

IN THE HIGH COURT OF SINDH AT KARACHI
(Extraordinary Constitutional Jurisdiction)

Before :

Mr. Justice Nadeem Akhtar

Mr. Justice Adnan-ul-Karim Memon

Constitutional Petition No. D – 6241 of 2016

(Anjum Badar V/S Province of Sindh and 2 others)

Constitutional Petition No. D – 828 of 2016

(Faisal Khalid V/S Province of Sindh and another)

Constitutional Petition No. D – 5115 of 2016

(Izhar ul Haq Junejo V/S Province of Sindh and another)

Constitutional Petition No. D – 2683 of 2017

(Asmat Zehra V/S Government of Sindh and 2 others)

Constitutional Petition No. D – 4516 of 2017

(Dr. Sehrish Ishfaque and 5 others V/S Province of Sindh and 2 others)

Constitutional Petition No. D – 6229 of 2017

(Yasir Iqbal and 2 others V/S Province of Sindh and 5 others)

Constitutional Petition No. D – 2732 of 2018

(Mr. Tajamul Hassan & 21 others V/S Province of Sindh and 2 others)

Constitutional Petition No. D – 4271 of 2018

(Akram Basheer and 45 others V/S Province of Sindh and 3 others)

Constitutional Petition No. D – 5995 of 2018

(Muhammad Tayyab V/S Province of Sindh and 2 others)

Constitutional Petition No. D – 9016 of 2018

(Khurram Rauf Khan V/S Province of Sindh and 2 others)

Constitutional Petition No. D – 4107 of 2019

(Aqeel Ahmed and 9 others V/S Province of Sindh and 3 others)

Constitutional Petition No. D – 7376 of 2019

(Mr. Abdullah V/S Province of Sindh and 3 others)

Constitutional Petition No. D – 1572 of 2020

(Kifayat Ali 8 others V/S Government of Sindh and another)

Constitutional Petition No. D – 4292 of 2020

(Dr. Gul Hassan Qutrio and 8 others V/S Province of Sindh and 3 others)

Constitutional Petition No. D – 4902 of 2020

(Zaiba Anjum V/S Province of Sindh and 2 others)

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Dates of hearing : 12.02.2020, 18.03.2020, 26.09.2020, 04.11.2020 and 17.11.2020.

M/S M. M. Aqil Awan, Abdul Salam Memon, Malik Naeem Iqbal, Muhammad Arshad Khan Tanoli, Ali Asadullah Bullo, Faizan Hussain Memon, Danish Rashid and Altaf Ahmed Sahar, Advocates for the petitioners.

Mr. Salman Talibuddin, Advocate General Sindh.

Mr. Ali Safdar Depar, Assistant Advocate General Sindh.

J U D G M E N T

NADEEM AKHTAR, J. – Through these Constitutional Petitions filed by the petitioners under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, they have prayed that their temporary contractual appointments / services be regularized in BPS-17 under Section 3 of The Sindh (Regularization of Adhoc and Contract Employees) Act, 2013 (**'the Act of 2013'**). All these petitions were heard together and are being disposed of by this common judgment as common questions of law and facts are involved therein. Before unpacking the questions raised on behalf of the petitioners, it may be observed that all the said questions have already been set at naught by the Hon'ble Supreme Court through various authoritative pronouncements. However, learned counsel for the petitioners insisted that the said authorities were inapplicable to their cases as the facts and circumstances therein were distinguishable from those in their cases, or some of the authorities are in their favour. Accordingly, full opportunity was afforded to them on several dates of hearing to make their respective submissions. In the above circumstances, we deem it appropriate to record their submissions in this judgment which has made it a bit lengthier than expected.

2. The Act of 2013 came into force on 25.3.2013. It is the case of the petitioners, who were admittedly appointed on contract as temporary employees, that by virtue of Section 3 of this Act, they have acquired vested right for being regularized as a regular / permanent employee and they should be deemed to have been validly appointed on regular basis. The said Section 3 of the Act of 2013 reads as under :

“ 3. Regularization of Services of employees – Notwithstanding anything contained in the Act or rules made thereunder or any decree, order or judgment of a court, but subject to other provisions of this Act, an employee appointed on ad-hoc and contract basis or otherwise (excluding the employee appointed on daily wages and work-charged basis), against the post in BS-1 to BS-18 or equivalent basic scales, who is otherwise eligible for appointment on such post and is in service in the Government department and it's project in connection with the affairs of the Province, immediately before the commencement of this Act, shall be deemed to have been validly appointed on regular basis.”

