

IN THE HIGH COURT OF SINDH, AT KARACHI

Present:

Mr. Justice Muhammad Shafi Siddiqui
Mr. Justice Adnan-ul-Karim Memon

C.P No. D- 6955 of 2017

Sidra Khan and anotherPetitioners

V/s

Province of Sindh & othersRespondents

Date of hearing: 13.09.2019

Date of order: 13.09.2019

Ms. Saifi Ali Khan advocate for the Petitioners.

Mr. Muhammad Sadiq Ali advocate holding brief for Mr. Wazeer Hussain Khoso advocate for the respondent No.3

Mr. Ali Safdar Deepar, AAG.

ORDER

ADNAN-UL-KARIM MEMON,J:- Petitioners have impugned the Notifications dated 11.11.2014 and 23.11.2015 issued by the Secretary Universities and Boards, Government of Sindh, whereby the Respondent No.3 was appointed as Controller of Examinations, Shaheed Mohtarma Benazir Bhutto Medical University (SMBBMU), Larkana for the period of four years. Per petitioners, the appointment of Respondent No.3 was/is against Shaheed Mohtarma Benazir Bhutto Medical University Larkana Act, 2008 and Sindh Universities and Institutes Laws (Amendment) Act, 2013.

2. We asked the learned Counsel for the petitioners as to how the appointment of the Respondent No. 3, as Controller of Examination at (SMBBMU), Larkana suffered from disqualification.

3. Ms. Saifi Ali Khan, learned Counsel for the petitioners replied that the Notification dated 11.11.2014 regarding posting of the Respondent No.3 as Controller of Examination at (SMBBMU), Larkana, without competitive process was illegal; that Respondent No.3 belonged to Teaching cadre as such he could not be posted in Administrative Cadre,

thus his appointment on the aforesaid post was suffering from inherent defect.

4. At this stage, Mr. Muhammad Sadiq Ali, learned Counsel holding brief for Mr. Wazeer Hussain Khoso advocate for the Respondent No.3 has placed on record a copy of Notification dated 21.3.2019, whereby the Respondent No.3 was relieved from the post of Controller Examinations SMBBMU, Larkana with immediate effect for further posting as senior lecturer. He also referred to the Counter Affidavit filed on behalf of Respondent No.3 and prayed for dismissal of the instant petition. An excerpt of the Office Order dated 21.03.2019 is as under:-

OFFICE ORDER

I

On the completion of tenure of three years vide Section 14 sub-section (4) of SMBBMU Act, 2008, Dr. Ali Akbar Bhutto, Senior Lecturer (BS-20) is relieved from the post of Controller Examinations SMBB Medical University Larkana with immediate effect.

He is further directed to report Principal Chandka Medical College Larkana for further posting as Senior Lecturer.

II

Prof. Saifullah Jamro, Professor of Paediatrics, SMBB Medical University Larkana is hereby assigned the additional charge of Controller of Examinations, & Director Q-Bank, SMBB Medical University Larkana till appointment of regular Controller of Examinations through competent procedure or until further orders.

This issues with the approval of the Vice Chancellor, SMBB Medical University Larkana.

sd/-

ADDITIONAL REGISTRAR
SMBBMU Larkana

5. Conversely, learned Counsel pointed out that when his basic appointment was against the law and merely relinquishing the charge now will not give sanctity to him from such illegalities which he committed during his tenure of service as Controller Examination of (SMBBMU), Larkana. Learned Counsel added that the Respondent No.1 acted beyond its mandate and power as provided under the law by ignoring the academic qualification of the Respondent No.3 for the subject post and arbitrarily appointed him as Controller Examination of (SMBBMU), Larkana, which action was illegal, unlawful and without jurisdiction; that in the present matter, merit has been bypassed since nepotism and favoritism has prevailed, which is in violation of principle of structured discretion in violation of constitutional rights guaranteed

