

IN THE HIGH COURT OF SINDH AT KARACHI

Constitution Petition No.D-2378 of 2017 (*Shahzad Qamer Abbas Versus Province of Sindh and others*)

Present:
Mr. Justice Muhammad Shafi Siddiqui and
Mr. Justice Muhammad Faisal Kamal Alam

Date of hearing : 02.08.2017

Date of order : _____

Petitioner
(*Shahzad Qamer Abbas*); : Represented by M/s. S.M. Shuja
Abbas Rizvi and Humaira Aftab,
Advocates.

Respondent No.1
(*Province of Sindh*)

Respondent No.2
(*Secretary Law & Prosecution*
Department, Government
of Sindh);

: Represented by Ms. Nasreen
Sehto, State Counsel alongwith
Mr. Saleem Soomro, Assistant
Draftsman, Law Department.

Respondent No.3
(*Sindh Public Service*
Commission);

: Represented by Mr. Muhammad
Yousuf Alvi, Law Officer.

Case law cited by the Petitioner's counsel.

- 1. 2016 PLC (C.S) 1130 [High Court (AJ&K)]**
(*Muhammad Javeid and others Versus Azad Jammu and Kashmir*
Government through Chief Secretary and others) [**Javeid case**]
- 2. 2015 SCMR Page-456**
(*Supreme Court of Pakistan*)
(*Ali Azhar Khan Baloch and others Versus Province of Sindh and*
others) [**Azhar case**]

Case law relied upon by Respondents' counsel.

- Other Precedent:**
- (1). **2017 PLC (C.S.) 984** [*Supreme Court*] [*Suo Motu action regarding eligibility of Chairman and Members of Sindh Public Service Commission*] [*Suo Motu Case*]
 - (2). **2009 PLC (C.S.) 640** [*Karachi High Court*] (*Syed Munawar Sultan and 6 others Sultan and 6 others Versus Province of Sindh through Chief Secretary and 2 others*). [*Sultan case*]
 - (3). **2004 PLC (C.S) 69** [*Muhammad Qasim and 6 others Versus Home Department, Government of the Punjab through Secretary, Civil Secretariat, Lahore and 2 others*] [*Qasim case*]
 - (4). **2011 PLC (C.S) 1537** [*Lahore High Court*] [*Irfan Naseer Baig and another Versus Province of Punjab through Secretary, S&GAD and 2 others*] [*Irfan case*]
 - (5). **2003 SCMR Page-1772** [*Muhammad Yar through legal Heirs Versus Muhammad*] [*Yar case*]
- Law under discussion:**
- (1). The Constitution of the Islamic Republic of Pakistan, 1973.
 - (2). The Sindh Criminal Prosecution Service (Constitution, Functions and Powers) Act. 2009 (*Prosecution Law*).
 - (3). The Sindh Prosecutors (Appointment) and Conditions of Service) Rules, 2006 (*Rules 2006*).
 - (4). Sindh Public Service Commission Act. (*Commission Law*).
 - (5). Sindh Public Service Commission (Function) Rules, 1990. (*Commission Rules*).

ORDER

Muhammad Faisal Kamal Alam, J: Through this Petition, Petitioner, who is a practicing Advocate, has called in question the

consolidated Advertisement No.1 of 2017 (*Annexure “F” of the Petition*), issued by Respondent No.3-(*Sindh Public Service Commission*), whereby, the applications were invited for various posts in different departments of Government of Sindh-Respondent No.1 (*Province of Sindh*). The Petition contains following prayer clause:

“It is prayed by the Petitioner above named that this Hon’ble Court may be pleased to pass Judgment and Decree to the following effect: -

- a) ***Declaring that the requisition and subsequent advertisement No.01/2017 dated 14.04.2017 to the extent of recruitment to the post of deputy Prosecutor General, is illegal, unlawful, unconstitutional, mala fide, arbitrary and in violation of principles of natural justice, equity and fairness, made without lawful authority and accordingly void ab-initio to set aside the same unless the previous examination result and merit list prepared by the respondent No.3 i.e. Sindh Public Service Commission in pursuance of Advertisement No.05/2011 dated 22.10.2011 are incorporated and given preference for the selection of the Post of Deputy Prosecutor General Sindh.***
- b). ***Restraining the respondents from making recruitment to the posts of Deputy Prosecutor general till the final adjudication of this Petition.***
- c). ***Directing the respondents No.1 to 3 to abstain from going beyond their jurisdiction / authority / domain and acting against the interest of Petitioner or violating his fundamental rights.***
- d) ***Directing the respondent No.3 to conduct the interview of the successful candidates vide press release No.PSC/EXAM:(S.S) 2012/ 694 dated 10.07.2012.***
- g) ***Any other relief(s) which the Hon’ble Court deems fit and proper under the circumstances of this petition.***

It is prayed in the interest of justice.”

