

**JUDGMENT SHEET**  
**IN THE ISLAMABAD HIGH COURT, ISLAMABAD**  
**JUDICIAL DEPARTMENT**

I.C.A. No.424 of 2014  
Dr. Basharat Hassan Bashir  
**Versus**

Federation of Pakistan through Secretary, Ministry of Water  
and Power and others

<b>Date of Hearing:</b>	11.12.2019 and 18.05.2020.
<b>Appellant by:</b>	Mr. Ghulam Nabi Niazi, Advocate.
<b>Respondents by:</b>	Mr. Saqlain Haider Awan, learned Assistant Attorney-General with Mr. Mehmood Khan Lakho, S.O. (Establishment Division). M/s Muhammad Faisal Khan and MNA Rehan, Advocates for A.E.D.B.

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**MIANGUL HASSAN AURANGZEB, J:-** Through intra Court appeals No.424/2014 and 425/2014, the appellant, Dr. Basharat Hassan Bashir (“Dr. Bashir”), impugns the judgment dated 23.06.2014 passed by the learned Judge-in-Chambers, whereby writ petitions No.4394/2013 and 2819/2013 were allowed and Dr. Bashir’s appointment and regularization as a Consultant in the Alternative Energy Development Board (“A.E.D.B.”) was declared to be unlawful. Furthermore, it was directed that an inquiry be conducted and proceedings initiated against the persons responsible for the lapses in the process for Dr. Bashir’s appointment and regularization.

**FACTUAL BACKGROUND:-**

2. The facts essential for the disposal of these appeals are that on 27.08.2005, the Alternative Energy Development Board Ordinance, 2005 (“A.E.D.B. Ordinance”) was promulgated. Section 3 of the said Ordinance provided for the establishment of A.E.D.B. whereas Section 6 of the said Ordinance provided for the composition of A.E.D.B.’s Board, which included *inter alia* six members from the private sector, including two full time Technical Members, who were to be experts on alternative energy, to be nominated by A.E.D.B. with the approval of the Prime Minister.

3. On 14.12.2005, a summary was submitted by the Cabinet Division to the Prime Minister proposing the names of eight persons from the private sector (including Dr. Bashir), out of whom four persons were to be selected for appointment as Members, A.E.D.B. On 31.12.2005, the Prime Minister approved the appointment of four persons from the private sector (including Dr. Bashir) as Members, A.E.D.B.

4. On 04.01.2006, the Establishment Division issued a notification whereby Dr. Bashir was appointed as a Member, A.E.D.B. Subsequently, administrative control over A.E.D.B. was transferred from the Cabinet Division to the Ministry of Water and Power. On 23.02.2007, a summary was prepared by the Ministry of Water and Power for the Prime Minister proposing that Dr. Bashir be appointed as a full time Technical Member of A.E.D.B. with a salary and perquisites equivalent to MP-II scale, with effect from 04.01.2006. This summary had to be routed to the Prime Minister's Secretariat through the Finance and Establishment Divisions. Vide letter dated 09.03.2007, the Finance Division disagreed with the proposal made in the said summary on the following two grounds:-

- "i. The selections of professionals in MP scales is made by a high level selection committee constituted vide Establishment Division's O.M.No.1(72)/2002-E-6, dated 11<sup>th</sup> April, 2005 (Annex-VI). In the summary there is no indication that Dr. Basharat was selected through the said prescribed procedure.*
- ii. In terms of Finance Division's O.M.No.3(10)R.4/2006, Dated 8<sup>th</sup> May, 2001 (Annex-VII) the appointments in MP Scales are made through open competition after advertising the post."*

5. The Establishment Division, in its letter dated 28.03.2007, took the position that Dr. Bashir's case should be treated differently from the other Members of A.E.D.B. from the private sector, and recommended that the proposal made by the Ministry of Water and Power in its summary may be approved and the procedural deficiencies in the selection process pointed out by the Finance Division be condoned.

6. On 06.04.2007, the Prime Minister decided that the matter regarding the appointment of Dr. Bashir as Technical Member on A.E.D.B.'s Board be re-submitted after consideration by A.E.D.B. The A.E.D.B., in its meeting dated 07.04.2007, 'opined' that

Dr. Bashir cannot be appointed as Technical Member since the A.E.D.B. Ordinance re-promulgated in 2007 had no provision for a paid full time Technical Member. Hence, the agenda item regarding Dr. Bashir's appointment as Technical Member was dropped. However, A.E.D.B. authorized the Chairman, A.E.D.B. to take a decision regarding Dr. Bashir's appointment and to compensate him for his consultancy services (only on assignment basis). The Chairman, A.E.D.B., in its letter dated 11.04.2007 to the Secretary, Ministry of Water and Power conveyed his decision that Dr. Bashir should be paid a salary commensurate with his qualifications and experience. He also requested for the said decision to be sent to the Prime Minister's Secretariat so that Dr. Bashir could be paid a salary. In the said letter, the Chairman, A.E.D.B. highlighted Dr. Bashir's qualifications, experience and expertise in the field of alternative energy.

7. The Secretary, Ministry of Water and Power asked the Chairman, A.E.D.B. to elaborate as to the position that Dr. Bashir would hold and to mention the quantum of his salary. A.E.D.B., vide letter dated 26.04.2007, requested the Ministry of Water and Power to obtain approval of the competent authority for Dr. Bashir's appointment as a Consultant to A.E.D.B. in MP-I scale commensurate with his previous pay. In the said letter, it was mentioned that Dr. Bashir had been drawing a monthly salary of Rs.1,91,000/- from the Higher Education Commission ("H.E.C.") prior to his joining A.E.D.B.

8. On 06.07.2007, another summary was submitted by the Ministry of Water and Power to the Prime Minister proposing therein that Dr. Bashir be appointed as Consultant, A.E.D.B. in MP-I scale with effect from 01.06.2006 so that salary is paid to him in accordance with the recommendations of A.E.D.B. It was also proposed that Dr. Bashir's appointment as Member, A.E.D.B. from the private sector be terminated immediately. On 24.08.2007, the proposals made in the said summary were approved by the Prime Minister. Consequently, vide notification dated 08.09.2007 issued by the Ministry of Water and Power, Dr. Bashir was appointed as a Consultant in A.E.D.B. in MP-II scale for a period of two years with

effect from 01.06.2006. Vide another notification dated 08.09.2007, Dr. Bashir's appointment as Member, A.E.D.B. from the private sector was terminated. Vide office order dated 03.10.2007, the terms and conditions of Dr. Bashir's service as a Consultant in A.E.D.B. were settled, which provided for payment of salary, house rent allowance and utilities with effect from 01.06.2006. His salary and other benefits beyond 11.04.2007 were on the basis of the revised scale, whereas his salary beyond 01.06.2007 was enhanced by including increments.

9. Since Dr. Bashir was appointed on contract basis for a period of two years, the term of his contractual employment was due to expire on 31.05.2008. Vide letter dated 24.05.2008, Dr. Bashir requested A.E.D.B. to re-designate his post as Director General in the A.E.D.B. organogram. In the said letter, it was stated that the A.E.D.B., in its 13<sup>th</sup> Board meeting, had decided that the position of Technical Member would be re-designated as Director General.

10. On 03.06.2008, Dr. Bashir requested the C.E.O. of A.E.D.B. to allow him to continue to work and be paid a salary for the period beyond 31.05.2008 until a decision was taken on the case for an extension in the period of his contractual employment. Vide letter dated 07.06.2008, the A.E.D.B. requested the Ministry of Water and Power to take up the case for an extension in Dr. Bashir's contractual employment with the Prime Minister's Secretariat. The contents of the said letter show that the C.E.O. of A.E.D.B. had allowed Dr. Bashir to continue working as a Consultant so that the assignments given to him were completed. He had been allowed to continue working on the basis that his case for an extension in his contractual employment was being sent to the Ministry of Water and Power.

