

HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD

C.P No. D-1879 of 2022

[Dr. Irshad Ali Lodhi Vs. Province of Sindh & Ors]

BEFORE:

MR. JUSTICE MUHAMMAD IQBAL KALHORO
MR. JUSTICE ADNAN-UL-KARIM MEMON

Petitioner : Through Mr. Sarmad Hani Muslim Advocate

Respondent-4 : Through M/s Malik Naeem Iqbal and
Muhammad Saleem Khaskheli Advocates

Mr. Allah Bachayo Soomro, Additional
Advocate General along with Dr. Sikandar
Memon representative of Health Department
Government of Sindh.

Date of hearing : 10.11.2022

Date of order : 17.11.2022

ORDER

Dr. Irshad Ali Lodhi, petitioner has approached to this court under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, with following prayers:

- I. Declare that the Impugned Advertisement dated 10 May 2022 is person specific and has been issued in blatant violation of the Act 2013, the Rules 2021 and the Terms and Conditions Rules 2021.
- II. Declare that the age bracket for the post of the Executive Director S.I.O.V.S cannot exceed the age of 60 years as provided for under the Terms and Conditions Rules 2021.
- III. Declare that only a serving Professor can hold the office of the Executive Director S.I.O.V.S and not a retired Professor.
- IV. Declare that no person can apply/be considered for the post of Executive Director S.I.O.V.S once he has attained the age of superannuation i.e. 60 years as provided for under the Terms and Conditions Rules 2021.
- V. Declare that the 11th Minutes of the Meeting of the Board of Directors of S.I.O.V.S held on 27th April 2022 pursuant to the Item No.3 are illegal and without lawful authority and beyond the scope of the Act 2013, the Rules 2021, and the Terms and Conditions Rules 2021.

VI. Direct the official Respondents to appoint the Executive Director amongst the Professors serving in the S.I.O.V.S Hyderabad or in any other Institution(s).”

2. Mr. Sarmad Hani Muslim, learned counsel for the petitioner, argued that the petitioner has impugned the advertisement dated 10.5.2022 published in Daily Dawn newspaper issued by the respondent No.4 advertising the post of Executive Director, Sindh Institute of Ophthalmology and Visual Sciences (SIOVS) Hyderabad, inter-alia on the ground that it is person specific advertisement; and issued in violation of Sindh Institute of Ophthalmology and Visual Science Act, 2013 and the Rules made thereunder, just to accommodate respondent No.4. Per learned counsel, the Act-2013 and Rules made thereunder require the Executive Director to be a fulltime serving Professor and not a retired professor of Ophthalmology Institute, whereas respondent No.4 had already reached the age of superannuation on 3.11.2020 and stood retired from the said post, as such allowing him to participate in the recruitment process after retirement; and subsequent his indirect unilateral and arbitrary recommendation by the competent authority, is illegal and without lawful authority. Learned counsel asserted that the re-appointment of respondent No.4 vide notification dated 26.11.2020 after his superannuation was assailed by the petitioner through C.P No.1769 of 2021 which was allowed vide judgment dated 24.12.2021; and, his re-appointment was declared nullity in the eyes of law, with direction to the competent authority to de-notify his re-appointment as Executive Director SIOVS with further direction to make appointment against the said post after advertising and observing all the codal formalities as provided under the law; and the respondent No.4 was set free on his own risk and cost to compete the fresh process and that is subject to law. Learned counsel highlighted that the participation of respondent No.4 in the impugned recruitment was / is subject to law and the law does not permit him to be re-appointed / re-employed in SIOVS after superannuation. Learned counsel emphasized that again the official respondents are bent upon accommodating respondent No.4 after his retirement from service in the year 2020, which is against the spirit Act-2013, the Rules 2021 and the terms and conditions set forth therein. Learned counsel during arguments referred to the statement of learned AAG verbally made in court that respondent No.4 has been shortlisted for the subject post, though the result has not yet been made public in terms of restraining order dated 25.5.2022 passed by this court, therefore, the