3. In order to keep our focus on the main questions involved in these petitions, we have formulated them as under :

- A. Whether temporary employees appointed on contract in BS 16 and above can be deemed to have been validly appointed on regular basis, without going through the competitive process of selection through the Sindh Public Service Commission, merely in view of Section 3 of the Act of 2013 ?
- B. Whether the mandatory requirement of competitive process of selection only through the Sindh Public Service Commission for appointments in BS 16 and above, which is the command of the Constitution and specific direction to the Government of Sindh by the Hon'ble Supreme Court, can be waived, relaxed, done away with, exempted and or bypassed in view of Section 3 of the Act of 2013 ?
- C. Whether the petitioners have any vested right for regular appointment, or to claim regularization, or to approach this Court in its constitutional jurisdiction to seek redressal of their grievance relating to regularization ; and, is there any corresponding legal duty cast on the Government of Sindh to appoint them on regular basis ? If no, then can a writ of mandamus to this effect be issued against the Government of Sindh ?
- D. Whether Section 3 of the Act of 2013, to the extent of regularization / appointment in BS 16, 17 and 18 without the mandatory competitive process of selection through the Sindh Public Service Commission, is *ultra vires* the Constitution and against the law laid down and the direction given by the Hon'ble Supreme Court to the Government of Sindh in *Ali Azhar Khan Baloch and others V/S Province of Sindh and others, 2015 SCMR 456.*

4. On 02.03.2020, the following order was passed in these petitions :

“ Learned counsel for the petitioners, who are seeking regularization of their services in BS-17 under Section 3 of the Act of 2013, is put on notice to satisfy the Court on the next date regarding maintainability of these petitions in view of Ali Azhar Khan Baloch and others V/S Province of Sindh and others, 2015 SCMR 456, wherein Hon'ble Supreme Court was pleased to hold, inter alia, that the Rules of 1974 require that a post of BS-17 can only be filled through Public Service Commission (PSC) after advertisement ; 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 appointment of a civil

servant through PSC ; the Sindh Government through executive or legislative instruments cannot withdraw any post from the purview of the PSC ; and, the Sindh Government shall make all the appointments in BS-16 to BS-22 through PSC.

Learned Advocate General Sindh is also put on notice to satisfy the Court on the next date regarding vires of Section 3 of the Act of 2013, which, prima facie, appears to be in clear conflict with the above mentioned authority of the Hon'ble Supreme Court to the extent of regularization of service in BS-16 and above. Let notice under Rule 1 of Order XXVII-A CPC be issued to learned Advocate General Sindh."

5. Mr. M. M. Aqil Awan, learned counsel for the petitioners in C.P. Nos. D-6241/2016, D-2732/2017, D-7376/2019, and D-4292/2020, contended that there is no cavil to the legal position that recruitment to the posts of BS-16 and above are to be made through the Sindh Public Service Commission (**'the Commission'**) ; to regulate the terms and conditions of service of a civil servant, special service laws and rules framed thereunder are in the field ; under Section 2(1)(b)(ii) of The Sindh Civil Servants Act, 1973 (**'the Act of 1973'**), a contract employee is not a civil servant ; it was held in Administrator Lucky Marwat V/S Izzat Khan, 2000 SCMR 777, that a contract employee, not being a civil servant, was not amenable to the jurisdiction of Service Tribunal and the same view was taken in Muhammad Mubeen-us-Salam and others V/S Federation of Pakistan through Secretary, Ministry of Defence and others, PLD 2006 SC 602 ; therefore, to hold that a contract employee can be regularized through the Commission would only be possible if it is first held that a contract employee is a civil servant, and if that is not possible in law, then such proposition cannot be put forward ; in the last 73 years of judicial history of the country, there is no rule, law or precedent whereby contract employees of Grade 16 and above can be regularized only through the Commission ; under dispensation of the service laws enacted under the command of Article 240 of the Constitution, a contract employee, not being a civil servant, is not to be governed by the service laws ; selection of contract employees in BS-16 to BS-18 through the Commission is barred under Rule 4 of the Sindh Public Service Commission (Function) Rules, 1990 ; as there is no concept of a Scrutiny Committee in the Act of 2013, constitution / composition of such committee and the findings / decision thereof would be *ultra vires* the Act of 2013 ; even otherwise reliance of the respondent-Government on the objections / findings of the Scrutiny Committee does not fall within the ambit of 'eligibility and fitness' ; and, as vires of Section 3 of the Act of 2013 are not under challenge before this Court, this Court cannot look into the vires of the said Section *suo motu*.

