

IN THE HIGH COURT OF SINDH, AT KARACHI

Present:

Mr. Justice Muhammad Iqbal Kalhoro

Mr. Justice Adnan-ul-Karim Memon

C.P No.D-2991of 2013

Ali Asghar and others..... Petitioners

Versus

Federation of Pakistan and others..... Respondents

Date of hearing: 19.04.2017

Mr. Maula Bux Khatian, Advocate for the Petitioners.

Barrister Sarfaraz Ali Maitlo for Respondent No.4

Mr. Abdul Jalil Zubedi, AAG.

JUDGMENT

ADNAN-UL-KARIM MEMON, J:- Through the above captioned Petition, the Petitioners are seeking regularization of their service from the date of their initial appointment in Sindh Madressatul Islam University.

2. Brief facts of the case as set forth in the Memo of Petition are that initially Petitioners were appointed as Junior School Teachers (J.S.T) in BPS-14 in Sindh Madressatul Islam College, now University (hereinafter referred as "SMI College") under the control of Government of Pakistan, Ministry of Education (Respondent No.1). The sole grievance of the Petitioners is that their services have not been regularized from the date of their initial appointment. Petitioners have asserted that their contract

period was extended from time to time and the last extension was valid till July/August, 2013. But prior to the expiry of the contract period, the Petitioners were relieved from their service by the Management of University without any formal letter of termination and payment of salary dues. The Petitioners added that SMI College was devolved to the Government of Sindh under 18th Amendment in the Constitution. The Provincial Assembly of Sindh on 22.12.2011 promulgated The Sindh Madressatul Islam University Act, 2011 (hereinafter referred to as "SINDH ACT NO.VI/2012") for establishment of Sindh Madressatul Islam University at Karachi. Before devolution of SMI College to Government of Sindh, the Federal Government regularized its employees, who were working on contract basis. According to the Petitioners in accordance with the Cabinet Decision dated 4.6.2008 regarding regularization of contract employees, the working paper of the contract employees of SMI College was prepared but the Management of SMI College did not process the case of the regularization to the Competent Authority. Petitioners have further contended that they filed the instant Petition on 16.7.2013 before this Court with apprehension of adverse action by the University that is, relieving them from service before the end of their contractual tenure. The Respondent-University filed its comments denying the allegations that University had decided to advertise all contractual posts including the posts on which the Petitioners were working.

3. Mr. Moula Bux Khatian, learned counsel for the Petitioners has argued that Petitioners have been working since 2006 in Sindh Madressatul Islam College (now University since 2011) and that their contractual tenure was extended from time to time. He further contended

that Petitioners have served with the University for about seven years yet their services were not regularized by the Management of the Respondent-University. He next contended that the affairs of the Respondent-University are being run by the Vice Chancellor who is Nominee by the Government of Sindh. He next added that Provincial Assembly of Sindh on 25.3.2013 promulgated Sindh (Regularization of Adhoc and Contract Employees) Act, 2013 (hereinafter referred to as the Act, 2013) for regularization of services of certain employees appointed on adhoc and contract basis and the case of Petitioners also falls within the ambit of Section 3 of the Act 2013 and the service of the Petitioners can be regularized under this beneficial legislation. In support of his contention, he relied upon the case of Dr. Iqbal Jan and others versus Province of Sindh and others (2014 PLC [CS] 1153) and argued that in the similar circumstances, this Court has allowed the Petitions with directions to Respondent No.2 to consider the case of the Petitioners for regularization of their service in accordance with Section 3 of the Act, 2013. He next contended that Respondent-University did not allow the Petitioners to continue on the posts and illegally relieved the Petitioners from service without giving any plausible reasons or personal hearing which is in violation of Article 10-A of the Constitution. Learned counsel further argued that prior to the expiry of the contract period of the Petitioners, the Respondent-University advertised the said posts in the Daily Newspaper "The News" dated 16.6.2013, including the posts on which the Petitioners were working. Feeling aggrieved by and dissatisfied with the said advertisement, the Petitioners filed the instant Petition on 16.7.2013 before this Hon'ble Court with prayer for regularization of their services.

