

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

C. P. No. D – 667 of 2020

Prof. Dr. Jan Muhammad & another v. Province of Sindh & others

Before:

Mr. Justice Muhammad Junaid Ghaffar
Mr. Justice Zulfiqar Ali Sangi

Date of hearing: **08-02-2022**

Date of decision: **08-02-2022**

M/s Nisar Ahmed Bhanbhro and Sheeraz Fazal, Advocates for the Petitioners.

Mr. Sarfaraz Ali M. Abbasi, Advocate for Respondents No.2 to 4 / SMBB Medical University, Larkana.

Mr. Mehfooz Ahmed Awan, Advocate for Respondent No.6.

Mr. Mehboob Ali Wassan, Assistant Advocate General Sindh.

Mr. Muhammad Hamzo Buriro, Deputy Attorney General.

J U D G M E N T

Muhammad Junaid Ghaffar, J. – Through this Petition, the Petitioners seek the following relief(s):

- a. *To declare that the act of respondents by issuing the office order No. SMBBMU/REG/928 dated 22-06-2020 issued by Respondent No. 3 in favor of Respondent No. 6 which is issued on favoritism, nepotism and against the settled & prescribed rules of PMDC to a junior professor who is on probationary period & whose service have not been regularized yet is illegal unlawful void and ab-initio in the eyes of law.*
- b. *To set-aside the office order No. SMBBMU/REG/928 dated 22-06-2020 issued by Respondent No. 3 in favor of Respondent No. 6 which is issued on favoritism, nepotism and against the settled & prescribed rules of PMDC to a junior professor who is on probationary period & whose service has not been regularized yet.*
- c. *To suspend the operation on the office order No. SMBBMU/REG/928 dated 22-06-2020 issued by Respondent No. 3 in favor of Respondent No. 6 which is issued on favoritism, nepotism and against the settled & prescribed rules of PMDC to a junior professor who is on probationary period & whose service has not been regularized yet till the final disposal of this petition.*

- d. *To direct the respondents No. 2 & 3 to pass an appropriate order to hold the charge of principal GMMMC Sukkur to a suitable senior professor on merit and seniority.*
- e. *To grant any other relief, which this Honourable Court deems fit and proper in circumstances of the case.*
- f. *To award the costs of the petition.*

2. Learned Counsel for the Petitioners has contended that Respondent No.6 was appointed on 26-12-2019 as a Professor in BPS-21, which was on probation for a period of eighteen (18) months; that immediately thereafter, within six (06) months' time through impugned order dated 22-06-2020, he was allowed to hold the charge of Principal with immediate effect, in addition to his own duties; that Respondent No.6 was not qualified to be appointed as Principal either on permanent basis; or for that matter, for holding additional charge inasmuch as he was on probation for a period of eighteen (18) months; that various other Professors, not only senior to Respondent No.6, but even otherwise qualified and competent to be appointed as Principal, were ignored without any lawful justification; that the Vice Chancellor exercised its discretion in a manner which is against the settled principles of law enunciated in respect of exercise of discretion; that the entire process was in fact a favour to the newly appointed Professor on probation; that even otherwise Respondent No.6 lacks any administrative experience; that a person who has been appointed a Professor on probation basis, even otherwise cannot acquire any administrative experience within six (06) months of his appointment; that the Petition is maintainable and the objections raised on behalf of the Respondents are misconceived; that the Petitioners are not seeking any favourable order for themselves; rather it is a Petition under *quo warranto* in terms of Article 199(1)(b)(ii) of the Constitution, and therefore, the objection regarding non-statutory rules and the very maintainability of the Petition would not apply. In support of his contention, he has relied upon the cases reported as *Capt. (Retd.) Muhammad Naseem Hijazi v. Province of Punjab through Secretary, Housing and Physical Planning and 2 others* (2000 SCMR 1720), *Muhammad Siddiq Javaid Chaudhry v. The Government of West Pakistan (PLD 1974 Supreme Court 393)*, *Province of Sindh and others v. Ghulam Fareed and others* (2014 SCMR 1189), *Asif Hassan and others v. Sabir Hussain and others* (2019 SCMR 1720) and *Muhammad Rafi and another v. Federation of Pakistan and others* (2016 SCMR 2146).