6. It was further submitted by Mr. Awan that as the cases of the petitioners squarely fall within the ambit of the Act of 2013, their services are to be regularized under Section 3 thereof which specifically provides for regularization of employees who were appointed either on contract or ad-hoc basis and were holding such posts before the commencement of the Act of 2013 ; it would be a clear case of discrimination if the law passed by the Provincial Assembly is not applied equally to similarly placed persons as numerous employees have already been regularized, but their regularization was not opposed or challenged by the Provincial Government ; the respondents cannot approbate and reprobate in the same breath as they have already regularized the services of numerous employees falling under Section 3 of the Act of 2013 ; the respondent-Government is precluded at this belated stage from raising any objection with regard to the regularization of the petitioners ; the petitioners did not lack the requisite qualification, therefore, the respondents cannot be allowed to take benefit of the irregularity, if any, committed by them at the time of their appointments ; the petitioners cannot be blamed or penalized because primarily the authority who had exceeded or misused its powers, for reasons known to it, is bound to be held responsible for the same instead of penalizing the petitioners who accepted the employment in good faith to earn a livelihood to support their families ; it has been held by the Hon'ble Supreme Court that instead of removing the employees from service, action should be taken against the authority who had committed irregularity in their appointment ; abuse of discretion by a public functionary violates Article 4 of the Constitution as it impairs due process and the right of a person to be treated in accordance with law ; the present situation created by the respondents is a glaring example of lack of application of mind resulting in abuse of discretion by the appointing authority ; a vested right has accrued in favour of the petitioners and subsequent requisitions in the ordinary course to re-advertise the vacancies would, on the one hand, frustrate the basic object of the Act of 2013, and on the other hand, would deprive the petitioners of their jobs ; after having successfully served for a considerable period, if the petitioners are removed from service, they shall be seriously prejudiced ; it is well-settled that major penalty of dismissal from service cannot be awarded without a full-fledged inquiry in accordance with law ; and, there was/is no inherent disqualification in the candidature or appointment of any of the petitioners and they have undergone the process of training and have acquired the requisite expertise in their field, therefore, they are required to be regularized as provided in Section 3 of the Act of 2013.

7. In support of his above submissions, Mr. M. M. Aqil Awan placed reliance on (1) Government of KPK V/S Adnanullah, 2016 SCMR 1375, (2) Government of

N.W.F.P. (Now KPK) through its Chief Secretary VS Kaleem Shah, 2011 SCMR 1004, (3) Ghulam Mustafa VS Omaid Ali, 1984 SCMR 1126, (4) Miss Benazir Bhutto V/S Federation of Pakistan, PLD 1988 SC 416, (5) Director, Social Welfare, N.W.F.P., Peshawar VS Sadullah Khan, 1996 SCMR 1350, (6) Chairman, Minimum Wage Board, Peshawar VS Fayyaz Khan Khattak, 1999 SCMR 1004, (7) Muhammad Akhtar Shirani VS Punjab Textbook Board, 2004 SCMR 1077, (8) Federation of Pakistan VS Gohar Riaz, 2004 SCMR 1662, (9) Muhammad Ashraf Tiwana V/S Pakistan and others, 2013 SCMR 1159, (10) Government of N.W.F.P. through Secretary, Education Department, Peshawar V/S Qasim Shah, 2009 SCMR 382, (11) Sumara Umar Awan V/S Chancellor Gomal University, D.I. Khan, 2014 PLC (CS) 526, (12) Rafaqat Ali V/S Executive District Officer (Health), 2011 PLC (CS) 1615, (13) Shabana Akhtar V/S District Coordination Officer, Bhakkar, 2012 PLC (CS) 366, (14) Shahid Habib V/S Government of Khyber Pakhtunkhwa, 2019 PLC (CS) 1426, and Suo Motu Action Regarding Eligibility Of Chairman And Members of Sindh Public Service Commission etc., 2017 SCMR 637.

8. M/S Abdul Salam Memon, Malik Naeem Iqbal, Ali Asadullah Bullo, Faizan Hussain Memon, and Altaf Ahmed Sahar, learned counsel for the petitioners in other petitions, adopted the arguments advanced by Mr. M. M. Aqil Awan by contending that the learned senior counsel has extensively argued the matter by covering every aspect of the case. It was, however, added by them that the main question of regularization involved in these cases has already been decided by a learned Division Bench of this Court in the case of Dr. Iqbal Jan and others V/S Province of Sindh and others, 2014 PLC (CS) 1153, by holding, *inter alia*, that the petitioners therein shall be deemed to have been validly appointed on regular basis under Section 3 of the Act of 2013. It was also contended by them that it would be prejudicial to the petitioners if they are not regularized at this stage after serving for a considerable period and after spending the prime period of their professional life with the respondents. According to them, if the petitioners are not regularized and their services are eventually dispensed with, they will not be able to seek fresh employment at any other place, and in such an eventuality their professional career will come to an end much prior to their expected age of superannuation.

