IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

Present:

Mr. Justice Jamal Khan Mandokhail
Mr. Justice Muhammad Ali Mazhar
Mr. Justice Syed Hasan Azhar Rizvi

Civil Appeals No.26-K to 38-K of 2021

Against the judgment dated 08.04.2021 passed by High Court of Sindh, Karachi in Constitutional Petitions No. D-6241, D-6229, D-2732, D-4271/2017, D-5995, D-9016/2018, D-4107, D-7376/2019, D-4292 and D-4902/2020

CMAs.7436 & 3498/2021 IN CPLAs No.NILL/2021
(Permission to file and argue)

Abdullah Jumani and others	(In CA.26-K/21)
Tariq Ali and others	(In CA.27-K/21)
Anjum Badar	(In CA.28-K/21)
Yasir Iqbal and others	(In CA.29-K/21)
Tajamul Hassan	(In CA.30-K/21)
Syed Masoom Ali Shah and another	(In CA.31-K/21)
Abdullah	(In CA.32-K/21)
Dr. Gul Hassan Qutrio & others	(In CA.33-K/21)
Fahad Ahmed Shaikh and others	(In CA.34-K/21)
Akram Basheer and others	(In CA.35-K/21)
Khurram Rauf Khan	(In CA.36-K/21)
Muhammad Tayyab	(In CA.37-K/21)
Ms. Saba Wake	(In CA.38-K/21)
	...Appellants

Versus

Province of Sindh & others	(In all cases)
	...Respondents

For the Appellants:	Mr. Abid S. Zuberi, ASC
	Mr. Abdul Salam Memon, ASC
	Mr. Malik Naeem Iqbal, ASC
	Mr. Muhammad Shoaib Shaheen, ASC
	Mr. Muhammad Iqbal Chaudhry, AOR
	Mr. K. A. Wahab, AOR
	Anjum Badar, Saba Wakeel, in-person
For the Respondents:	Mr. Soulat Rizvi, Addl. AG Sindh
	Mr. Shafiq Ahmed, ASC
	Mr. Bhuromal, LO (Focal Person)
	Mr. Abdul Razzaq, Dy. Secretary
	Mr. Abdul Samih, Dy. Dir. (L)
	Mr. Ahmed Ali, SO
	Ms. Tehmina Rahman, F.P. (WDD)
Date of Hearing:	29.12.2023

JUDGMENT

MUHAMMAD ALI MAZHAR, J. These Civil Appeals are directed against the common judgment dated 08.04.2021 passed by the Sindh High Court, Karachi, in Constitutional Petitions No.D-6241, D-828, D-5115/2016, D-2683, D-4516, D-6229/2017, D-2732, D-4271/2018, D-5995, D-9016/2018, D-4107, D-7376/2019, D-1572, D-4292, and D-4902/2020, whereby the Constitutional Petitions were dismissed with certain directions.

2. The cursory statistics of the case are that in the year 2009, respondent No.1 published an advertisement in different newspapers for inviting applications to fill up the vacancies of Deputy District Attorneys in the Solicitor Department. The petitioners applied for the post, and after careful examination of their credentials and experience, respondent No. 1 appointed them to the post of Deputy District Attorneys on contract basis. The contractual services were extended from time to time with the total length of six years. In the year 2013, respondent No. 1 promulgated the Sindh (Regularization of Adhoc and Contract Employees) Act, 2013 (**"2013 Act")** and according to Section 3 of the 2013 Act, an employee appointed on ad hoc and contract basis against the post of BS-1 to BS-18 who is eligible for appointment on such post, and is presently in service with any government department of the Province of Sindh, shall be deemed to have been validly appointed on a regular basis. On 16.09.2014, respondent No.1 constituted three Scrutiny Committees for screening the credentials and antecedents of adhoc or contract employees for their regularization in service.