11. By the time Dr. Bashir's contractual employment expired, neither the Ministry of Water and Power nor the Prime Minister had granted approval for an extension in Dr. Bashir's contractual employment. Vide letter dated 07.06.2008, A.E.D.B. called upon Dr. Bashir to relinquish the charge of Consultant since the period of his contract had expired on 01.06.2008. The said letter was issued on the basis of the Establishment Division's office memorandum

(“O.M.”) dated 10.11.2007 according to which the officers, whose cases for re-employment or extension in contract were under consideration, must relinquish their charge without waiting for the approval of the Prime Minister unless specifically directed otherwise by the Prime Minister’s Secretariat. Vide letter dated 01.12.2007, the Ministry of Water and Power had requested the Chairman, A.E.D.B. that a report regarding the relinquishment of charge of seven officers whose period of contract had expired be submitted to the said Ministry.

12. On 07.06.2008, A.E.D.B. issued an office order conveying the A.E.D.B.’s C.E.O.’s decision to allow Dr. Bashir to look after all matters relating to Institute of Renewable Energy Technology (“I.R.E.T.”) in addition to his own duties as Consultant, A.E.D.B.

13. During the special audit of A.E.D.B. for the fiscal year 2007-08, a number of irregularities regarding Dr. Bashir’s appointment as Consultant in A.E.D.B. were pointed out. It was suggested that a case for the fixation of Dr. Bashir’s pay including the payment of the arrears with retrospective effect (i.e. from 01.06.2006 to 31.08.2007) be submitted to the Prime Minister for regularization. The special audit report was discussed in the Departmental Accounts Committee’s meeting held on 26.03.2009. The Departmental Accounts Committee advised A.E.D.B. to move a consolidated summary to the competent authority (i.e. the Prime Minister) through the Finance and Establishment Divisions for the regularization of the irregularities committed in Dr. Bashir’s appointment, and the extension made in Dr. Bashir’s contractual employment. Consequently on 16.05.2009, A.E.D.B. submitted a summary to the Secretary, Ministry of Water and Power proposing *inter alia* that a post of a Consultant in MP-II scale may be created in A.E.D.B. with effect from 01.06.2006 and a budget of Rs.8.864 million be allocated for the payment of Dr. Bashir’s arrears. Furthermore, it was also proposed that Dr. Bashir’s employment contract may be extended with effect from 01.06.2008, and the permission granted to him to continue working be regularized.

14. Vide letter dated 26.06.2009, the Ministry of Water and Power informed the A.E.D.B. that since Dr. Bashir’s “*retrospective*

*appointment was approved by the Prime Minister being competent authority, therefore, there is no need for creation of post in MP-II scale with effect from his appointment.”* A.E.D.B. was also informed that since the case submitted by A.E.D.B. for an extension in Dr. Bashir’s contractual appointment was not accompanied by his performance evaluation reports, his case was not forwarded to the Committee headed by the Finance Secretary, which was empowered to recommend extensions in the contractual appointment of MP scale holders. The Ministry of Water and Power also reminded A.E.D.B. about the Establishment Division’s O.M. dated 10.11.2007 which, as mentioned above, required officers whose contracts had expired to relinquish charge without waiting for an approval of the Prime Minister for an extension in their contracts. It was also pointed out that the continuation in the payment of salary to MP scale holders after the expiry of their employment contracts was unlawful and irregular. A.E.D.B. was requested to make necessary arrangements for the payment of the arrears in Dr. Bashir’s salary from A.E.D.B.’s available budget for the year 2009-10.

15. A.E.D.B., in its letter dated 20.09.2011, after narrating the facts leading to the said audit objection of the Departmental Accounts Committee, made the following request to the Ministry of Water and Power:-

*“After foregoing through facts, it is once again requested that his case for fixation of pay including payment of arrears for retrospective appointment i.e. 1<sup>st</sup> June 2006 to 31<sup>st</sup> August 2007 may please be taken up with the Finance and Establishment Divisions for regularization to avoid from legal complications. Allocation of fund may also be obtained to enable AEDB to made payment of arrear in the light of Office Order dated 3<sup>rd</sup> October 2007 as the concerned consultant is pressing hard for early payment of arrear of his salary and perquisite.”*

16. Having not received any response from the Ministry of Water and Power, A.E.D.B. sent reminders dated 20.09.2011, 09.04.2012, and 06.06.2012. Vide letter dated 22.06.2012, the Ministry of Water and Power took the position that the case regarding the fixation of Dr. Bashir’s pay as well as the payment of arrears from 01.06.2006 to 31.08.2007 is to be submitted to the Prime Minister *“for regularization”* in order to avoid legal complications. Accordingly,

A.E.D.B. was advised to submit a draft summary for the Prime Minister *“for regularization of Dr. Basharat Hassan Bashir, Consultant, A.E.D.B.”* On 19.07.2012, A.E.D.B. forwarded a draft summary for the Prime Minister to the Ministry of Water and Power. Thereafter, the Ministry of Water and Power, vide letter dated 09.05.2013, requested A.E.D.B. to clarify as to who was the competent authority to appoint Dr. Bashir as a Consultant and to extend his services. In case the competent authorities were different, A.E.D.B. was also asked to explain the variation with supporting rules/laws if any. A.E.D.B. was also asked to explain as to under which financial regulation was salary paid to Dr. Bashir.

17. A.E.D.B., vide letter dated 15.05.2013, informed the Ministry of Water and Power that the Prime Minister was the appointing authority of Dr. Bashir as a Consultant. It was also explained that Dr. Bashir’s contractual appointment as a Consultant had not been extended by the Prime Minister, but he had been allowed to continue working vide A.E.D.B.’s office order dated 07.06.2008.

18. Vide office order dated 11.06.2013 issued by the Ministry of Water and Power, Dr. Bashir was assigned the additional charge of the office of C.E.O. of A.E.D.B. till the appointment of a regular incumbent. Dr. Bashir held the said position until 20.08.2013 when Mr. Asjad Imtiaz Ali was assigned the task of looking after the work of the office of C.E.O. of A.E.D.B.

19. The 28<sup>th</sup> Board meeting of A.E.D.B. was held on 28.10.2013. Agenda item No.5 for the said meeting was *“Determination of Services of Dr. Basharat Hasan Bashir.”* The decision taken by the Board of A.E.D.B. was as follows:-

*“Board approved regularization of services of Dr. Basharat Hasan Bashir in AES-11.”*

20. On 01.07.2013, writ petition No.2819/2013 had been filed before this Court by one Muhammad Ali questioning the additional charge of C.E.O. of A.E.D.B. being given to Dr. Bashir. Subsequently on 28.11.2013, writ petition No.4394/2013 was filed before this Court by one Sulman Ishaque Malik seeking a writ of *quo warranto* to be issued to Dr. Bashir, who was then holding the post of Director General, A.E.D.B. The said writ petitions were allowed vide

judgment dated 23.06.2014, and Dr. Bashir's appointment / regularization was declared to be *"illegal, unlawful, without lawful authority, against the Constitutional mandate, prescribed procedure and applicable law."* Furthermore, it was directed that an inquiry be initiated against the persons responsible for the lapses on their part.

