

JUDGMENT SHEET.
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD.

I.C.A No. 899 of 2013

Ghulam Sarwar Sandhu

Versus

Muhammad Qasim and Others

Appellant By : M/s Muhammad Shoaib Shaheen and
Muhammad Umair Baloch, Advocates

Respondents By : Mr. Kashif Ali Malik, Advocate

Date of hearing : 20.11.2017

AAMER FAROOQ, J. - This appeal is directed against judgment dated 04.07.2013, whereby a petition filed by one Muhammad Qasim (Writ petition 1733/2013) was allowed by the Judge in Chambers and the appellant was held to have been appointed at the post of Director Housing Societies, CDA illegally.

2. The facts, in brief, are that the appellant joined respondent No.2 in 1988 and subsequently was promoted as Dy. Director General (Planning) on 26.03.2009. On 24.12.2010, he was appointed as Director General (Planning) on current charge basis. Respondent No.2 advertised two posts of Director (Urban Planning) and Director (Regional Planning) in BS-19. Pursuant to the same, applications were filed with respondent No.2 and the appellant was also one of the applicants. The candidates were scrutinized and shortlisted. The shortlisted candidates were then interviewed by the Selection Committee. Subsequently, Departmental Recruitment Committee recommended four candidates for appointment against two posts and the appellant was placed at Sr. No. 1, according to the merit. Meanwhile, initially appeal was preferred before the

Federal Service Tribunal which, however, abated. Subsequently, the process of appointment through advisement was assailed before the Hon'ble Lahore High Court by way of a petition under Article 199 of the Constitution (Writ Petition 1793/2006). In the referred petition, on 17.07.2006, in C.M. No. 2/2006, an interim injunction was granted by way of a direction that the advertised posts shall not be filled. The said petition was dismissed by this Court vide order dated 02.04.2012. On 17.04.2007, in its 10th meeting, the Board of Capital Development Authority (CDA)/ respondent No.2 decided the establishment of new wing dealing with the issues of housing societies in Zones 2 and 5 of Islamabad Capital Territory which was accordingly approved. It was further decided that instead of advertising the post of Director Housing Societies and appointing the person thereon, the summary was forwarded for appointment of the appellant against the post on which approval was accorded on 23.04.2007. Accordingly, on 16.06.2007, the appellant was appointed as Director Housing Societies, CDA. The said appointment was challenged by respondent No.1 by way of a petition under Article 199 of the Constitution (Writ petition No. 1733/2013) which was allowed by the Judge in Chambers vide the impugned judgment.

3. Learned counsel for the appellant, *inter alia*, contended that Judge in Chambers exercised *suo motu* power while setting-aside the appointment of appellant as Director Housing Societies, Planning Wing, CDA as it was beyond the prayer made in the writ petition which is not permissible in light of the decision of the Hon'ble Supreme Court of Pakistan in case reported as Dr. Imran khattak and another Vs. Ms. Sofia Waqar Khattak, PSO to Chief Justice and others (2014 SCMR 122). It was further contended that the controversy involved factual controversy which cannot be resolved in a petition under Article 199 of the Constitution. Reliance was placed on cases reported as Fida Hussain and another Vs. Mst. Saiga and others (2011 SCMR 1990); Amir Jamal and others Vs. Malik Zahoor-ul-Haq and others (2011 SCMR 1023). It was further contended that the

petition under Article 199 of the Constitution is not maintainable inasmuch as the service regulations of respondent No.2 are non-statutory; that petition is hit by laches inasmuch as appointment was made on 16.06.2007, whereas petition was filed in 2013. It was further contended that petition for *quo warranto* was filed with *mala fide*, therefore, the same merits dismissal. It was further contended that Judge in Chambers failed to take into account provisions of Capital Development Authority Ordinance, 1960 as well as Capital Development Authority Employees (Service) Regulations, 1992. In this behalf, it was contended that under the CDA Employees (Service) Regulations, 1992, method of appointment to the post of Director in the Planning Wing and/or Director Housing Societies could have been made without advertisement. It was also contended that it is trite law that an employee should not suffer because of the irregularity in his appointment by the employer.

4. Learned counsel for respondent No.2, *inter alia*, contended that the appellant applied, pursuant to advertisement, to the post of Director Planning, however, due to the injunctive order passed by the Hon'ble Lahore High Court, he could not be formally appointed and on account of new structure being created, he was appointed as Director Housing Societies. It was further contended that admittedly no advertisement was made before the appointment as Director Housing Societies which is in violation of the CDA Employees (Service) Regulations, 1992 i.e. regulation 4.09, which provides that all initial appointment on all vacancies shall be advertised.