3. The anthology of facts involved in the aforesaid civil appeals characterizes that, in fact, the original petitioners approached the High Court through various constitutional petitions, entreating that, by virtue of Section 3 of the 2013 Act, the respondents be directed to issue the necessary notification for regularization and issue directions for unpaid salaries. Some petitioners also challenged the report of the Scrutiny Committees constituted for the regularization of employees. The petitioners claimed that they were appointed against the permanent posts; hence, they were entitled to all consequential benefits as permanent employees from the date of their initial appointment. Alternatively, they entreated that the respondents be

directed to treat the petitioners as regular employees in their respective grades from the date of promulgation of the 2013 Act and issue notifications accordingly. Some petitioners had prayed that the failure of the respondents to regularize the services of the petitioners is illegal, arbitrary, fanciful, discriminatory and unconstitutional. Therefore, they further prayed that the respondents be restrained from terminating the services of the petitioners as contract employees. Directions were also sought against the respondents to finalize the proceedings on the summary initiated on 07.05.2018, pursuant to the cabinet decision of the Government of Sindh for regularizing the petitioners. Declaration was also sought that the minutes of the Scrutiny Committees are *ultra vires* of the 2013 Act.

4. Leave to appeal was granted *vide* order dated 17.06.2021 in the following terms:-

> "C.M.As. No.589-K and 695-K of 2021. These CMAs are allowed and the office is directed to register the civil petitions.
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> 2. Learned counsel for the petitioners contends that the Sindh (Regularization of Ad hoc and Contract Employees) Act, 2013 (the Act of 2013) is a valid law and was made by the competent legislature and is not hit by Articles 240 and 242 of the Constitution of the Islamic Republic of Pakistan, 1973. Further contends that the Act of 2013 is made under Article 240 and in this regard has relied upon the judgment of this Court in the case of Inspector General of Police, Punjab, Lahore and others vs. Mushtaq Ahmad Warraich and others (PLD 1985 Supreme Court 159).
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> 3. The submissions made by the learned counsel for the petitioners require consideration. Leave to appeal is granted to consider, inter alia, the same. The appeals shall be heard on the available record but the parties are allowed 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, expeditiously, preferably, after three months."

5**.** The learned counsel for the petitioners collectively argued that the impugned judgment is in violation of the 2013 Act. It was further argued that the regularization of a large number of employees was reversed through the impugned judgment without affording any right of audience to such affected employees who were even not party to the proceedings. It was further contended that the impugned judgment has been passed on the basis of some misunderstanding of the applicable law which caused a grave miscarriage of justice. It was further averred that the High Court, in passing the impugned judgment, has committed judicial overreach by declaring the 2013 Act to be *ultra vires*. The said 2013 Act was never under challenge before

the learned High Court but was addressed in exercise of *suo motu* jurisdiction, which was not applicable to the High Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution"). It was further contended that the 2013 Act is a beneficial statute which was promulgated with the sole aim to secure the rights of adhoc or contractual employees. The petitioners were performing their duties since 2009 without any complaint; therefore, after promulgation of the 2013 Act, the services of the petitioners were required to be regularized and the benefit rendered to them under the 2013 Act cannot be reserved. They further argued that the eligibility and fitness of the petitioners was scrutinized and assessed by the said Scrutiny Committee and after scrutiny, their services were regularized. They further averred that the there was no challenge to the 2013 Act; neither in CP No. D- 6241/2016, nor in any of the connected petitions. Despite that, the High Court, beyond the ambit of its jurisdiction, declared the 2013 Act *ultra vires* by exercising its *suo motu* jurisdiction. In the present case, the petitioners, being contractual employees, were regularized as civil servants by the operation of law i.e., Section 3 of the 2013 Act, which is not in conflict with any provisions of the Civil Servants Act, 1973 or the Sindh Civil Servants (Appointment, Promotion & Transfer) Rules, 1974. It was further contended that the impugned judgment passed by the High Court is contrary to Article 10-A of the Constitution. In support of their arguments, the learned counsel also relied upon the judgment rendered by the High Court in the case of Dr. Iqbal Jan and others Vs. Province of Sindh and others **(2014 PLC (C.S.) 1153).**

6. The learned Additional Advocate General, Sindh, with the assistance of departmental representatives present in Court argued that the 2013 Act was promulgated for the regularization of services of contractual and adhoc employees and in various departments, by virtue of the same Act, services of many employees were regularized at a large scale. He further argued that in view of the judgment passed by the Sindh High Court in the case of Dr. Iqbal Jan and others VS Province of Sindh and others (*supra)*, directions were issued by the High Court for regularization on fulfillment of certain requirements and on the basis of the said judgment, other benches of the High Court decided the cases from time to time. He further averred that the judgment rendered in the case of Dr. Iqbal Jan was challenged by the Sindh Government in this Court but their challenge remained unsuccessful.