under Articles 4,8,9,14,18,25(1) and 38 of the Constitution of the Islamic Republic of Pakistan 1973. Learned Counsel has emphasized that the entire process of the aforesaid appointment appears to be engineered, which shows arbitrariness, ambiguity and whimsical approach; that the position of Controller Examination of (SMBBMU), is a permanent post as well as public office and thereby appointing a person on such higher post, who is/was not eligible for such position which caused grave loss to the public at large; that the appointment of Mr. Ali Akbar Bhutto/Respondent No.3 for the position of Controller Examination is/was without lawful authority and without jurisdiction. Learned Counsel for the Petitioners in support of her contention has relied upon the case of Pakistan Medical Association (Centre) vs. Chancellor Dow University of Health Sciences and others (2016 PLC CS 1232) and argued that discretion has to be exercised according to rational reasons. She added that the action of the official Respondents is arbitrary and misuse of powers. She further added that it was bounden duty of the Chief Minister to recommend the candidate for the position of Controller Examination on merits. Learned counsel has further contended that the rules and regulations, as framed under the Act 2008, being statutory and mandatory for the appointment to the post of Controller Examination ought to have been observed. Learned Counsel for the Petitioners has further argued that the Respondent No.3 is/was not qualified to hold a public office of Controller Examination of SMBBMU, Larkana; that as per Public Notice, dated 17.7.2015 for the appointment of Controller Examination SMBBMU, Larkana, qualification is provided whereas the Respondent No. 3 does not have the minimum qualification for the aforesaid position therefore, he was not authorized to hold the said post; that his appointment is called in question under Article 199 (1)(b)(ii) of the Constitution of Islamic Republic of Pakistan 1973, being a holder of Public Office without lawful authority. She lastly prays for issuance of Writ in the nature of quo-warranto against Respondent No.3

to meet the ends of justice. In support of her above contention, the learned counsel placed reliance upon the case of *Munir Ahmed vs. Federation of Pakistan and others* (Writ Petition No.38449/2015). She prayed for allowing the instant Petition.

6. Mr. Ali Safdar Deepar, learned AAG has drawn our attention to the para-wise comments filed on behalf of the Respondents No.2 and 4 and prayed for disposal of the instant petition on the ground that the Respondent No.3 has already been relieved from post of Controller Examinations SMBBMU, Larkana vide Notification dated 21.3.2019, therefore the purpose of filling of the instant petition has been served.

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

8. Points involved in the instant Petition are as to whether the Respondent No.3 was lawfully appointed as Controller of Examinations of Shaheed Mohtarma Benazir Bhutto Medical University, Larkana? Secondly as to whether the purpose of the instant petition has been served when the Respondent No.3 has already been relieved from the said post on 21.3.2019?

9. To commence with the first proposition as referred to hereinabove, as per Section 14(1) of the Shaheed Mohtarma Benazir Bhutto Medical University Larkana Act 2008 and under Section of Sindh Universities and Institutes Laws (Amendment) Act 2013, the powers for appointment of Controller of Examinations were vested with the Government of Sindh/Chief Minister. An excerpt of Section 14(1) of SMBBMU is reproduced as under:-

“14. (1) There shall be a controller of examinations, to be appointed by the Senate on the recommendation of the Vice-Chancellor, on such terms and conditions as may be prescribed: Provided that the first Controller of Examinations shall be appointed by the Vice-Chancellor.

(2) The minimum qualifications necessary for appointment to the post of the controller of examinations shall be as may be prescribed.

(3) The controller of examinations shall be a full time officer of the University and shall be responsible for all matters connected with the conduct of respective under graduate or post graduate examinations and perform such other duties as may be prescribed.

(4) The controller of examinations shall be appointed for a renewable term of three years: Provided that the Senate may on the advice of the Vice Chancellor,

terminate the appointment of the controller of examinations on grounds of inefficiency or misconduct in accordance with prescribed procedure.”

10. We have noted that Section 14(1) of the Shaheed Mohtarma Benazir Bhutto Medical University Larkana Act, 2008 has been amended vide Sindh Universities and Institutes Laws (Amendment) Act, 2013 Sindh Act No. XLIII of 2013 and sub-Section (1) has been substituted in the following manner:-

“7. In section 14, for sub-section (1), the following shall be substituted:-

(1) The Controller of Examinations shall be a whole time officer of the University and shall be appointed by Government on such terms and conditions as it may determine.”

11. There is no cavil to the proposition that the discretionary power under Section 14(1) of the Shaheed Mohtarma Benazir Bhutto Medical University Larkana Act 2008 and Section 14 (1) of Sindh Universities and Institutes Laws (Amendment) Act, 2013 is in line with discretionary powers, given to the Government of Sindh/ Chief Minister to appoint Controller of Examinations for a period of four years, which may be extended for one more term, on such terms and conditions, as Government may determine.

12. We have not good experience in the matters of Shaheed Mohtarma Benazir Bhutto Medical University; Larkana and this Court was compelled to observe against the Vice Chancellor SMBBMU in the case of Dr. Muhammad Rafiq & others Vs. Shaheed Mohtarma Benazir Bhutto Medical University and another (SBLR 2017 Sindh 1906). The relevant portion of the Judgment dated 22.03.2017 at paragraph No.35, is reproduced as under:-

“After considering all the aspects of the instant matters, we came to the conclusion that the Vice Chancellor of the University being the Chairman for the Selection Board is solely responsible for all the illegal acts done in the instant matters.”