9. Mr. Salman Talibuddin, learned Advocate General Sindh, submitted that since he is on notice under Order XXVII-A CPC, he was bound to assist the Court on the above point irrespective of the fact that he was representing the Government of Sindh. He candidly conceded that under Section 2(1)(b)(ii) of the Act of 1973, employees appointed on contract are not civil servants, and they cannot be

regularized in BS 16, 17 and 18 under Section 3 of the Act of 2013. He submitted that contractual appointments violate the rule of seniority, which has been strongly deprecated by the Hon'ble Supreme Court in various pronouncements. He further submitted that the word '*employee*' used in Section 3 of the Act of 2013 refers only to such person who is otherwise eligible for appointment in BS 16, 17 and 18 ; and, in *Ali Azhar Khan Baloch* supra the Hon'ble Supreme Court has directed the Government of Sindh to make all appointments in BS 16 to 22 through the Commission and not otherwise. He also submitted that in view of the settled position as stated above, every post in BS 16 and above is required to be filled only through the prescribed competitive process. Mr. Talibuddin also submitted that appointments against permanent posts ought not to have been made on contract basis, and if such appointments were made for any reason, they cannot be regularized with retrospective effect. It was pointed out by him that ad-hoc appointment can still be made in BPS-17, however, with certain conditions as provided under Rules 18 to 20 of the Rules of 1974. He lastly submitted that regularization of the petitioners in BS 17 through the Act of 2013 would be in direct conflict with the law laid down by the Hon'ble Supreme Court. He prayed for the dismissal of all these petitions.

10. We have heard learned counsel for the petitioners and the learned Advocate General Sindh at great length and with their able assistance have minutely examined the material available on record and have also carefully gone through the case-law cited at the bar. Since only the questions of law are involved in these petitions and all the petitioners are admittedly contractual employees, we need not discuss the facts of each case.

11. It is an admitted position that the petitioners are contractual employees and thus their status and relationship are regulated and governed by the principle of 'master and servant'. The Hon'ble Supreme Court has been pleased to hold in its numerous pronouncements that a contract employee, whose terms and conditions of service are governed by the principle of 'master and servant', does not acquire any vested right for regular appointment, or to claim regularization, or to approach this Court in its constitutional jurisdiction to seek redressal of his grievance relating to regularization ; in fact he is debarred from approaching this Court in its constitutional jurisdiction and the only remedy available to him is to file a Suit for damages alleging breach of contract or failure on the part of the employer to extend the contract ; after accepting the terms and conditions for contractual appointment, the contract employee has no *locus standi* to file a Constitutional Petition seeking writs of prohibition and or mandamus against the authorities from terminating his

service and or to retain him on his existing post on regular basis ; a contract employee, whose period of contract expires by efflux of time, carry no vested right to remain in employment of the employer and the courts cannot compel the employer to reinstate him or to extend his contract ; and, no rights would accrue to a *de facto* holder of a post whose right to hold the said post was not established subsequently. In view of the above well-settled law consistently laid down by the Hon'ble Supreme Court, the petitioners, being contractual employees having no vested right for regular appointment or to seek regularization of their services, are debarred from invoking the constitutional jurisdiction of this Court. Thus, these petitions filed by them are not maintainable on this ground alone.

12. Our above view is fortified, *inter alia*, by *Farzand Ali V/S Province of West Pakistan, PLD 1970 S.C. 98, Government of Balochistan, Department of Health, through Secretary Civil Secretariat, Quetta V/S Dr. Zahida Kakar and 43 others, 2005 SCMR 642, Dr. Mubashar Ahmed V/S PTCL, through Chairman, Islamabad, and another, 2007 PLC (C.S.) 737, Sindh High Court Bar Association V/S Federation of Pakistan, PLD 2009 S.C. 879, Abid Iqbal Hafiz V/S Secretary, Public Prosecution Department, Government of Punjab, Lahore, and others, PLD 2010 S.C. 841, Suo Motu Case No.15 of 2010 (In re : Sou Motu action regarding regularization of contract employees of Zakat Department and appointment of Chairman of Central Zakat Council) 2013 SCMR 304, Qazi Munir Ahmed V/S Rawalpindi Medical College and Allied Hospital through Principal and others, 2019 SCMR 648, Province of Punjab through Secretary Agriculture Department Lahore and others V/S Muhammad Arif and others, 2020 SCMR 507, Naureen Naz Butt V/S Pakistan Internatinal Airlines, 2020 SCMR 1625, Government of Khyber Pakhtunkhwa, Workers Welfare Board, through Chairman V/S Raheel Ali Gohar and others, 2020 SCMR 2068*, and judgment dated 18.02.2021 pronounced in Civil Appeal Nos. 936 and 937 of 2020.