21. The said judgment has been assailed by Dr. Bashir in these appeals (intra Court appeals No.424/2014 and 425/2014) which are proposed to be decided through this judgment. It may be mentioned that vide interim order dated 21.07.2014 passed by the Division Bench of this Court, the operation of the said judgment dated 23.06.2014 was suspended. The effect of the said order dated 21.07.2014 was that Dr. Bashir continued to work as Director General in A.E.D.B.

22. During the pendency of these appeals and the subsistence of the said interim order, A.E.D.B., vide letter dated 09.03.2016, terminated Dr. Bashir's services with immediate effect. In the said letter, reference was made to the order dated 13.01.2015 passed by the Hon'ble Supreme Court in criminal petition No.560/2014, wherein it was held *inter alia* that the holders of posts on MP scale were not entitled to be regularized or the holders of such posts be made permanent.

23. The said letter dated 09.03.2016 was assailed by Dr. Bashir in writ petition No.933/2016 before this Court. Vide judgment dated 28.04.2016, the said writ petition was dismissed. The said judgment has been assailed by Dr. Bashir in intra Court appeal No.246/2016 which is being decided by this Court through a separate judgment.

**CONENTIONS OF THE LEARNED COUNSEL FOR THE APPELLANT:-**

24. Learned counsel for the appellant/Dr. Bashir, after narrating the facts leading to the filing of the instant appeals, submitted that ever since 01.04.2006, Dr. Bashir had been working on full time basis in A.E.D.B. but had not been paid any salary; that the notification dated 04.01.2006, whereby Dr. Bashir was appointed as a Member on A.E.D.B.'s Board, did not specify as to whether he had been appointed as a Technical Member or otherwise; that Dr. Bashir had fulfilled the criteria prescribed in Section 7(1) of the A.E.D.B.



Ordinance to be appointed as a full time Technical Member; that while a summary for Dr. Bashir's appointment as Technical Member was pending in the Prime Minister's Secretariat, the A.E.D.B. Ordinance lapsed and the re-promulgated A.E.D.B. Ordinance had no provision for the appointment of a Technical Member; that the A.E.D.B.'s Board, in its meeting dated 07.04.2007 authorized the Chairman, A.E.D.B. to take a decision regarding Dr. Bashir's appointment and to compensate him for his consultancy services; and that on 11.04.2007, the Chairman, A.E.D.B. decided that Dr. Bashir should be paid a salary.

25. Furthermore, it was submitted that vide letter dated 26.04.2007, A.E.D.B. requested the Ministry of Water and Power to obtain the Prime Minister's approval for Dr. Bashir's appointment as a Consultant in the A.E.D.B. in MP-1 scale; that after the approval of a summary dated 06.07.2007 submitted by the Ministry of Water and Power to the Prime Minister, the latter, on 24.08.2007, approved Dr. Bashir's appointment as Consultant in A.E.D.B. in MP-1 scale with effect from 01.06.2006, and his termination as a member of A.E.D.B.'s Board from the private sector; that consequently on 08.09.2007, Dr. Bashir was notified as A.E.D.B.'s Consultant in MP-II scale with effect from 01.06.2006 and his salary along with arrears was paid on 03.10.2007; that the A.E.D.B.'s Board, in its emergent meeting held on 28.11.2007, temporarily adjusted all MP scale officers / consultants of the A.E.D.B. in Alternative Energy Board Scale ("A.E.S.") scale; that Dr. Bashir was also temporarily adjusted in A.E.S.-10 scale; that A.E.D.B.'s Board, in its 28<sup>th</sup> meeting held on 28.10.2013 regularized Dr. Bashir in A.E.S.-11 scale; that on 03.12.2013, A.E.D.B. issued an office order for Dr. Bashir's regularization as Director General (Power Projects) in A.E.S.-11; and that since A.E.D.B.'s Board was fully empowered to regularize Dr. Bashir's services and since A.E.D.B.'s Board had decided in its 28<sup>th</sup> meeting to regularize Dr. Bashir's services, such regularization could not have been declared unlawful by the learned Single Bench.

**CONENTIONS OF THE LEARNED COUNSEL FOR A.E.D.B.:-**

26. On the other hand, learned counsel for A.E.D.B. submitted that at no material stage had Dr. Bashir been appointed as Technical

Member on A.E.D.B.'s Board; that it is an admitted position that Dr. Bashir did not participate in any competitive process for appointment as Technical Member; that the relevant record makes it amply clear that Dr. Bashir had been appointed as a Member from the private sector on A.E.D.B.'s Board; that after Dr. Bashir had been appointed as a Member from private sector, an effort was made to have him appointed as a fulltime Technical Member and, in this regard, a summary dated 23.02.2007 was submitted to the Prime Minister, but the proposal to appoint Dr. Bashir as Technical Member had not been approved by the Prime Minister at any stage; that the re-promulgated A.E.D.B. Ordinance did not have a provision for a Technical Member on A.E.D.B.'s Board; that subsequently Dr. Bashir was appointed as a Consultant in A.E.D.B. in MP-II scale on contract basis for a period of two years with effect from 01.06.2006 after summary dated 06.07.2007 for such appointment had been approved by the Prime Minister; that Dr. Bashir had not participated in any competitive process for the appointment of a Consultant in A.E.D.B.; that since Dr. Bashir had not been appointed as a Consultant through an open competition, and since the procedure laid down in the Establishment Division's O.M. dated 11.04.2005 for the appointment of professionals in MP scales had not been observed while appointing Dr. Bashir, his appointment was without lawful authority; that Dr. Bashir's very appointment as Consultant on contract basis was unlawful: that Dr. Bashir could not have been appointed as a Consultant with retrospective effect since between 01.06.2006 and 31.08.2007, he was a Member of the A.E.D.B. Board from the private sector; and that it is well settled that a notification cannot be given retrospective effect unless there is a specific sanction of the statute in that regard.

27. Learned counsel for A.E.D.B. further submitted that Dr. Bashir could not have been adjusted in A.E.S.-10 scale since the office order dated 12.12.2007 did not apply to him; that in the said office order, it was explicitly mentioned that the adjustment of officers in A.E.S. scales did not apply to the officers at serial number 3 to 10 and 12 in the list of officers in the said office order; that since Dr. Bashir's name in the said list appears at serial number 6, the

benefit of adjustment in A.E.S. scale could not be extended to him; that since Dr. Bashir had been appointed as a Consultant on contract basis for a period of two years, he could not have been permitted to serve beyond the expiry of his contract period without the approval of the Prime Minister; that the decision of the Chairman, A.E.D.B. to allow Dr. Bashir to work and receive payments beyond the expiry of his contract period was irregular; that this irregularity resulted in an audit objection being raised regarding payments made to Dr. Bashir beyond his contract period; that A.E.D.B.'s summary dated 16.05.2009 clearly shows that the Departmental Accounts Committee in its meeting held on 26.03.2009, had directed that A.E.D.B. should move a consolidated summary for the regularization of the irregularities committed in Dr. Bashir's appointment as a Consultant and payment of salary beyond the expiry of his contract period; that a proposal for making Dr. Bashir a regular employee of A.E.D.B. had not been made; that even though the Ministry of Water and Power, in its letter dated 12.06.2012, advised A.E.D.B. to submit a draft summary for the Prime Minister for the regularization of Dr. Bashir's services as a Consultant, such a summary had not been submitted to the Prime Minister at any material stage; that agenda item No.5 for the 28<sup>th</sup> meeting of the A.E.D.B.'s Board did not contain a proposal for Dr. Bashir to be made a regular employee of A.E.D.B.; that the said agenda item shows that Dr. Bashir had been temporarily adjusted in A.E.S.-10 scale pursuant to a decision taken by A.E.D.B.'s Board in its emergent meeting dated 28.11.2007; that the minutes of the said meeting dated 28.11.2007 show that the decision taken by the A.E.D.B.'s Board to re-adjust, in A.E.S. scale, the officers who had been appointed in MP scales and whose contract periods had expired did not apply to Dr. Bashir; that the names of the officers to whom the said decision applied were mentioned in the minutes; and that the said decision could not have applied to Dr. Bashir since his contract period had not expired when the said decision was taken. Learned counsel for A.E.D.B. prayed for the appeals to be dismissed.