3. Learned Counsel for Respondent / University has objected to the maintainability of this Petition on the ground that there are no statutory rules of service; that Respondent No.6 was a competent Professor and was eligible; that in law, there is no restriction as to the authority of the Vice Chancellor to appoint any Professor of Level-III as a Principal of the College; that even a person on probation can be appointed as a Principal; that the Petitioners had involved themselves into various litigation against the University, hence, are disqualified, and therefore, the Petition is liable to be dismissed. In support, he has relied upon Muhammad Zaman and others v. Government of Pakistan through Secretary, Finance Division (Regulation Wing), Islamabad and others (2017 SCMR 571), Muhammad Zahid Maqsood v. University of Karachi through Vice Chancellor and 4 others (2013 MLD 9), an **unreported judgment(s) dated 04-01-2018 and 20.3.2020** passed by Division Benches at Circuit Court Larkana in C. P. No. D-1036 of 2017 and C. P. No. D-460 of 2019.

4. Learned Counsel for Respondent No.6 has also raised an objection as to maintainability of the Petition and has contended that this is not a Petition of *quo warranto* as it involves personal interest; that the Petitioners also filed an appeal before the Vice Chancellor and so also a complaint before the Hon'ble Chief Justice of this Court which shows their personal interest; that under the rules now in force issued by Pakistan Medical Commission, it is the prerogative of the Vice Chancellor to appoint any Professor in Level-III as a Principal; hence, Respondent No.6 being qualified was rightly appointed; that the office of Principal is not a sanctioned post; nor there are any prerequisites or terms and conditions for such appointment; hence, the appointment of Respondent No.6 is lawful, and therefore, the Petition is misconceived and is liable to be dismissed. In support, he has relied upon Muhammad Zaman and others v. Government of Pakistan through Secretary, Finance Division (Regulation Wing), Islamabad and others (2017 SCMR 571) and two unreported judgments, which have also been relied upon by Counsel for Respondent / University.

5. We have heard all the learned Counsel and perused the record.

6. First we would like to address the objection regarding maintainability of this Petition. It is not in dispute that insofar as the University in question is concerned, it does not have any statutory rules, and in that case, the Petition of an employee against the University *per-se* would not be

maintainable. However, in this case, it is not a matter of the employees coming before the Court as Petitioners to seek a personal relief relating to their terms and conditions of service; rather it is more of a *quo warranto* which can be looked into by this Court in terms of Article 199 (1)(b)(ii)¹ of the Constitution of Pakistan. In other words, the procedure of *quo warranto* gives the Judiciary a weapon to control the Executive from making the appointment to public office against law and to protect a citizen from being deprived of public office to which he has a right. These proceedings also tend to protect the public from usurpers of public office, who might be allowed to continue either with the connivance of the Executive or because of its apathy. It will, thus, be seen that before a person can effectively claim a writ of *quo warranto*, he has to satisfy the Court that the office in question is a public office and is held by a usurper without legal authority and that inevitably would lead to the inquiry as to whether the appointment of the alleged usurper has been made under law or not². At the same time, it is settled law that even in a writ of *quo warranto* (which otherwise is not subject to the principles of maintainability of a Petition as against statutory and non-statutory rules), if such a petition is filed by an interested person, the same is not maintainable. In this case, if all such exceptions are found to be applicable, even then in our considered view, this Petition can be maintained inasmuch as the Petitioner No.1 now stands retired, and therefore, he is neither an aggrieved person nor an interested person seeking any relief for his personal interest; hence, a writ of *quo warranto* on his behalf is maintainable. Nonetheless, we may also refer to a celebrated judgment of a learned Division Bench of this Court authored by late Sabihuddin, J., in the case of Gul Muhammad Hajano³ wherein the following observations of the Bench regarding *quo warranto* fully applies to the present case in hand. It reads as under;

19. We would like to add that the matter is not one of mere technical non-compliance with statutory rules. Our Constitutional and legal system attaches foremost importance to transparency and fairness in the administration of matters relating to appointment and career building of civil servants who are required to