However, he did not deny that on the basis of the aforesaid law, the Sindh Government regularized the services of various employees performing their adhoc or contractual duties in various departments. It was further argued that the petitioners came before the High Court for their own regularization and neither they challenged the law nor the services of other employees.

7. Heard the arguments. Indeed, the petitioners in the High Court had filed their constitution petitions with the grievance that despite the promulgation of the 2013 Act, the concerned department did not regularize their contractual services. Indubitably, neither did any petitioner challenge the *vires* of the 2013 Act nor questioned the regularization of any other employee or colleague. So for all intents and purposes, the grievances of the petitioners were confined to the negation of their regularization by the government with a further plea of discrimination and non-payment of accrued salaries. The High Court not only dismissed the petitions without adverting to the real claims lodged for adjudication, but also imparted a number of opinions and directions which prejudiced the rights and interests of numerous employees already regularized or under consideration, without giving any opportunity of hearing or issuing any notice to them. As a result thereof, not only did the original petitioners approach this Court to assail the impugned judgment but certain sets of other employees also approached this Court to challenge the same impugned judgment on the notion that it gravely devastated and offended their vested right and also infringed their fundamental right of fair trial and due process as enshrined under Article 10-A of the Constitution.

8. The 2013 Act came into force on 25.03.2013. The whole controversy revolves around Section 3 of the 2013 Act which, for the ease of convenience, is replicated as under:-

> "**3.Regularization of Services of employees**-
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> Notwithstanding anything contained in the Act or rules made thereunder or any decree, order or judgment of a court, but subject to other provisions of this Act, an employee appointed on ad-hoc and contract basis or otherwise (excluding the employee appointed on daily wages and work-charged basis), against the post in BS-1 to BS-18 or equivalent basic scales, who is otherwise eligible for appointment on such post and is in service in the Government department and it's project in connection, with the affairs of the Province, immediately before the commencement of this Act, shall be deemed to have been validly appointed on regular basis."

9. The learned High Court in the impugned judgment also referred to the case of Dr. Iqbal Jan (*supra*). The minutiae of the Dr. Iqbal Jan case (*supra*) divulge that the petitioners approached the Sindh High Court in its constitutional jurisdiction for the regularization of their services. It is also a ground reality that during pendency of the Dr. Iqbal Jan case, the Sindh Government promulgated the 2013 Act. In that petition, too, the Government of Sindh filed comments but neither the *vires* of the law was in question nor did the Advocate General Office argue that the 2013 Act was *ultra vires* the Constitution. When the lawgivers declare or promulgate any law, especially a beneficial law, then it is their strenuous and arduous responsibility to implement it across the board benevolently, with an open heart, and without any conservative, rigid, or discriminatory approach.

10. The overview of the impugned judgment provides a picture of focal points articulated by the learned High Court in its judgment from paragraph 11 and onward that: (1) the petitioners are contractual employees and thus their status and relationship is regulated and governed by the principle of 'master and servant'; (2) notice was issued under Order XXVII-A, C.P.C., to the Advocate General, Sindh, to satisfy the Court regarding the *vires* of Section 3 of the 2013 Act; (3) the petitioners do not have any vested right to seek appointment on regular basis; (4) as to the alleged right of the petitioners to be regularized under Section 3 of the 2013 Act, the High Court does not agree that the *vires* of the said Section cannot be looked into by the High Court as the same is not under challenge in these proceedings; (5) the petitioners have not challenged the *vires* of the said Section 3 for the obvious reason that they are seeking benefit thereunder, however, the learned Advocate General, Sindh, has questioned the *vires* of the said Section by raising specific pleas before us; (6) all such contractual employees in BS-16, 17 and 18 who have been regularized are liable to be reversed forthwith; (7) the Chief Secretary, Sindh, is directed to submit compliance report in terms of paragraph 23 above to the Registrar of this Court within 15 days along with a list of all such contractual employees who were regularized in BS-16 and above, and; (7) finally, all the petitions and applications were dismissed by the High Court.