28. We have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance.

29. The facts leading to the filing of the instant appeals have been set out in sufficient detail in paragraphs 2 to 23 above and need not be recapitulated.

**STATUTES GOVERNING A.E.D.B.:**

30. A.E.D.B. was established vide Notification No.1/2003-Admn II, dated 12.05.2003. Subsequently, the A.E.D.B. Ordinance, 2005 (**"Ordinance No.I of 2006"**) was promulgated whereby A.E.D.B. was statutorily established and under Section 23 the former Board established under the Notification dated 12.05.2003 was dissolved. Section 6(1)(i) of the said Ordinance provided that A.E.D.B.'s Board would include *inter alia* **"six members from private sector including two fulltime Technical Members who are experts on alternative energy to be nominated by the Board with the approval of the Prime Minister."** Section 6(4) of the said Ordinance provided that the Federal Government may prescribe the qualification and mode of appointment of Members from the private sector in such manner as it may deem appropriate whereas Section 6(5) provided that the Technical Members shall be eminent professionals in related fields of alternative or renewable energy having known integrity, reputation and expertise. Under Section 7(1) of the said Ordinance, the terms and conditions of the fulltime Technical Members and their remuneration and privileges were to be determined by the Federal Government. The said Ordinance lapsed by efflux of time.

31. The A.E.D.B. Ordinance, 2007 (Ordinance No.XXII of 2007) was promulgated on 21.04.2007. Section 6(1)(i) of the said Ordinance provided that A.E.D.B.'s Board would include *inter alia* **"six members nominated by the Federal Government with the approval of the Prime Minister."** In this Ordinance, there was no provision for the appointment of full time Technical Members on the A.E.D.B.'s Board. Section 19 of the said Ordinance provided that the Board may make Regulations, not inconsistent with the said Ordinance and the Rules, to carry out the purposes of the said Ordinance. In exercise of the powers conferred by Section 19 of the

said Ordinance, A.E.D.B.'s Board made the A.E.D.B. Employees Service Regulations, 2007. The said Ordinance also lapsed by efflux of time.

32. The A.E.D.B. Ordinance, 2009 (Ordinance No.LX of 2009) was promulgated on 12.12.2009. The provisions of this Ordinance were in *pari materia* to the A.E.D.B. Ordinance, 2007. This Ordinance also lapsed by efflux of time.

33. The A.E.D.B. Act, 2010 was enacted on 21.05.2010. Section 6(1)(h) of the said Act provides that A.E.D.B.'s Board would include *inter alia* "six members from private sector, of whom at least three shall be experts on alternative energy, as full-time Members to be appointed by the Prime Minister on the recommendations of the Board." Section 6(4) of the said Act provides that the Federal Government may prescribe the qualifications and mode of appointment of Members from the private sector in such manner as it may consider appropriate. In exercise of the powers under Section 19 of the said Act, A.E.D.B.'s Board made the A.E.D.B. Employees Service Regulations, 2013.

**DR. BASHIR'S APPOINTMENT AS CONSULTANT IN A.E.D.B. ON CONTRACT BASIS FOR TWO YEARS:-**

34. Vide notification dated 04.01.2006 issued by the Establishment Division, Dr. Bashir was appointed as a Member of A.E.D.B.'s Board. This appointment was made after the Prime Minister had approved the summary dated 14.12.2005 for the appointment of four nominees, including Dr. Bashir, as Members of A.E.D.B.'s Board. The said summary, approval of the Prime Minister and the said notification, does not show that Dr. Bashir was appointed as a Technical Member on A.E.D.B.'s Board. There is nothing on the record to show that Dr. Bashir had participated in a competitive process for appointment as a Technical Member on A.E.D.B.'s Board. Although the summary dated 23.02.2007 was submitted by the Ministry of Water and Power to the Prime Minister proposing that Dr. Bashir be appointed as a full time Technical Member with a salary and perquisites equivalent to MP-II scale with effect from 04.01.2006, the said summary was not approved by the Prime Minister at any stage.

35. As mentioned above, there was no provision in the A.E.D.B. Ordinance, 2007 for the appointment of Technical Members on the Board of A.E.D.B. Consequently on 06.07.2007, a summary was submitted by the Ministry of Water and Power to the Prime Minister proposing *inter alia* that Dr. Bashir be appointed as a Consultant in A.E.D.B. in MP-I scale with effect from 01.06.2006. After the said summary was approved by the Prime Minister, Dr. Bashir was appointed as a Consultant in A.E.D.B. in MP-II scale on contract basis for a period of two years with effect from 01.06.2006. This was done through notification dated 08.09.2007 issued by the Ministry of Water and Power. On the very same day, Dr. Bashir's appointment as a Member on the Board of A.E.D.B. was terminated by the Ministry of Water and Power.

**WHETHER DR. BASHIR PARTICIPATED IN ANY COMPETITIVE PROCESS FOR APPOINTMENT AS CONSULTANT IN A.E.D.B. ON CONTRACT BASIS:-**

36. It is an admitted position that Dr. Bashir did not participate in any competitive process for appointment as Consultant in A.E.D.B. On 15.05.2007, an advertisement was published in a newspaper called "*Daily Times*" inviting qualified internationally experienced Biomass/Waste to Energy Experts/Consultants having Ph.D and twenty years experience of Biomass to Energy to submit technical and financial proposals for development of Biomass Policy for Pakistan. Dr. Bashir participated in the competitive process pursuant to the said advertisement. Vide letter dated 15.08.2007, A.E.D.B. informed Dr. Bashir that his offer to provide consultancy services for the development of Biomass/Waste to Energy Policy had been accepted. A.E.D.B. requested Dr. Bashir to render his services within the lump sum amount of Rs.1.5 Million.

37. Dr. Bashir's participation in the competitive process for being selected for developing the Biomass Policy for Pakistan can most certainly not be equated with him having participated in a competitive process for appointment as a Consultant with effect from 01.06.2006. Since Dr. Bashir's appointment as a Consultant had been made effective from a date when the advertisement inviting bids for selection of a party for developing the Biomass

Policy for Pakistan had not even been issued, the said selection process had nothing to do with the process for appointing Dr. Bashir as a Consultant in A.E.D.B.

38. Dr. Bashir's appointment as a Consultant was also in derogation of the procedure prescribed in the Establishment Division's O.M. dated 11.04.2005 for the selection of professionals in MP scales. The said O.M. requires the selection of professionals in MP scales to be made by a high-level selection committee. It is an admitted position that Dr. Bashir's appointment as a Consultant in MP-II scale had not been made pursuant to a decision of a high-level selection committee. Additionally, the Finance Division's O.M. dated 08.05.2001 requires that appointments in MP scales are to be made through open competition after advertising the post in question. There is nothing on the record to show that A.E.D.B. had advertised the post of a Consultant in MP-I scale or that Dr. Bashir had participated in any competitive process before being appointed as a Consultant in MP-I scale.