¹ **199. Jurisdiction of High Court.**- (1) Subject to the Constitution, a High Court may, if it is satisfied that no other adequate remedy is provided by law,-

- (b) on the application of any person, make an order-
- ii) requiring a person within the territorial jurisdiction of the Court holding or purporting to hold a public office to show under what authority of law he claims to hold that office;

² Muhammad Salman v Government of Sindh (unreported judgment dated 16.02.2022 in CP No.6779 of 2021)

³ Gul Muhammad Hajano v Federation of Pakistan [2000 PLC (C.S.) 46]

perform sensitive public duties strictly in accordance with law. There is no room for spoils system in our jurisprudence as repeatedly asserted by the superior Courts. Strict adherence to-rules can be enforced as fundamental rights guaranteed under Article 18 of the Constitution as held in *Re: Abdul Jabbar Memon* (1996 SCMR 1349). Executive discretion in matters relating to service conditions is strictly controlled by law and statutory rules and every order, passed by a departmental authority relating to terms and conditions of a civil servant is appealable to a high level independent judicial tribunal and therefrom to the Supreme Court on a point of law. Against this ethos when competent and senior officers are ignored for promotion and the authorities, after by passing duly constituted promotion Committees Selection Board arrogate to themselves, through the device of making current charges appointments the power of appointment junior offices to enjoy the supervisory authority and perquisites of higher posts for indefinite duration and element of arbitrariness is introduced which is not warranted by law. Such appointments if continued beyond a reasonable time, if not justiciable before Service Tribunals may attract the jurisdiction of this Court under Article 199 of the Constitution, including writ of *quo warranto* by directing the incumbent to lay down his office. Indeed, the device of continuing with such appointments was acknowledged to be undesirable in several letters from higher authorities but apparently the matter was not taken seriously. It may also be recalled that when the Honourable Supreme Court, disapproved appointments of acting and ad hoc Judges to the Supreme Court against permanent posts in *Al Jihad Trust v. Federation of Pakistan* (PLD 1996 SC- 324), how can current charge appointments in Civil services against permanent posts be approved when the rules themselves require such appointments, to be made against vacancies lasting for less than six months.

Therefore, treating this Petition as a Petition under *quo warranto* in terms of Article 199(1)(b)(ii) of the Constitution filed by a person (Petitioner No.1) who is no more an employee, is maintainable and the objection in this regard is hereby overruled.

7. As to the gist of the case, it is not in dispute that when Respondent No.6 was appointed or was given the charge of Principal of the College in question, through impugned order, he was on probation and was yet to be confirmed as a regular employee. This apparently is not in dispute; though, now he may have been made a regular employee; however, as rightly pointed by the Petitioners Counsel by placing reliance on the case of ***Asif Hassan***⁴ that in cases where the eligibility of a public servant is under attack on the ground that such public servant did not fulfill the substantive condition of eligibility to such office on the cutoff date prescribed in the process, then such violation could not be overlooked merely on the ground that pending action in the Court the person has met such requirement. It has once again not been disputed that probation period of Respondent No.6 was 18 months and thereafter he could have sought his appointment confirmed if he had performed satisfactorily. The Oxford dictionary has defined probation as a

