

Stereo. HCJDA 38
JUDGMENT SHEET
LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Writ Petition No. 2528/2023

Hashim Raza

Vs.

Federation of Pakistan etc.

JUDGMENT

Date of hearing	03.03.2023
For Petitioner:	Mr Jawwad Khan Lodhi, Advocate, with Syed Samir Sohail and Ahmad Khan Niazi, Advocates.
For Respondents No.1, 2 & 4:	Mr A. D. Naseem, Deputy Attorney General, with Zafar Iqbal Bhutta, Deputy Secretary, Ministry of Industries & Production.
For Respondents No.3 & 5:	Mr Umer Javed, Advocate, with Muhammad Arif Chaudhry, Deputy General Manager SMEDA.

Tariq Saleem Sheikh, J. – The Small and Medium Enterprises Development Authority – SMEDA – (Respondent No.3), an autonomous organization under the Federal Government, has been established under Ordinance XXXIX of 2002. Its mission is “to provide requisite support services for encouraging and facilitating the development and growth of small and medium enterprises in Pakistan by way of policy-making and through the provision of resources and support services.” It works under the Ministry of Industries and Production (MoIP). On 14.1.2020, the Federal Government appointed the Petitioner as the Chief Executive Officer (CEO) of SMEDA on a three-year contract under section 12(1) of the Ordinance. On the expiry of his term, the Government appointed Respondent No.5 as the CEO, vide Notification No. PF.(683) E-5(PAS) dated 13.1.2023 (the “Impugned Notification”). The Petitioner has challenged the appointment of Respondent No.5 in this petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (the “Constitution”), and seeks a directive to the Federal Government to consider an extension of his service in accordance with section 12(2) of the Ordinance due to his “exemplary performance.”

2. Mr Jawwad Khan Lodhi, Advocate, contends that the Federal Government has appointed Respondent No.5 as CEO of SMEDA without following the procedure outlined in section 7(xxvii) of the Ordinance, read with Rule 8 of the SMEDA Employees Service Rules 2015, and the Guidelines issued by the Securities and Exchange Commission of Pakistan (SECP). Therefore, he argues, the Impugned Notification is void *ab initio*. He further contends that, according to section 11(3) of the Ordinance, the Chairman of SMEDA's Board of Directors is the competent authority to review the CEO's performance. He submitted his case for the extension of tenure and apprised him that SMEDA was one of the best-performing entities in the financial year 2021-22. Resultantly, the Petitioner's case was placed on the agenda of the Board's 22nd Meeting, and this fact was also intimated to the MoIP vide letter dated 10.10.2022. However, the Board could not meet because the six private members required by its constitution had not been nominated. Mr Lodhi contends that he has a right to be considered before any new appointments are made to the office.

3. Mr A. D. Naseem, Deputy Attorney General, maintains that the Federal Government has the exclusive mandate under section 12 of the Ordinance to designate the CEO of SMEDA. The Board's role is limited to making recommendations that are not legally binding. According to the learned Law Officer, the appointment of Respondent No.5 is valid, and no exception can be taken thereto. As regards the Petitioner's request for re-appointment as CEO, he contends that a contractual employee has no vested right which he can get enforced through a constitutional petition. Even otherwise, his performance has been dismal, and the Federal Government has no desire to re-appoint him.

4. The counsel for Respondent No.5, Mr Umar Javed, Advocate, has adopted the arguments of the Deputy Attorney General. He adds that Respondent No.5 is an experienced officer, having served in various key posts and thus qualified for the office of CEO of SMEDA.

Determination

5. To appreciate the contentions of the learned counsel, it is necessary to look at the legal provisions regarding the appointment of SMEDA's CEO. Chapter V of the Ordinance deals with this subject. Section 12(1) provides that the Federal Government shall appoint him

subject to such terms and conditions as it may determine. Section 12(2) states that the CEO shall be appointed for a term of three years which may be extended for a maximum of one additional term not exceeding three years. Section 13 sets out the qualifications for that office, whereas section 14 outlines the disqualifications.

6. In the exercise of the powers conferred by section 36 of the Ordinance, the Federal Government has framed the SMEDA (Employees Service) Rules, 2015 (the “Rules”). Rule 4(1) stipulates that subject to provisions of sections 12, 13 and 14 of the Ordinance, the Federal Government shall appoint the CEO on the recommendation of the Board as provided in section 7 (xxxvii) thereof.¹ Rule 8 adds that the CEO shall be selected from among the persons having knowledge and at least 18 years of post-qualification relevant experience and possessing a Masters/Bachelors Degree (minimum sixteen years of education) in Business Administration, Management, Marketing H.R., Public Administration, Public Policy, Economics & Engineering, Finance & Accounts, Law, Social Science or equivalent from a reputable foreign or HEC recognized institute/university.

