

Judgment Sheet

IN THE HIGH COURT OF SINDH KARACHI

Before :

Mr. Justice Nadeem Akhtar

Mr. Justice Adnan-ul-Karim Memon

Constitutional Petition No. D – 1194 of 2020

(Mushtaq Ahmed Sangrasi V/S Province of Sindh and 09 others)

Constitutional Petition No. D – 5470 of 2019

(Muzaffar Jamil Mirza V/S Province of Sindh & 27 others)

Constitutional Petition No. D – 5685 of 2019

(Syed Umair Ahmed V/S Province of Sindh & 27 others)

Date of hearing : 05.03.2020

Date of decision : 07.04.2020

M/S Muhammad Ali Lakhani, Mujtaba Sohail Raja, Syed Ali Ahmed Zaidi, advocates for petitioners in C.P. No.D-5470/2019 and C.P. No.D-5685/2019 and M/S Muhammad Yasir and Zaeem Hyder, advocates for the petitioner in C.P. No.D-1194/2020.

M/S M. Saad Siddiqui and Zaeem Hyder, advocates for respondents 4, 5, 6, 8, 9, 10,12, 19, 20 and 22 in C.P. No.D-5470/2019 and C.P. No.D-5685/2019.

Mr. Hakim Ali Shaikh, Additional Advocate General Sindh.

Mudassir Khan, Director and Muhammad Yasin Solangi, Section Officer (Boards), Universities and Boards Department on behalf of Secretary, Universities and Boards Department, Government of Sindh.

J U D G M E N T

ADNAN-UL-KARIM MEMON, J. – The petitioners have impugned the recruitment / examination process initiated by the Universities and Boards Department, Government of Sindh, for the posts of Secretary / Controller of Examination Sindh Boards of Intermediate and Secondary Education, inter-alia, on the ground that the examination process was compromised in order to accommodate the beneficiaries / private respondents, who were having influence and/or were selected for extraneous consideration.

2. The facts of the case as per pleadings of the parties are that on 01.03.2019 the posts of Secretary / Controller Examination were advertised in various newspapers, for the Boards in Sindh i.e. Board of Intermediate & Secondary Education, Hyderabad, Sukkur, MirpurKhas, Larkana, Board of Secondary Education, Karachi, Board of Intermediate Education, Karachi and Sindh Board of Technical Education, Karachi. On 28.07.2019 MCQs test for the

said positions was conducted by Institute of Business Administration (IBA), Karachi. The IBA after initiation of process declared the result and none of the candidates secured 50% passing marks to make them eligible for further interview, which includes the petitioners as well. The prescribed qualification and experience contained in the advertisement was as under:-

- “(i) *Master’s Degree or Bachelor’s Degree with B.Ed. with 12 years teaching & administrative experience in BPS-17 or above or which at least 5 years’ experience in teaching is essential. Academic qualification must not be below 2nd class.*
- (ii) *Minimum Age Limit 55 years (as on 15th March 2019).*

Terms of the appointment:

This will be a contract appointment for a period of four years. He / She will be entitled to draw salary equivalent to BPS-19 (Minimum).”

3. Record reveals that competent authority in order to extend favor constituted a Search Committee with the sole object to ensure selection of candidates of their choice. The Search Committee was notified on 4th May 2018 which again was reconstituted on 7.3.2019. However the Search Committee did not have the mandate of short listing the candidates, who had not secured 50% marks to get eligible for interview. The Search Committee shortlisted the candidates by reducing their passing marks from 50% to 40% declared by IBA. The composition of the Search Committee was as under:-

“S.O(U) U&B/MISC/23-19/2018:695 In continuation to this Department notification No. SO(U)/U&B/15-14/2013, dated 04th May, 2018, the Competent Authority has been pleased to re-constitute the Search Committee as under:-

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|------|---|---|
| i. | <i>Prof. Dr. Abdul Qadeer Rajput
Ex-V.C MUET, Jamshoro.</i> | <i>Chairman</i> |
| ii. | <i>Prof. Dr. A. Q Mughal
Ex-V.C SAU, Tandojam</i> | <i>Permanent Member</i> |
| iii. | <i>Prof. Dr. Neelofer Shaikh
Ex-V.C SALU, Khairpur</i> | <i>Permanent Member</i> |
| iv. | <i>Prof. Dr. Muhammad Qasier
Ex-V.C Uok, Karachi.</i> | <i>Permanent Member</i> |
| v. | <i>Mr. Imtiaz Kazi
Ex-Federal Secretary,</i> | <i>Permanent Member</i> |
| vi. | <i>Secretary, Sindh Higher Education Commission</i> | <i>Ex-Officio Member</i> |
| | <i>1. Prof. Dr. S.F.A Rafeeqi</i> | <i>Co-opted Member for Engineering Universities</i> |
| | <i>2. Prof. Dr. Abdul Rehman Memon</i> | |
| | <i>1. Prof. Dr. Iqbal Memon</i> | <i>Co-opted Member for Medical Universities</i> |
| | <i>2. Prof. Dr. Yunus Soomro</i> | |
| | <i>1. Prof. Dr. Qasim Pirzada</i> | <i>Co-opted Member for General Universities</i> |
| | <i>2. Mr. Muhammad Salim Khan</i> | |