conduct of respondents including the private respondent was / is illegal, void, without lawful authority and based on malafide. Learned counsel further submitted that the purpose of enhancing the age bracket from 60 to 65 years has been consciously made so that respondent No.4 could be made eligible to participate in the recruitment process; that the impugned advertisement is self-contradictory, at one hand it reads that the candidate applying must be a Professor and on the other, the impugned advertisement imposes that the candidate could be above the age of 60 years. He stressed on the point that the person once reaching the age of 60 years does not continue to be a Professor as he retires from service; therefore, the impugned advertisement is self-contradictory and person-specific thus could not be construed to accommodate respondent No.4. Learned counsel referred to the proviso of Section 11 of the Act 2013 and submitted that this is a condition precedent for holding the post of Executive Director which entails that the person should be in service and should be a Professor. He further submitted that rule 4(7)(i) of the Rules also imposes similar requirement. He lastly submitted that the impugned advertisement is person specific and has been issued to defeat this Court's judgment dated 24th December 2021 passed in CP No.1769 of 2021 and the impugned advertisement is a clean chit to respondent No.4 making him eligible to compete for such post, who otherwise under the Act 2013 and the rules made thereunder is not eligible to apply for the said post.

3. Learned AAG has referred the statement of respondent No.2 and submitted that in compliance with the order dated 24.12.2021 passed by this court in C.P No.1769 of 2021, the recommendation has been finalized and the only result is to be announced; that respondent No.4 has been shortlisted for the post of Executive Director SIOVS Hyderabad and that is subject to order of this court.

4. Malik Naeem Iqbal, learned counsel for respondent No.4, has referred to his objections to the main petition and refuted the stance of petitioner with the narration that the advertisement dated 10th May 2022 has been issued in terms of the judgment dated 24.12.2021 passed in CP No.D-1769/2021 and the same does not contravene any provision of the Act-2013. He specifically denied that the advertisement is person specific to accommodate respondent No.4 and the criteria contained in the advertisement has, infact, increased the opportunity for more experienced


and senior persons in the field to contest for the coveted position of Executive Director; that it is absolutely misconceived on the part of petitioner that only a serving Professor could contest for the position of Executive Director as a Professor on reaching the age of superannuation; and stood disqualified which is not the case as portrayed by the petitioner; as there is no such prohibition contained in the provisions of the Act-2013 and rules made therein; that the petition is motivated with malice; and has been filed by the petitioner on behest of certain vested interest holders to exclude respondent No.4 from the process, contrary to Judgment dated 24.12.2021 which specifically provides that the answering respondent would be free to compete the process of appointment; that the petitioner is eligible to contest for the post of Executive Director as per criteria contained in the advertisement as such petitioner is neither aggrieved person nor has locus standi to file the captioned petition, which merits out-and-out dismissal; that though it is true that criteria contained in the advertisement has been framed by the Board of Directors of SIOVS in exercise of its statutory power contained in the Act 2013, yet it is vehemently denied that the same is person specific and has been framed to extend favour to respondent No.4; that the employees were given option to either serve in the Institute of LUHMS under Section 4(2) of the Act 2013 and the petitioner opted to continue in LUHMS Jamshoro; that respondent No.4 was the first Director of Institute, however, it is vehemently denied that his appointment as first Director was extension of any favor rather it was in accord with the proviso to Section 11(2) of the Act 2013; that the Board of Director in its 7th meeting recommended the name of respondent No.4 as Executive Director with effect from 01.01.2021 and there was no malafide on the part of Board of Directors and no other Professor with requisite qualification was available, as such, given the services rendered by him and in the best interest of the Institute, he was re-appointed as Executive Director. Learned counsel denied that enhancing the age bracket for the post of Executive Director to 65 years offends any provision of law, particularly when the Act 2013 does not prescribes a maximum age limit for appointment of Executive Director SIOVS; that there were many other identically placed institutes / statutory/ autonomous bodies in the Province of Sindh, where maximum age limit for the head of such body is 65 years;

that the post of Executive Director is an ex-cadre post, appointment against which, is the sole prerogative of Board of Directors; that it is not a promotion post and for this obvious reason, there is no condition that only regular employees serving the Institute or otherwise can be appointed. It is open to all subject to fulfilling the requisite qualification prescribed by the Board of Directors; that the petitioner is trying to defeat the judgment dated 24.12.2021 as if his contention is accepted that the post of Executive Director is a regular post, then no question arises of filling this post through competitive examination and in such eventuality, only regular and eligible officers of SIOVS can be appointed, this position is altogether contrary to what the petitioner contended in his earlier petition and judgment dated 24.12.2021 after appreciating his contentions; that petitioner has come to this court with apprehension, thus is not entitled to relief; therefore, no further indulgence of this court is required. He concluded by saying that this petition is liable to be dismissed with cost.

