

IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:

MR. JUSTICE GULZAR AHMED, CJ

MR. JUSTICE IJAZ UL AHSAN

MR. JUSTICE SAYYED MAZAHAR ALI AKBAR NAQVI

AFR

Civil Appeals No.617 to 626 of 2020

*Against judgment dated 12.02.2020 of Peshawar High Court,
Bannu Bench, passed in Writ Petitions No. 759-B, 296-B, 586-B,
609-B, 581-B, 192-B, 195-B, 193-B, 196-B of 2019 and 649-B
of 2018.*

Khushal Khan Khattak University
through its Vice Chancellor and
others

Appellants

(in all cases)

VERSUS

Jabran Ali Khan and others

Respondents *(in CA#617/20)*

Riaz Ullah and others

Respondents *(in CA#618/20)*

Muhammad Fayaz-ud-Din

Respondents *(in CA#619/20)*

Ikram Ullah and others

Respondents *(in CA#620/20)*

Zarbat Khan and others

Respondents *(in CA#621/20)*

Ali Ehtisham and another

Respondents *(in CA#622/20)*

Muhammad Siar and others

Respondents *(in CA#623/20)*

Rehman Ullah and others

Respondents *(in CA#624/20)*

Muhammad Awaiz and others

Respondents *(in CA#625/20)*

Nauman Khalid and others

Respondents *(in CA#626/20)*

For the Appellant(s)

: Mr. Ghulam Mohyuddin Malik, ASC
(via video link from Peshawar)

For the Respondent(s)

: Mr. M. Shoaib Shaheen, ASC
Nos. 1-5 in CA#617 & 1 in CA#623-626/20
Mr. M. Junaid Akhtar, ASC
Nos. 1-8 in CA#618, 1 in CA#619, 620 & 1-2 in CA#622/20
Mr. Imran Fazal, ASC
Nos. 1-6 in CA#621/20

Date of Hearing

: 23.02.2021

JUDGMENT

IJAZ UL AHSAN, J. Through single this
judgment, we intend to decide Civil Appeals (hereinafter to be

referred as "CA") No.617 to 626 of 2020 as they involve a common question of law.

2. Through the instant Appeals, the Appellants have challenged a Judgment of the Peshawar High Court, Bannu Bench dated 12.02.2020 passed in Writ Petitions No.759-B, 296-B, 586-B, 609-B, 581-B, 192-B, 195-B, 193-B, 196-B of 2019 and 649-B of 2018. The Respondents had, through their Constitutional Petitions, challenged the decision of the Promotion and Selection Committee which had declared them as unsuccessful for appointment to various posts such as those of Lower Division Clerks. The challenge was allowed and the Appellants were directed to regularize/confirm the Respondents against their respective posts.

3. The necessary facts giving rise to this *lis* have elaborately been laid out in the leave granting order of this Court dated 07.07.2020. The basic controversy revolves around the denial to the Respondents of regular employment by the Syndicate of the Khushal Khan Khattak University (the "**University**") and that of the Promotion and Selection Committee (the "**P&SC**").

4. Leave to Appeal was granted by this Court vide order dated 07.07.2020 in the following terms:-

"Leave to appeal is sought against the judgment of the Peshawar High Court, Bannu Bench dated 12.02.2020. Through the impugned judgment, constitutional petitions filed by the Respondents were allowed and a direction was issued that their contractual services shall be deemed to be

on regular basis for the purpose of inter se seniority and those who were appointed on regular basis.

2. The Respondents were appointed on temporary posts for a period of six months on contingency basis under Section 11(5)(d) of the Khyber Pakhtunkhwa Universities (Amendment) Ordinance, 2016 ("the Amendment Ordinance"). Under the Amendment Ordinance, the Vice Chancellor has powers to create and fill temporary posts for contingency requirements for a period not exceeding one year. It is stated that the Respondents were engaged on temporary basis in exercise of such powers vide appointment letter dated 18.07.2016. Later, the Respondents alongwith others applied for the advertised posts of LDCs/KPOs and although they qualified for the screening test but failed the skill test and were therefore neither interviewed nor selected for regular posts. The process was completed in April, 2017.

3. Feeling aggrieved, the Respondents approached the learned High Court by way of constitutional petitions. The learned High Court directed the Syndicate of the University to look into the matter. The Syndicate constituted an inquiry committee which held fresh interviews. The University Promotion and Selection Committee did not recommend any of the Respondents, who again approached the learned High Court by stating that its earlier judgment had not been implemented and they had unlawfully been kept out of employment.