5. Petition, filed before this Court, was in the nature of the writ of *quo warranto*. In this behalf, the Hon'ble Supreme Court of Pakistan in various pronouncements has elucidated the scope and nature of such proceedings. In case reported as Capt. (Retd.) Muhammad Naseem Hijazi Vs. Province of Punjab

through Secretary, Housing and Physical Planning and 2 others [**2000 PLC (C.S.) 1310**], the following observations were made:-

"Under Article 199(2)(b)(ii) of the Constitution of the Islamic Republic of Pakistan the High Court in exercise of its. Constitutional jurisdiction is competent to enquire from any person, holder of a public office to show that under what authority lie is holding the said office. In such-like cases where a writ in the nature of quo warranto is instituted the duty of the petitioner is to lay an information before the Court that such and such officer has no legal authority to retain such office. For a petitioner who acts, in fact, as an informer is not required to establish his locus standi to invoke the jurisdiction of the Court. Writ of quo warranto in its nature is an information laying against persons who claimed or usurped an office, franchise or liberty and was intended to inquire by what authority he supported his claim in order that right to office may be determined. It is necessary. for the issuance of writ that the office should be one created by the State of character or by statute and that the duty should be of a public nature. Writ of quo warranto could be moved by "any person who even may not be an aggrieved party but is holding a public office created by character or statute by the State". Any person can move the High Court to challenge the unauthorized occupation of a public office. On any such application Court is not, only to see that the incumbent is holding the office under the order of a Competent Authority but it is to go beyond that and see as to whether he is legally qualified to hold the office or to remain in the office. The Court has also to see if statutory provisions have been violated in making the appointment. The invalidity of appointment may arise not only from want of qualifications but also from violation of legal provision for appointment."

Similarly in case reported as Malik Nawab Sher Vs. Ch. Muneer Ahmad and others (2013 SCMR 1035), the august apex Court following its earlier decision in case reported as Pakistan Tobacco Board Vs. Tahir Raza (2007 SCMR 97) observed as follows:-

"It was held that in writ of quo warranto the jurisdiction of the Court was primarily inquisitorial and not adversarial and thus the Court could undertake such inquiry as it may deem necessary in the facts and circumstances of the case, including the examination of the entire record and such exercise can even be done suo motu even the intension of the High Court is not drawn by the party concern."

In Hafiz Hamdullah Vs. Saifullah Khan and others (PLD 2007 SC 52), the Hon'ble Supreme Court of Pakistan observed as follows:-

"A writ of the quo warranto is in the nature of laying an information before a Court, against a person who claimed and usurped an office, franchise or liberty, requesting for holding an enquiry to enable him to show the authority under which he supported his claim of right to the office, franchise or liberty. Its object is to determine the legality of the holder of a statutory or constitutional office and decide whether he was holding such office in accordance with law or was unauthorizedly occupying a public office. Where a person prays for a writ of quo warranto the Court would be under an obligation to enquire whether the incumbent is holding the office under the orders of a competent authority and also to examine whether he would be legally qualified to hold the office or to remain in the office. For issuance of a writ of quo warranto the person invoking the jurisdiction of the High Court under Article 199 of the Constitution is not required to fulfill the stringent conditions required for bringing himself within the meaning of an aggrieved person. Any person can move the High Court to challenge the usurpation or unauthorized occupation of a public office by the incumbent of that office and he is not required to establish his locus standi to invoke the constitutional jurisdiction under Article 199 of the Constitution in a manner as generally required by the said Article."

The principles discerned from the above judgments of the Hon'ble Supreme Court of Pakistan are that in order to institute a petition for *quo warranto*, a person need not be an aggrieved person; proceedings are inquisitorial in nature; Court can examine any record and undertake proceedings *suo moto* and can examine not only qualifications of a person, holding the post of public organization including the statutory organization, but also can examine mode of appointment and if the same is in violation of law, it can be struck down.

6. Sections 37 and 38 of the CDA Ordinance, 1960 provide for appointment of officers and servants as well as terms and conditions of service and disciplinary powers. Likewise, Sections 50 and 51 of the referred Ordinance empower CDA to make rules and regulations receptively. Under the CDA Employees (Service) Regulations, 1992 i.e. Regulation 4.09, all vacancies which are to be filled by initial appointment shall be advertised in such newspapers as may be considered appropriate. Admittedly no advertisement was made by respondent No.2 for appointment of Director Housing Societies which is in violation of regulation 4.09 *ibid*. The Hon'ble Supreme Court of Pakistan in various

pronouncements has held that where initial appointment is being made even on ad hoc basis, the same should be in a transparent manner after advertisement and following the prescribed procedure. This Court in Ms. Shagufta Hashmat, etc. Vs. Federation of Pakistan, through Secretary Cabinet Div., etc. (Writ Petition No. 2117/2016), observed as follows:-