⁴ 2019 SCMR 1720

*process of testing or observing the character or abilities of a person who is new to a role or job*⁵. A probationer is a person who is taken in service to the condition that it will attain a sure footing only if during the period that he is on probation he shows that he is a fit person to be retained in service⁶. It is well settled as has also been observed in the case of Muhammad Siddiq Javaid Chaudhry (PLD 1974 SC 393) that appointment of a probationer can only acquire a sure footing if he successfully completes the period of probation and the appointing authority is fully satisfied with his conduct and performance of duties⁷. It is further settled that a probationer's service can be dispensed with even without issuance of a show cause notice or a formal inquiry as against a permanent or regular employee⁸. A probationary appointment is only a preliminary step towards permanent appointment of the appointee who, during this period, is really on trial and he has to show by his good work that he is fit and suitable to hold the post which has been given to him and if he measures up to the demands of the said post during the period of his probation, he will be confirmed thereto, otherwise he will be relieved of the post or sent back to his original post from where he was promoted⁹. This factual aspect as to the probationary period of the said Respondent is not in dispute. While confronted, it has been argued by the learned Counsel for the University that there is no bar in law to appoint any such person or even assigning him acting charge of the Principal's office. To justify this assertion, the Respondents Counsel have referred to the *Shaheed Mohtarma Benazir Bhutto Medical University Larkana Act 2008* ("**Act**"), as according to them nothing has been provided in that context and it is the sole discretion of the Vice Chancellor, which she in this matter has exercised in the best interest of the University and in discharge of her duties in accordance with the mandate of the Charter of the University. Whether this assertion is correct or not will be examined later in juxtaposition to the Act in question. Nonetheless, even if it is so; as and when a person exercises any discretion, either conferred by law or otherwise, the same has to be done in a manner which is free from ambiguity and suspicion; shall not be based on the personal whims and lastly, should be in accordance with the law settled by the Courts in this regard. Per settled proposition, law recognizes no such thing as an unfettered discretion; all discretionary

⁵ Shakeel Ahmed Shaikh v Agha Khan University [2017 PLC (CS) 1080]

⁶ Muhammad Siddiq Javaid Chaudhry v Government of Pakistan (PLD 1974 SC 393)

⁷ Mrs Abida Parveen Channar v High Court of Sindh (2009 SCMR 605)

⁸ Rehan Saeed Khan v Federation of Pakistan [2001 PLC (CS) 1275]

⁹ Idreesul Hasam Usmani v Government of Pakistan (1991 SCMR 113)

powers, especially that as conferred by statute, must be exercised in terms of well-established principles of administrative law, which were of longstanding authority and had been developed, enunciated and articulated from time to time by the Apex Court¹⁰. Per settled law the functionaries of any organization or establishment cannot be allowed to exercise discretion at their whims, sweet will or in an arbitrary manner; rather they are bound to act fairly, evenly and justly¹¹. In discretionary decisions there be findings of primary facts based on good evidence and the decisions about the facts be made for reasons which serve the purpose of statute in intelligible and reasonable manner, whereas, the actions which do not meet the threshold requirements as mentioned in discretionary decisions, are arbitrary, and may be considered a misuse of powers¹².

8. Per settled law, any person who is on probation, is always subject to regularization / confirmation after lapse of the probationary period. A probationer is dealt with differently as against a confirmed or permanent employee. His services could be terminated if his performance is found unsatisfactory during the probationary period. He is not considered to be a regular or a permanent employee and is always subject to conditions applicable to a probationer; as against a regular employee, who is to be dealt with separately. Now, the question would be that even if there is no restriction in the University Act in question, can the Vice Chancellor exercise its discretion in appointing any person on probation to hold charge of the office of the Principal, with complete disregard to the fact that not only various other senior professors were available; but were also permanent and not ad-hoc employees. In our considered view, the answer would be a big 'No'. Time and again, the Hon'ble Supreme Court as well as High Courts of the country have deprecated this proposition of holding acting charge or holding charge of a higher office by an officer of a lower grade on his own pay and scale. This has not been appreciated by the Courts and in various judgments, writs of *quo warranto* have been allowed against such public office holders. The same principle of law is applicable in this matter, notwithstanding the fact that there is no restriction under the University Act in question. Moreover, we have also been informed that since introduction of the Act in question, no rules have been framed by the syndicate of the

¹⁰ 2018 S C M R 1544 COMMISSIONER INLAND REVENUE V. PAKISTAN BEVERAGES LIMITED, KARACHI

¹¹ Abid Hassan v P.I.A.C (2005 SCMR 25)

¹² A.K. Brohi in his treatise Fundamental Law of Pakistan

University or for that matter, the Government of Sindh so as to regulate the appointment and procedure in respect of the Principal(s) of the College(s) accredited with the University in question. This slackness on the part of these Respondents by itself leads to a conclusion that it has been so done purposefully so as to appoint a Principal of its own choice.