4. It appears that contracts of the Respondents, in the meantime, had expired. The learned High Court allowed the constitutional petitions vide the impugned judgment and issued the aforesigned directions.

5. It is argued by the learned ASC for the petitioners that the learned High Court erred in law in ignoring the provisions of the Amendment Ordinance especially the powers of the Vice Chancellor under Section 11(5)(d) thereof. Further, the relief granted by the learned High Court could not have been granted in view of the fact that contractual employment of the Respondent had since come to an end and they were no longer in service. It was also argued that the High Court wrongly held that the Promotion and Selection Committee had no mandate to interview the Respondents and

recommend them for appointment or otherwise as permanent employees of the University. It is further maintained that the process was neither in violation of the earlier order of the High Court nor did the Syndicate act beyond jurisdiction in constituting a Committee to test the skills and abilities of the Respondents to perform jobs against which they sought regularization. It is also argued that the posts in question had already been filled though open/competitive process of test and interview. He adds that the learned High Court acted illegally and beyond its jurisdiction to override the decision of the competent forum i.e. the Syndicate of the University.

6. *Leave to appeal is therefore granted to consider inter alia the aforenoted questions. Let appeal stage paper books be prepared on the available record. However, the parties are at liberty to file additional documents, if any, within a period of one month. As the matter relates to service, the Office is directed to fix the same for hearing in Court expeditiously, preferably after three months.*

7. *In the meantime, operation of the impugned judgment shall remain suspended.”*

5. The arguments of the learned counsel for the Appellants have been discussed in detail in our order granting leave as noted above. The main thrust of his arguments is that the Respondents were properly appointed on contract and the Promotion and Selection Committee made the decision not to appoint them on regular basis and as such, the learned High Court could not have stepped into the shoes of the Syndicate and order the regularization of the Respondents.

6. The learned counsel for the Respondents submits that the Appellants appointed others in place of the Respondents which clearly indicates *mala fides* on the part of

the Appellants. He adds that the appointment of others in place of the Respondents is based on favouritism by the Acting Vice Chancellor of the University. Further, that the Syndicate transgressed the order of the learned High Court dated 12.11.2018 wherein specific directions were issued to the Syndicate to probe into the matter of alleged favouritism and to see whether the Respondents qualified the Skill Test. Lastly, the learned counsel stated that the P&SC in its 8th meeting illegally declared the Respondents as unsuccessful.

7. Heard. Record perused. The issues that fall before this Court for determination are as follows:-

- (i) *Did the Syndicate act in violation of the order dated 12.11.2018 of the learned High Court;*
- (ii) *Did the regular employment of others confer a vested right on the Respondents for regularization; and*
- (iii) *Could the High Court go into factual controversies while exercising jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (the "Constitution").*

DID THE SYNDICATE ACT IN VIOLATION OF THE ORDER DATED 12.11.2018 PASSED BY THE LEARNED HIGH COURT?

8. The learned High Court vide order dated 12.11.2018 in Constitutional Petition No.798-P of 2017 issued, *inter alia*, the following directions to the Syndicate:-

1. *Whether the Petitioners qualify the skill test conducted by the University?*
2. *Whether undue favour was extended to Respondents No. 4 to 14 and illegality was committed in the process of selection and appointment of Key Punch Operators and Lower Division Clerks?*
3. *Whether Muhammad Zubair, Chairman Computer Science Department disowned result of skill test*

prepared by the University and appended with the comments? (sic)"

9. The Syndicate constituted an inquiry committee which held its first meeting on 02.03.2019 which *inter alia* held as under:-

" i. All the petitioners except Mr. Asim Nawaz (LDC) who has failed the skill test may be called for interview and if they succeeded to qualify the interview be considered strictly in accordance with law".

The learned High Court has held that the Syndicate bypassed the order of the learned High Court and instead of probing into the matter itself, constituted an inquiry committee. We are unable to agree with this finding of the learned High Court for the reason that it is for the Syndicate to decide how to conduct its affairs in the best possible manner as long as the object of the order was met and the report of the Syndicate owned and endorsed the findings of the Committee. The Syndicate on account of its volume constitution and nature of work could not, as a body, have conducted the sort of inquiry as directed by the High Court. Appointment of a Committee for the said purpose consisting of credible and impartial persons enjoying the trust and confidence of the Syndicate was sufficient and adequate compliance of the order of the High Court. The Syndicate decided to refer the matter to an inquiry committee appointed by it. We do not see any illegality in the same. We therefore find that there was no violation on part of the Syndicate of the order of the learned High Court dated 12.11.2018. The learned High Court could not have stepped into the shoes of

the Syndicate, micromanaged and decided how it ought to organize and run its affairs especially when there is no illegality, bias or partiality alleged against the Inquiry Committee.