7. Section 6 of the Ordinance describes the composition of SMEDA’s Board. It comprises 12 members, out of which six are *ex officio* directors, including the Federal Minister for Industries and Production as Chairman, Secretary Industries and Production Division, Secretary Finance Division, Secretary Commerce Division, Chairman FBR and CEO SMEDA. The remaining six members of the Board are appointed from the private sector who fulfil the eligibility criteria specified in section 6(1)(g) of the Ordinance. The Board is responsible for executive control of SMEDA. Section 37 of the Ordinance empowers the Board to make regulations that are not inconsistent with the Rules, and to provide for all matters for which provision is necessary or expedient for carrying out the purposes and provisions of the Ordinance. In exercising those powers, the Board has framed SMEDA Employees Performance, Promotion and

¹ Section 7 (xxxvii) of the Ordinance reads as under:

7. **Powers and functions of the Board.**— Subject to the provisions of this Ordinance, the Board shall—

(xxxvii) recommend suitable persons for the appointment as the Chief Executive Officer.

Recruitment Regulations 2016. Regulation 16 elaborates the procedure to be followed for naming the CEO.

8. It is pertinent to note that the SECP has issued the Public Sector Companies (Appointment of Chief Executive), Guidelines, 2015.² They apply to all Public Sector Companies,³ which must also comply with any special law related to their business activity, including the provisions for the Chief Executive's appointment, fitness, and propriety, as long as they are not inconsistent with their enabling law or enactment.

9. In the present case, SMEDA has no Board in accordance with section 6 of the Ordinance because the six private members have not been nominated. As a result, the Board made no recommendations, and the Federal Government appointed Respondent No.5 without them. The purpose of regulating the appointment process of CEOs in public sector companies is to promote merit and good governance and eschew favouritism and nepotism. In *Muhammad Ashraf Tiwana and others v. Pakistan and others* (2013 SCMR 1159), the Supreme Court of Pakistan held:

“We wish to add that issues of appointments to senior positions in public bodies, which have been highlighted in this petition and in other cases which have come up before us, have underscored the need for a transparent, inclusive and demonstrably fair process for the selection of persons to be appointed to such senior positions. The Federal Government may consider the necessity of putting in place independent mechanisms and of framing open, fair and transparent processes so that the objectives for which public bodies are established can be efficiently achieved and, at the same time, the pernicious culture of arbitrariness, favouritism and nepotism is eliminated.”

The Supreme Court further stated:

“It has by now become well settled that Courts will look into the process of appointments to public office. It is the process which can be judicially reviewed to ensure that the requirements of the law have been met. In the case of *Muhammad Yasin*⁴, the process of appointment to public office has been made the subject of judicial review to ensure adherence to the command of the law. This is also a requirement of good governance and

² SECP has issued these Guidelines under section 506B of the Companies Ordinance, 1984, read with Rule 5(2) of the Public Sector Companies (Corporate Governance) Rules, 2013.

³ Rule 2(1)(g) of the Public Sector Companies (Corporate Governance) Rules, 2013 states:

“Public Sector Company” means a company, whether public or private, which is directly or indirectly controlled, beneficially owned or not less than fifty one percent of the voting securities or voting power of which are held by the Government or any instrumentality or agency of the Government or a statutory body, or in respect of which the Government or any instrumentality or agency of the Government or a statutory body, has otherwise power to elect, nominate or appoint majority of its directors, and includes a public sector association not for profit, licensed under section 42 of the Act.

⁴ *Muhammad Yasin v. Federation of Pakistan and others* (PLD 2012 SC 132).

has been a subject of comment from ancient times. Abu al-Hassan al-Mawardi (d. 1058 A.D), the famous scholar from Baghdad devoted a substantial portion of his 11th century treatise on constitutional law, the *al-Ahkam al Sultaniyyah*, to the qualifications for holding public office. These are universal principles of good governance and are reflected in sections 5 and 6 of the Act, which lay down stringent criteria for the kind of person the Federal Government may appoint as Commissioner/Chairman SECP. Section 5(1) of the Act specifies that a Commissioner ‘shall be a person who is known for his integrity, expertise, experience and eminence in any relevant field, including the securities market, law, accountancy, economics, finance, insurance and industry.’ Under the law, the Federal Government has the authority to appoint the Chairman and Commissioners of SECP. The Federal Government, however, has no absolute and unbridled powers in this behalf. It is constrained by the aforesaid requirements of the Act. We have come a long way from the days of the whimsicality of Kings and Caesars, such as Caligula, who could conceive of appointing his horse Incitatus as Consul of Rome. The element of subjectivity and discretion of the Government has been severely limited by the legal requirement that an appointee must be a person having integrity, expertise, eminence etc. This requirement imposes a duty on the Federal Government to put in place a process which ensures that the requirements of the law are met.”

10. In ***Ghulam Rasool v. Government of Pakistan and others*** (PLD 2015 SC 6), the Supreme Court held:

“...the matter of appointment of heads of statutory bodies, autonomous/semi-autonomous bodies, corporations, regulatory authorities, etcetera are governed under specific statutory provisions which cannot be overlooked or substituted by some other mechanism. We have noted that various Acts/Ordinances lay down specific criteria/qualifications for high-level appointments and empower the Federal Government to make such appointments.”

