

IN THE HIGH COURT OF SINDH KARACHI

Before:

Mr. Justice Aftab Ahmed Gorar
Mr. Justice Adnan-ul-Karim Memon

Constitutional Petition No.D-5862 of 2021

(Muhammad Aslam Awan v. Province of Sindh and 03 others)

Constitutional Petition No.D-7058 of 2021

(Muhammad Aslam Awan v. Province of Sindh and 02 others)

Mr. Abdul Qadir Laghari, advocate for the petitioners
M/s. Abrar Hassan & Syed Masroor Ahmed Alvi, advocate for respondent No.3.
Mr. Mukesh Kumar G. Karara, advocate holding brief for Malik Altaf Hussain, advocate
Mr. Ali Safdar Depar, AAG along with Ghulam Ali Birkhmani, Additional Secretary (Services-1), SGA&CD.

Date of hearing
& order : **17.02.2022**

ORDER

The impugned office notifications/orders stipulate that the private respondents in both the petitions were posted/transferred in their "Own Pay and Scale".

Mr. Abdul Qadir Laghari, learned counsel for the petitioners, has assailed the vires of the notification dated 24.9.2020, whereby the private respondents were assigned the additional charge of Managing Director, KW&SB, and another post, inter alia, on the ground that the aforesaid positions cannot be assigned to them which violates the dicta laid down by the Hon'ble Supreme Court of Pakistan in its various pronouncements on the issue of `Own Pay and Scale`. Learned counsel for the petitioners cited the orders passed by this court in CP No.D-4434/2020 and CP No.D-5842/2020 and submitted that the Government of Sindh, Local Government Department, vide notification dated 20.03.2021 implemented the order of this court and directed all the notifications/orders regarding the assignment of any charge on OPS basis and/or additional charge(s) and/or look after charges(s) have been canceled/withdrawn, however, the private respondents are still holding the posts on OPS basis including the post of Managing Director, which has now been de-cadared by the order of the competent authority vide summary for Chief Minister Sindh dated 11.11.2021. He further pointed out that the post of Managing Director could be filled through a competitive process and not otherwise, therefore, the notification dated 18.01.2022 issued by the Chief Secretary Sindh is illegal, unlawful and without lawful justification and in

violation of the policy decision of the Government of Sindh vide summary dated 11.11.2021. He prayed for allowing the instant petitions.

Mr. Abrar Hassan, learned counsel representing the KW&SB and respondent No.3 in CP No.D-7058/2021 has raised the question of maintainability of the captioned petitions, inter alia, on the ground that after de-cadring the post of MD, KW&SB, from cadre schedule, the respondent No.3 who is in BS-20, has been posted as full-fledged MD, KW&SB on regular basis, thus the question of holding additional charge as DMD (BS-20) is of no consequence that respondent No.3 has already relinquished the additional charge of the post and he has taken over the charge of MD, KW&SB, on regular basis vide notification dated 18.01.2022. Per learned counsel, the orders passed by this court have already been complied with by the respondent department in its letter and spirit and respondent No.3 has already relinquished the charge as DMD as discussed supra. He, however, submitted that the posts of Managing Director, Deputy Managing Director (Finance), and Secretary, KW&SB, are now required to be filled through a competitive process from the public or private sector open market, which will take two months for such appointments. He lastly prayed for the dismissal of the instant petitions.

Learned AAG has supported the stance of learned counsel representing the KW&SB and respondent No.3 in CP No.D-7058/2021.

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

Karachi Water and Sewage Board (**KW&SB**) is a statutory body established in April 1996, through the Karachi Water and Sewage Board Act, 1996. Primarily, Karachi Water and Sewage Board are a body corporate and its main function is to supply water and disposal of sewerage in Karachi, whereas the Government has complete control over its affairs, thus falls within the ambit of Article 199(5) of the Constitution and this Court can look into the affairs including the appointment for the post of Managing Director, Deputy Managing Director (Finance) and Secretary, and other officers of KW&SB.