5. We have heard learned counsel for the parties and perused the record with their assistance.

6. Since the question of maintainability of the petition has already been set at naught by this Court in the earlier round of litigation whereby direction was given to the official respondents to advertise the post of Executive Director SIOVS Hyderabad and allow respondent No.4 to participate in the recruitment process, however, it was subject to all just exceptions as provided under the law, therefore, it would be expedient to have a look upon this issue before proceeding further in the matter.

7. Petitioner has called in question advertisement dated 10.5.2022 published in Daily Dawn newspaper, in which in addition to qualification and experience, the age has been enhanced from 60 to 65 years; therefore, he has challenged the vires of the same advertisement reproduced herein below.



**GOVERNMENT OF SINDH
HEALTH DEPARTMENT**

**POSITION ANNOUNCEMENT FOR THE VACANCY
OF EXECUTIVE DIRECTOR, SINDH INSTITUTE
OF OPHTHALMOLOGY AND VISUAL SCIENCES
HYDERABAD**

In compliance of the judgment of Honorable Sindh High Court, Hyderabad Bench, in C.P. NO. D - 1769 - 2021, the Government of Sindh Health Department is seeking for an individual of exceptional integrity, highly accomplished, experienced, motivated, and having intellectual vision for the position of Executive Director of Sindh Institute of Ophthalmology and Visual Sciences (SIOVS) Hyderabad, and domiciled in the province of Sindh.

ESSENTIAL ATTRIBUTES, TERMS AND CONDITIONS:
The Executive Director shall be the principal executive and academic officer of the Institute in order to promote eye health, teaching, training, research community work, administration and the efficiency and good order of the Institute. Therefore, the applicant should:

- The candidate must be a Professor in Ophthalmology;
- Have experience in maintaining coordination with high level medical institutions in order to promote eye health teaching, training, community work, research and publications;
- Have at least 5 years of experience in senior academic, research, management leadership or administration in any CPSP recognized public sector Ophthalmic Post-graduate Institute in the leadership capacity;
- Have at least 10 years of service working at Senior Level in Ophthalmology of any public or private sector Institute;
- The candidate shall not be more than 65 years of age on the last date fixed on the submission of applications;
- The candidate shall possess post-graduation, i.e. FRCS/FCPS/M.S. in Ophthalmology or equivalent degree from any reputable and recognized national or foreign university; and
- The candidate must have experience of working with national and international bodies and must possess international exposure through participation in workshops, seminars, or conferences held inside / outside the country.

TERMS OF APPOINTMENT AND SALARY:

- The Executive Director shall be appointed for a period of four (04) years.
- The Executive Director shall enjoy the perks and privileges of BPS-22 and shall draw salary of MP-1.

APPLICATIONS:
Interested professionals are required to apply on plain paper having detailed information with their updated Curriculum Vitae attached. The application shall be accompanied by the following documents:

- Certified copies of all educational certificates, degrees, and diplomas;
- Certified details of teaching experience;
- Certified details of administrative experience;
- Certified details of all the other mentioned attributes;
- A detailed Curriculum Vitae clearly highlighting all the elements of eligibility criteria and personal attributes;
- Seven recent passport size photographs;
- Those candidates already in service should apply through proper channel.
- Applications will be considered for the advertised vacant position of the Executive Director as per the eligibility criteria aforementioned.

PROCEDURE:
The candidates applying for the position of Executive Director of Sindh Institute of Ophthalmology and Visual Sciences (SIOVS) Hyderabad shall follow all the necessary instructions as mentioned above in the application criteria and submit it in office of the Section Officer (General), Health Department, 5th Floor, Sindh Secretariat, Building No. 1, Karachi on or before 25th May, 2022.

NOTE:

- Only shortlisted candidates will be called upon for interview.
- No TA/DA will be given.

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INSP-KRYV No. 2352/22

8. Before finalizing candidate for the subject post, by the respondent-SIOVS's Board, each aspiring candidate is required to be considered and adjudged under the prescribed recruitment rules. In earlier round of litigation, respondent No.4's re-appointment as Executive Director SIOVS was set aside vide judgment dated 24.12.2021 passed by this Court in CP No.D-1769/2021. Now, the petitioner has again approached this Court with the assertion that no employee of the Institute could be retained in service beyond the age of superannuation i.e. 60 years, including the post of Executive Director. The post of Executive Director is the head of Institute of SIOVS and he is required to be appointed by the SIOVS's Board in terms of Section 11 of the Act 2013, which provides that the person holding the office of Professor of Ophthalmology at Liaquat University of Medical and Health Sciences Jamshoro before the commencement of Act shall be the first Director of the Institute and he shall be appointed by the Board subject to his qualification and experience in the field of Ophthalmology and Visual Sciences Institution for at least 10 years, whereas rule 7 of Sindh Institute of Ophthalmology and Visual Sciences Administrative Structure, Powers and Duties of Institute Officers Rules, 2021, provides as under:

