

Judgment Sheet
IN THE HIGH COURT OF SINDH, KARACHI

Const. Petition No.D-1859/2017

PRESENT:

Mr. Justice Muhammad Ali Mazhar
Mr. Justice Arshad Hussain Khan

Muhammad Khurram Siddiqui & Others

Vs.

Province of Sindh & Others

Petitioners: Through M/s. M.M. Aqil Awan and Danish Rashid
Advocates.
Respondent No.2: Through Mr. Shahryar Mehar, A.A.G.
Respondents 3 & 4 Through Mr. Sarfaraz Ali Metlo Advocate.
Date of Hg. 18.11.2020 & 27.11.2020

JUDGMENT

ARSHAD HUSSAIN KHAN-J., Through instant constitutional petition, filed under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the petitioners have made the following prayers: -

- i. Declare that the appointment of Respondent No.4 as Social Security Officer on contract basis is illegal, unlawful, unconstitutional, malafide, discriminatory and in violation of principles of good governance and Respondent No.4 is liable to be repatriated to his parent department viz. SGA&CD.
- ii. Declare that the impugned orders dated 23.02.2017 and 17.03.2017 are ultra vires, illegal, unlawful, mala fide, unconstitutional, discriminatory, arbitrary and in violation of principles of natural justice, equity and fairness and set aside the same forthwith.
- iii. Declare that the petitioners are senior to Respondent No.4 since the petitioners were regularly appointed in the year 2004 much prior to the regular appointment of Respondent No.4.
- iv. Suspend the operation of the impugned orders dated 23.02.2017 and 17.03.2017 and also to restrain the Respondents from taking any adverse action against the Petitioners till final adjudication of the captioned Petition.
- v. Grant any other relief(s), which this Honourable Court may deem appropriate and proper in the circumstances of the case.
- vi. Grant cost of the petition.

2. Briefly, the facts giving rise to the present petition are that petitioners, the employees of Sindh Employees Social Security Institution [SESSI], through this petition have called in question the retrospective regularization of services of respondent No.4. It has been stated that respondent No.4 was appointed as Social Security Officer [BS-16] on contract basis for the period of two years, vide order dated 05.09.2002, subsequently the contractual services of respondent No.4 were extended from time to time and lastly it was extended for a period of one year, vide office order dated 06.09.2006. Thereafter, on 07.04.2007, his services were regularized with effect from 31.03.2007. It is averred that the appointment of respondent No.4 on contractual basis in SESSI as well as his regularization was illegal inasmuch as he was employee of Sindh Government in BS-12 in SGA&CD and was appointed in statutory body controlled by Sindh Government on contract basis in BS-16 without even advertising the post as such his appointment could at best be termed as deputation. It is further averred that respondent No.4 is liable to be repatriated to his parent department as has been done in the case of many other employees appointed and regularized in SESSI after pronouncement by the apex Court. It is also averred that respondent No.4 did not raise any objection to his regularization with immediate effect, vide office order dated 07.04.2007, however, in the year 2013, after about six years, he moved an application to the Chairman Governing Body of respondent No.3 (SESSI) for ante-dated seniority with effect from 05.09.2002. However, when respondent No.4 did not receive any response from respondent-SESSI, he filed C.P. No.D-528/2016 before this Court. Although, the present petitioners were not made party in the said petition, but upon intervenor's application, the petitioners joined the proceedings. On 06.05.2016, the said petition was disposed of with the directions that Governing Body, SESSI will decide the representation of the present respondent No.4 (petitioner in said petition). It is alleged that the Governing Body instead of deciding the respondent's representation, itself, constituted a Committee for the said purpose. The alleged Committee presented its recommendation in the meeting of the Governing Body held on 23.02.2017 and, vide item No.44, the recommendations of the Committee were approved and respondent

No.4 was declared senior to the petitioners except one. It has been further averred that the placement of respondent No.4 over and above the petitioners and his subsequent posting, vide office order dated 17.03.2017, are illegal and coram-non-judice besides being violative of the Sindh Employees Social Security Institution [Revised] Service Regulations, 2006, and absolutely unconstitutional, hence the present petition.