**WHETHER DR. BASHIR'S APPOINTMENT AS A CONSULTANT ON CONTRACT BASIS WAS UNLAWFUL SINCE THE SAID POST WAS NEVER ADVERTISED AND DR. BASHIR DID NOT GO THOROUGH ANY COMPETITIVE PROCESS FOR APPOINTMENT AGAINST THE SAID POST:-**

39. 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. A Court cannot hold such an appointment to be legal and proper on the ground that others have been similarly appointed without any advertisement. A person appointed without an advertisement to any office under the State cannot be allowed to continue in such office by a Court on the

ground of violation of the right to equality guaranteed under Article 25 of the Constitution.

40. It is an admitted position that Dr. Bashir was appointed as a Consultant in MP-II Scale on contract basis for a period of two years in the A.E.D.B. without any competitive process. At no material stage did the A.E.D.B. publish an advertisement or notice inviting applications from the eligible candidates for appointment as Consultant on contract basis. Even though Dr. Bashir's appointment as a Consultant was on contract, such an appointment could not have been made in a non-transparent manner i.e. without any competitive process. It has consistently been held that recruitments made without open advertisements were *prima facie* violative of Article 18 of the Constitution and could not be countenanced. Dr. Bashir's appointment as a Consultant in A.E.D.B. in the absence of a competitive process was an illegality, rather a violation of Article 18 of the Constitution as well as the law laid down by the Superior Courts in the following judgments:-

- (i) In the case of Dr. Naveeda Tufail Vs. Government of Punjab (2003 SCMR 291), it was held as follows:-

*"The appointments 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 trustee with complete transparency as per requirement of law so that no person who is eligible to hold such posts, is excluded from the process of selection and is deprived of his right of appointment in service."*

- (ii) In the case of Mushtaq Ahmad Moral Vs. The Honourable Lahore High Court (1997 SCMR 1043), the great jurist, the Hon'ble Mr. Justice Ajmal Mian, speaking for the Hon'ble Supreme Court, held in paragraphs 16 and 17 of the said report as follows:-

*"... 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. on the basis of 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 enshrined in our Constitution cannot be achieved unless due publicity is made through public notice for inviting applications with the aid of the leading newspapers having wide circulation.*

...

*17. We reiterate that the appointments to various posts by the Federal Government, Provincial Governments, Statutory Bodies and other Public Authorities, either initial or ad hoc or regular, without inviting applications from the public through the press, is violative of Article 18 read with Article 2A of the Constitution, which has incorporated the Preamble to the Constitution as part of the same and which inter alia enjoins equality of opportunity and guarantees for creation of an egalitarian society through a new order, which objective cannot be achieved unless every citizen equally placed or situated is treated alike and is provided equal opportunity to compete inter alia for the posts in aforesaid Government set-ups/institutions.*

- (iii) In the case of Munawar Khan Vs. Niaz Muhammad (1993 SCMR 1287), the Full Bench of the Hon'ble Supreme Court voiced an expectation 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 Vs. Habibullah (PLD 1997 SC 835).
- (iv) In the case of Lt. Col. (R) Muhammad Arif Zahid Vs. Azad Government of the State of Jammu and Kashmir (2018 PLC (C.S.) Note 136), a writ of *quo warranto* seeking the quashment of the appointment against the post of Director Armed Services Board for a period of one year was allowed on the ground *inter alia* that the said post was not advertised before making the appointment.
- (v) In the case of Sohail Baig Noori Vs. High Court of Sindh (2017 PLC (C.S.) 1142) a writ of *quo warranto* seeking the quashment of the appointment against the post of Chairman, Inspection Team of High Court (Sindh) on contract basis was allowed by the Hon'ble High Court of Sindh *inter alia* on the ground that neither was any advertisement published inviting applications for appointment against the said post nor was equal opportunity provided to other persons through a competitive process.

- (vi) In the case of Muhammad Muneer Malik Vs. Allama Iqbal Open University (2016 PLC (C.S.) 896), this Court 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. Furthermore, it was held as follows:-

*“Transparency entails principles of equal opportunity in order to guarantee that the appointment is made on merit and of the most capable and qualified person. Persons eligible in terms of the prescribed criterion, qualification and conditions relating to experience have a right to be given fair consideration through a transparent process. Transparency is the key to ensuring a merit based selection and wide advertisement of the criterion and qualifications determining the eligibility of candidates is a pre-condition.”*

- (vii) In the case of Zain-ul-Aziz Khan Babar Vs. Ministry of Inter-Provincial Coordination (2015 PLC (C.S.) 1343), a writ of *quo warranto* seeking the quashment of the appointment against the post of Director General, Pakistan Sports Board was allowed by the Hon'ble Lahore High Court *inter alia* on the ground that no advertisement inviting applications for appointment against the said post had been issued. In the said report, it was held that *“it was incumbent upon the Federal Government to fill the post of Director General Pakistan Sports Board by way of direct recruitment through publicity and advertisement in order to bring harmony and transparency in the matter of appointment to a public office of such a higher pedestal.”*
- (viii) In the case of Dr. Asmatullah Vs. International Islamic University (2014 PLC (C.S.) 297), this Court declared the appointments against various academic positions made in the respondent/University without inviting applications through advertisements to be unlawful.
- (ix) In the case of Dr. Hafiz Muhammad Bashir Vs. International Islamic University, Islamabad (2013 PLC (C.S.) 191), this Court declared the appointment of Professors on *ad hoc*/contract basis in the International Islamic University, Islamabad to be void and unconstitutional on the ground that no competitive

process had been undertaken before making the appointments. This Court directed the said University to advertise the posts. Furthermore, it was held that *“even for contract employment, advertisement of post was not only essential but in order to ensure transparency and competition, it was also mandatory.”*

- (x) In the case of M. Ashraf Azeem Vs. Federal Government of Pakistan (2013 PLC (C.S.) 1147), this Court declared that the appointment against the post of Managing Director, Pakistan Television Corporation to be the *“result of colourable exercise of authority, without due process, non-transparent approach, against the principles of healthy competition, fairness, openness, merit, offensive to the constitutional provisions and besides the dictums laid down by the Hon'ble Supreme Court of Pakistan” inter alia* on the ground that no advertisement had been issued or competitive process conducted prior to the said appointment. Furthermore, this Court held that all appointments made in the Pakistan Television Corporation without a competitive process during the tenure of the Managing Director were illegal and void.
- (xi) In the case of Muhammad Ashfaq Ahmed Vs. Ali Arshad Hakeem (2013 PLC (C.S.) 1463), this Court allowed a writ petition challenging the appointment on contract basis against the position of Chairman, Federal Board of Revenue on the ground that the requirement of advertisement inviting applications for appointment and competitive process could not have been relaxed. In the said report, the following observations were made:-
- “This is an admitted fact that post of Chairman FBR is not only important but sensitive as well. I totally failed to understand that how the qualification, experience, exposure, and performance of any individual can be gauged without inviting others to compete. The approach of picking any individual of personal liking from open market is totally uncalled for and against the principles of transparency, good governance, merit, rule of law and credible process.”*
- (xii) In the case of Barrister Sardar Muhammad Vs. Federation of Pakistan (PLD 2013 Lahore 343), appointment against the position of Chairman Pakistan Telecommunication Authority

was declared to have been made without lawful authority on the ground that no public advertisement was issued and no competitive process had been carried out before the appointment was made. In paragraph 36 of the said report, it was held as follows:-