11. Sections 12, 13 and 14 of the Ordinance read with section 7 (xxxvii) thereof and Rule 4(1) and Regulation 16 are mandatory. The Board has an important role in appointing a CEO, and its recommendations are vital. In ***Human Rights Case No. 11827-S of 2018 (In the matter regarding the Selling of National Assets, including PIA, at Throwaway Price)*** (2019 SCMR 1952), the Supreme Court held:

“24. Until and unless strict compliance with the provisions of the statute and rules governing appointment to these senior positions are adhered to in letter and spirit, such appointments will always be subject to challenge on the ground of arbitrariness and non-compliance with the law and settled principles. It cannot be stressed enough that the Board of Directors is a body that owes a fiduciary duty to the stakeholders of the company, and its role, as explained above, is not of a mere bystander. The role of the Board envisaged by law is central and pivotal, and has clearly been articulated in the Rules, 2013 whereby the Board has an active duty to safeguard the rights of its stakeholders. Such duty needs to be performed by employing independent and honest individuals with training and experience in the relevant field, with the highest level of integrity, probity and honesty.”

12. The Impugned Notification gives the impression that it is a routine transfer of an officer (Respondent No.5) awaiting posting in the Establishment Division to SMEDA as its CEO. Moreover, it does not mention his tenure and says the transfer/appointment is “with immediate effect and until further orders.” As per section 12(2) of the Ordinance, the CEO’s appointment has to be for three years. It is trite that when the law requires a thing to be done in a particular manner, it must be done in that manner and not otherwise.⁵ In *Federation of Pakistan and another v. E-Movers (Pvt.) Limited and another* (2022 SCMR 1021), the Supreme Court held:

“The Constitution of the Islamic Republic of Pakistan (the ‘Constitution’) is the fountainhead of the rule of law in Pakistan. ‘To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen.’ The rule of law constitutes the bedrock of governance. When the law stipulates that something has to be done in a particular manner, that is how it should be done. And any person who exercises authority must do so in accordance with law. The right to be treated in accordance with law was invigorated and bolstered when the Constitution was amended to provide an additional Fundamental Right by adding Article 10A to the Constitution stipulating that, ‘For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process.’ The due process requirement must be met in the determination of rights and obligations. The Constitution does not define the due process. Therefore, it would not be appropriate to limit its scope by defining it. But this does not mean that the due process requirement is a meaningless concept. Rather, due process incorporates universally accepted standards of justice and is not dependent upon any law or laws. It is an all-encompassing expression which may not be curtailed with reference to particular laws. Due process is to be understood holistically by keeping in mind the entire Constitution, which excludes arbitrary power, authoritarianism and autocratic rule.”

13. In view of the above, the appointment of Respondent No.5 as the CEO of SMEDA is declared to be without lawful authority and of no legal effect. The Impugned Notification dated 13.1.2023 is set aside.

14. The Petitioner wishes to be considered for a second term as CEO under section 12(2) of the Ordinance. The Deputy Attorney General states that the Federal Government is not interested in him because of several complaints against him. He has placed on record copies of some of them. Admittedly, the Petitioner retired on 13.1.2020 after completing his

⁵ Also see: *Human Rights Case Nos. 4668 of 2006, 1111 of 2007 and 15283-G of 2010 in the matter of Action taken on news clippings regarding Fast Food outlet in F-9 Park, Islamabad* (PLD 2010 SC 759); *Shahida Bibi and others v. Habib Bank Limited and others* (PLD 2016 SC 995); *Muhammad Hanif Abbasi v. Imran Khan Niazi and others* (PLD 2018 SC 189); *Ajmir Shah v. The Inspector General, Frontier Corps Khyber Pakhtunkhwa and another* (2020 SCMR 2129); and *Wajid Ali Shah v. Election Commission of Pakistan and 13 others* (2022 CLC 1507).

three-year tenure. He has no vested right to claim an extension if the competent authority is not interested owing to legitimate or justifiable reasons. Reference may be made to *Jawad Ahmad Mir v. Dr. Imtiaz Ali Khan and others* (2023 SCMR 162).

15. It is also well-settled that an employee cannot seek an extension of his contract in a constitutional petition. Reliance is placed on *Khushal Khan Khattak University and others v. Jabran Ali Khan and others* (2021 SCMR 977); *Government of Khyber Pakhtunkhwa and others v. Intizar Ali and others* (2022 SCMR 472); and *Jawad Ahmad Mir v. Dr. Imtiaz Ali Khan and others* (2023 SCMR 162).

16. In the result, Respondent No.1 cannot be issued the direction the Petitioner has prayed for.

17. SMEDA is without a functional Board – and a CEO – which is likely to impact its operations. Respondent No.1 is directed to take immediate steps to fill the vacancies on the Board. Following that, it shall proceed for the appointment of the CEO.

18. This petition is disposed of in the above terms.

(Tariq Saleem Sheikh)
Judge

Announced in open Court on _____

Judge

Naeem

Approved for reporting

Judge