3. Upon notice of the present petition, parawise comments on behalf of respondent No.3 [SESSI] have been filed wherein the respondent while taking the preliminary legal objections regarding maintainability of the petition has stated that the service of respondent No.4 has been regularized with effect from his initial appointment by the Governing Body headed by the Chief Minister Sindh in compliance with orders dated 06.05.2016 of this Court passed in C.P. No.D-528/2016 filed by respondent No.4. It has been further stated that respondent No.3 through the advertisement published in Daily Dawn dated 08.06.2002 and Daily Jang dated 09.06.2002 invited for applications to fill the vacancies of Social Security Officer in SESSI. Respondent No.4 applied through proper channel and was appointed against permanent post(s) as Social Security Officer [BS-16] on contract basis for the period of two years by office order dated 05.09.2002. His employment was extended for a period of one year by office order dated 31.08.2004, which was further extended for one year through office order dated 08.09.2005. The said contract was third time extended for another one year by office order dated 06.09.2006. The service of Respondent No.4 was regularized with immediate effect by order dated 07.04.2007 and he was given promotion / selection Grade BS-17 by office order dated 22.07.2013. However, respondent No.4 made representation to SESSI, which was decided in his favour by the Governing Body of SESSI, pursuant to the directions of this Court in CP No. D-528 of 2016. It has been stated that respondent No.4 is a regular employee of respondent No.3 and as such cannot be categorized on deputation. It has also been stated that the petitioners have approached this Court with unclean hands and have attempted to re-agitate the subject matter of consent order dated 06.05.2016 passed

in CP. No.D-528/2016, therefore, the petition is liable to be dismissed with costs being void of any merit.

4. During the course of the arguments, learned counsel for the petitioners while reiterating the contents of memo of the petition has contended that respondent No.4 was appointed on contract basis in Sindh Government without advertising the vacancies and the selection through selection committee and, as such, the appointment of respondent No.4 was in violation of SESSI Service Regulations and cannot be regularized in any manner whatsoever. He has further contended that the impugned appointment of respondent No.4 in SESSI on contract basis as well as subsequent orders are illegal, discriminatory and in violation of principles of natural justice and fairness. It is also contended that an employee of Sindh Government could only be appointed in a statutory body controlled by Sindh Government by way of deputation and since Respondent No.4 does not qualify to be appointed on deputation basis as such his appointment is also hit by judgment pronounced by the Honourable Supreme Court reported as 2013 SCRMR 1752 and 2015 SCMR 456. It is also argued that the impugned orders have been passed in serious violation of Regulation No.9(3) of Regulations, 2006, which, inter alia, provides that the seniority of the service of a member shall be reckoned from the date of his regular appointment. Learned counsel further argued that constitution of the committee was a serious departure from the order dated 06.05.2016, passed by this Honourable Court, whereby only the Governing Body was authorized to decide the representation of respondent No.4. However, in order to accommodate respondent No.4, a committee was constituted without any legal authority and as such any order passed by the alleged committee is without any lawful authority and the same does not confer any right or title upon respondent No.4. It is also argued that the alleged committee ignored the fact that the petitioners were regularly appointed in the year 2004, whereas, respondent No.4 was regularly appointed in the year 2007. Thus, in terms of Regulations, 2006, the petitioners are senior to respondent No.4. It is also argued that the Governing Body was estopped under the law to pass the impugned orders having become functus officio. It is further argued that neither the Governing Body

possessed any jurisdiction nor was conferred any lawful authority to grant retrospective seniority to respondent No.4. It is further argued that this Court in CP No. 528 of 2016 directed the Governing Body to decide the matter in accordance with law in its own discretion. This discretionary power could not have been delegated to any committee. Therefore, merely countersigning or approval of the findings of the committee without application of mind by a Governing Body as a whole was an illegal exercise of jurisdiction rendering such orders to be illegal and unlawful. It is also argued that the impugned order is also violative of principle of natural justice as colleagues of the petitioners who were adversely affected in prospects of their seniority and promotion by the impugned order were not heard at any stage. Learned counsel further argued that the impugned orders are also violative of Article 4 and 25 of the Constitution of Islamic Republic of Pakistan. Learned counsel in support of his stance in the case has relied upon the case reported as 2013 SCMR 1159, PLD 1970, 1980 SCMR 928, PLD 1991 SC 82, 1993 PLC [CS] 937, 2001 SCMR 389, 2019 PLC [CS] 1278, 1994 SCMR 2232, 2004 SCMR 468, 2016 SCMR 2148, 2015 SCMR 1188, PLD 2002 SC 1079, 2015 SCMR 1257 and 2013 SCMR 1707.