13. After holding as above, we need not dilate upon the other questions raised on behalf of the petitioners. However, as they were put on notice vide order dated 02.03.2020 to satisfy the Court as to how they could be regularized in the absence of the prescribed selection process through the Commission especially when the Government of Sindh was specifically directed by the Hon'ble Supreme Court to make all appointments in BS 16 to 22 only through the Commission, and notice under Rule 1 of Order XXVII-A CPC was also issued to learned Advocate General Sindh to satisfy the Court regarding vires of Section 3 of the Act of 2013, being *prima facie* in conflict with the direction of the Hon'ble Supreme Court in *Ali Azhar Khan Baloch* supra to the extent of regularization of service in BS 16 and above,

and both the sides have made their respective submissions in this regard at length, we deem it appropriate to discuss this issue as well.

14. In order to understand and appreciate the background in which the Commission was established, the reason of its establishment and its role and importance in the appointments in the civil service, it would be expedient to discuss the relevant provisions of law. Under Article 240 of the Constitution, the appointments of persons in the service of Pakistan and the conditions of their service shall be determined (a) by or under Act of Parliament in the case of the services of the Federation, posts in connection with the affairs of the Federation and all Pakistan Services ; and, (b) by or under Act of the Provincial Assembly in the case of the services of a Province and posts in connection with the affairs of a Province. Article 242(1) of the Constitution provides that the Parliament in relation to the affairs of the Federation and the Provincial Assembly of a Province in relation to the affairs of the Province may, by law, provide for the establishment and constitution of a Public Service Commission. Sub-Article (2) of Article 242 provides that the Commission shall perform such functions as may be prescribed by law. Under Clause (b) of Article 240, The Sindh Civil Servants Act, 1973 (the Act of 1973) was enacted by the Provincial Assembly of Sindh for the appointments of persons in the service of the Province of Sindh and to regulate the terms and conditions of their service ; and, in exercise of the powers conferred by Section 26 of the Act of 1973, the Government of Sindh framed The Sindh Civil Servants (Appointment, Promotion and Transfer) Rules, 1974 (the Rules of 1974). Rule 10 of the Rules of 1974, which deals with the initial appointment to the posts in BS 16 to 22, specifically provides that initial appointment to the posts in BS 16 to 22 **“shall”** be made (a) by the Commission on the basis of examination or test to be conducted by the Commission if the posts fall within the purview of the Commission ; or in the manner as may be determined by the Government if the posts do not fall within the purview of the Commission. Likewise, The Sindh Public Service Commission Act, 1989, (**‘the Commission Act of 1989’**) was enacted by the Provincial Assembly of Sindh under Article 240(b) and in exercise of the powers conferred by Section 10 of this Act, the Government of Sindh made The Sindh Public Service Commission (Function) Rules, 1990 (**‘the Commission Rules of 1990’**). Rule 3(1)(i) of the Commission Rules 1990 provides that the Commission **“shall”**, subject to other provisions of the Commission Rules 1990, conduct tests for initial recruitment to civil posts connected with the affairs of the Province in BS 16 to 22 except those specified in the Schedule.

15. Perusal of the above mentioned Rule 10 of the Rules of 1974 and Rule 3(1)(i) of the Commission Rules 1990 clearly shows that initial appointments to the posts in BS 16 to 22 are to be made only by the Commission on the basis of examination or test to be conducted by it if the posts fall within its purview ; and, because of the word “*shall*” used therein the intention of the legislature was to make this condition mandatory. As the Act of 1973 and the Commission Act of 1989 were enacted by the Provincial Assembly of Sindh under the powers conferred upon it by Article 240(b) of the Constitution, and the Rules of 1974 and the Commission Rules of 1990 were framed by the Government of Sindh under the Act of 1973 and the Commission Act of 1989, respectively, the Rules of 1974 and the Commission Rules of 1990 are to be deemed to have been made under the powers conferred by Article 240(b) ; and, due to this reason, the mandatory requirement of initial appointments to the posts in BS 16 to 22 only through the competitive process of selection by the Commission must be respected and treated as the command of the Constitution. Our above view is supported by Ali Azhar Khan Baloch supra wherein the Hon’ble Supreme Court was pleased to hold, *inter alia*, that the Rules of 1974 require that a post of BS-17 can only be filled through the Commission after advertisement ; and, 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 22 against the language of the Rules of 1974, which are framed under the dictates of the Act of 1973 as mandated under Article 240 of the Constitution. For the ease of convenience, paragraph 198 of the judgment pronounced in Ali Azhar Khan Baloch supra is reproduced here :