10. The learned High Court has further held that a proper order was not passed by the Syndicate. We are unable to agree with this finding for the reason that the inquiry committee was acting on instructions and authorization received from the Syndicate and as such, delegation of such powers to the said committee cannot be termed as illegal or improper. As stated above, the matter related to the internal working and procedures of the Syndicate and in the absence of bias, partiality or lack of transparency on the part of the Committee the same could not have been interfered with. The said committee, under lawfully delegated authority passed an order which addressed the issues raised by the High Court. As such, the same could not have been rejected without assigning cogent and legally sustainable reasons.

11. The learned Counsel for the Appellants has pointed out that the contracts of the Respondents expired in March 2018 whereas the judgment of the High Court was delivered in December 2018. As such, the Constitutional Petition pending before the learned High Court had become infructuous insofar as it could not have been entertained because the Respondents had ceased to be in the employment of the Appellants. In any event the High Court lacked

jurisdiction to revive or renew expired contracts. The judgment of the learned High Court, in the facts and circumstances of the instant case, could only apply prospectively and not retrospectively. Conferring a retrospective right upon the Respondents when their contracts had already expired was *ex facie* erroneous, illegal and without jurisdiction.

12. Even otherwise, it is settled law that continuity in service is required for seeking regularization. Since the contracts of the Respondents had expired in March 2018, it could not be held by any stretch of the language that there was no break in the continuity of their service. The Appellants were at liberty to dispense with the services of the Respondents in accordance with the terms and conditions of the contract which were accepted by the Respondents when they accepted contractual employment. The High Court could not have amended or altered the terms and conditions of the contract of the Respondents in exercise of its constitutional jurisdiction under Article 199 of the Constitution.

DID THE REGULAR EMPLOYMENT OF OTHERS CONFER A VESTED RIGHT ON THE RESPONDENTS OF REGULARIZATION?

13. It is settled law that there is no vested right to seek regularization for employees hired on contractual basis unless there was legal and statutory basis for the same. Reliance in this regard is placed on a recent judgment of this Court reported as Government of Khyber Pakhtunkhwa,

Workers Welfare Board v. Raheel Ali Gohar (2020 SCMR 2068) which provides as under:-

"6. In any case, this Court in recent judgments has unequivocally held that contractual employees have no automatic right to be regularized unless the same has specifically been provided for in a law. Most recently, in a judgment of a bench of this Court in Civil Petitions Nos. 4504 to 4576, 4588 and 4589 of 2017 dated 08.01.2013 this court has held that:

"Having heard the learned counsel for the parties, we find that contractual employees have no right to be regularized until there is a law provided to that effect and we are not confronted with any such legal proposition. They are the contractual employees and they have to serve till the pleasure of their master and in case of any wrongful termination, which according to them has taken place, they cannot seek the reinstatement. At the best, they can only have the compensation for the wrongful termination by applying to the competent court of law. Resultantly, these petitions are converted into appeals and allowed, and the impugned judgment is set aside."

14. The learned Counsel for the Respondents has not been able to show us any law which conferred a right upon the Respondents to be regularized. The assertion of the learned ASC that since others were regularized, the Respondents should also be regularized despite there being no statutory basis has not impressed us. As noted above, the Respondents could not claim regularization as a matter of right. Even otherwise, all the appointment orders of the Respondents clearly state that they would have no right to claim regularization. Therefore, the Respondents cannot disown the terms and conditions of their own employment contracts and claim permanent employment when at the very

inception of their employment they had accepted contractual employment on the conditions that they would have no right to claim regularization.

15. The learned Counsel for the Respondents has not been able to satisfy us how the Respondents could have approached the High Court in its Constitutional Jurisdiction, being contractual employees, for a right that was not conferred upon them in their contracts or otherwise. No vested right was denied to the Respondents nor any right conferred by the Constitution or any Statute was shown to have been violated. As such, the constitutional jurisdiction of the High Court could not have been invoked by the Respondents. Reliance in this regard is placed on the judgment of Raheel Ali Gohar *supra* where this Court has held that:-

"8. In addition to these issues, we also find ourselves at odds with the fact that the present Respondents approached the High Court in its writ jurisdiction to seek regularization without there being any law conferring a right that may have been denied and was sought to be enforced by way of a petition under Article 199 of the Constitution. It is settled law that as contractual employees, the relationship between the Respondents and the Appellant is governed by the principle of master and servant. In these circumstances, the Respondents did not have the right to approach the High Court to seek redressal of their grievances relating to regularization. As noted above, in case of a contractual dispute the Respondents could have sought appropriate redressal of their grievances before a competent court of law. However, only by virtue of being contract employees, no automatic right of regularization has accrued in their favour. In this regard, reference may also be made to the judgment of this Court in Chairman NADRA, Islamabad and another v. Muhammad Ali Shah and others (2017 SCMR 1979)."