“(7) The Executive Director shall be appointed by the Board under section 11 of the Act, on following terms and conditions:

- i. *He shall be appointed by the Board from amongst the Senior Professors of Institute having at least 10 years' experience in the field of Ophthalmology with sufficient administrative experience;* (emphasis supplied)
- ii. His appointment shall be approved as recommended by the Board and notified by the Health Department, Government of Sindh;
- iii. He shall enjoy the perks and privileges of BPS-22 and shall draw salary of MP-1 on his extraordinary achievements in the field of Ophthalmology;
- iv. That the Board shall recommend the re-appointment of eminently qualified person having experience in the field of Ophthalmology and has contributed to the Institute to the greater extent during the period, he has remained the Executive Director, for a term of four (4) years with the perks and privileges as may be determined by the Board."

9. The abortive attempt on the part of the respondent Board to provide the incentive to the retired Executive Director of SIOVS: age from 60 years to 65 years was enhanced in the advertisement has been issued in flagrant violation of the Act 2013, and rule 7(1) of Sindh Institute of Ophthalmology and Visual Sciences Administrative Structure, Powers and Duties of Institute Officers Rules, 2021. Prima-facie the reasons are obvious: the advertisement was person specific and meant to provide facility to a particular person. In principle, a retired civil / public servant shall not ordinarily be reemployed under the Provincial / Federal Government unless such reemployment is necessary and is in public interest and was / is required to be made in the exercise of discretionary powers only; such discretion, however; must be exercised in a structured and reasonable manner and in the public interest. In the present case, we do not see presence of any public interest, as portrayed by the respondents. In such like cases, the Honorable Supreme Court *in Suo Motu Case No.24 of 2010 (PLD 2011 SC 277)*, *In Re: Suo Motu Case No.16 of 2011 (PLD 2013 SC 443)*, '*In re Criminal Original Petition No.89 of 2011 (2013 SCMR 1752)*, *Ali Azhar Khan Baloch and others v. Province of Sindh and others*" (2015 SCMR 456) and *Re-Azhar Hayat v. KPT and others*, (2016 SCMR 1916), has dealt with the issue of re-employment after retirement and held that re-employment of such persons in services on their retirement must be made in the public interest only because re-employment against a sanctioned post is likely to affect the junior officers, who are waiting for promotion to the next higher rank as their right of promotion is blocked.

And they have to wait till such a re-employed officer completes his contract. In the meanwhile, they have to face difficulties in maintaining their seniority, etc. It is settled principle of law that the promotion of an employee is not to be blocked to accommodate a retired officer; however, if the right of promotion is not blocked by re-employment, then such powers can be exercised that too in exceptional cases.

10. Surprisingly, the Government of Sindh through A.A.G. has supported the proposed re-employment of Respondent No.4 in SIOVS although, in previous litigation before this court, he was removed from the said post on cogent reasons. Learned counsel representing respondent No.4 has endorsed the point of view of the official respondents by describing the post as an ex-cadre post, with the narration that the subject post could be filled through Contract as this is not a promotion post, which could be filled amongst the serving professors. We are not in agreement with the learned counsel, for the reason that this stance is against the recruitment rules as discussed in the preceding paragraph; additionally, the regular budgetary post cannot be converted into the contractual post under the Service Jurisprudence, however, the story did not end here, it is stated that private respondent has been reconsidered by the competent authority/Board and would be appointed once the veil imposed by this court vide order dated 25.5.2022 is lifted. Prima-facie the aforesaid attitude of the respondents is surprising rather shocking, just to circumvent, the ratio of the judgment dated 24.12.2021 passed by this court, where the re-appointment of respondent No.4 was nullified and which has attained finality as no Civil Petition has been preferred before the Honorable Supreme Court, and now the respondent-Board under the garb of Rule 7(4) is attempting re-appointment of respondent No.4, despite knowing that respondent No.4 stood retired from SIOVS in the year 2020 and rules thereof notified in 2021, as such rule 7(4) supra will not be helpful to the case of respondent No.4.