*“The requirement to reach out to the public (through public notice or advertisement) before filling public posts is an essential obligation of trusteeship to be exercised by the executive. A workable democracy must be pillared in an unwavering commitment to rule of law and due process with the vision to develop inclusive and participatory institutions, which form the bedrock and engines of growth of any progressive nation. Recruitment to a “public office” orchestrated behind closed-doors, driven by greed of nepotism, without open public participation is undemocratic and deeply injures the constitutional objectives of political, social and economic justice. It also fractures the ownership of an ordinary person in the government and gradually erodes their confidence in the State.”*

- (xiii) In the case of Muhammad Ali Vs. Province of KPK through Secretary, Elementary and Secondary Education, Peshawar (2012 PLC (C.S.) 1006), several persons had been employed in the Education Department without an advertisement inviting applications from eligible candidates. The services of such employees were terminated by the District Coordination Officer, Dera Ismail Khan without affording them an opportunity of a hearing. The Provincial Services Tribunal dismissed their appeal against the termination of their services. Their appeal before the Hon'ble Supreme Court met the same fate. The Hon'ble Supreme Court held that such employees who had got their appointments through backdoor without advertisement of vacancies could not agitate any grievance on the pretext of denial of due opportunity of hearing to them before the termination of their services.
- (xiv) In the case of Azad Government of the State of Jammu and Kashmir Vs. Ashfaq Ahmad Hashmi (2001 PLC (C.S.) 34), it was held *inter alia* that a show cause notice need not be issued for terminating an officer's services who had been appointed against a public post without a competitive process or issuance of an advertisement.

- (xv) In the case of Secretary for Prime Minister Vs. Muhammad Aslam (2000 PLC (C.S.) 155), the Hon'ble Supreme Court of Azad Jammu and Kashmir, held that *"if a post has not been advertised the appointment made against the post, even if based on the recommendation of a Selection Board, shall be void."* Furthermore, it was held as follows:-

*"In our view advertising a post is the basis on which merit system stands. If this condition is not complied with there can be no appointment on merit. Then people will be appointed without giving the Selection Committee/Board the opportunity for selecting the best person available for given posts and favoritism will become order of the day."*

- (xvi) In the case of Mst. Humaira Noorani Vs. Administrator, M.C., Gujranwala (1999 PLC (C.S.) 1078), the petitioner was appointed as a teacher without publishing an advertisement inviting applications from eligible candidates for appointment against the said post. Since the petitioner was not paid her salary, she approached the National Industrial Relations Commission for the payment and was able to obtain an order in her favour. Despite this, the Hon'ble Lahore High Court held that *"since the petitioner has obtained appointment by illegal manner, therefore, petitioner is not entitled to get any discretionary relief on the well-known principle that he who seeks equity must come to the Court with clean hands."* Furthermore, it was held as follows:-

*"It is admitted fact that the petitioner was appointed without advertisement and in violation of prescribed procedure under the law. The Hon'ble Supreme Court has held in Jalal-ud-Din's case (PLD 1992 SC 207) that if the order is illegal then it cannot be perpetuated. The appointment of petitioner, therefore, cannot be permitted to remain in the field as the action of respondents to appoint the petitioner is repugnant of Articles 4 and 18 of the Constitution of Islamic Republic of Pakistan 1973. The Hon'ble Supreme Court of Pakistan has taken serious notice of such type of appointments in Human Right's case No. 104 of 1992 which was decided on 6-3-1993 (1996 SCMR 1349) and the relevant observation is as follows:-*

*"While inquiring into various complaints of violation of Fundamental/Human Rights, it has been found that the Federal Government, Provincial Governments Statutory Bodies and the Public Authorities have been making initial recruitments, both ad hoc and regular, to posts and offices without publicly and properly advertising the vacancies and at times by converting ad hoc appointments into regular appointments. This practice is prima facie violative of Fundamental Rights*

*(Article 18 of the Constitution) guaranteeing to every citizen freedom of profession. Subject to notice to all concerned, and subject to final orders after full hearing in the matter, it is ordered as an interim measure that the violation of this Fundamental/Human Right shall be discontinued forthwith.”*

- (xvii) In the case of State of Orissa Vs. Mamata Mohanty (2011) (3) SCC 436), it was held by the Indian Supreme Court as follows:-

*“... it is a settled legal proposition that no person can be appointed even on a temporary or ad hoc basis without inviting applications from all eligible candidates. If any appointment is made by merely inviting names from the Employment Exchange or putting a note on the Notice Board etc. that will not meet the requirement of Articles 14 and 16 of the Constitution. Such a course violates the mandates of Articles 14 and 16 of the Constitution of India as it deprives the candidates who are eligible for the post, from being considered. A person employed in violation of these provisions is not entitled to any relief including salary. For a valid and legal appointment mandatory compliance of the said Constitutional requirement is to be fulfilled. The equality clause enshrined in Article 16 requires that every such appointment be made by an open advertisement as to enable all eligible persons to compete on merit.”*

- (xviii) In the case of Kendriya Vidyalaya Sangathan Vs. L.V. Subramanyeswara (2007 (5) SCC 326), the Indian Supreme Court has held that if all the eligible candidates are not called by means of the advertisement, then the process of recruitment will violate *inter alia* Articles 14 and 16 of the Constitution of India.

- (xix) In the case of Union Public Service Commission Vs. Girish Jayanti Lal Vaghela (2006 (2) SCC 482), it was held as follows:-

*“The appointment to any post under the State can only be made after a proper advertisement has been made inviting applications from eligible candidates and holding of selection by a body of experts or a specially constituted committee whose members are fair and impartial through a written examination or interview or some other rational criteria for judging the inter se merit of candidates who have applied in response to the advertisement made. A regular appointment to a post under the State or Union cannot be made without issuing advertisement in the prescribed manner which may in some cases include inviting applications from the employment exchange where eligible candidates get their names registered. Any regular appointment made on a post under the State or Union without issuing advertisement inviting applications from eligible candidates and without holding a proper selection where all eligible candidates get a*

*fair chance to compete would violate the guarantee enshrined under Article 16 of the Constitution.”*

- (xx) In the case of Suresh Kumar Vs. State of Haryana (2003 (10) SCC 276), the Indian Supreme Court upheld the judgment of the Punjab & Haryana High Court wherein 1600 appointments made in the Police Department without advertisement stood quashed though the Punjab Police Rules, 1934 did not provide for such a course. The High Court reached the conclusion that the process of selection stood vitiated because there was no advertisement and due publicity for inviting applications from the eligible candidates at large.

**WHETHER DR. BASHIR COULD HAVE BEEN PERMITTED TO CONTINUE WORKING BEYOND THE EXPIRY OF HIS CONTRACT PERIOD:-**

41. It was explicitly mentioned in the notification dated 08.09.2007 issued by the Ministry of Water and Power that Dr. Bashir was appointed as Consultant in A.E.D.B. in MP-II scale for a period of two years with effect from 01.06.2006. Dr. Bashir's contractual employment expired on 31.05.2008. In his letter dated 24.05.2008, Dr. Bashir asserted that he was *“the most suitably qualified and experienced scientist and engineer for the post”* of Director General in A.E.S.-11 and requested A.E.D.B. for his position to be re-designated as Director General. In the said letter, Dr. Bashir pointed out that his contract as a Consultant was expiring on 31.05.2008. Vide letter dated 03.06.2008, Dr. Bashir informed the A.E.D.B. that on 31.05.2008, the contract period of his appointment as a Consultant had expired and that a case for an extension in the contract period was under process. He requested to be allowed to continue to work and be paid the salary beyond 31.05.2008 till the finalization of his case for extension.