"In the case titled "Dr Naveeda Tufail and 72 others v. Government of Punjab and others" [2003 SCMR 291] the august Supreme Court has observed and held as follows:

"The making of recruitment on ad hoc basis with or without advertisement of the post in the normal circumstances, amounts to curtail the legitimate right of appointment of deserving persons on regular basis and is against the policy of law. The concept of ad hoc appointment against the posts in public sector is a stopgap arrangement which is not the permanent character of the civil service. It is not proper in the public sector to occupy the posts required to be filled through the method prescribed by law by making ad hoc appointments and allow the incumbents to continue in the same position beyond the terms of their employment without taking any step for the filling the posts on regular basis. It was observed by this Court in Abdul Jabar Memon and others (1996 SCMR 1349) that there can be no justification to take keep the posts nationally vacant by making ad hoc appointments and keep the ad hoc employees hanging in the same situation for number of years with the understanding of their adjustment on permanent basis and ultimately they are informed that they are no more required. This method of appointments in the public sector by the functionaries is misuse of the authority of law as in the normal circumstances, recruitment against the posts in the Government Department, the statutory bodies and organizations should be filled within reasonable time by following the procedure provided under the law for fulfilling such posts on the basis of open merit through Public service Commission. There can be no exception to the policy of law that the ad hoc appointments should be made only in exceptional circumstances in exigencies of service and should not be allowed to prolong beyond the period for which the appointment was made and keeping a person continuously as an ad hoc employee by extending his period of service would definitely create a legitimate expectancy in his mind for regularization."

It has been further observed as follows:

"There is no cavil to the proposition that an ad hoc employee has no right to hold the post beyond the period for which he was appointed and it is also not right for the Government to continue ad hoc appointments for number of years without undertaking the exercise of selection on regular basis in the prescribed manner. The ad hoc appointment is appointment of a duly qualified person made otherwise in accordance with prescribed method of recruitment and is made only in exceptional circumstances. This stopgap arrangement as a temporary measure for a particular period of time does not by

itself confer any right on the incumbent for regular appointment or to hold it for indefinite period but at the same time if it is found that incumbent is qualified to hold the post despite his appointment being in the nature of precarious tenure, he would carry the right to be considered for permanent appointment for considerable length of time would create an impression in the mind of the employee that he was being really considered to be retained on regular basis."

17. In the case titled 'Mushtaq Ahmad Mohal and others v The Honourable Lahore High Court, Lahore and others' [1997 SCMR 1043] the august Supreme has held:

"We reiterate that the appointment 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."

18. In the case titled "Syed Mubashir Raza Jaffri and others v. Employees Old Age Benefits Institutions (EOBI) through President of Board, Board of Trustees and others" [2014 SCMR 949] the august Supreme Court, after examining the precedent law, has observed and held as follows:

"All the cases discussed above reveal that the jurisdiction of this Court has been clear and consistent with regard to the manner in which appointment to public offices are to be made strictly in accordance with applicable rules and regulations, without any discrimination and in a transparent manner. Thus, it is essential that all appointments to public institutions must be based on a process that is palpably and tangibly fair and within the parameters of its applicable rules, regulations and bye-laws."

19. The august Supreme Court, in the case titled "Suo Motu Action Regarding Eligibility of Chairman and Members of Sindh Public Service Commission etc" [2017 SCMR 637], has held as follows:

"If through a discriminatory selection process civil servants are selected and appointed it would infringe Article 27 of the Constitution which states that, "No citizen otherwise qualified for appointment in the service of Pakistan shall be discriminated against." Article 25, prescribing the equality of citizens, is another Fundamental Right which is attracted if all those who are tested and interviewed are not treated equally."

20. In the case titled "Muhammad Ashraf Tiwana and others v. Pakistan and others" [2013 SCMR 1159] the august Supreme Court has emphasized that due diligence must be exercised while making appointments and that in doing so a fair and transparent selection process ought to be adhered to. In the case titled 'Muhammad Yasin v Federation of Pakistan through Secretary, Establishment Division, Islamabad and others' [PLD 2012 S.C. 132] the august Supreme Court has observed that adherence to a credible and transparent selection process with due diligence is a pre requisite. The august Supreme Court has also emphasized that in order to ensure good governance it is inevitable to observe the highest standards of diligence, transparency and probity in selecting a person for a post.

