVS for four years on certain terms and conditions from senior Professors of the Institute having 10 years experience in the field of Ophthalmology with sufficient administrative experience. He argued that since there was no other Professor other than respondent No.4, hence, respondent No.4 having all the requisite experience and qualification, as required by Section 11 *ibid*, was re-appointed as Executive Director. He further argued that according to Act, 2013 publication for the re-appointment of Executive Director is not mandatory. He asserted that the case of the petitioner is not maintainable in the light of the ratio of the order dated 28.1.2021 passed by this court in the case of Nazakat Hussain v. Province of Sindh and others on the premise that the petitioner is not an aggrieved person neither has any locus standi to file such petition. Learned A.A.G. pointed out that the Hon'ble Supreme Court in the Civil Petition No. 404-K of 2019 vide **order dated 27.10.2021** has held that the constitutional jurisdiction of this court can be invoked only if a right vests by law or the constitution which is denied to him by a person performing functions in connection with the affairs of the federation, province or the local authority. He further pointed out that this court lacks the jurisdiction or power to create rights that are not provided by the constitution or a validly enacted law. Learned A.A.G.



emphasized that the petitioner is an ex-employee / associate professor of the then Department of Ophthalmology LUMS and opted to remain in service of the aforesaid department and this respect submitted his option form to the competent authority and was not transferred to the respondent department which came into existence by the act of Parliament on 13.3.2013; that Board of Directors of the respondent institution exercised its power and continued the services of the respondent No.4 in pursuance of Section 11 of the Act, 2013 in the public interest for the period of four (04) years with effect from 01.01.2021 to 31.12.2024 and the said recommendations were duly approved by the competent authority i.e. Chief Minister Sindh, as also provided under the Act, 2013; that the Rules / Regulation of respondent institution were also adopted/approved by the Board of Director in its 5th meeting held on 16.08.2018 which were sent to the concerned quarter for waiting and approval. Learned A.A.G cited the Judgment of Honorable Supreme Court reported as [2013 SCMR 1752] and argued that re-employment must be in the public interest and it may not on a cadre post and in the case of respondent No.4 his re-employment is in the larger public interest and it is not a cadre post. Besides that, the re-employment of respondent No.4 has not blocked rights of promotions of other officers; that the decision of the Board of Directors is final and cannot be called into question. Learned A.A.G referred to Section 3(2) of the Act, 2013 which provides that the institute shall be a body corporate and can be sued in the manner provided under the law. Thus, in the absence of the Board of Directors being a party in the proceedings, the matter cannot be adjudicated and decided as such the instant petition is suffering from misjoinder and nonjoinder of necessary party. Learned A.A.G further pointed out that the petitioner has impugned notification dated 26.11.2020 after about one year of its issuance as such the matter falls within the ambit of the doctrine of laches; that under Section 4(b) of the Act, 2013, it is provided that all the persons serving in the respondent institution shall be governed by the regulations as institute may make; that in the instant case, till the reappointment of the respondent No.4 i.e. on 26.11.2020 the regulations were not made under Section 9(2)(v) and Section 9(2) of the Act, 2013. Learned A.A.G referred to Section 14(1) of the Act, 2013 which provides that the institute may for the efficient performance of its functions appoint such officer and staff possessing such professional, technical, or



ministerial qualifications and experience in such manner and on such terms and conditions as may be prescribed. Learned A.A.G. also referred to Section 15(1) of the Act, 2013 which provides that there shall be a selection board consisting of the Director and such other members as the board may appoint; that the Act, 2013 in Section 15(5) further provides that no member of the Selection Board who is also a candidate for the post to which appointment is to be made shall take part in such proceedings of Selection Board. Learned A.A.G also referred to Sections 21, 22, and 24 of the Act, 2013, and argued that the instant petition is not maintainable and is liable to be dismissed.

5. Mr. Kamaluddin, representing respondent No.5/ University submits that they are a formal party, as no relief has been sought against them, he; however, added that no appointment can be made against a regular post without publication and observing other codal formalities.

6. Heard the learned counsel for parties and perused the material available on record and case-law cited at the bar.

7. Sindh Institute of Ophthalmology & Visual Sciences (SIOVS) is a research institute established through an act of Provincial Assembly of Sindh by upgrading its status from Liaquat University Eye Hospital Hyderabad to SIOVS, which offers teaching, training, and clinical services in the field of Ophthalmology.