16. The learned Counsel for the Appellants has drawn our attention to the parawise comments of the Appellants which state that the Respondents were exempted from appearing in the Skill Test in compliance with the order of the learned High Court. This is the admitted position as well. The Respondents were given a second chance and did not qualify for appointment in their interviews on account of poor performance. As such, the learned High Court had no jurisdiction to interfere in the matter and its findings to this effect are not sustainable inasmuch as it is stated that the Syndicate could not have interviewed the Respondents to assess their fitness and suitability to hold their respective posts. To say the least, we are quite surprised by the observation of the learned High Court which in essence bars an employer from assessing the competence and fitness of a person before employing him. This could obviously not be the intent of the said observation.

17. The learned Counsel for the Respondents has alleged *malafides* on part of the Appellants in not appointing the Respondents. We note that other than a mere allegation of *mala fides* no material of any nature has been placed on record to substantiate the allegation. It needs no repetition that *mala fides* where alleged must be proved. We also note that the P&SC comprised of five independent members of good credentials and standing and nothing has been shown or even alleged indicating *mala fide* or bias against the

Appellants. Notwithstanding the above, we note that even otherwise, the Vice Chancellor only has the power to fill temporary posts for a limited duration and is neither competent nor has the power to make permanent appointments as provided in Section 11(5)(d) of the University of KP (Amendment) Act 2016 which provides as under:-

"(5) The Vice-Chancellor shall also have the powers to (d) create and fill temporary posts for a period not exceeding one year after which the posts shall stand abolished;"

COULD THE HIGH COURT GO INTO FACTUAL CONTROVERSIES INVOLVED IN THE CASE WHILE EXERCISING JURISDICTION UNDER ARTICLE 199 OF THE CONSTITUTION?

18. The learned Counsel for the Respondents has alleged that the P&SC and the Syndicate disenfranchised the Respondents and this act was *mala fide* and discriminatory. Further, the learned High Court has made the following observations in the impugned judgment:-

"The finding of the Promotion & Selection Committee is based on malafide and to justify the non-appointment of petitioners declared them failed in the so-called interview. As the petitioners were not treated in accordance with the law, and Constitution of 1973 and as they were meted out with discrimination and were ousted and deprived of their legal, constitutional and vested right to be appointed on the posts, for which they had successfully, went through all the codal formalities and had passed not only the test conducted through ETEA but also the skill test."

The above findings of the High Court are neither supported by the record nor by the law on the subject. Further, these findings are in contradiction to the order dated 12.11.2018 passed by the High Court for the reason that the High Court had itself directed the Syndicate to undertake an

inquiry into the matter. Once having reposed confidence in the Syndicate, it could not have substituted the findings of the Syndicate without proof of *mala fides*, bias, illegality or lack of transparency which was non-existent in the instant case. Further, all the findings recorded by the learned High Court in the impugned judgment relate to questions of fact which could not have been gone into in exercise of constitutional jurisdiction specially so since these required recording of evidence which exercise could not have been and was not undertaken by the High Court.

19. We also find that the learned High Court arrogated to itself the executive function of being the appointing authority which function is beyond the pale of jurisdiction of the High Court and militates against the fundamental concept of trichotomy of powers which is a foundational block of our Constitutional scheme. Further, the High Court in our opinion lacked the power to direct regularization of the Respondents in the absence of a legal and statutory basis for the same. The Appellants have in their parawise comments specifically distinguished the posts which were regular, and those, which were not. The learned High Court has omitted to examine this aspect of the matter and has made sweeping and generalized observations that are against the record as well as the facts and circumstances of the cases before it.

20. We find that the Impugned Judgment of the High Court proceeds on an incorrect factual and legal premise

which is not supported by the law, rules and regulations relevant to the facts and circumstances of the cases before it. The same is therefore unsustainable in law as well as facts and liable to be set aside.

21. For reasons recorded above, we allow these Appeals and set aside the impugned judgment of the Peshawar High Court dated 12.02.2020.

sd/J=HCJ
Sd/J=J
Sd/J=J

Announced in Court on 26.04.21 at
Islamabad

sd/J=J

NOT APPROVED FOR REPORTING

(sd/J=J)