

IN THE HIGH COURT OF SINDH, AT KARACHI

Present:

Mr. Justice Muhammad Shafi Siddiqui

Mr. Justice Adnan-ul-Karim Memon

C.P. No. D- 1151 of 2019

Dr. Fozia AkmalPetitioner

Versus

Province of Sindh & 04 othersRespondents

Date of hearing: 27.08.2019

Date of Judgment: 27.08.2019

M/s. Shoaib Mohiuddin Ashraf & Ameer-Uddin, advocates for the Petitioner.

Mr. Jawad A. Sarwana, advocate for Respondents No.2 to 5.

J U D G M E N T

ADNAN-UL-KARIM MEMON, J:- The petitioner, through the captioned Petition, has sought the following relief(s):

- a) To declare that the office orders dated 05.10.2018 & 19.10.2018 are illegal and has been issued without any authority.
- b) To declare that the petitioner is still an employee of the respondent No.2 without any discontinuation of her service.
- c) To direct the respondents to confirm the service of the petitioner retrospectively from the completion of probation period i.e. 26.03.2015 or
- d) To direct the respondent No.1 to absorb the service of the petitioner in SESSI, respondent No.2 in accordance with under the Sindh Regulation Act (Ad-hoc and contract employees) Act 2013, with all the consequential benefits.

2. The relevant facts involved in this *lis* are that, initially the Petitioner was assigned duties as a Gynecologist in Sindh Employees' Social Security Institution (SESSI) against the leave vacancy, in the year 2012. Petitioner's case is that Respondent-SESSI vide Office Order dated 25.3.2013, hired her services against the aforesaid post on a fixed honorarium of Rs.50000/- till the appointment of Gynecologist. Per Petitioner, she continued as Consultant in SESSI till assumption of charge by Dr. Hina Toufeeq a regular Gynecologist. Petitioner being aggrieved by and dissatisfied with the aforesaid action of Respondent-Institution, preferred applications to the Respondent-SEESI for restoration of her service on the premise that she has been working as a Consultant Gynecologist for about six years; that on 05th October, 2018 she was informed by the Respondent-Institution that there were two Budgetary posts of Consultant Gynecologist in the Kulsum Bai Valika Social Security Site Hospital H-3 Manghopir and the same has been

occupied and she is now in excess. Petitioner has submitted that she performed her duties assigned to her with keen interest and devotion without any complaint, therefore, she may be regularized in the service on the aforesaid post but her request was turned down vide letter dated 19.10.2018. Petitioner being aggrieved by and dissatisfied with untimely removal from service by the Respondents has filed the instant petition on 19.2.2019.

3. Upon notice, Respondents No.2 to 5 filed comments and denied the allegations leveled against them.

4. Mr. Shoaib Mohiuddin Ashraf, learned Counsel for the petitioner has mainly argued that the Petitioner was eligible for permanent absorption as Consultant Gynecologist in Respondent-SESSI; that it is consistent practice of the Respondent-Institution to hire persons on contract basis and thereafter regularize them; that the Petitioner has the right to be appointed on permanent basis, but the Respondents ignored the Petitioner deliberately and intentionally avoided not to consider her application, request and appeal for regularization of her service under Sindh (Regularization of Ad-hoc and Contract Employees) Act, 2013; that Petitioner has been working on the aforesaid post for about six years, thus she has a right to ask for regularization of her service. In support of his contention, he relied upon the cases of *Messrs State Oil Company Limited v. Bakht Siddique and others* (2018 SCMR 1181), *Board Of Intermediate And Secondary Education, Faisalabad through Chairman and others v. Tanveer Sajid and others* (2018 SCMR 1405), *Abdul Ghaffoor and others v. The President National Bank Of Pakistan and others* (2018 SCMR 157), *Board of Intermediate and Secondary Education, DG Khan and another v. Muhammad Altaf and others* (2018 SCMR 325), *Pakistan Defence Officers' Housing Authority v. Lt. Col. Syed Jawaid Ahmed* (2013 SCMR 1707), *Qayyum Khan v. Divisional Forest Officer, Mardan* (2016 SCMR 1602), *Muhammad Rafi and another v. Federation of Pakistan* (2016 SCMR 2146), *Government of Khyber Pakhtunkhwa v. Adnanullah* (2016 SCMR 1375) & *Pir Imran Sajid v. Managing Director / General Manager (Manager Finance) Telephone Industries of Pakistan* (2015 SCMR 1257). He lastly prayed for allowing the instant Petition.