11. It is to be noted that it may be the prerogative of the Government to look into all such cases by applying relevant provisions of law noted hereinabove and the observations made by the Honorable Supreme Court from time to time in this regard. For ready reference, reliance can be placed on Suo Motu Case No.24 of 2010 (ibid), a judgment, which has been delivered by an 8-Member Bench of the Honorable Supreme Court. The Honorable Supreme Court in the case of Watan Party & others V/S

Federation of Pakistan and others, (PLD 2012 SC 292) has held that the appointments are to be made in the exercise of discretionary powers; such discretion must be employed in a structured and reasonable manner and in the public interest. Notwithstanding, to support only one individual candidate in absence of any justification making it in the public interest will be deemed an exercise of discretion not in a structured manner and only person specified.

12. In this petition, the criteria outlined in the advertisement for appointment of the Executive Director of SIOVS is that the candidate must be a Professor in Ophthalmology with experience, however, another rider is made that candidate shall be up to 65 years of age on the last date fixed on the submission of applications. Both these conditions are contradictory to each other for the reason that the Executive Director is required to be appointed amongst serving Professor in terms of Section 11 of the Act, 2013 and rule 7(1) of Sindh Institute of Ophthalmology and Visual Sciences Administrative Structure, Powers and Duties of Institute Officers Rules, 2021, meaning thereby he must be 60 or less than 60 years; as such the enhancing age limit from 60 to 65 years in the advertisement was unwarranted and seems to be person specific, contradictory and ultra vires to rule 7(1) of Sindh Institute of Ophthalmology and Visual Sciences Administrative Structure, Powers and Duties of Institute Officers Rules, 2021 (referred as SIOVS Officers Rules 2021) and is hereby, therefore, declared to be against the law and so also various pronouncements of the Honorable Supreme Court on the subject. Since the upper age cap enhanced from 60 to 65 years in the subject advertisement has been declared unlawful; therefore, the advertisement is required to be read to the extent that the candidate must be within the age limit i.e. 60 years and not beyond that.

13. It is well settled that mere granting liberty to a candidate to participate in any process of recruitment for appointment on a substantive basis pursuant to any advertisement does not mean automatic appointment; or even his consideration, which is always subject to certain qualifications in law. Only if he/she otherwise satisfies the eligibility criteria as set forth in the recruitment rules he would be considered. It must further be realized that when an advertisement mentions a particular qualification and the appointment is to be made in disregard of the same, it is not a matter only between the appointing authority and the appointee concerned. The aggrieved persons are all those who had similar or even better qualifications than the appointee or appointees

but because of person-specific rules or regulations could not apply for the post and were left out, Because apparently, they did not possess the qualifications mentioned in the advertisement.

14. We are afraid that the official respondents lost sight of this fact and misconstrued the judgment passed by this court in the earlier round of litigation. It was/is imperative that the appointee should be eligible in terms of recruitment rules as by mere applying for the post is not sufficient to accept his candidature ipso facto. Mere referring to the portion of the judgment of this court will not amount to condoning age plus qualification of candidate, which otherwise are sine-quo-non in terms of rule 7(1) SIOVS Officers Rules 2021. The portion of the Judgment whereby respondent No.4 was given a chance to apply was not a Judgment in rem in strict sensu upholding the right of respondent No.4 to be considered for appointment in the face of his inherent disqualification i.e. his retirement from service in the year 2020. The aim was to provide a level playing field to all the aspirants of the post but such application is to be deemed subject to all just exceptions.

15. The contractual post is to be created by the relevant department / Ministry to meet the exigency arising out of a huge load of applications requiring examination and is not required to be filled up following the same process by which the permanent post is required to be filled up. In this regard we asked from Dr. Sikandar Memon, a representative of the Health Department whether the post of Executive Director SIOVS Hyderabad was/is contractual and could be filled either by appointing a serving or retired professor of SIOVS Hyderabad; he submitted that this position is not clear from the rules which forms another reason to get suspicious about inclination of the department to appoint respondent No.4 at any cost. And this is one of the grounds we have decided to interfere for.

16. This petition, therefore, is disposed of with direction to the competent authority to announce the result of shortlisted candidates for appointment of Executive Director of SIOVS forthwith strictly in terms of Section 11 of the Act, 2013 read with rule 7(1) SIOVS Officers Rules 2021 and in the light of what has been discussed and concluded above. The pending application(s) are also disposed of in the above terms.

JUDGE

JUDGE

17/11/2022