Primarily, in Constitutional Petition No.D-7058 of 2021, respondent 3 is holding the post of Managing Director, KW&SB, despite knowing the fact that the subject post is no more a cadre post and could be filled through a competitive process and not otherwise vide policy decision of the Government of Sindh vide summary dated 11.11.2021. An excerpt of the letter dated 06.12.2021 is as under:

"The Secretary, Local Government & Housing Town Planning Department, Government of Sindh, may kindly refer to the Summary for Chief Minister, Sindh bearing diary No.133 dated 11.11.2021, on the subject noted above and to convey the approval of SGA&CD with

regard to decadering the posts viz. Managing Director (BS-20), Deputy Managing Director (Finance) (BS-20) and Secretary (BS-20), Karachi Water and Sewerage Board from the Cadre Schedule of SGA&CD and filling up these posts by appointment through competitive process from public or private sector open market.”

There is no dispute that the post of MD, KW&SB, is not a Tenure Post in terms of section 5(1) of the Karachi Water and Sewage Board Act, 1996.

Primarily, the appointment in the public sector is a trust in the hands of public authorities and it is their legal and moral duty to discharge their function as a trustee with complete transparency as per the requirement of law so that no person who is eligible to hold such post, is excluded from the process of selection and is deprived of his right of appointment in service. In principle, the Constitutional requirement, inter alia, enshrined in Article 18 of the Constitution which enjoins that subject to such qualifications, if any, as may be prescribed by law, every citizen shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business includes the right of a citizen to compete and participate for appointment to a post in any Federal or a Provincial Government department or an attached department or autonomous bodies/corporations, etc. based on open competition, which right he cannot exercise unless the process of appointment is transparent, fair, just and free from any complaint as to its transparency and fairness. The above objective as enshrined in our Constitution cannot be achieved unless due publicity is made through a public notice for inviting applications with the aid of the leading newspapers having wide circulation; and if a person appointed to any office under the State without any advertisement is appointed in violation of the rights of other citizens to equality of opportunity in matters relating to appointment to any office under the State guaranteed to them under Article 27(1) of the Constitution, which provides that no citizen otherwise qualified for appointment in the service of Pakistan shall be discriminated against in respect of any such appointment on the ground only of race, religion, caste, sex, residence, or place of birth. The spirit of the said Article applies with equal force to appointments made in statutory bodies, autonomous bodies, and corporations owned and controlled by the Government. The Full Bench of the Hon'ble Supreme Court in the case of *Munawar Khan v. Niaz Muhammad*, **1993 SCMR 1287**, raised a voice of concern in such a situation and held that in future, all appointments shall be made after due publicity in the area from which the recruitments had to take place. Law to the said effect was also laid down by the Hon'ble Supreme Court in the case of *Obaidullah v. Habibullah*, **PLD 1997 SC 835**. The Honorable Supreme Court in the case of *Lt. Col. (R) Muhammad Arif Zahid v. Azad Government of the State of Jammu and Kashmir*, **2018 PLC (C.S.) Note 136**, a writ of quo warranto seeking the quashing of the appointment against the post of Director Armed Services Board for one year was allowed on the ground inter alia that the said post was not

advertised before making the appointment. The Honorable Supreme Court in the case of *Muhammad Muneer Malik v. Allama Iqbal Open University*, **2016 PLC (C.S.) 896**, has held that the object of inviting applications from candidates through advertisements was to make certain that all eligible interested candidates might have an opportunity to compete for appointment through a fair and transparent selection process. On the aforesaid proposition, we are supported by the decisions of the Honorable Supreme Court in the cases of *Watan Party & others v. Federation of Pakistan and others*, **PLD 2012 SC 292**, Suo Moto Case No.24 of 2010, **2014 SCMR 484**, Suo Moto Case No.16 of 2011, *Contempt proceedings against Chief Secretary, Sindh, and others*, **2013 SCMR 1752** and *Muhammad Bachal Memon and others v. Syed Tanveer Hussain Shah and others*, **2015 PLC (C.S.) 767**.