8. The pivotal questions involved in the present petition are as under:-

i) Whether respondent No.4's re-appointment as Executive Director Sindh Institute of Ophthalmology & Visual Sciences is hit by Article 199(1)(b)(ii) of the Constitution, 1973. **And**

ii) Whether respondent No.4's re-appointment as Executive Director Sindh Institute of Ophthalmology & Visual Sciences on a contract basis was/is unlawful on the ground that the said post was not advertised and he did not go through the competitive process for the appointment for the subject post. **And**

Whether his re-appointment is in the Public Interest and is not hit by the judgments of Honorable Supreme Courts on the issue of re-appointment of retired civil/public servants.



9. First and foremost the maintainability issue is to be resolved. Respondent No.4 is holding the present post as Executive Director, which is primarily in connection with the affairs of the Province; and, is governed by the Sindh Institute of Ophthalmology and Visual Science Act 2013, and the rules framed there under later on in the year 2021, thus this petition is maintainable under Article 199 (1) (b) (ii) of the Constitution.

10. On the second proposition, in principle a retired civil/public servant shall not ordinarily be re-employed under the Provincial/Federal Government unless such re-employment is necessary for the public interest, and was/is required to be made in exercise of discretionary powers; such discretion must be employed in a structured and reasonable manner and in the public interest.

11. 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 appointment is under law and rules.

12. Primarily, the appointment in the public sector is a trust in the hands of public authorities and it is their legal and moral duty to discharge their function as a trustee with complete transparency as per the requirement of law so that no person who is eligible to hold such posts, is excluded from the process of selection and is deprived of his right of appointment in service. In principle the Constitutional requirement, inter alia, enshrined in Article 18 of the Constitution which enjoins that "Subject to such qualifications, if any, as may be prescribed by law, every citizen shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business" includes the right of a citizen to compete and participate for appointment to a post in any Federal or a Provincial Government department or an attached department or autonomous bodies/corporations, etc. based on open competition, which right he cannot exercise unless the process of appointment is transparent, fair, just and free from any complaint as to its transparency and fairness. The above objective enshrined in our



Constitution cannot be achieved unless due publicity is made through a public notice for inviting applications with the aid of the leading newspapers having wide circulation; and if a person is appointed to any office under the State without any advertisement, that is appointed in violation of the rights of other citizens to equality of opportunity in matters relating to appointment to any office under the State guaranteed to them under Article 27(1) of the Constitution, which provides that no citizen otherwise qualified for appointment in the service of Pakistan shall be discriminated against in respect of any such appointment on the ground only of race, religion, caste, sex, residence, or place of birth. The spirit of the said Article applies with equal force to appointments made in statutory bodies, autonomous bodies, and corporations owned and controlled by the Government. The Full Bench of the Hon'ble Supreme Court in the case of Munawar Khan v. Niaz Muhammad (1993 SCMR 1287), raised a voice of concern in such a situation and held that "in future, all appointments shall be made after due publicity in the area from which the recruitments had to take place." Law to the said effect was also laid down by the Hon'ble Supreme Court in the case of Obaidullah v. Habibullah (PLD 1997 SC 835). The Honorable Supreme Court in the case of Lt. Col. (R) Muhammad Arif Zahid v. Azad Government of the State of Jammu and Kashmir (2018 PLC (C.S.) Note 136), a writ of quo warranto seeking the quashing of the appointment against the post of Director Armed Services Board for one year was allowed on the ground inter alia that the said post was not advertised before making the appointment. The Honorable Supreme Court in the case of Muhammad Muneer Malik v. Allama Iqbal Open University (2016 PLC (C.S.) 896), has held that the object of inviting applications from candidates through advertisements was to make certain that all eligible interested candidates might have an opportunity to compete for appointment through a fair and transparent selection process. Furthermore, it was held as follows:-



"Transparency entails principles of equal opportunity in order to guarantee that the appointment is made on merit and of the most capable and qualified person. Persons eligible in terms of the prescribed criterion, qualification and conditions relating to experience have a right to be given fair consideration through a transparent process. Transparency is the key to ensuring a merit based selection and wide advertisement of the criterion and qualifications determining the eligibility of candidates is a pre-condition."