11. Under Article 199 of the Constitution, subject to the Constitution, a High Court may, if it is satisfied that no other adequate remedy is

provided by law then on the application of any aggrieved party, can direct a person performing, within the territorial jurisdiction of the Court, functions in connection with the affairs of the Federation, a Province or a local authority, to refrain from doing anything he is not permitted by law to do, or to do anything he is required by law to do. The High Court can also declare that any act done or proceeding taken within the territorial jurisdiction by a person performing functions in connection with the affairs of the Federation, a Province or a local authority has been done or taken without lawful authority and is of no legal effect; or on the application of any person, can issue directions that a person in custody within the territorial jurisdiction of the Court be brought before it so that the Court may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner; and can also require a person within the territorial jurisdiction of the Court holding or purporting to hold a public office to show under what authority of law he claims to hold that office; and on the application of any aggrieved person, can issue directions to any person or authority, including any Government exercising any power or performing any function in, or in relation to, any territory within its jurisdiction as may be appropriate for the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II. However, subject to the Constitution, the right to move a High Court for the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II shall not be abridged. The term 'Person" includes any body politic or corporate, any authority of or under the control of the Federal Government or of a Provincial Government, and any Court or tribunal, other than the Supreme Court, a High Court or a Court or tribunal established under a law relating to the Armed Forces of Pakistan; and prescribed law officer means in relation to an application affecting the Federal Government or an authority of or under the control of the Federal Government, the Attorney-General, and, in any other case, the Advocate-General for the Province in which the application is made. It is a settled exposition and ratification of law that the High Court does not possess any *suo motu* jurisdiction under Article 199 of the Constitution as compared to this Court which has been bestowed exclusive jurisdiction by virtue of Article 184(3) of the Constitution which is not interchangeable, switchable or transposable to the High Court while excercsing jurisdiction under the sphere and dominion of Article 199.

12. No doubt, if the constitutionality of any law is challenged in the High Court, the Court can scrutinize and survey such law and also strike it down if it is found to be offending the Constitution for absenteeism of law-making and jurisdictive competence or is in violation of fundamental rights. In unison, it also a well-settled exposition that the law should be saved, rather than be destroyed. According to the niceties of Article 240 of the Constitution, the appointments to, and the conditions of service of persons in, the service of Pakistan shall be determined (a) in the case of the services of the Federation, posts in connection with the affairs of the Federation and All Pakistan Services, by or under Act of [Majlis-e-Shoora (Parliament)]; and (b) in the case of the services of a Province and posts in connection with the affairs of a Province, by or under Act of the Provincial Assembly. Attached explanation corresponds that "All-Pakistan Service" means a service common to the Federation and the Provinces, which was in existence immediately before the commencing day or which may be created by Act of [Majlis-e-Shoora (Parliament)]. While declaring the law in question *ultra vires*, nothing was orated in the impugned judgment regarding whether the law was promulgated beyond the legislative competence or was beyond the pale or authority of Article 240 of the Constitution.

13. The function of the judiciary is not to legislate or question the wisdom of the legislature in making a particular law, nor can the judiciary refuse to enforce a law. The intention of the legislature is primarily to be gathered from the language used. The words of a statute are first understood in their natural, ordinary, or popular sense, and phrases and sentences are construed according to their grammatical meaning, unless that leads to some absurdity or unless there is something in the context or the object of the statute that suggests the contrary or that lacks legislative power. If the *vires* of a law are challenged, the burden always rests upon the person making such challenge to show that the same was violative of any of the fundamental rights or the provisions of the Constitution and where more than one interpretation is possible, the Court must prefer the interpretation which favours the validity without attributing *mala fide* to the legislature. In the case of Lahore Development Authority through D.G. and others v. Ms. Imrana Tiwana and others **(2015 SCMR 1739)**, it was held by this Court that "The power to strike down or declare a legislative enactment void, however, has to be exercised

with a great deal of care and caution. The Courts are one of the three coordinate institutions of the State and can only perform this solemn obligation in the exercise of their duty to uphold the Constitution. This power is exercised not because the judiciary is an institution superior to the legislature or the executive but because it is bound by its oath to uphold, preserve and protect the Constitution. It must enforce the Constitution as the Supreme Law but this duty must be performed with due care and caution and only when there is no other alternative".