21. In the case titled "Asaf Fasihuddin Khan Vardag v. Government of Pakistan and others" [2014 SCMR 676] the august Supreme Court has held that a public authority possessed powers only to use them for the public good and this imposed a duty to act fairly. In relation to making an appointment the august Court has held as follows:

"It is to be noted that in the cases of Muhammad Ashraf Tiwana v. Pakistan and others (2013 SCMR 1159) and Khawaja Muhammad Asif v. Federation of Pakistan (2013 SCMR 1205) this Court in exercise of powers under Article 184(3) of the Constitution has concluded that in the public interest and also to enforce their Fundamental Rights, appointments must be made on merit, lest it should cause damage to the institutions responsible for running different affairs of the Government and also generating funds for the purpose of spending on the welfare of the citizens with a view to improve standard of their life in terms of Article 9 of the Constitution. If there is corruption and corrupt practices on account of appointment of the concerned functionaries, including in pursuance of unlawful exercise of power or by causing loss in running of the affairs of public institutions, the citizens are bound to be affected directly or indirectly. Therefore, their Fundamental Rights under Article 9 of the Constitution are not enforced in letter and spirit."

22. In the case titled "Chief Secretary Punjab and others v Abdul Raoof Dasti" [2006 SCMR 1876] the august Supreme Court, in relation to the appointment of a person in public service, has held as follows:

"We need to remind ourselves that choosing persons for public service was not just providing a job and the consequent livelihood to the one in need but was a sacred trust to be discharged by the ones charged with it, honestly, fairly, in a just and transparent manner and in the best interest of the public. The individuals so selected are to be paid not out of the private pockets of the ones appointing them but by the people through the public exchequer. Therefore, we must keep it in mind that not selecting the best as public servants was a gross breach of the public trust and was an offence against the public who had right to be served by the best. It is also blatant violation of the rights of those who may be available and whose rights to the said posts are denied to them by appointing unqualified or even less qualified persons to such posts. Such a practice and conduct is highly unjust and spreads a message from ones in authority that might was right and not vice versa which message gets gradually permeated to the very gross root level leading ultimately to a society having no respect for law, justice and fair play. And it is the said evil norms which ultimately lead to anarchic and chaotic situations in the society. It is about time we suppressed such-like evils tendencies and eliminated them before the same eliminated us all."

23. In the case titled "Government of N.W.F.P through Secretary Forest Department, Peshawar and others v Muhammad Tufail Khan" [PLD 2004 Supreme Court 313] the august Supreme Court reiterated the law expounded in the earlier judgments titled "Munawar Khan v. Niaz Muhammad" [1993 SCMR 1287], "Mushtaq Ahmed Mohal v. Lahore High Court" [1997 SCMR 1043], "Obaidullah v. Habibullah" [PLD 1997 S.C. 835] and "Abdul Rashid v. Riazuddin" [1995 SCMR 999] by observing as follows:

"The Courts are duty bound to uphold the Constitutional mandate and to keep up the salutary principle of rule of law. In order to uphold these principles it has been stated time and

again by the superior Courts that all the appointments are to be made after due publicity in a transparent manner after inviting applications through Press from all those who are eligible, deserving and desirous."

Respondent No.2 instead of advertising the post for Director Housing Societies decided to adjust the appellant who had applied for the post of Director (Urban Planning) and/or Director (Regional Planning). The referred decision by respondent No.2 is not in accordance with law settled by the august Apex Court as well as service regulations of respondent No.2. The applicants who might be more competent than the appellant could have applied for the post of Director Housing Societies and the said post had no nexus with the earlier two advertised posts.

7. The objection raised by the learned counsel for the appellant that Judge in Chambers has travelled beyond the relief sought in the petition under Article 199 of the Constitution, is not correct as challenge to the appointment of the appellant was made which has been so declared by the Judge in Chambers. Likewise, other objections regarding controversy being factual in nature and the petition being barred by laches are also not tenable inasmuch as no factual controversy is involved which has to be resolved by way of evidence; moreover, laches is not an absolute bar to the filing of writ petition in light of the law laid down by the august apex Court in case reported as Pakistan Post Office Vs. Settlement Commissioner and others (1987 SCMR 1119). The appointment of the appellant was made clearly in violation of law declared by the august apex Court. The fact that the service regulations of respondent No.2 are non-statutory does not mean that an absolute discretion is vested with respondent No.2 to make appointment in any way as is deemed appropriate. Respondent No.2 is a statutory organization and acts as a regulator vis-à-vis affairs of the Islamabad Capital Territory. Hence, it was imperative for respondent No.2 to have followed the law while appointing the appellant in a transparent manner according to the established principles. The appellant was aware of the fact that he is being

appointed on the post of Director Housing Societies for which he had not applied, therefore, cannot claim ignorance and attribute fault only to respondent No.2 as irregularity on its part.

8. For the above reasons, the instant appeal is without merit and is accordingly **dismissed**.

(MOHSIN AKHTAR KAYANI)
JUDGE

(AAMER FAROOQ)
JUDGE

Announced in open Court this _____ day of February, 2018.

JUDGE

JUDGE

M.Shah/.

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