“ 198. We may observe that on 6-5-2013, two C.M.As. numbered as 245/2013 and 247/2013, containing list of other nine persons who were also appointed as D.S.P. without recourse to the provisions contained in the Rules, 1974, along with the petitioner, were filed. **The said Rules require that a post of BS-17 can only be filled through Public Service Commission after advertisement. 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 22 against the language of these Rules, which are framed under the dictates of the Act as mandated under Article 240 of the Constitution. The Article 242 of the Constitution provides the mechanism for appointment of a Civil Servant through Public Service Commission. This Article is safety valve which ensures the transparent process of induction in the Civil Service. It provides appointment by Public Service Commission with the sole object that meritorious candidates join Civil Service. The Sindh Government through executive or legislative instruments cannot withdraw any post from the purview of the Public Service Commission as has been done in the case of the DSPs, in negation to the command of Article 242 of the Constitution. For the aforesaid reasons, we hold that the Sindh Government shall make all the appointments in BS 16 to 22 through Public Service Commission.**”
(emphasis added)

16. The mandatory requirement of initial appointments to the posts in BS 16 to 22 only through the Commission, being the command of the Constitution and direction of the Hon'ble Supreme Court as discussed above, cannot be ignored, waived, relaxed, done away with, exempted and or bypassed on any ground whatsoever. There is no cavil to the proposition that contractual employees are not civil servants and the above mandatory requirement of appointment through the Commission does not apply to them. However, the petitioners cannot take advantage of this legal position by seeking exemption therefrom as it is not their case that they want to retain their posts on contract. As they want their said posts to be regularized by changing their status from that of contractual employees to civil servants, they shall have to go through the same mandatory competitive process of selection that is required / prescribed for the appointment of a civil servant ; and, unless they succeed in that prescribed mandatory competitive process of selection, they cannot be treated at par or equated with the other civil servants serving on that post who were selected and appointed through the said prescribed mandatory competitive process. The argument advanced on behalf of the petitioners that it would be discriminatory if they are not regularized after serving for a considerable period or they will not be able to get another job at this stage if they are relieved, has no force. Instead of seeking appointment as a civil servant through the prescribed competitive process of selection, all the petitioners, who are educated adults, had voluntarily applied for appointment on contract and after fully understanding the implications and consequences of a contractual appointment, had voluntarily accepted the same. Therefore, they cannot turn around at this stage and claim regularization of their contractual appointments which was neither part and parcel of the terms and conditions of their contracts nor is permissible in law. In fact, it would be discriminatory against the serving civil servants if contractual employees are granted the status of a civil servant without having gone through the mandatory competitive process prescribed for the selection and appointment of a civil servant. If the petitioners are confident that they are competent, eligible and fit for the posts on which they want to be regularized / made permanent, there is no justifiable reason for them to shy away or avoid the prescribed mandatory process of selection. In fact, to show their bonafides and in order to avoid any stigma of discrimination, they ought to have volunteered their participation in the said selection process. As far as the contractual period of service of the petitioners is concerned, suffice it to say the entire such period will be added to their resume as their experience which will certainly help them in seeking fresh employment, if they so desire. In any event, mere continuance of employment of a temporary employee

for two years or more in service does not *ipso facto* convert the appointment into a permanent one as held by the Hon'ble Supreme Court in *Federation of Pakistan and another V/S Hashim Shah Qureshi, 1987 SCMR 156.*

17. There is another important aspect of this case. It is well-established that a writ of mandamus cannot be claimed as a matter of right ; and, for issuance of direction in the nature of mandamus, there must be a legal right existing in favour of the person seeking a writ of mandamus and a corresponding legal duty imposed upon the public officer or authority against whom the writ is sought. We have seen that in view of the well-settled law discussed above, the petitioners do not have any vested right to seek appointment on regular basis ; and, they have also not acquired any legal right from the appointment made by the Government of Sindh and accepted by them admittedly on contract. Therefore, no corresponding legal duty was/is cast on the Government of Sindh to appoint them on regular basis, and thus writ of mandamus, as prayed for by the petitioners, cannot be granted. Their alleged right to be regularized under Section 3 of the Act of 2013 is dealt with separately in subsequent paragraphs.