5. Conversely, Mr. Jawad A. Sarwana, learned Counsel representing the Respondent-SESSI has raised the question of maintainability of the instant Petition and argued that the Petition is not maintainable on the ground that she was appointed against leave vacancy vide order dated 19.10.2018; that she is no more in service, therefore, her contractual period has ended and cannot be regularized; that the matter involves factual controversy, which requires evidence. Besides, no fundamental / vested right of the Petitioner is violated, however, he conceded that the Petitioner will be considered, through competitive process, on occurrence of a vacancy; that Petitioner was working against leave vacancy purely on temporary basis; that she has performed and completed her last tenure on 05th October, 2018 and thereafter she is no more in the service of the Respondent-Institution; that the Petitioner had no lien against any vacant / regular post. Learned Counsel for the Respondent-SESSI has placed reliance on the case reported as *Ghulam Hafeez v. Government of Sindh through Secretary, Labour, Sindh and another* (1991 P L C (C.S.) 530) and argued that the petitioner is not a civil servant nor she is governed by any statutory rules of service. The rules by which the petitioner is governed have been made by the Governing Body of the Sindh Employees' Social Security Institution by virtue of powers vesting in it under section 80 of the Provincial Employees' Social Security Ordinances, 1965. He next relied upon the case reported as *Dr. Farah naz and others v. Province of Sindh through Secretary Labour Sindh and others* (2011 P L C 153) and argued that if there are no statutory rules, notwithstanding the fact that an organization is owned and controlled by the Government, and is therefore a person within contemplation of Article 199(5) of the Constitution of the Islamic Republic of Pakistan, employees of such an organization would not be able to maintain Constitution Petition, in respect of any matter arising out of terms and conditions of their respective employment. He prays for dismissal of the instant petition.

6. The learned Counsel for the Petitioner, in exercising of his right of rebuttal, has relied upon the case of *M/s Hadeed Welfare Trust & another Vs. Syed Muhammad Shoab & others*, rendered by the Honorable Supreme Court of Pakistan in Civil Petitions No.121-K and 122-K of 2017, wherein the Honorable

Supreme Court has maintained the Judgment dated 15.12.2016 passed by this Court against M/s. Hadeed Welfare Trust (A subsidiary of Pakistan Steel Mills) (2017 PLC (C.S.) 1020), whereby the contract employees of Pakistan Steel Cadet College were regularized. He next relied upon the Judgment of this Court dated 01.6.2017 passed in the Constitution Petitions No.D-3199, D-4605 and D-5079 of 2013, D-509, D-2034, and D-1091 of 2014 respectively, whereby Pakistan State Oil Company was directed to regularize the services of third party contractor/“outsourced employees”. The said Judgment was assailed before the Honorable Supreme Court of Pakistan in Civil Petitions No.409-K to 414-K of 2017, which maintained the same (2018 SCMR 1181). He next argued that submissions of the Respondent-Institution are misconceived and are not well founded on the premise that the regularization of the service of the Petitioner is based upon her length of service, she has worked for the Respondent-Institution since 2012 and it is on the above principle that the Petitioner has approached this Court for regularization of her service under Articles 4, 9 and 25 of the Constitution of the Islamic Republic of Pakistan. It is asserted by the learned Counsel for the Petitioner that she was earlier on temporary basis as per terms and conditions set forth in the contract appointment letter dated 08.11.2012; that the contract continued till the Petitioner’s services were dispensed with from the month of October, 2018; that performance of the Petitioner in the Respondent- Institution has not been called in question throughout her service period by the Respondents; that the terms and conditions of service of the Petitioner were changed from temporary appointment against leave vacancy position as claimed by the Respondents, which could not be done if it is so; that the objection of the Respondents that Petitioner was working against leave vacancy would be of no legal effect as it would be hit by the prohibition contained in Articles 4, 9 and 25 of the Constitution as junior of the Petitioner under the similar circumstances had been confirmed by the Respondent-Institution; that under Article 5 of the Constitution it is an imperative obligation of the functionaries of the State to abide by the Constitution and the law; that the Respondent-Institution cannot act whimsically while making fresh appointments against the post already held by the

Petitioner, who was appointed in a transparent manner and nothing adverse in terms of her qualification and character and/or inefficiency in the subject field was observed by the Competent Authority of the Respondent-Institution during entire period of her service; that the Petitioner served the Respondent-Institution for a period of 6 years, the said period of service is more than sufficient to acquire expertise in the respective field. Therefore, considering others while ignoring the Petitioner is unjustified and against the principles of natural justice and equity. Learned Counsel for the Petitioner has further submitted that the Provincial Sindh Assembly promulgated Sindh (Regularization of Adhoc and Contract Employees) Act, 2013 and the Petitioner is also entitled to be benefited under the aforesaid beneficial enactment.

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

8. In the first place, we would like to examine the issue of maintainability of the instant Petition under Article 199 of the Constitution.