42. In the said letter dated 03.06.2008, Dr. Bashir mislead A.E.D.B. by asserting that since he was a Member of the Board selected by the Prime Minister of Pakistan on the basis of his technical qualification, his post should be renamed as Director General. Now, at no material stage had Dr. Bashir been appointed as a Technical Member on the Board of A.E.D.B., therefore Dr. Bashir could not assert that he was appointed as a full time

Technical Member on A.E.D.B.'s Board on 04.01.2006. If that were so, there would have been no need for the Ministry of Water and Power to have subsequently moved a summary dated 23.02.2007 for the Prime Minister proposing therein that Dr. Bashir be appointed as a full time Technical Member. Therefore, it is safe to hold that Dr. Bashir was never appointed as a full time Technical Member on A.E.D.B.'s Board. Even if it is assumed that Dr. Bashir had been appointed as a Technical Member on A.E.D.B.'s Board, such an appointment could not have formed any legal basis for his appointment as a Consultant or his re-designation as a Director General beyond the expiry of this contract period. In fact, his appointment as a Member on the Board of A.E.D.B from the private sector was terminated vide notification dated 08.09.2007. Dr. Bashir's applications dated 07.07.2008 and 18.07.2012 to "*reinstate*" him as a Member, A.E.D.B. had not even been processed by A.E.D.B.

43. The Establishment Division's O.M. dated 10.11.2007 shows that the Prime Minister's Secretariat had directed that in all cases where the extension of contracts beyond the officers' age of superannuation or the expiry of the officers' contract period was under consideration, such officers should relinquish charge without waiting for the approval of the Prime Minister. The said office memorandum was brought to the notice of A.E.D.B. by the Ministry of Water and Power vide letter dated 01.12.2007. It is not disputed that the Prime Minister had not extended the period of Dr. Bashir's appointment as a Consultant beyond 31.05.2008. Accordingly, vide letter dated 07.06.2008, A.E.D.B. called upon Dr. Bashir to relinquish the charge as Consultant upon the expiry of his contract on 31.05.2008. Despite this, the C.E.O. of A.E.D.B. vide office order dated 07.06.2008 allowed Dr. Bashir to look after all matters related to I.R.E.T. in addition to his own duties. Since there was no formal order issued extending the duration of Dr. Bashir's contractual employment beyond 31.05.2008, Dr. Bashir should have been shown the door upon completion of his two-year contract appointment as a Consultant. On the basis of appointments on contract basis for fixed periods, no right – much less a vested right – can be acquired by



employees to be continued in employment after the expiry of the tenure specified in the order of their appointments.

44. The C.E.O. of A.E.D.B. could not have been considered to be vested with the authority to appoint Consultants in A.E.D.B. or to extend their employment contracts at his whim and without any competitive process. Since there is no specific provision in either the A.E.D.B. Service Regulations, 2013 or the statutes governing A.E.D.B. authorizing the C.E.O. of A.E.D.B. to appoint Consultants in A.E.D.B. or to extend their employment contracts without any competitive process, A.E.D.B.'s letter dated 07.06.2008 calling upon Dr. Bashir to relinquish the charge of Consultant on the expiry of his contract period was lawful whereas the letter dated 07.06.2008 allowing Dr. Bashir to look after all matters related to I.R.E.T. in addition to his own duties was without lawful authority and of no legal effect. In view of the above, it is held that the continuation of Dr. Bashir's services beyond the date of the expiry of his employment contract (i.e. 31.05.2008) was also unlawful.

45. Even if it is assumed that Dr. Bashir's contract period could be extended, since Dr. Bashir had been appointed as a Consultant in MP scale-II for a period of two years with effect from 01.06.2006 pursuant to a decision taken by the Prime Minister on 24.08.2007, an extension in his contract period beyond 30.05.2008 could not have been made without the approval of the Prime Minister. Be that as it may, Dr. Bashir continued working in A.E.D.B., and had been given the designation of Director General with an additional charge of C.E.O. until 20.08.2013, a few months before he was "*regularized*" pursuant to a decision of the Board Meeting held on 28.10.2013. The effect of such regularization was that Dr. Bashir was now considered as a regular/permanent employee of A.E.D.B.

**WHETHER DR. BASHIR'S SERVICES COULD HAVE BEEN REGULARIZED BY A.E.D.B.'S BOARD:-**

**Emergent meeting of the A.E.D.B.'s Board held on 28.11.2007:-**

46. An emergent meeting of the A.E.D.B.'s Board was held on 28.11.2007. Agenda item No.1a for the said meeting was "*Manpower issue: Re-employment / Extension in Contract of MP Scale Holders.*" The minutes of the said meeting show that seven officers in A.E.D.B.

had been appointed with the approval of the Federal Government in MP scales as Senior Project Developers and Project Developers with effect from 21.10.2005 on contract basis. Dr. Bashir's name was not amongst these seven officers. A case for an extension in the contract periods of these officers had been forwarded to the Ministry of Water and Power for obtaining the approval of the competent authority. As mentioned above, the Establishment Division's O.M. dated 10.11.2007 provided that officers appointed in MP scales on contract basis had to relinquish charge upon the expiry of their employment contract. In order to prevent a vacuum from being created due to the relinquishment of the charge by the seven officers who had been appointed in MP scales on contract basis and whose contract period had expired, the emergent meeting of the A.E.D.B.'s Board was called. By this time, the draft of the A.E.D.B. Employees Service Regulations had not been approved by the Federal Government. In order for the A.E.D.B. to function smoothly, the A.E.D.B. Board decided to re-adjust these officers in A.E.D.B. pay scales provided in the draft Regulations and appropriate adjustments in their respective positions and emoluments be made after the approval of the draft Regulations by the Federal Government.

47. Dr. Bashir's reliance on the office order dated 12.12.2007 issued by the A.E.D.B. is misplaced since it does not apply to him. The said office order was issued pursuant to the emergent meeting of the A.E.D.B.'s Board held on 28.11.2007, and under Section 12 and 19(b) and (c) of the A.E.D.B. Ordinance, the Chairman, A.E.D.B. approved the regularization/re-adjustment and re-designation of the officers listed in the said office order. Although Dr. Bashir's name appears at serial No.6 in the said list, it has explicitly been mentioned in the said office order that it does not apply to deputationists and the officers whose names are mentioned at serial No.3 to 10 and 12. Since Dr. Bashir's name appears at serial No.6, the said office order did not apply to him. Dr. Bashir did not assail the said office order at any material stage. The said office order dated 12.12.2007 cannot, by any stretch of imagination, be termed as an order to appoint Dr. Bashir as a Consultant in A.E.D.B. on

permanent basis in A.E.S.-10. The mere fact that Dr. Bashir's pay package was changed from MP-1 scale to A.E.S.-10 would not change the contractual nature of his appointment as a Consultant for a period of two years only.

**28<sup>th</sup> Board meeting of A.E.D.B. held on 28.10.2013:-**

48. As mentioned above, A.E.D.B.'s Board, in its 28<sup>th</sup> meeting, decided to approve Dr. Bashir's regularization of services. It ought to be borne in mind that the matter regarding Dr. Bashir's regularization started with A.E.D.B.'s letter dated 20.09.2011 whereby a request had been made to the Ministry of Water and Power to take up Dr. Bashir's case *"for fixation of pay including payment of arrears for retrospective appointment i.e. 1<sup>st</sup> June 2006 to 31<sup>st</sup> August 2007"* with the Finance and Establishment Divisions for regularization. This request was made after an audit objection was raised by the Departmental Accounts Committee on the basis of the special audit report wherein objections were raised regarding the fixation of Dr. Bashir's pay including the payment of arrears with retrospective effect. It was not suggested that Dr. Bashir's services be regularized by making him a permanent employee of A.E.D.B. The Ministry of Water and Power in its letter dated 22.06.2012 has taken the position that the case regarding the fixation of Dr. Bashir's pay as well as the payment of arrears be submitted to the Prime Minister for regularization.