13. The aforesaid Judgment dated 22.03.2017 was impugned before the Hon’ble Supreme Court of Pakistan in Civil Petitions No. 989 to 994 and 250-K to 253-K of 2017 by the Vice Chancellor of SMBBMU and others. The same was dismissed vide order dated 15.05.2017 as under:-

“The provision reproduced above shows that Selection Board shall consist of as many as eight members as is provided by section 6(1) of the statute. Five members shall form the quorum for the selection of a professor or an Associate Professor. A look at the minutes of the meeting would reveal that the members whose presence in the Board could ensure impartial, independent and objective assessment of the merit are conspicuous by their absence. The experts who could assess and evaluate the professional competence of the candidates are also conspicuous by their absence. Quorum no doubt was complete but how the merit or professional competence of each of the candidates recommended or rejected was assessed is not supported by any record. Another thing militating against the transparency of the selection is that the candidates were selected and notified before their selection was approved by the syndicate. The entire process when seen and this perspective 18 appears to be a façade to cover the foregone conclusion. The selection so may cannot be held to be transparent. The High Court thus rightly set it naught and sent the case back for selection afresh. We, therefore, do not feel persuaded to interfere within the impugned judgment. 6. For the reasons discussed above, these petitions being without merit are dismissed and the leave asked for is refused.”

14. In the present case, we have to see whether in the appointment of Respondent No.3, the discretion was rightly observed or not by the Competent Authority.

15. On the issue of discretion of the Competent Authority /Chief Minister Sindh, in this context, the law enunciated by the Hon’ble Apex Court in the case of Prof. Dr. Razia Sultana and others Vs. Prof. Dr. Ghazala 12 Yasmeen Nizam and others (2016 SCMR 992), covers the issue in hand. The relevant portion of the judgment is reported herein below:-

“In the instant matter, absolute power of appointment was not given to authorities i.e. the Chancellor/Governor to appoint any person of their choice but the Search Committee consisting of eminent professionals was constituted who after detailed scrutiny of the credentials and lengthy interview of each candidate, recommended three names which as per para-wise comments, was not on the basis of any preference and the Chancellor/Governor, on the advice of the Chief Minister, appointed one candidate out of the three candidates in exercise of his powers, as mentioned above, Section 12(1) of the Khyber Pakhtunkhwa Universities Act 2012 gives discretion to the Chancellor/Governor to appoint anyone out of the candidates recommended by the Search Committee on the advice of C.M.”

16. Progressing further, a perusal of annexure-‘H’ attached with the memo of Petition prima facie shows that post of Controller of Examinations is to be filled through initial recruitment as per prescribed qualifications as provided under section-14 (2) of the Act 2008 as amended upto 2013, the minimum qualification necessary for appointment to the post of Controller Examinations shall be as may be prescribed. Whereas, the Notification dated 23.11.2015 reads as under:-

NOTIFICATION

No.SO (Unit)CMH/SMBBMU-LRK/15: In exercise of powers vested in him under section (14) sub section (1) of Shaheed Mohtarma Benazir Bhutto Medical University, Larkana, Act-2008, as amended by Sindh Universities Laws (Amendment) Act-2013, the Hon’ble Chief Minister Sindh/Competent Authority has been pleased to appoint Dr. Ali Akber Bhutto, as Controller of Examinations, Shaheed Mohtarma Benazir Bhutto Medical University, Larkana, for period of four years with immediate effect.

By order of the Chief Minister, Sindh
Secretary to Chief Minister
For Universities & Boards

17. Perusal of the record shows that Respondent No.3 filed C.P No.D-1236/2015 before this Court at Circuit Court Larkana challenging the impugned order dated 01.10.2015 passed by the Respondent-Secretary and this Court vide order dated 01.03.2016 directed that the post shall be filled within three months by a person qualified for such post and acting charge shall not be extended more than six months from the date of posting. Record further reflects that no competitive process took place for the post of Controller Examination and the Respondent No.3 continued to enjoy the post of Controller Examination as per Notification discussed supra but the question has arisen when the Respondent No.3 has already relinquished the charge and nothing adverse has been observed against him during his tenure of service by the Competent Authority, then what action needs to be taken against him at this stage.

18. In the light of preceding paragraphs, we therefore direct the Competent Authority of SMBBMU to appoint a regular Controller of Examination of SMBBMU through competitive process in accordance with law by fulfilling all the legal and codal formalities within a period of two months' time from the date of receipt of this order

19. In result of foregoing discussion, the instant Petition is disposed of in the above terms along with the listed application(s).

JUDGE

JUDGE