Learned AAG has referred to the order dated 10.02.2022 passed by this court and submitted that the posts of Managing Director, Deputy Managing Director (Finance), and Secretary, KW&SB, have been de-cadared by the Services Department with the approval of the competent authority i.e. Chief Minister Sindh. He further submitted that after de-cadaring the posts of MD KWSB, the Deputy Managing Director Asadullah Khan, holding the additional charge for the post of MD KWSB, was transferred and posted as MD of the Water and Sewerage Utility on a regular basis.

This Court after taking the comments on the record inquired the learned AAG about the annexure in the comments about the de-cadaring of the posts of MD, Deputy Managing Director (Finance), and Secretary KWSB and filling up these posts by appointment through the competitive process from the public and private sector open market. Learned AAG has submitted that the subject posts could be filled through a competitive process and not otherwise, however, the Government shall require sufficient time to issue the public notice for the subject appointments. Be that as it may, we are only concerned with the enforcement of the orders/judgments passed by the Hon'ble Supreme Court of Pakistan on the subject issue, however, at the same time, we are cognizant of the policy decision of the Government of Sindh to fill the subject posts through competitive process vide summary dated 11.11.2021.

Touching the issue of Own Pay and Scale, the Honorable Supreme Court in the case of *Province of Sindh v. Ghulam Fareed*, **2014 SCMR 1189**, held, that posting/transferring a civil servant on his own pay and scale (OPS) is not legally permissible:

"11. We have inquired from the learned Additional Advocate-General to show us any provision of law and or rule under which a Civil Servant can be appointed on a higher grade/post on OPS basis. He concedes that there is no specific provision in the law or rule which permits appointment on OPS basis. He, however, submitted that in exigencies the Government makes such appointments as a stop-gap arrangement. We have examined the provisions of Sindh Civil Servants Act and the Rules framed

thereunder. We do not find any provision which could authorize the Government or Competent Authority to appointment [of] any officer on higher grade on "Own Pay And Scale Basis". Appointment of the nature that, too of a junior officer causes heart burning of the senior officers within the cadre and or department. This practice of appointment on OPS basis to a higher grade has also always been discouraged by this Court, as it does not have any sanction of law, besides it impinges the self-respect and dignity of the Civil Servants who are forced to work under their rapidly and unduly appointed fellow officers junior to them. Discretion of the nature if allowed to be vested in the Competent Authority will offend valuable rights of the meritorious Civil Servants besides blocks promotions of the deserving officers."

We have noticed that, unfortunately, the respondent-Chief Secretary, Sindh, did not act in the light of the ratio of the judgment passed by the Honorable Supreme Court as well as the policy decision taken by the competent authority i.e. Chief Minister Sindh vide summary floated by the Secretary, Local Government and Housing Town Planning Department on 11.11.2021 and issued the notification dated 11.01.2022 by posting respondent No.3 as MD (BS-20) KW&SB on regular basis and allowed him to join the post vide joining report dated 25.01.2022. This is the unfortunate state of affairs on his part.

In view of the above, instant petitions stand allowed, with directions to the Government of Sindh to de-notify the posting of respondent No.3 in CP No.D-7058 of 2021 as MD, KW&SB, forthwith and make appointment against the said post after advertising the post and observing all the codal formalities as provided under the law. However, it is made clear that in the intervening period no Adhoc arrangement shall be made, so far as the posting of MD, KW&SB, Deputy Manager Director (Finance) (BS-20), and Secretary (BS-20) is concerned, in violation of the provisions of the Karachi Water and Sewage Board Act, 1996 and Policy Decision made by the competent authority i.e Chief Minister Sindh vide summary dated 11.11.2021 floated by the Secretary, Local Government, and Housing Town Planning Department. The aforesaid exercise shall be undertaken within two weeks from today.

JUDGE

JUDGE