18. In the above-quoted paragraph 198 of the judgment pronounced in *Ali Azhar Khan Baloch* supra it was held, *inter alia*, by the Hon'ble Supreme Court that the Government of Sindh and or the competent authority cannot bypass the mandatory requirement of filling the post of BS 17 through the Commission after advertisement and substitute a parallel mechanism to appoint a person in BS 16 to 22 against the language of the Rules of 1974, which have been framed under the dictates of the Act of 1973 as mandated under Article 240 of the Constitution ; Article 242 of the Constitution provides the mechanism for appointment of a civil servant through the Commission ; this Article, which is a safety valve to ensure the transparent process of induction in the civil service, provides appointment by the Commission with the sole object that meritorious candidates join civil service ; the Sindh Government through executive or legislative instruments cannot withdraw any post from the purview of the Commission in negation to the command of Article 242 of the Constitution ; and, the Government of Sindh shall make all the appointments in BS 16 to 22 through the Commission. Under Article 189 of the Constitution, the Hon'ble Supreme Court of Pakistan is the Court of last resort and the law declared or principles enunciated by it are binding on all the subordinate Courts and authorities in Pakistan ; and, all the Courts and public institutions are bound to follow the principles laid down by the Hon'ble Supreme Court. After the above clear direction by the Hon'ble Supreme Court, the Government of Sindh cannot make any appointment in BS 16 to 22 by bypassing the Commission, and even this Court

cannot allow any such appointment. Therefore, regularization / appointment in BS 16 to 22 without the mandatory competitive process of selection by the Commission, being clearly against the command of the Constitution and direction of the Hon'ble Supreme Court, cannot be ordered by this Court.

19. As to the alleged right of the petitioners to be regularized under Section 3 of the Act of 2013, we do not agree with the learned counsel for the petitioners that vires of the said Section cannot be looked into by this Court as the same are not under challenge in these proceedings. The petitioners have not challenged the vires of the said Section 3 for the obvious reason that they are seeking benefit thereunder. However, the learned Advocate General Sindh has questioned the vires of the said Section by raising specific pleas before us. Therefore, it cannot be said that the vires are not under challenge before us. In any event, this Court, being a Constitutional Court, is duty-bound to pass orders only in the aid of justice and not in the aid of injustice, and only under the Constitution and not in favour of anything extra-constitutional. If the statute, or any part thereof, under which relief is sought is *ultra vires* the Constitution or is against the law laid down by the Hon'ble Supreme Court, this Court, while declining the relief, would be fully justified and competent to look into the vires of such statute and to declare it *ultra vires*. Rather, this Court would be failing in its constitutional duty if it keeps its eyes shut by allowing such statute to remain in the field.

20. Regarding vires of Section 3 of the Act of 2013, it must be made clear that only such law is valid and effective which is made in accordance with law and not which violates the law or which will have the effect of frustrating the law. Moreover, a piece of legislation which is against the command of the Constitution and or the law laid down or direction given by the Hon'ble Supreme Court, which in this case is Section 3 of the Act of 2013 to the extent of regularization / appointment in BS 16, 17 and 18 without the mandatory competitive process of selection by the Commission, being *ultra vires* the Constitution, cannot be applied or enforced. Our above view is fortified by *Shahid Pervaiz V/S Ejaz Ahmed and others*, **2017 SCMR 206**, wherein the Hon'ble Supreme Court was pleased to hold, *inter alia*, that undoubtedly the legislature enjoys much leeway and competence in matters of legislation, but every law enacted may not necessarily be tenable on the touchstone of the Constitution ; and thus, legislative competence is not enough to make a valid law as the law must also pass the test at the touchstone of constitutionality to be enforceable, failing which it becomes invalid and unenforceable.

21. In the above context, we may also rely upon Muhammad Azam Khan and 10 others V/S Government of NWFP through Chief Secretary, NWFP, Peshawar, and 4 others, 1998 SCMR 204, wherein it was held by the Hon'ble Supreme Court that the learned Peshawar High Court was right in observing that the direction prayed for would violate the law which prescribes that appointments to the posts in the Province of NWFP (now KPK) in BS 16 to 20 are to be made on the advice of the Public Service Commission, based on the test and examination conducted by the Commission, and the posts in BS 17 held by the appointees can only be filled up in the manner prescribed by law ; appointments are to be made by the authority with which such power vests in the manner prescribed by law and not otherwise ; and, only such recommendation will be meaningful and effective which is made in accordance with law and not which violates the law or which will have the effect of frustrating the law.

22. The cases of Dr. Iqbal Jan supra and the unreported order dated 07.10.2019 passed by a learned Full Bench of this Court in C.P. No.D-5397/2019 were heavily relied upon on behalf of the petitioners. The said cases cannot be applied to their case as the command of Article 240 of the Constitution and or the vires of Section 3 of the Act of 2013 to the extent of regularization / appointment in BS 16, 17 and 18 without the competitive process of the Commission, were not argued or discussed therein. Moreover, the case of Dr. Iqbal Jan supra was decided prior to the law laid down by the Hon'ble Supreme Court in Ali Azhar Khan Baloch supra with specific direction therein to the Government of Sindh to make all appointments in BS 16 to 22 only through the Commission. Regarding the above mentioned unreported order passed in C.P. No.D-5397/2019, it is said with all humility and respect that the same is *per incuriam* in view the above principles enunciated and direction given by the Hon'ble Supreme Court much prior to the passing of the said order.