5. Conversely, learned counsel for respondents No.3 & 4, while reiterating the contents of para-wise comments filed on behalf of respondent No.3, has argued that service of the petitioners and respondent No.4 is governed by master and servant rule because respondent No.3 does not have statutory rules / regulations of service as such the relief claimed by the petitioners does not fall within the ambit of Article 199 of the Constitution of Islamic Republic of Pakistan and on this count alone the petition is liable to be dismissed being not maintainable. It is also argued that the petition is also not maintainable as the petitioners have approached this Court without availing alternate remedy available under the Sindh Employees Social Security Institution [Revised] Service Regulations, 2006, hence present petition is liable to be dismissed on this count as well. He has further argued that the petitioners' temporary service / seniority was reckoned from the date of their initial appointment while respondent No.4 was discriminated, therefore, he made representation before respondent

No.3, however, when the same was not decided, respondent No.4 filed CP. D-528 of 2016. This Court after hearing the petitioners and respondent No.4 passed a consent order dated 06.05.2016 in C.P. No.D-528/2016 whereby the Governing Body of SESSI was directed to decide the representation of respondent No.4 after hearing the petitioners and the respondent. The Governing Body in compliance of the directions of this Court has finally decided the issue after providing full opportunity of hearing to the petitioners and respondent No.4, hence the petitioners cannot re-agitate issue finally settled by this Court through a consent order. Learned counsel further argued that Regulation 9(4) does not prohibit retrospective regularization of contract employee appointed against permanent post after observing all the codal formalities required for the regular appointment. Regulation 9(4) only prohibits retrospective regularization of adhoc employee, which leads to an inescapable conclusion that the Governing Body has rightly regularized continuous contractual employment of respondent No.4 from the date of initial appointment against the permanent post after fulfilling all codal formalities. It is also argued that reckoning of the seniority of respondent No.4 from the date of initial appointment is in line with the principles laid down by a five member Bench of the Hon'ble Supreme Court of Pakistan reported as 2014 SCMR 1289. It is also argued that none of the decisions cited at the bar by learned counsel for the petitioners relates to non-statutory employment, therefore, the same is inapplicable. Moreover, decisions cited by the petitioners have not been rendered by a five members Bench, therefore, the principle laid by the five members Bench of the Hon'ble Supreme Court of Pakistan *ibid* will prevail. Lastly, he has argued that the petitioners are maliciously persecuting respondents 3 & 4 for ulterior motives to satisfy personal vendetta, therefore, the petition may be dismissed with costs. Learned counsel in support of his arguments has relied upon cases reported as 1991 PLC [CS] 530, 2011 PLC [Lab] 153, 2017 PLC [CS] Note 71, 2013 SCMR 1707, 2014 SCMR 1289, 2012 PLC [CS] 130, and order dated 15.11.2020 passed in Civil Appeal No.87-K of 2010, Order dated 13.01.2011 passed in C.P. No.D-1239/2009 as well as Judgment dated 06.03.2015 passed in Civil Appeal No.1462 of 2013.

6. Learned AAG, while adopting the arguments of learned counsel for the respondents prayed for dismissal of the petition.

7. We have heard learned counsel for the parties as well as perused their submissions in writing and the material available on the record, and have gone through the case-law cited at the bar by learned counsel for the parties.

Since the respondents have raised the question of maintainability of the petition, therefore, it would be expedient to dilate upon this issue before proceeding further in the matter.

It has been settled that under Article 199 of the Constitution of Pakistan any person ‘performing functions in connection with affairs of the Federation, a province or a local authority’ is amenable to writ. Clause 5 of Article 199 of the Constitution describes the expression ‘person includes anybody politic or corporate, any authority of or under the control of the Federal Government or of a Provincial Government’. Here the expression ‘body politic’ could be referred to the Government, itself. The inclusion of the expression ‘corporate’ is referable only to corporate authorities created by the Government to perform certain functions of a public nature either by Statute or otherwise.