14. It is conspicuously manifesting from the record that neither the petitioners approached the High Court to challenge the *vires* of the law nor did any other person challenge it. On the contrary, the law was in field since 2013 and under the same law, various cases of numerous contractual or adhoc employees must have been dealt with by the government. In order to examine the competency and antecedents of the contractual employees, Scrutiny Committees were also constituted. It was also not disputed by the Government that the petitioners in the High Court claimed to have been performing their contractual obligations since 2009 regularly. The petitioners approached the High Court for regularization on the backing of the 2013 Act. Therefore, the observation of the High Court deducing the relationship of master and servant is not the correct exposition of law. It is also astonishing to note that when a notice under Order XXVII-A, C.P.C., was issued to the Advocate General, Sindh, on the issue of maintainability, he allegedly argued that the law is *ultra vires* despite knowing the fact that it is not a new law but is in field since 2013 and various employees have acquired the benefit of this law. The High Court, by striking down the law in its *suo motu* jurisdiction has, in fact, passed a judgment in rem which literally binds the world as opposed to affecting only the rights and judgments inter parties.

15. The learned High Court exercised its *suo motu* jurisdiction and held that since the Advocate General is not supporting the law, hence, it could not be construed that the law is not under challenge. However, it is clear from the prayer clauses of such petitions that the *vires* of the law was never challenged nor had the Advocate General, Sindh, approached the High Court for declaring any law *ultra vires*. Under Article 140 of the Constitution, it is the duty of the Advocate General to give advice to the Provincial Government upon such legal matters, and to perform such other duties of a legal character, as may be

referred or assigned to him by the Provincial government. Nothing from the impugned judgment shows whether the Advocate General was on instructions of the government or on his own opinion allegedly opposed the law in field, while his utmost duty was to defend the law promulgated by his provincial legislature. Even if one assumes that the Advocate General pointed out some lapses or defects in law, he should have advised the government to make necessary amendments and if the law was so defective or unconstitutional or hit by legislative competence, then the government or provincial legislature could be advised to repeal the law in question or make necessary amendments for rectifying or curing its defects. However, for such facilitation, the High Court under Article 199 could not assume *suo motu* jurisdiction. It ought to have exercised its writ jurisdiction within the realm, rigors and province of powers assimilated to it without any overreaching or overstretching of jurisdiction beyond the pale of Article 199 of the Constitution. The phrase "*forum prorogatum*" originated in Roman law, which literally means "prorogated jurisdiction" i.e., extension of the jurisdiction of a court by agreement of the parties in a case which would otherwise be outside its jurisdiction.

16. In fact, the case before the High Court was to consider whether the petitioners are entitled for regularization of their services and obviously, if no case was made out, the petitions could have been dismissed. Here, however, not only were the petitions dismissed but the law was also declared *ultra vires* which disturbed and traumatized a long chain of employees who are regularized or were being regularized since 2013 by the Government of Sindh in its different departments/ministries under the same law. The impugned judgment has deprived a long chain of employees and virtually made them jobless without providing any right of audience to them which was a grave violation of Article 10-A of the Constitution and also amounts to the contravention of the principle of natural justice and due process of law. In the case of Jameel Qadir and another Vs Government of Balochistan, Local Government, Rural Development and Agrovilles Department, Quetta through Secretary and others **(2023 SCMR 1919)**, it was held by this Court that the term 'jurisdiction' in the legal parlance means the command conferred to the Courts by law and Constitution to adjudicate matters between the parties. The jurisdiction of every Court is delineated and established to adhere to and pass legal orders. Transgressing or overriding the boundary of

its jurisdiction and authority annuls and invalidates the judgments and orders. The Courts commit judicial overreach when they exercise powers beyond the compass of powers and jurisdiction entrusted to the courts through the law and the Constitution. We are again making endeavors to recapitulate the legal position with the fond hope that the High Court would keep in mind the legal position and the law declared by this court which is crystallized by a catena of decisions as under:-