2. The undisputed facts are that earlier Petitioner in response to the Consolidated Advertisement No.05 of 2011 (*Annexure "C" of the Petition at Page-21*) had applied for the post of Deputy Prosecutor General in Basic Pay Scale (*BPS-18*). The basic eligibility criteria was also mentioned in the said Advertisement, *inter alia*, lower and upper age limit as 25 and 35 years respectively. The Petitioner since fulfilled the basic criteria took the Pre-interview Written Test and was also declared successful as evident from the Press Release (*available at Page-25 as Annexure "D" of the Petition*). According to Mr. Shuja Abbas, the learned counsel for the Petitioner, the Interviews could not be conducted as in a subsequent Press Release dated 31.01.2013 (*Annexure "E"*), the Interviews were postponed, and it is not a disputed position, as also evident from the para-wise comments of Respondents that the Interviews were postponed on account of litigation *sub judice* in this Court at that relevant time in the shape of Constitution Petition No.D-3735 of 2011. However, Petitioner did not participate in the current Selection Process under taken in pursuant to the impugned Advertisement No.1/2017.

3. Mr. Shuja Abbas, the learned counsel representing the Petitioner has placed reliance upon the reported decisions of Javeid and Azhar cases [*supra*].

4. According to Petitioner's side, once the latter was declared successful in the pre-interview written test, then atleast he should be considered in the present ongoing Selection Process for the Post of Deputy Prosecutor General, which is being under taken in pursuant to the impugned Advertisement No.1 of 2017. It was further argued that in the above cited Azhar case, the Hon'ble Supreme Court has laid down the Rule that Post in BPS-17 and above can only be filled through Public Service Commission

and that too after publishing advertisement, in order to ensure and maintain merits and transparency in Selection Process.

5. On the other hand, learned Standing Counsel for Respondents has argued that presently the Selection Process has been conducted in a transparent manner, but earlier the same (*Selection Process*) could not be completed due to restraining orders of this Court in the above referred Constitution Petition No. D-3735 of 2011. The Respondents have also appended with their para-wise comments the restraining order passed on 21.01.2013.

6. It was stated at Bar by the learned A.A.G. that recently the above referred Constitutional Petition was withdrawn and in the intervening period they have filled up certain Posts of Deputy Prosecutor General (*DPG*) through promotion, for running the Prosecution Department in an effective manner, as large number of criminal cases are to be conducted/ prosecuted throughout the Province of Sindh.

7. With the able assistance of learned Advocates representing the parties, record of the case has been examined and their respective submissions taken into account.

8. For deciding the present case, the relevant statutes are Prosecution Law, Rules 2006 made thereunder, Commission Law and Commission Rules, which are already mentioned in the title of this order.

9. Both the above mentioned statutes and Rules have been examined. Section 7 of the Commission Law empowers the Respondent No.3 to take examination for initial appointment for such post which is connected, *inter alia*, with the affairs of the Province of Sindh. Similarly, Rule 2(g) of the Commission Rules defines the test to include either one or more; (a) written

examination (b) interview and (c) viva voce. In terms of Rule 3, the Commission is empowered to conduct test for initial recruitment for the civil post in BPS-11 to 22. Section 14 of the Prosecution Law contemplates that except for the Prosecutor General, the members and staff in the Sindh Criminal Prosecution Service is to be appointed and governed under the Sindh Civil Servants Act, 1973 and Rules made there under. The induction in the Sindh Criminal Prosecution Service (*as defined in Section 2 (o) of the Prosecution Law*) can be made through three modes as provided by Rule 3 of the Rules 2006; (i) by initial appointment on regular basis on the recommendation of the Sindh Public Service Commission (ii) on contract basis for a non-extendable period of three years on the recommendation of Selection Committee as constituted under Rule 5 (*of the said Rules*) and (iii) through promotion / transfer as contained in Rule 9.

10. The case law cited by the Petitioner's counsel has been taken into account. The Judgment of learned High Court (*AJ&K*) in Javeid case [*supra*] is not helpful to the Petitioner as in that case the Petitioner was already in service and was working as a Junior Clerk and laid his claim on the advertised post in terms of 60% allocated quota of initial recruitment and after successfully clearing his written test, interviews were also conducted, but after completion of Selection Process the advertised post was withdrawn; with these set of facts the learned High Court of Azad Jammu and Kashmir was of the view that since Selection Process was finalized, therefore, the disputed post could not have been withdrawn by the Government. Admittedly, none of these factors are present in the instant *lis*.