13. The songs of praise showered by the learned counsel for respondent No.4 and learned AAG Sindh on respondent No.4 is meaningless when his appointment was on a contract basis for four years without a competitive process, and his qualifications and ability were not assessed along with any his competitor. On the aforesaid proposition we are supported by the decisions of the Honorable Supreme Court in the case of Watan Party & others V/S Federation of Pakistan and others, (PLD 2012 SC 292), Suo Moto Case No.24 of 2010, (2014 SCMR 484), Suo Moto Case No.16 of 2011, Contempt proceedings against Chief Secretary, Sindh, and others, (2013 SCMR 1752) and Muhammad Bachal Memon and others V/S Syed Tanveer Hussain Shah and others, (2015 PLC (C.S.) 767).

14. Since respondent No.4's re-appointment as an Executive Director in SIOVS was without any advertisement, same cannot be considered to be transparent.

15. We are of the considered view that mere applying for the job does not create any vested right to claim the same job. It is well-settled law that in public sector universities and institutions, before finalizing a fit candidate by the competent authority or Selection Board, the testimonials and antecedents of each candidate shall be considered under the prescribed benchmarks, but to maintain a level playing field and evenhanded competition amongst all candidates, the qualification and competency in all fairness should be considered and adjudged under the qualification notified.

16. The dictum laid down by the Honorable Supreme Court in the case of Government of Punjab through Secretary (S&GAD) Lahore and another vs. Zafar Maqbool Khan and others (2012 SCMR 686) has held that the eligibility of a candidate had to be determined under the advertisement for the post, service rules governing the appointment and any amendment or instruction backed by the law. An excerpt of the order is reproduced as



"22. The eligibility of a candidate shall be determined in accordance with the advertisement for the post, service rules governing appointments to the relevant post, and such other ancillary instructions issued by the Government and/or the Commission from time to time. For this purpose, the age, qualification, experience and other

credentials, etc., of the candidates existing on or up to the closing date fixed for such posts as advertised, shall be taken into account. No relaxation in this regard shall be allowed".

17. During the proceedings, the respondents have placed a copy of Sindh Institute of Ophthalmology and Visual Sciences Administrative Structure, Powers and Duties of Institute Officers Rules 2021 which were framed pursuant to the powers conferred by Section 24 of the Act, 2013, and were notified in gazette on 20.09.2021. Under Rule 4(7)(iv), the Board has been empowered to recommend re-appointment of the Executive Director. We have noticed that while Section 11 of the Act, 2013 confers powers on the Board to appoint Executive Director for the institute, it does not expressly empower the Board to reappoint the Executive Director for another term. However, for the purposes of the present position, we do not travel to consider whether the said Rules are beyond the scope of Act 2013. Inasmuch as those Rules were published in the official gazette on 20.09.2021, after the Respondent No.4 had been re-appointed, and thus cannot be made applicable retrospectively to the re-appointment the respondent No.4. If that were to be allowed the Rule 4(7)(iv) would be manifestly person specific and would be ^{be} ~~be~~ ^{be} struck down on that ground alone. Therefore, if the respondent No.4 seeks a re-appointment he would have to undergo the process of a fresh appointment in a transparent manner after the position is advertised and applications are invited from the public, so that the element of transparency and competition in the appointment process is not questioned. In such a situation, the Honourable Supreme Court in case of Director General, National Savings, Islamabad v. Balqees Begum and others (PLD 2013 SC 174) has settled the proposition and held that the rules of equity cannot be taken into account to frustrate and defeat the law.

18. In view of the above, instant petition stands allowed, with directions to the competent authority to de-notify the re-appointment of respondent No.4 as Executive Director SIOVS forthwith and make appointment against the said post after advertising the post and observing all the codal formalities as provided under the law. The respondent No.4 would be free to compete such process.

Sd/- Adnan-ul-Karim Memon, Judge
Sd/- Adnan Iqbal Chaudhry, Judge

CERTIFIED TO BE TRUE COPY

Assistant Registrar (Writ)

C.P.No.D-1769 of 2021 No. 24/12/2021

Dated 29 December, 2021

Copy forwarded for information & necessary compliance in view of this Honourable Court's above mentioned order. to:-

- X. The learned Additional Advocate General, Sindh, Hyderabad.
1. Province of Sindh through Chief Secretary, living office at Sindh Secretariat, Government of Sindh, Karachi.
2. The Secretary Health Department, Government of Sindh, Karachi.
3. Pakistan Medical Association, Islamabad.
5. The Registrar, Liaquat University of Medical & Health Science, Jamshoro.

ASSISTANT REGISTRAR (WRIT)

24/12/2021