4. Barrister Sarfaraz Ali Maitlo, learned counsel for Respondent-University has raised the preliminary legal objection of maintainability of the instant Petition on the ground that University is an autonomous body with non-statutory Rules of service and is being controlled and governed by the authorities of University. Therefore, the instant Petition is not maintainable. He further argued that contract period of Petitioners stood expired on 31.07.2013 and 02.08.2013 respectively and Petitioners are no more in the service of the Respondent-University therefore, the question of regularization of service of the Petitioners does not arise. He further added that before expiry of contract period of the Petitioners their case was presented before the Selection Board of the University where unanimous decision was taken on 12.02.2013 that no employee of the University is to be regularized and the contractual posts have to be advertised for regular employment. He further argued that the Sindh (Regularization of Adhoc and Contract Employees) Act, 2013 is not applicable on the University because it is an independent/autonomous and statutory body and not under the control of the Provincial Government.

5. Mr. Abdul Jalil Zubedi, learned AAG has adopted the arguments advanced by learned counsel for Respondent-University.

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

7. First of all, we address the question of maintainability of the instant Petition under Article 199 of the Constitution. Prima-facie, it appears that Sindh Madressatul Islam University is a public Sector

University and a statutory body in terms of Sindh Act No.VI/2012. As per Section 3(3) of Sindh Act No.VI/2012, Respondent-University is a Body Corporate performing functions in connection with the affairs of the Province. The functions of University have an element of Public Authority hence, the same is amenable to Writ Jurisdiction. In this view of the matter, the status of Respondent-University can ordinarily be regarded as a 'person' performing functions in connection with the affairs of the Province within the meaning of Article 199 (1) (a) (ii) read with Article 199 (5) of the Constitution. The test laid down by the Honorable Supreme Court in Paragraph 50 of the judgment rendered in the case of Pakistan Defense Housing Authority & others vs. Lt. Col. Syed Jawaid Ahmed (2013 SCMR 1707) is fully applicable to the instant Petition. The Honorable Supreme Court while discussing the status and functions of various authorities held that

“these are statutory bodies, performing some of the functions which are functions of the Federation State and through the exercise of public power, these bodies create public employments. These bodies are therefore "persons" within the meaning of Article 199(1)(a)(ii) read with Article 199(5) of the Constitution. If their actions or orders passed are violative of the Statute creating those bodies or of Rules/Regulations framed under the Statute, the same could be interfered with by the High Court under Article 199 of the Constitution.” (Emphasis added).

Respondent-University being a public Sector entity is receiving funds from the Government of Sindh pursuant to section 47(2) of the Sindh Act No.VI/2012 and the Government is exercising powers in connection with the affairs of the University which include extension of the contract period of employees including Petitioners. Furthermore, as per The Sindh Universities and Institutes Laws (Amendment) Act, 2014, the legislature

has made amendments in the laws of 20 Universities/Institute of Sindh to maintain uniformity in the Organization, Management and control of public sector Universities in the Province of Sindh. The amendment provides for that the Vice Chancellor shall be appointed by the Chancellor of the Respondent-University on the advice of the Government, for a period of four years which may be extended for one more term on such terms and conditions as the Government may determine. Therefore, it is clear that the Government of Sindh has role in the affairs of Respondent University. For reference following sections of the ibid Law are reproduced herewith:-

“Sections 6(1) *Notwithstanding anything contained in any law the University shall have jurisdiction within the limit of its Campuses and in respect of Colleges in such areas as may be notified by Government:*

Provided that Government may, in consultation with the University, by general or special order modify the jurisdiction.

(2) *No educational institution situated within the territorial limits of the University shall, save the consent of the University and the Sanction of Government, be associated in any way with or seek admission to the privileges of any other University.*

(3)

Section 7. *The University shall be open to all persons of either sex gender and of whatever religion, race, creed, class or colour and no person shall be denied the privileges of the University on the grounds of religion, race, caste, creed, class or colour:.....*

Section 11(1), *The Chancellor may cause an inspection or inquiry to be made in respect of any matter connected with the University, and shall, from time to time, appoint such person or persons in consultation with the Government for the purposes of carrying out inspection of-*

Section 12(1), *The Minister for Education shall be the Pro Chancellor.*

Section 13(1), *There shall be a Vice-Chancellor of the University who shall be an eminent academic or a distinguished administrator and shall be appointed by the chancellor on the advice of Government, for a period of four years, which may be extended for one more term on such terms and conditions as Government may determine.*