11. The second Judgment of Hon'ble Apex Court, in our considered view, with regard to maintaining transparency and Merit Base Selection has been followed by the Respondents in the present case, as argued by learned Standing Counsel, while referring to the Notification dated 28th November,

2016, from the Law Department of Respondent No.1, wherein, method, qualification and other condition for appointment in the Criminal Prosecution Service has been clearly laid down. If Condition No.2 pertaining to D.P.G. in BPS-18 is examined together with the impugned Public advertisement, it appears that the maximum age limit for the post of Deputy Prosecutor General (*DPG*) is prescribed as 35 years. The date of birth of the present Petitioner is 10.04.1981 as mentioned on his CNIC appended with the Petition, which means that he has already crossed the upper/maximum age limit of 35 years and apparently this is the main reason he did not sit for the Written Test conducted pursuant to the impugned Consolidated Advertisement No.01 of 2017, while maintaining that since Petitioner had already passed the earlier written exam, thus he should be called for the interview directly.

12. When queried, learned Standing Counsel has drawn our attention to the Notification dated 12.07.2017, which he placed on record during his arguments, that since a restraining order was operating in respect of the earlier Advertisement No.5 of 2011, in which the Petitioner participated, therefore, in order to run the Criminal Prosecution Service in an effective manner, the Assistant Prosecutor General of BPS-17 were promoted as Deputy Prosecutor General with effect from 15.05.2017, vide Notification dated 12.07.2017.

13. The Prosecution Law and the Rules 2006 have under gone a judicial scrutiny in the *Sultan case [ibid]*, when the said Prosecution Law was promulgated as an Ordinance, and it was observed, *inter alia*, that purpose and object of this statute is to ensure prosecutorial independence in criminal justice system and thus competent person(s) on merits should be inducted in the Criminal Prosecution Service.

14. When present Petitioner participated in selection process held under the previous Consolidated Advertisement (No.05/2011), the present Petitioner was within the prescribed age limit and was eligible to compete in the selection process, in which he did not only compete, but was also declared successful, but due to the factors mentioned in the forgoing paragraphs, the earlier selection process could not be completed. No doubt, these factors were beyond the control of Petitioner; thus latter cannot be penalized for the same. Three reported decisions handed down in *Qasim, Irfan and Suo motu cases [supra]*, provide an answer to the present situation. In first case (*Qasim case*), a relaxation in the upper age limit was given, for recruitment to the post of ASI (*Assistant Sub-Inspector*) in Punjab Police on the ground that there was a five years ban on fresh recruitment imposed by the Government of Punjab in 1997 till the publication of Public Notice for the above post and hence, it was held that Petitioner No.14 (*of above reported decision*) was entitled to relaxation in the upper age limit equivalent to the period during which no recruitment was made, with directions that the competent authority would examine the case, subject to qualifying the examination. In the second case (*Irfan case*), the learned Lahore High Court has highlighted the importance of recruitment process for a Public Office, for which the best of the best be selected so that persons so selected can serve the public at large to the best of their capabilities; failure to select a competent person, it was held, would amount to failure to discharge one's duty with honesty and fairness and is a gross breach of the public trust. Consequently, the Public Advertisement impugned in above *Irfan case (ibid)* and the recruitment process was set-aside, *inter alia*, on the ground that in the impugned Public Notice (*of above case*) the relaxation in upper age limit, which was consistently granted in such types of public advertisements was done away with, but without recording any plausible reason, though the relevant rules, viz.

Punjab Delegation of Powers (*Relaxation of Age*), Rules 1961, extending such benefit of upper age limit, was in the field.

Similarly, the Hon'ble Supreme Court in its recently pronounced decision in *Suo Motu case (ibid)*, while considering the fact that fresh written tests for different posts have been directed to be taken, the candidates who earlier took written tests, were permitted to take fresh one (written tests) by granting a relaxation in prescribed upper age limit.

15. There is yet two other established principles applicable to the facts of present case, which are 'lex non cogit ad impossibilia'-***The law does not compel a man to do that which he cannot possibly perform*** and 'Actus curiae neminem gravabit'-***an act of the Court shall prejudice no man.***

16. The present Petitioner did what he should have done being a prudent person, by fulfilling the requisite formalities as mentioned in the previous Consolidated Advertisement No.05 of 2011 and passed the written test, but on account of the litigation the recruitment process was admittedly shelved and has been restarted now, through the impugned Advertisement (*No.01 of 2017*). Though we have found no illegality in the impugned advertisement and recruitment/selection process undertaken in pursuance thereof, as agitated by present Petitioner, but on the basis of reported decisions [*supra*] and the quoted legal maxims, which have been upheld and endorsed from time to time through various judicial pronouncements including in **Yar case [2003 SCMR 1772]**, we are of the view that Petitioner is at least entitled to participate in the present recruitment/selection process, which is being undertaken in pursuance of the (impugned) Advertisement No.01 of 2017.

17. We, wherefore, while moulding the relief of present Petition, direct that Respondents should consider the case of present Petitioner purely on

merits from the stage of Interview and onwards, as he had already cleared/passed the written test earlier.

18. In view of above observations and directions, the instant Constitutional Petition stands disposed of.

JUDGE

Dated _____

JUDGE

M.Javid P.A.