8. In the instant case, it is an admitted position that respondent No.3 is a statutory body and the government controlled entity, however, its service regulations are non-statutory. The Honourable Supreme Court of Pakistan, in the case of *Pakistan Defence Officers’ Housing Authority v. Lt. Col. Syed Jawaid Ahmed* [2013 SCMR 1707], while discussing the issue of statutory body having non-statutory service rules and regulation has settled the guiding principles in para-50 of the Judgment, which for the sake of ready reference is reproduced as under: -

“50. The principles of law which can be deduced from the foregoing survey of the precedent case-law can be summarized as under:-

- (i) Violation of Service Rules or Regulations framed by the Statutory bodies under the powers derived from Statutes in absence of any adequate or efficacious remedy can be enforced through writ jurisdiction.
- (ii) Where conditions of service of employees of a statutory body are not regulated by Rules / Regulations framed under the Statute but only Rules or Instructions issued for its internal

use, any violation thereof cannot normally be enforced through writ jurisdiction and they would be governed by the principle of 'Master and Servant'.

- (iii) In all the public employments created by the Statutory bodies and governed by the Statutory Rules / Regulations and unless those appointments are purely contractual, the principles of natural justice cannot be dispensed with in disciplinary proceedings.
- (iv) Where the action of a statutory authority in a service matter is in disregard of the procedural requirements and is violative of the principles of natural justice, it can be interfered with in writ jurisdiction.
- (v) That the Removal from Service (Special Powers) Ordinance, 2000 has an overriding effect and after its promulgation (27th of May, 2000), all the disciplinary proceedings which had been initiated under the said Ordinance and any order passed or action taken in disregard to the said law would be amenable to writ jurisdiction of the High Court under Article 199 of the Constitution.

9. Moreover, the Honourable Supreme Court in the case of Muhammad Rafi and another v. Federation of Pakistan and others [2016 SCMR 2146 SC] while interpreting the scope of para-50 of the afore-mentioned Judgment, inter alia, has observed as under:

“8. We, therefore, are of the considered view that issue in hand is fully covered by para-50 of the judgment referred to hereinabove, which provides that an aggrieved person can invoke the constitutional jurisdiction of High Court against a public authority if he satisfies that the act of the authority is violative of service Regulations even if they are non-statutory.”

10. In the present case, the petitioners who are regular employees of respondent No.3 (SSESI), a statutory body and government controlled entity, seek declaration to the effect that the appointment of respondent No.4 as Social Security Officer on contract basis and subsequently, confirmation of his service from the date of initial appointment are illegal, discriminatory and in violation of law and the service regulations. Such act of the respondents, on the touch stone of the above referred legal precedents, prima facie, give rise to the petitioners to invoke writ jurisdiction of this Court. Besides, it is also settled position of law that the regularization of the employees is not part of the terms and conditions of service of the employees but it relates to the length of service. Reliance in this regard can be placed on the case of Nabeela Ashfaq v. Federation of Pakistan through Secretary Defence and 3 others [2020 PLC (C.S.)24]

In view of the above, the objection regarding maintainability of the instant Petition has no force and as such the same is rejected accordingly.

11. Adverting to the case in hand on merit, from the record it transpires that respondent No.4, pursuant to advertisement appeared in daily DAWN dated 08.06.2002 had applied for the post of Social Security Officer (BS-16) in SESSI and subsequently on 05.09.2002, he along with others was selected for appointment as Social Security Officer in BS-16 in SESSI on two years extendable contract. Thereafter, on 31.08.2004 his contract period was extended for a period of one year. On 08.09.2005, the said period was further extended to one year. Thereafter, on 06.09.2006 the period of contract again extended for one year. And on 07.2007, the service of respondent No.4 was regularized w.e.f. 31.03.2007. On 22.07.2013, pursuant to the recommendation of Departmental Promotion Committee, respondent No.4 along with others was promoted from BS-16 to BS-17 against 25% upgraded posts with immediate effect. Record also shows that on 27.01.2016, respondent No.4 approached this Court by filing a Constitutional Petition No.D-528 of 2016 praying therein that his services may be regularized with effect from his initial appointment i.e. 05.09.2002, as his representation dated 07.3.2013 submitted before the Minister for Labour and Governing Body SESSI, has not been decided despite lapse of sufficient time. Record further shows that present petitioners also joined the said petition being Interveners. On 06.05.2016, this Court disposed of the said petition in the following terms:-

“The petition is disposed of with the directions that when the Governing Body will decide the representation of the petitioner after hearing him, the opportunity of hearing will also be afforded to the interveners and due consideration will also be given to the order passed by this Court in C.P. No.D-2190/2012 which was affirmed by the Honourable Supreme Court of Pakistan in CPLA No.287-K/2012 vide order dated 2.11.2012. The Governing Body shall decide the matter within two months....”