49. The record of the case does not present any explanation as to how and why a matter regarding the regularization of Dr. Bashir's pay and payment of arrears turned into a matter regarding the regularization of his services. Agenda item No.5 for the 28<sup>th</sup> meeting of A.E.D.B.'s Board simply provides that vide notification dated 08.09.2007 Dr. Bashir was appointed as a Consultant in A.E.D.B. *"by the Prime Minister"* and was later temporarily adjusted in A.E.S.-10 as per the decision of A.E.D.B.'s Board in its emergent meeting held on 28.11.2007. A.E.D.B.'s Board was requested to take a decision regarding Dr. Bashir's services in A.E.D.B. It had not been proposed that Dr. Bashir's services be regularized so as to make him a permanent employee of A.E.D.B. Nonetheless, the A.E.D.B.'s Board, in its 28<sup>th</sup> meeting held on 28.10.2013, approved the regularization

of Dr. Bashir's services in A.E.S.-11. This decision had the effect of making Dr. Bashir a permanent employee of A.E.D.B. There is nothing on the record to show as to why the A.E.D.B's Board decided to regularize Dr. Bashir's services even though he had not been appointed as a Consultant in A.E.D.B. as a result of any competitive process required by Article 18 of the Constitution, read with the judgment of the Hon'ble Supreme Court in the case of Mushtaq Ahmad Moral Vs. The Honourable Lahore High Court (1997 SCMR 1043).

50. The vital question that needs to be answered is whether A.E.D.B.'s Board could have regularized Dr. Bashir's services in that he was made a permanent employee of A.E.D.B. even though he had not been through any competitive process when appointed as a Consultant on contract basis. The appointment of a person on contract basis in any Federal or a Provincial Government department or an attached department or autonomous bodies/corporations without any competitive process has been held by the Superior Courts to be a violation of Article 18 read with Article 2A, and therefore without any lawful consequence. Such a fundamental flaw in an appointment cannot be "regularized" by the decision makers at the helm of affairs in the body in which the appointment was made. The only exception to this is if the person who was appointed on contract basis without any competitive process is subjected to such a process and he is able to prove that his credentials are better than those of his competitors. Such contract/temporary employees cannot claim legitimate expectation of absorption/regularization as they knew when they were appointed that they were temporary inasmuch as the government did not give nor could have given an assurance of regularization without the regular recruitment process being followed. The songs of praise showered by an employer on an employee appointed without a competitive process are meaningless where such an employee's qualifications and ability were not assessed along with those of his competitors. Regularization of services of employees in such bodies who had been appointed on contract basis without any competitive process in my view is tantamount to playing fraud on all

those persons who would have applied if the posts were advertised as permanent posts. The regularization of such employees would be in stark contrast with the law laid down by the Superior Courts, especially the judgment of the Hon'ble Supreme Court in the case of Mushtaq Ahmad Moral Vs. The Honourable Lahore High Court (supra). In the case of B.N. Nagarajan Vs. State of Karnataka ((1979) 3 SCR 937), the Supreme Court of India clearly held that the words “regular” or “regularization” do not connote permanence and cannot be construed so as to convey an idea of the nature of tenure of appointments; and that they are terms calculated to condone any procedural irregularities and are meant to cure only such defects as are attributable to the methodology followed in making the appointments.

51. A distinction is to be drawn between an “irregularity” and an “illegality” in the process of making appointments against public posts. Regularization can only be of an irregularity but not an illegality. An appointment, whether permanent or contractual, made against a public post without issuing advertisements in newspapers for ensuring competition amongst the eligible candidates would certainly be illegal as distinguished from irregular. Such an illegality being a transgression of Article 18 of the Constitution cannot be regularized, be it under some policy or a provision in the service rules of a public sector or statutory body. Admittedly, the appointment of Dr. Bashir was not preceded by the advertisement of the post with a view to enable other eligible persons to be considered for recruitment against the post of Consultant in A.E.D.B. The non-issuance of an advertisement with a view to give opportunity for competition to other eligible persons was violative of the doctrine of equality embodied in Articles 25 and 27 of the Constitution. This fundamental deficiency in Dr. Bashir’s appointment process could not have been washed out or condoned by the A.E.D.B.’s Board’s decision to regularize his services.

52. Since Dr. Bashir’s appointment as a Consultant in A.E.D.B. without any advertisement or selection process cannot be considered to be a valid appointment, his regularization by the Board of A.E.D.B. was equally invalid. There is nothing on the

record to show that any advertisement was issued giving opportunity to all eligible candidates to compete or any selection process was undertaken before Dr. Bashir's appointment in A.E.D.B. was regularized or made permanent. Such backdoor appointments have been time and again deprecated by the Superior Courts.

53. Although the provisions of the A.E.D.B. Ordinances had provided that the six members from the private sector on the Board of A.E.D.B. were to be nominated by the Board *"with the approval of the Prime Minister,"* there is no provision in any of the said Ordinances or the A.E.D.B. Act requiring the appointment of a Consultant in A.E.D.B. to be made or approved by the Prime Minister. In view of the lack of statutory prescription in this regard, I am of the view that Dr. Bashir's appointment as a Consultant in A.E.D.B. in MP-II scale on the basis of the Prime Minister's approval of the summary dated 06.07.2007, was without any statutory sanction, and therefore unlawful. The argument that the C.E.O. or the Board of A.E.D.B. had the power to employ consultants cannot be stretched to condone the grant of employment without any competitive process.

54. It is well settled that the High Court will not exercise equitable jurisdiction in favour of a party where equitable considerations weigh against him or where his conduct is inequitable. It is not disputed that Dr. Bashir was seeking payment of salary with effect from 04.01.2006. Dr. Bashir's conduct in seeking the payment of salary from A.E.D.B. with effect from 04.01.2006 can be termed as inequitable inasmuch as for the period for which the petitioner was seeking the payment of salary was the same as the period for which the petitioner was seeking the payment of his salary from the H.E.C. Dr. Bashir had filed criminal original petition No.129/W/2006 before the Hon'ble High Court wherein it was pleaded that he had not been paid his salary after 31.05.2008 *"although [he] has been regularly attending his office at Allama Iqbal Open University Islamabad."* Vide email dated 09.08.2007, Dr. Bashir requested the H.E.C. to pay his salary for the past fourteen months. This fourteen-month period includes the period during which Dr. Bashir had been appointed as

a Member of A.E.D.B.'s Board from the private sector (i.e. between 04.01.2006 and 08.09.2007). Dr. Bashir's appointment as a Consultant in MP-II scale had been made effective from 01.06.2006 on the ground that he had performed services for A.E.D.B. from the said date. If he did indeed provide services for A.E.D.B. since 01.06.2006, his conduct in seeking payment for this period from the H.E.C. is most inequitable disentitling him to any indulgence in the discretionary jurisdiction of this Court.

55. In view of the above, we do not find any merit in these appeals, which are dismissed along with all civil miscellaneous applications with no order as to costs.

(CHIEF JUSTICE)

(MIANGUL HASSAN AURANGZEB)  
JUDGE

ANNOUNCED IN AN OPEN COURT ON \_\_\_\_\_/2020.

(CHIEF JUSTICE)

(JUDGE)

*Ahtesham\**

*Uploaded By : Engr. Umer Rasheed Dar*