Section 15(1), *The Chancellor may, on the recommendation of the Government and in consultation with the Vice-Chancellor, appoint a Pro-Vice Chancellor for the main campus or of the additional campus, if any, or for both the campuses jointly or separately, on such terms and conditions and for such period not exceeding four years at a time as the Chancellor may determine.*

Section 16, *The Registrar shall be a whole-time of the University and shall be appointed by the Chancellor from among the persons recommended by the Government.*

- (a)
- (b)
- (c)
- (d)
- (e)

Section 17(1) *The Director of Finance shall be a whole-time officer of the University and shall be appointed by the Chancellor from among the persons recommended by the Government on such terms and conditions as may be prescribed.....*

- (a)
- (b)
- (c)
- (d)

Section 18, *The Controller of Examination of the University shall be a whole-time officer of the University and shall be appointed by the Chancellor from among the persons recommended by the Government and shall be responsible for all matters connected with the conduct of examinations and perform such other duties as may be prescribed.*

Section 20 *All the other remaining officers mentioned in section 9, shall be appointed by such officer or authority as authorized by Government on such terms and conditions as it may determine. They shall perform their duties as may be prescribed.*

Section 35(4) *The accounts of the University shall be audited once a year in conformity with the statues, regulations and*

rules by the Auditor appointed by Government for this purposes.

Section 47(2) *The Government shall continue to provide funds for the education from class one to twelve mentioned in sub-section (1) as per practice in vogue at the time of commencement of this Act.*

8. In view of the provisions referred to in the statute of Respondent University, it is obvious that the Government of Sindh has a financial interest and control of the affairs of Respondent-University. Guidance is also taken from the decision of august Supreme Court given in the case of Abdul Wahab and others v. HBL and others (2013 SCMR 1383). In this judgment, the Honorable Supreme Court has held that two factors are most relevant i.e. the extent of financial interest of the State/Federation in an Institution and the dominance in the controlling affairs thereof. The same principle is laid down in the case of Salahuddin v. Frontier Sugar Mills and Distillery Ltd. (PLD 1975 SC 244), and therefore this Court has jurisdiction to entertain this Petition.

9. So far as the objection of learned counsel for Respondent-University on the issue of statutory and non-statutory rules is concerned, in similar circumstances in respect of statutory or non-statutory Rules of University, the Hon'ble Supreme Court of Pakistan has taken into consideration the above referred proposition in the case of Rector National University of Science and Technology (NUST) Islamabad and others v. Driver Muhammad Akhter rendered in Civil Appeal No.495 of 2010 decided on 28.04.2011, held as under:-

“4. The learned counsel produced a copy of the statutes called the National University of Sciences and Technology (Enforcement of Academic, Service, and Financial Matters) Statutes, 2005, made by the Board of Governors in exercise of

the powers conferred upon it by subsection (2) of Section 21 of the University of Sciences and Technology Act, 1997, in order to “regulate the creations of institutes and faculties etc and for enforcement of academic, service, appointment, discipline and financial matters”. Section 21 of the Act provides for making of statues to regulate, inter alia, service, pension and fringe benefits and other terms and conditions of services of the employees of the University. Subsection (2) provides the procedure that “Draft of the statues shall be proposed by the Executive Committee for approval by the Board which may approve them or refer them back for reconsiderations”. Subsection (3) further mandates that “no statue shall be valid until it has been approved by the Board/Chancellor.” Section 21 neither requires approval of the Government of the proposed statues or its notification. It prescribes its own procedure. The draft statues become enforceable upon its approval by the Board of Governors. The case of Chairman, State Life Insurance Corporation v HamayunIrfan(ibid) is clearly distinguishable as there the Regulation making power conferred by the statute on the Corporation required the previous approval of the Central Government, followed by notification of the Regulation in the official gazette. The Court was, therefore, interpreting the particular rule making power, while holding and as a matter of fact such requirements were fulfilled and that the Regulations were statutory. We have no doubt in our minds that the National University of Sciences and Technology (Enforcement of Academic, Service, and Financial Matters) statues, 2005, are statutory in nature as they were framed in accordance with the procedure prescribed in the statute. Since this was the only ground on which leave was granted, the appeal is dismissed.” (Emphasis added).