9. It is also a matter of record that Respondent No.6 is much junior in the seniority list being at Serial No.10 of the seniority list issued on 26.3.2020 and various Professors appointed much earlier in time available in the seniority list have not been considered to be appointed as Principal. During hearing of this case, additional comments have been filed on behalf of the Vice Chancellor and in fact an attempt has been made to convince the Court that all such Professors were considered but do not qualify. From where, and how, such conclusion has been drawn by the Vice Chancellor itself is unclear and under what authority, such exercise has been carried out as we have not been assisted that any advertisement was published or even the Professors were asked to come forward with their credentials and qualifications so as to assess their suitability for appointment as Principal. It appears that all along the Vice Chancellor was and is exercising its discretion in appointing Principal of her own choice. Such an act and conduct cannot be approved by this Court as it is against the settled principles of law as well as parameters laid down by the Courts in exercising discretionary powers by the public servants.

10. It may also be of relevance to observe that in Civil Structure (both Federal and Provincial) there is a provision in law(s) for holding acting charge of an office. To meet exigencies and emergent situations, officers possessing requisite experience and qualification can be appointed on acting charge basis in terms of Rule 8-A of the Sindh Civil Servants (Appointment, Promotion and Transfer) Rules, 1974, whereby, the competent authority can appoint a Civil Servant on acting charge basis or current charge basis, if such post is required to be filled through promotion and the senior most Civil Servant otherwise eligible does not possess the specific length of service, an appointment may be made on acting charge basis. However, within sub-rule (4) *ibid*, there is a rider that such an appointment can only be made for a maximum period of 6 months. This is so because an acting charge basis appointment is a stop gap arrangement; being temporary in nature and has to remain operative for a short period of time and is never to be treated as a permanent arrangement. No other

mechanism can be adopted in such like cases as it has been deprecated by the Hon'ble Supreme Court in the case of **Province of Sindh**¹³. Even if no such provision has been found in the Act of the University in hand, it cannot be presumed that this would confer unfettered discretion upon the Vice Chancellor to appoint a probationer with acting charge to hold the office of Principal for an indefinite period. Notwithstanding the fact that no such probationer could have been appointed to such an important post; but even for the sake of arguments, if the contention of the Respondents is accepted, then such appointment could not have lasted beyond 6 months, being an appointment as a stop gap arrangement of temporary nature.

11. Lastly, before us an attempt has also been made by the Respondents Counsel to the effect that since the Act in question does not provide any restrictions on the discretion and powers of the Vice Chancellor in making appointment of the Principal of an accredited College; therefore, it is only the good conscience and authority of the Vice Chancellor which matters and in this particular case it has been so exercised; hence no case is made out. This again does not appear to be a correct approach. Insofar as the ("**Act**") is concerned, in Section 3(2), the University has been defined, which shall consist of:

- i. *The Chancellor;*
- ii. *the Vice Chancellor;*
- iii. *the members of the Senate;*
- iv. *the members of the Authorities of the University;*
- v. *all University teachers and students; and*
- vi. *all other full time officers and members of the staff of the University.*

Similarly, Section 4(iv) and (v) provides as under:

- iv. *to prescribe the terms and conditions of employment of the officers, teachers and other employees of the University and to lay down terms and conditions that may be different from those applicable to government servants in general;*
- v. *to engage, where necessary, persons on contract basis for specified duration and to specify the terms of each engagement;*

Section 7 defines that who shall be the officers of the University i.e.

- i. *The Chancellor;*
- ii. *the Vice-Chancellor;*
- iii. *the Deans;*
- iv. *the Principals of the constituents colleges;*
- v. *the Chairpersons of the Teaching Departments;*

¹³ Province of Sindh v Ghulam Fareed (2014 SCMR 1189)

- vi. *the Registrar;*
- vii. *the Treasurer;*
- viii. *the Controller of Examination; and*
- ix. *such other person as may be prescribed under this Act.*

Then Section 10 defines the Vice Chancellor and the prerequisites and qualifications for being appointed as a Vice Chancellor; whereas, Sub-Section 5 is relevant and reads as under:

- (5) *The Vice-Chancellor shall also have the following powers,;-*
- a) *to direct teachers, officers and other employees of the University to take up such assignment in connection with examination, administration and such other activities in the University as he may consider necessary for the purposes of the University;*
 - b) *to sanction by re-appropriation an amount not exceeding an amount prescribed by the Senate for an unforeseen item not provided for in the budget and report it to the Senate at the next meeting;*
 - c) *to make appointments of such categories of employees of the University and in such manner as may be prescribed by the statutes;*
 - d) *to suspend, punish and remove in accordance with prescribed procedure, from service, officers, teachers and other employees of the University except those appointed by or with the approval of the Senate;*
 - e) *to delegate, subject to such conditions as may be prescribed, any of his powers under this ordinance to an officer or officers of the University; and*
 - f) *to exercise and perform such other powers and functions as may be prescribed.*

Perusal of this Sub-Section reflects that the Vice Chancellor shall also have the following powers, which includes directions to teachers, officers and other employees of the University to take up such assignment in connection with the examination, administration and such other activities in the University as he may consider necessary for the purposes of the University. Section 5(c) provides the power to the Vice Chancellor to make appointments of such categories of employees of the University and in such manner as may be prescribed by the statutes. Now one thing is clear that firstly the Vice Chancellor can administer the University as he may consider necessary for the purposes of the University; whereas, as to appointments of such categories of employees of the University i.e. teachers, officers and other employees, he can only make appointments as may be prescribed by the statutes. Admittedly, till date neither any rules, regulations or any other instrument has been promulgated for such purposes; therefore, to say that

it is the discretion of the Vice Chancellor to appoint any person as a Principal or nominating a Professor to hold acting charge is unfettered, appears to be misconceived and not supported by the Act itself.

12. Similarly, Section 25 under Chapter V provides statutes, regulations and rules. The relevant portions thereof read as under;

25. (1) *Subject to the provisions of the Act, Statutes, to be published in the official Gazette, may be made to regulate or prescribe all or any of the following matters: -*

- a)
- b)
- c)
- d) *the scales of pay and terms and conditions of service of officers, teachers and other University employees;*
- e)
- f)
- g)
- h)
- i) *the powers and duties of officers and teachers;*
- j)
- k)
- l) *efficiency and discipline of University employees;*
- m)
- n)
- o)
- p)

(2) *The draft of Statutes shall be proposed by the Syndicate to the Senate which may approve or pass with such modifications as the Senate may think fit or may refer back to the Syndicate, as the case may be, for reconsideration of the proposed draft:*

Provided that Statutes concerning any of the matters mentioned in clauses (a) and (1) of sub-section (1) shall be initiated and approved by the Senate, after seeking the views of the Syndicate:

Provided further that the Senate may initiate a Statute with respect to any matter in its power or with respect to which a Statute may be framed in terms of the Act and approve such Statute after seeking the views of the Syndicate.

Perusal of sub-section (1)(d) thereof defines the scales of pay and terms and conditions of service of officers, teachers and other University employees. In Sub-Clause (i), the powers and duties of officers and teachers and then in Sub-Clause (l), efficiency and discipline of University employees has been prescribed. Per sub-section (2), these are to be proposed by the Syndicate to the Senate and are subject to its approval. This on a combined reading would reflect that it is not only the Vice Chancellor, which can exercise powers in appointing or nominating the Professor as a Principal under the garb of administration as the same can

only be done on the basis of procedure provided in the Act / statutes. Till such time the statutes or rules or regulations are promulgated, propriety demands that such powers are exercised either by the Senate or for that matter at least by a Committee of three or five persons appointed by the Senate, so that transparency remains in field. Therefore, the stance of the Respondents that it is up to the Vice Chancellor to exercise the discretion is also ill-founded and is not supported by the Act itself.

13. In view of hereinabove facts and circumstances of this case, in our considered opinion, a writ of *quo warranto* was made out, as apparently, Respondent No.6 does not seem to be qualified to be appointed as a Principal or being assigned any additional charge of the office of the Principal, as apparently, at the relevant time, he was on probation; not only this, not even amongst the senior Professors, and therefore, the impugned notification to the extent of Part-1 was issued without lawful authority; hence, by means of a short order dated 08-02-2022, we had allowed this Petition by setting aside the said portion of the impugned order, and these are the reasons thereof.

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Abdul Basit