9. The profile of the Sindh Employees' Social Security Institution reveals that it is a statutory body established under the Provincial Employees' Social Security Ordinance, 1965 and is a Public Sector statutory entity. In view of the above background and status of SESSI, the same can be regarded as a Person performing functions in connection with the affairs of the Province under Article 199 (1) (a) (ii) read with Article 199 (5) of the Constitution. In the given circumstances, the Hon'ble Supreme Court of Pakistan in the case of *Pakistan Defence Officers Housing Authority v. Lt. Col. Jawed Ahmed* (2013 SCMR 1707) has laid down that an aggrieved person can invoke Constitutional Jurisdiction of this Court against a public authority. The Petitioner is seeking regularization in the Respondent-Institution i.e. SESSI. The same principle is also enunciated in the case of *Muhammad Rafi and others Vs. Federation of Pakistan & others* (2016 SCMR 2146). The Hon'ble Supreme Court has already held that Constitutional Petition is maintainable against Public Sector Institute. We, therefore, are of the view that this petition is maintainable and can be heard and decided on merits.

10. Having decided on the maintainability of the instant Petition, question, whether the services of the petitioner as Consultant Gynecologist in SESSI can be regularized?

11. Prima facie the engagement of the petitioner as a Consultant Gynecologist in BPS-18 on fixed honorarium till the appointment of regular Gynecologist was against the norms of natural course and deviation from recruitment/service rules and procedures and even otherwise the said appointment was against a leave vacancy, meaning thereby no clear vacancy was available with the institution at the relevant point in time.

12. We have also gone through the Recruitment Rules notified vid Notification dated 30.12.2006 which prescribed the qualification and the method of recruitment for the post of Gynecologist (BPS-18) in SESSI and the same can be filled by Initial Appointment and not otherwise.

13. The case of the petitioner for regularization of her contingency appointment does not involve any complicated question. In our view, by virtue of her engagement as Consultant Gynecologist in BPS-18, no vested right in terms of Recruitment Rules as discussed supra accrued to her to claim regularization on the basis of hiring on leave vacancy. Besides, her initial engagement in year 2012 was also found to be in violation of prescribed procedure and non-transparent manner and she is not entitled to regularization on this account also.

14. During the course of arguments, we asked the learned Counsel for the petitioner to answer whether the Petitioner's appointments as Consultant Gynecologist in BPS-18 against a leave vacancy till appointment of regular Gynecologist was in accordance with law? He submitted that the petitioner has been non-suited on a technicality and made submissions on the merits of the case. The learned Counsel referred to section 3 of Sindh (Regularization of Adhoc and Contract Employees) Act, 2013, which allow an employee appointed on Adhoc and contract basis or otherwise 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 or its project in connection with the affairs of the Province, immediately before commencement of this Act, shall be deemed to have been validly appointed on regular basis.

15. To appreciate the plea taken by the petitioner, we have to refer to Sindh Civil Servants (Regularization of Adhoc Appointments) Act, 2013, promulgated on 25.3.2013. The aforesaid enactment provides for regularization of the services of certain employees appointed on adhoc basis and as per the definition clause the “post” means a post sanctioned by Government connected with the affairs of the province, but in the present proceedings no sanctioned or substantive post of Consultant Gynecologist in BPS-18 was available to be filled on contract or contingency basis at that point of time. We are of considered view that the foundation i.e. purported appointment of the petitioner against the aforesaid post was illegal. We are also of the considered view that the case of the petitioner does not fall within the ambit of Section 3 of the Act, an excerpt of the same is reproduced hereunder:-

“(3) Regularization of services of certain civil servants. (1) Notwithstanding anything contained in the Act or rules thereunder or in any decree order or judgment of a Court but subject to other provisions of this Act a civil servant holding adhoc appointment against post on or before the 12th day of October, 1988 and continuing as such till the commencement of this Act, shall, on orders made in that behalf be deemed to have been validly appointed of that post on regular basis with effect from the date of the commencement of this Act. (2) The orders under subsection (1) shall not be made unless antecedents of such civil servants, with regard to his academic qualifications, experience, age and place of domicile are scrutinized and cleared by a Special Committee appointed by Government. (3) The Special Committee under subsection (2) shall be headed by the Secretary in charge of the Department concerned and amongst others shall consist of a representative each from that Department and the Services and General Administration Department.”

16. Now, we would like to address the question raised by the learned counsel for the Petitioner with respect to the applicability of the Sindh (Regularization of Adhoc and Contract Employees) Act, 2013.

17. In our view, prima-facie, this Act-2013 does not seem to be applicable to the facts and circumstances of the present case of the Petitioner, 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. Therefore the Petitioner is not entitled to the benefit of the aforesaid Act also.