10. For the above proposition of law a guidance has been sought from the judgment of Hon’ble Apex Court rendered in the case of Shafique Ahmed Khan and others v. NESCOM through Chairman, Islamabad and others (PLD 2016 SC 377) has held as under:-

“Fact that certain rules or regulations were framed without the approval of the Federal Government was not the sole criteria to term them as non-statutory in nature. It was indeed there nature and area of efficacy which were determinative of their status. Rules dealing with instructions for internal control or management were treated as non-statutory while those whose area of efficacy was broader and were complementary to the parent statute in the matters of crucial importance were statutory. The Rules framed under Section 7, 9 and 15 of the Act fell in the latter category as they were not

only broader in their area of efficacy but were also complementary to the parent statute in matters of crucial importance. It would rather be naïve and even myopic to equate the rules of the authority dealing with matters of crucial importance having so wide a scope and area of efficacy with the instructions meant for internal arrangement and thereby depriving them of their statutory status. Although, said rules had not been framed with the intervention and approval of the Federal Government, but that would not prevent them from being statutory. Firstly because, approval of the Federal Government was not required either under Section 9 or 15 of the Act; secondly because, all those who called the shots were already part of the authority while framing the rules, and thirdly because, the scope and area of their efficacy not only stretched beyond the employees of the authority but over reached many other strategic organization including nuclear and space related technologies systems and matters, as mentioned in section 8 and 9 of the Act. Rules enacted and approved by members of the Authority under Section 7, 9 and 15 of the Act also did not require another approval of yet any other personage.”

11. The above principle in respect of statutory or non-statutory nature of the statute has further been strengthened by the decision of the Hon’ble Supreme of Pakistan in the case of Muhammad Zaman and others v. Government of Pakistan through Secretary Finance Division (Regulation Wing), Islamabad and others(2017 SCMR 347) and in paragraph No.7 has held that:-

“According to the judgment delivered in Civil Appeal No.654/2010 etc. titled Shafique Ahmed Khan, etc v. NESCOM through its Chairman, Islamabad, etc. the test of whether reules/regulations are statutory or otherwise is not solely whether their framing requires the approval of the Federal Government or not, rather it is the nature and efficacy of such rules/regulations. It has to be seen whether the rules/regulations in question deal with instructions for internal control or management, or they are broader than and are complementary to the present statute in matters of crucial importance. The former are non-statutory whereas the latter are statutory.” (Emphasis added).

12. In the light of the above dicta, it is safely concluded that the Rules framed by the Competent Authority of Respondent-University under Section 25(2), 30(1) of Sindh Madarsatul Islam University Act 2011 are statutory in nature. We are of the opinion that the instant Petition is maintainable and can be heard and decided on merits by this Court while exercising Constitutional jurisdiction under Article 199 of the Constitution, 1973.

13. On merits, we hereby proceed to determine the controversy between the parties with respect to regularization of service of the Petitioners in Respondent-University. Record shows that pursuant to advertisement dated 14.5.2006 published in Daily Newspaper "JANG" Karachi, Petitioner No.1 and 3 were appointed as Junior School Teachers (JST) in (BPS-14) on 18.09.2006, whereas Petitioner No.2 was appointed on 6.10.2006 as Junior School Teacher (JST) in BPS-14 on contract basis (for two years). Thereafter, on 1.8.2009, Petitioner No.3 was offered the position of High School Teacher (HST) in BPS-16 on contract basis for one year (extendable to two years). The Petitioners continued to serve initially in SMI College thereafter in Respondent-University on contract basis and were in employment/service for several years on the posts which have now been given in the regular budget of Respondent-University.

14. We have noted that on 22.12.2011 Provincial Sindh Assembly enacted the Sindh Act No.VI/2012 to establish SMI University at Karachi. The protection was given to the employees who were already working in college under Section 4(2) of the Sindh Act No.VI/2012 which provides that:-

“all persons serving in the Sindh Madressatul Islam in any capacity immediately before the commencement of this Act shall, notwithstanding any law or terms and conditions of their service, stand transferred for service to the University on the terms and conditions as may be prescribed: Provided that such terms and conditions shall not be less favorable than the terms and conditions admissible to them immediately before their transfer.”