12. Subsequently, in compliance of the above order of this Court, the Governing Body in its [144th] meeting constituted a committee to furnish its recommendations in view of the above orders of the this

court. The decision of the [144th] meeting of the Governing Body, [SESSI] held on 23.09.2016, for the sake of ready reference is reproduced as under:-

DECISION

28. Governing Body, SESSI accorded approval to form a committee comprising the following:-

- | | | |
|-----|---|-----------|
| (1) | Mr. Abdul Rasheed Solangi (By name)
Secretary Labour & HR Department
Government of Sindh. | Chairman |
| (2) | Mr. Asif Ali Memon
Vice Commissioner, SESSI | Secretary |
| (3) | Mr. Shahjehan Shaikh
Employers' Representative/Member
Governing Body, SESSI. | Member |

The Committee shall furnish its recommendations in the matter after personal hearing to the petitioner and interveners, in view of the order passed by the Honourable High Court in C.P. No.2190 of 2012 dated 06-05-2016 keeping in view the initial mode and date of Recruitment, date and mode of Regularization, Seniority, G.P. Fund, etc., in the light of Law, Rules, Court citations in the case of Petitioners. The Committee shall submit its report to the Governing Body, SESSI in its next meeting for finalizing the matter.”

13. Pursuant to the above, the committee furnished a detailed report dated 16.01.2017, recommendation of the said committee for the sake of ready reference is reproduced as follows :-

“RECOMMENDATION:

The Committee recommends that the appointment of Mr. Nadir Hussain Kanasro as Social Security Officer was made on 12.09.2002 after completing all codal formalities i.e. age, requisite qualification, experience, against the permanent post on contract basis may be considered and treated as regular appointment. He may also be considered senior to the nine interveners out of ten interveners who were appointed later on in 2004, on purely temporary basis, while violating the codal formalities i.e. age, requisite qualification and experience etc.

The Committee further recommends that since the interveners have been appointed in violation of the codal formalities, i.e. age, requisite qualification, experience etc. Detailed enquiry may be conducted after verification of educational qualification from concerned quarters, action may be taken against the intervener in the light of above enquiry report as per Law/Rules.

The report is accordingly placed before Governing Body (SESSI) for the consideration & approval.”

14. The above recommendation of the committee was placed before [145th] General Body's meeting held on 28.01.2017, wherein it was approved in toto. The decision of the [145th] Meeting of the Governing Body of SESSI, held on 28.01.2017, at the Chief Minister House Sindh, Karachi, is reproduced as follows :-

“Decision

44. The Honourable Chief Minister Sindh and Governing Body, SESSI approved the recommendations of the Committee in toto.”

15. Thereafter, respondent No.3, vide its Office Order dated 01.03.2017, regularized the service of respondent No.4 with effect from 12.09.2002. For convenience's sake Office Order 01.03.2017 is reproduced as under: -

“SINDH EMPLOYEES’ SOCIAL SECURITY INSTITUTION
(HEAD OFFICE)

OFFICE ORDER

In compliance of the direction of the Honourable High Court of Sindh in C.P. No. D-528/2016, in preview of Governing Body SESSI's Constituted Committee vide its 144th Meeting held on 23.09.2016 and subsequently the recommendation of Governing Body SESSI vide its 145th Meeting held on 28.01.2017 at Chief Minister House, the Chief Minister Sindh/the Governing Body, SESSI has regularized the services of Mr. Nader Hussain Kanasro with effect from 12.09.2002, as his seniority stood stands in BS-18.

Sd.

(MUHAMMAD ZAHID BUTT)
DIRECTOR (ADMINISTRATION)
FOR COMMISSIONER

No.SS-Admn/2017-2234

Dated:1st March 2017”

16. Thereafter, respondent No.3, vide its Office Order dated 17.03.2017 [impugned herein] posted respondent No.4 as Director [BS-18] at Defence/Clifton Directorate subject to regularization by Governing Body SESSI.