18. As per the Recruitment Rules and Notification issued by the Government of Sindh on 30.12.2006, the post of Consultant Gynecologist in BPS-18 is a regular service post and can be filled by initial appointment.

19. The aforesaid Recruitment Rules clearly depict that the post of consultant Gynecologist in BPS-18 can be filled in the aforesaid manner through competitive process basis. Admittedly, the Petitioner has not been declared successful candidate by the Sindh Public Service Commission therefore, she cannot claim regularization of her service as a matter of right.

20. In view of the foregoing, we are of the considered view that the Petitioner was appointed as Consultant Gynecologist without recourse to the provisions contained in the Rules-2006. In our view, the aforesaid post can only be filled after advertisement and fulfillment of all codal formalities therefore no sanctity can be attached to the appointment of the Petitioner as Consultant Gynecologist, which is a regular service post.

21. The legal position of the present case is very clear on the ground that any candidate has, however, a right to be considered along with other eligible candidates for appointment in the substantive vacancy if he/she possesses the requisite qualifications and experience for the post applied for. In the present case, there is no material placed before us by which we can conclude that the competent authority wrongly exercised the discretion by declining to regularize the service of the Petitioner.

22. The Honorable Supreme Court of Pakistan in the case of Ali Azhar Khan Baloch V.S Province of Sindh (2015 SCMR 456) has held at paragraph No 188 "that the Sindh Government had appointed 10 D.S.Ps without observing requisite Codal formalities. On 06.05.2013, this Court enquired from the Additional Advocate General Sindh, representing the Sindh Government, to satisfy the Court as to how the Sindh Government could appoint D.S.Ps without recourse to the procedure prescribed under the service law. The Additional Advocate General sought time for instructions and on the following day, he made a statement that all

the D.S.Ps appointed directly, including the Petitioner, have been de-notified by notification dated 07.05.2013.”

23. Summing up our conclusions in the light of the discussions in the foregoing paragraphs, we hold that petitioner was appointed by the Respondents on contingency basis on a short term vacancy /leave vacancy, cannot claim a right to be regularized or even to remain in the service being appointed in a wholly illegal manner. We are fortified by the decision rendered by the Honorable Supreme Court of Pakistan in the case of *Ali Azhar Khan Baloch vs. Province of Sindh* (2015 SCMR 456) has held at paragraph No 198 as under:-

“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 withdrawn any post from the purview of the Public Service Commission as has been done in the case of the petitioners, 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.”

24. It is now well established that Article 199 of the Constitution casts an obligation on the High Court to act in the aid of law and protect the rights within the frame work of the Constitution. This extra ordinary jurisdiction of the High Court may be invoked to encounter and collide with extraordinary situation. The jurisdiction conferred under Article 199 of the Constitution is discretionary with the object to foster justice in aid of justice and not to perpetuate injustice. However, if it is found that substantial justice has been done between the parties then this discretion may not be exercised. Reliance is placed on the case of *Muslim Commercial Bank Ltd. through Attorney Vs. Abdul Waheed Abro and 2 others* (2015 PLC 259).

25. We have noticed that the Petitioner has been relieved from the aforesaid post vide order dated 5.10.2018 and her application for restoration was declined vide letter dated 19.10.2018 with the assertion that Petitioner was engaged as a Consultant Gynecologist on fixed honorarium basis against leave vacancy, therefore, her request regarding restoration of her job was declined. Petitioner’s appointment order dated 25.3.2013 available at Page-143 of the Memo of

Petition that she was engaged on leave vacancy till the appointment of Gynecologist, prima facie, the same is not regular appointment as agitated by the Petitioner.

26. We have also noticed that the dispute between the parties related to contract employment. The Hon'ble Supreme Court in its various pronouncements has settled the law that a contract employee is debarred from approaching this Court in its constitutional jurisdiction. The only remedy available to a contract employee is to file a suit for damages alleging breach of contract or failure to extend the contract. Reference in this behalf may be made to *Federation of Pakistan v. Muhammad Azam Chattha* (2013 SCMR 120), where it has been held that it is a cardinal principle of law that a contract employee cannot press for reinstatement to serve for the left over period and can at the best claim damages to the extent of unexpired period of his service. On the aforesaid proposition, we are fortified by the decision rendered by the Hon'ble Supreme Court in the case of Qazi Muneer Ahmed vs. Rawalpindi Medical College & Allied Hospital through Principal and others (2019 SCMR 648).

27. The case law cited by the learned counsel for the Petitioner are distinguishable from the facts obtained in the present case.

28. This petition is devoid of merits and is accordingly dismissed along with pending application[s].

29. These are the reasons of our short order dated 27.8.2019, whereby we have dismissed the captioned petition.

JUDGE

JUDGE

Nadir/-