15. We are of the view that Respondent-University cannot adopt policy of fresh appointments on the posts already held by the Petitioners on which they were appointed after going through a transparent procedure particularly when during their entire service nothing adverse in terms of their qualification and character and/or inefficiency in the subject field was observed by the Competent Authority of the Respondent-University. The Petitioners served the Respondent-University for almost seven years and thus gained sufficient expertise in their subject fields, therefore to appoint someone else on the said posts would be unjustified and against principles of natural justice and equity. Looking through the above perspective and keeping in view the factual position of the case, we hereby infer that the Petitioners ought to have been considered for regularization by the Respondent-University.

16. Now, we would like to address the question raised by the learned counsel for the Petitioners with respect to the applicability of the Sindh (Regularization of Adhoc and Contract Employees) Act, 2013. In our view *prima-facie* this Act does not seem to be applicable to the facts and circumstances of the present case of the Petitioners, as this Act 2013 is relevant for those employees, who held the posts in Government Department and includes the post in a Project of such Department in connection with the affairs of the Province.

17. As regards the next question raised before this Court that whether the petitioners can be regularized in the respondent university. We have sought guidance in this regard from the decision of the Hon'ble Supreme Court rendered in the case of Rana Aamer Raza Ashfaq and another v. Dr. Minhaj Ahmed Khan and another (2012 SCMR 6), wherein the Hon'ble Supreme Court has held at paragraph 39 that:-

“This Court would not interfere in the judgment of the High Court on yet another salutary principle of equity i.e. if in the exercise of Constitutional jurisdiction it has passed an order to remedy a manifest wrong. In Messrs Norwich Union Fire Insurance Society Limited v. Muhammad Javed Iqbal (1986 SCMR 1071), it was observed as follows:-

“In this view of the matter, as laid down in Raunaq Ali v. Chief Settlement Commissioner PLD 1973 SC 236, the High Court was within its power to refuse relief in writ jurisdiction, where the impugned order before it had the effect of fostering justice and righting a wrong, even though the authority concerned had acted clearly without jurisdiction. The High Court having acted in consonance with this higher principle of justice laid down by this Court, there is no justification for taking exception to the impugned judgment. The other question of law need not, therefore, be examined.”

18. We, therefore, are of the considered view that issue in hand is fully covered by para above of the judgment passed by the Hon'ble Apex Court referred to hereinabove, which provides that the Constitutional Jurisdiction of this Court can be invoked against the Respondent-University. Respondents can be directed for regularization of their contractual service as on that issue the Hon'ble Apex Court has already enunciated the principles in the case of Pir Imran Sajid and others Vs. Managing Director/General Manager (Manager Finance) Telephone

Industries of Pakistan and others (2015 SCMR 1257), wherein the Hon'ble Supreme Court has held at paragraph 13 that:-

“looking through the above constitutional prism and keeping in view the facts that the federal government which owns, controls, manages and finances TIP has directed TIP to regularize the appellants, and that admittedly the appellants have initially been appointed in an open and transparent manner and after the vacancies were advertised in the newspapers, one cannot escape the conclusion that the appellants ought to have been regularized.”

19. We are further fortified on the similar principle by the case law decided by five Member Bench of Hon'ble Apex Court in the case of Government of Khyber Pakhtunkhwa and others Vs. Adnanullah and others (2016 SCMR 1375), wherein the Hon'ble Supreme Court has held at paragraph 31 that:-

“The record further reveals that the Respondents were appointed on contract basis and were in employment/service for several years and Projects on which they were appointed have also been taken on the regular Budget of the Government, therefore, their status as Project employees has ended once their services were transferred to the different attached Government Departments, in terms of Section 3 of the Act. The Government of KPK was also obliged to treat the Respondents at par, as it cannot adopt a policy of cherry picking to regularize the employees of certain Projects while terminating the services of other similarly placed employees.”

20. We are of the view that the case of Petitioners is also on the same footing as decided by the Honorable Supreme Court in the case of Pir Imran Sajid and others (supra) and in the case of Government of Khyber Pakhtunkhwa and others (supra).

21. In the light of above the facts and circumstances of the case, the instant Petition is hereby allowed in the terms whereby the Respondent No.4 is directed to consider the case of the Petitioners without any discrimination for regularization of their service in accordance with law and the dicta laid down by the Hon'ble Supreme Court of Pakistan in the cases referred to hereinabove within a period of two months from the date of receipt of this judgment.

22. The Petition stands disposed of in the above terms along with pending application(s).

JUDGE

JUDGE