17. From perusal of the above, it appears that pursuant to the directions of this Court's order dated 06.05.2016, passed in CP. No.D-528 of 2016, the Governing Body, SESSI, in its 144th meeting duly constituted a three members committee to furnish its recommendations in terms of mandate provided in the above order. Subsequently, the committee after hearing the parties as well as considering their submissions in writing, framed points for determination, and while discussing/answering each and every point, furnished a comprehensive

report dated 16.07.2017. The said report was subsequently placed before the Governing Body in 145th meeting for its consideration and approval. The Governing Body in the said meeting approved the recommendations of the Committee and in pursuance whereof respondent No.3, vide its office order dated 01.03.2017 regularized the service of respondent No.4 from the date of his initial appointment. Thereafter, respondent No.4, vide office order dated 17.3.2017 was posted as Director (BS-18) at Defence/Clifton Directorate. The said Office Order is impugned in the instant proceedings.

18. Learned counsel for the petitioners during his arguments, inter alia, has contended that the Governing Body was estopped under the law of Estoppel to pass the aforementioned impugned orders having become functus officio; neither the Governing Body possessed any jurisdiction nor was conferred any lawful authority to grant retrospective seniority to respondent No.4; this Court directed the governing body to decide the matter in accordance with law in its own discretions; such discretionary power could not have been delegated to any committee and as such merely countersigning or approval of the findings of the committee without application of mind by a Governing body as a whole was an illegal exercise of jurisdiction rendering such order to be illegal and unlawful.

The above arguments appears to be based on misconception as firstly, the order dated 06.05.2016 passed in CP.No.D-528 of 2016 was the consent order whereby the petition was disposed of with directions to the Governing Body to decide the representation of respondent No.4 after providing opportunity of hearing to the present petitioners and respondent No.4. This order doesn't say that the Governing Body cannot delegate its power for compliance of said order. Further the record also doesn't reflect that the present petitioners have ever raised such objection either at the time of constitution of the committee or at the time when the said committee commenced the proceedings and as such they are estopped from raising such objections after the committee furnished its recommendations. Moreover, the approval of the Governing Body to the recommendations of the committee, which was duly constituted by the Governing Body having power under section 6 of the SESSI Act, 2016, appears to be within the mandate of the order

dated 06.05.2016 and as such cannot be termed as illegal and unlawful. Besides above, there appears no provision in the law, which may debar the confirmation of contractual service of an employee from the date of his initial appointment. Moreover, the Honourable Supreme Court of Pakistan in case of *Muhammad Aslam Awan, Advocate, Supreme Court v. Federation of Pakistan and other* [2014 SCMR 1289], inter alia, held as under:

“31.....We find that even in service-matters, while considering the seniority of civil servants, the seniority is reckoned from the date of initial appointment and not from the date of confirmation or regularization.”

19. In addition to the above, it is an admitted position that respondent No.4 was appointed in the year 2002 against the permanent post on contract basis whereas the petitioners were appointed in the year 2004 on temporary basis, as such they cannot claim seniority over respondent No.4.

20. As regards the contention of learned counsel for the petitioners that grant of retrospective seniority adversely affecting seniority of colleagues of respondent No.4 without hearing them was an unlawful exercise of power, the same also appears to be misconceived as the present petitioners who were going to be affected from the decision on the representation of respondent No.4, have been provided ample opportunity of hearing by the Committee before furnishing its report, and furthermore, the persons who have slept over their rights are not entitled to any relief. It may be observed that where a person in spite of having full knowledge of violation of any of his right of personal nature remained silent and did not take any measure for safeguarding it then he would be deemed to have impliedly waived it. Reliance in this regard can be placed on the case of *Messrs Dadabhoy Cement Industries Limited and others v. Messrs National Development Finance Corporation* [2002 C L C 166].

21. The case law cited by learned counsel for the petitioners have been perused and considered with due care and caution but are found distinguishable from the facts of the present case and hence the same are not applicable to the present case.

22. In view of the above facts and circumstances, no illegality or irregularity has been found in the impugned orders, as such there appears no justification for exercising discretionary and/or extraordinary constitutional jurisdiction of this Court in the matter in hand. Consequently, present constitutional petition is dismissed.

JUDGE

Karachi:
Dated:

JUDGE