1. Dr. Imran Khattak v. Ms. Sofia Waqar Khattak, PSO to the Chief Justice **(2014 SCMR 122).** It be noted that no Judge of a High Court or the Supreme Court is robed, crowned and sceptered as a King to do whatever suits his whim and caprice. In all eventualities, he is bound to abide by and adhere to the law and the Constitution. Yes, in certain cases a High Court on receipt of a letter or an application of an aggrieved person can convert it into a constitutional petition and exercise its Constitutional jurisdiction but not in the matters where the Constitution and the law of the land have provided a forum and a machinery for their settlement. It thus follows that the framers of the Constitution of 1962 and those of 1973, inasmuch as it can be gathered from the words used in Article 98 of the former and Article 199 of the latter, never intended to confer Suo Motu jurisdiction on a High Court. Article 175(2) of the Constitution leaves no ambiguity by providing that "no Court shall have jurisdiction, save as is or may be conferred on it by the Constitution or by or under any law". We would be offending the very words used in the Article by reading exercise of Suo Motu jurisdiction in it which cannot be read even if we stretch them to any extreme.

2.Jahanzaib Malik v. Balochistan Public Procurement Regulatory Authority thr. Chairman Board of Directors and others **(2018 SCMR 414)**. In this case, two years contract of the petitioner was expired on 08.04.2015 and he was granted a further extension of 2 years but said office order was not challenged by respondent No.3. The Court held that by taking Suo Motu Notice of such extension, the High Court appears to have exceeded its jurisdiction for reasons which are not legally sustainable.

3. Mian Muhammad Nawaz Sharif and others v. Muhammad Habib Wahab Al-Khairi and others **(2000 SCMR 1046).** It is true that in the order passed by the learned I.C.A. Bench, it has been held that the learned Single Judge had no suo motu jurisdiction under Article 199 of the Constitution and therefore, the proceedings initiated by him in exercise of his power under Article 199 of the Constitution in respect of the alleged illegal allotment of plots as well as mismanagement of Federal Baitul Maal Funds, were wholly without jurisdiction and were accordingly quashed.

4.Raja Muhammad Nadeem v. The State and another **(PLD 2020 SC 282)**. On the higher plane, High Court had no jurisdiction under the Constitution to take up the issue suo motu. Article 199 of the Constitution envisages an aggrieved person; there was none before the Court besides the bar of alternate remedy.

5. Mian Irfan Bashir v. The Deputy Commissioner, Lahore and others **(PLD 2021 SC 571)**. This Court held that suo motu

> exercise of judicial power not available to the High Court under the Constitution. Such exercise of judicial power by a judge passes for judicial overreach i.e., exercise of judicial power without any backing of law and clearly interfering in and encroaching on the legislative and executive domain.
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> 6.M/s Sadiq Poultry (Pvt.) Ltd. v. Government of Khyber Pakhtunkhwa thr. Chief Secretary and others **(PLD 2023 SC 236)**. It is settled law that the High Court does not have suo motu jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan (the "Constitution") as compared to this Court which has been conferred exclusive jurisdiction in the matter by the Constitution in terms of Article 184(3). The learned High Court could only pass appropriate and lawful orders on matters which have a direct nexus with the lis before it and could not overstep or digress therefrom.

17. The aforementioned Civil Appeals along with connected Civil Miscellaneous Applications No. 7436 & 3498/2021, moved for seeking permission to file and argue two CPLAs, were fixed on 29.12.2023, when the office was directed to number the said petitions and for the reasons to be followed, the Civil Appeals were allowed as well as the Civil Petitions were also converted into appeals and allowed. As a consequence thereof, the impugned judgment of the Sindh High Court dated 08.04.2021 was set aside and the matter was remanded to the High Court for deciding the Constitution Petitions afresh after providing opportunity of hearing to all the parties. Above are the reasons assigned in support of our short order.

Judge

Judge

Judge

KARACHI
29th December, 2023
Khalid
Approved for reporting