23. Regarding all such contractual employees in BS 16, 17 and 18 who have been regularized under Section 3 of the Act of 2013 without going through the mandatory process of selection by the Commission in violation of the command of the Constitution and the direction of the Hon'ble Supreme Court, suffice it to say the Hon'ble Supreme Court in the case of Shahid Pervaiz supra was pleased to hold, *inter alia*, that if an illegal benefit was accrued or conferred under a statute, whether repealed / omitted or continuing, and its benefits continue to flow in favour of beneficiaries of such an unconstitutional Act which is declared *ultra vires*, the benefits so conferred would have to be reversed irrespective of the fact that the conferring Act was still on the statute book or not ; and, such beneficiaries cannot take the plea of past and closed transaction as such plea would apply only in cases

where rights were created under a valid law. It may be noted that the case of Shahid Pervaiz supra went under review and the judgment of the said review proceedings is reported as Akhtar Umar Hayat Lalayka and others V/S Mushtaq Ahmed Sukhaira and others, **2018 SCMR 1218**, whereby the review petitions were dismissed / disposed of, and even the exception granted in paragraph 111 of the judgment in Shahid Pervaiz supra read with paragraph 143 thereof was withdrawn. As held by the Hon'ble Supreme Court in various pronouncements that its decisions laying down any proposition in law becomes the law binding on all whether or not they were party to the proceedings before the Hon'ble Supreme Court. Under Article 187(2) of the Constitution, it is the duty of this Court to ensure execution and enforcement of the directions, orders and judgments of the Hon'ble Supreme Court. Therefore, the purported regularization of all such contractual employees / beneficiaries in BS 16 and above under Section 3 of the Act of 2013 is liable to be reversed forthwith in view of the law laid down by the Hon'ble Supreme Court in Shahid Pervaiz supra and Akhtar Umar Hayat Lalayka supra. For the ease of convenience, paragraph 119 of the judgment pronounced in Shahid Pervaiz supra is reproduced here :

*“119. However, when a statute (whether existing or repealed) is found to be ultra vires the Constitution, the Court is empowered – indeed, mandated – to examine whether any person continues to enjoy the benefits of the ultra vires statute, or whether any state of affairs continues to exist as a result, and if it is found so, the Court is mandated to undo the same, provided that the benefit or state of affairs in question is not a past and closed transaction. For instance, the case of an employee who had enjoyed an out of turn promotion pursuant to a law found to be ultra vires the Fundamental Rights, who now stands retired and or died, it would constitute a past and closed transaction inasmuch as it would be a futile exercise to re-open the case of such an employee. **On the other hand, employees who were so promoted under such a statute and who continue to remain in service, would be liable to be restored to the position that existed prior to the benefit conferred under the statute found inconsistent with Fundamental Rights. Indeed, once a statute has been declared as being unconstitutional for any reason, all direct benefits continuing to flow from the same are to be stopped.** Reference in this behalf may be made to the case of Dr. Mobashir Hassan v. Federation of Pakistan (PLD 2010 SC 265).
.....”*
(emphasis added)

24. It would be seen that all the questions involved in these petitions have already been set at naught by the Hon'ble Supreme Court long ago in numerous pronouncements. Despite such well-established legal position, a large number of contractual appointees, seeking regularization / appointment on regular basis, have approached this Court and continue to do so by invoking Article 199 of the

Constitution, by claiming that either the law settled by the Hon'ble Supreme Court is inapplicable to them or they have some novel interpretation for the same. It is expected that such contractual appointees should withdraw their petitions and refrain in future from burdening this Court with unnecessary and uncalled for litigation.

25. The Chief Secretary Sindh is directed to submit compliance report in terms of paragraph 23 above to the Registrar of this Court within fifteen (15) days along with a list of all such contractual employees who were regularized in BS 16 and above under Section 3 of the Act of 2013 without going through the mandatory process of selection by the Commission in violation of the command of the Constitution and the direction of the Hon'ble Supreme Court. Let notice be issued to the Chief Secretary Sindh for compliance.

26. As a result of the above discussion, all these petitions and applications pending therein are dismissed with no order as to costs. Let this judgment be communicated forthwith to the Secretary Establishment Division, Government of Pakistan, as well as to the Chief Secretary Sindh and the Secretaries / Heads of all departments / autonomous bodies / organizations / cells / authorities of the Government of Sindh, for compliance.

JUDGE

JUDGE