2. **The mandate of Search Committee is as under :-**

- i. *Vice Chancellors / Executive Director IBA, and Director Finance in Universities.*
- ii. *Chairman, Secretary, Controller of Examination and Audit Officer in Education Boards in Sindh.*
- iii. *Chairman and Secretary of Benazir Bhutto Shaheed Human Resource, Research and Development Board.*
- iv. *Managing Director, Sindh TEVTA.”*

4. The terms of references of the Search Committee were as under:-

i) *To scrutinize and shortlist the applications in the light of eligibility criteria given in the advertisement.*

ii) *To hold interview of the shortlisted candidates having a proven track record of leadership in the fields of academia, administration and management. The Committee shall consider the applicant integrity, professional experience and contribution of public service.*

iii) *To recommend a panel of three most suitable candidates (in alphabetical order) to the Chief Minister, Sindh. The Chief Minister, Sindh may, select the most suitable candidate after interviewing the three candidates, considering their integrity, academic excellence, administrative experience and the abilities necessary to perform the job.”*

5. Mr. Muhammad Ali Lakhani, learned counsel for the petitioners in C.P. Nos. D-5470/2019 and D-5685/2019, contended that the private respondents were made to qualify written test for the position of Secretary / Controller Examinations in different Boards of Province of Sindh in disregard of the provision of the Sindh Boards of Intermediate and Secondary Education Ordinance, 1972, and rules framed thereunder, therefore, petitioners have impugned the entire process. Per petitioners, the same is in infraction of the ratio of judgment dated 04.03.2016 passed by this Court in C.P. No.D-6723/2015 and other connected petitions ; that the purported examination process for the aforesaid post was held on 28.07.2019 and result was announced on 11.08.2019 in violation of Promotion Policy ; that the office of Controller of Examinations is a promotion post which cannot be filled through direct recruitment, hence, the recruitment process is unlawful ; and, that the written examination result is politically maneuvered and could not be relied upon on the premise that the private respondents / beneficiaries are associated with political affiliation as such their qualifying in written test is tainted with malice. The learned counsel pointed out that respondent No.12 had secured

merely 47 marks, whereas respondent No.13 had secured with 42 marks, but they were declared as successful candidates in the written examination, whereas, the passing marks were 50%, which explicitly shows that their result was politically motivated ; and, that there was no transparency in the test conducted by the official respondent No.28.Learned counsel in support of his contention has relied upon paragraph No.10 (II, ii) of the memo of petition and argued that there has been no notification with regard to purported modification of the criteria for securing less than 50% marks ; and, that the Sindh Service Public Commission has been deliberately bypassed to conduct the examination for the aforesaid position. He lastly prays for annulment of appointment of Respondents No.4 to 26 as Controllers of Examination. In support of his contentions, he relied upon the cases of Malik Waqas Ahmed and another V/S Government of Pakistan through Secretary of Ministry of Water and Power and 13 others, 2011 PLC (C.S.) 455, and Messrs. Mustafa Impex, Karachi and others V/S The Government of Pakistan through Secretary Finance, Islamabad and others, PLD 2016 Supreme Court 808.

6. Mr. Muhammad Saad Siddiqui, learned counsel for respondents 4, 5, 6, 8, 9, 10, 12, 19, 20 and 22, has argued that the subject petitions are liable to be dismissed as there was transparency in the appointment procedure of the said respondents on the aforesaid posts purely on merit without any favoritism or otherwise, and they have qualification commensurate to the positions advertised in the newspapers. The Controlling Authority has the authority to appoint Secretary and Controllers of Examination on the basis of the recommendations of the Search Committee in order to maintain transparency. Petitioners have malafidely, in order to mislead this Court, portrayed an incorrect picture that the said posts were to be filled by means of promotion, Section 14 of the Sindh Boards of Intermediate and Secondary Education Ordinance, 1972, is clear in its terms to resolve the controversy in hand. The aforesaid posts are contractual posts for a specified period, as explicitly specified in the advertisements and that advertisements have not been challenged in the instant petitions. As per rule 4 of the Sindh Public Service Commission (Functions) Rules, 1990, the SPSC shall not conduct tests for such posts, therefore, IBA being a well-recognized institute was chosen by the Controlling Authority in this regard so as to avoid any allegations of lack of transparency or favoritism in the marking process. The petitioners have no vested right to challenge the reduction of passing marks from 50 to 40 made by the competent authority. In support of his contentions, he relied upon the case

of Sh. Muhammad Sadiq V/S Federal Public Service Commission and others,
2013 SCMR 264.

7. Mr. Hakim Ali Shaikh, learned Additional Advocate General, has adopted the arguments of learned counsel for respondents 4, 5, 6, 8, 9, 10, 12, 19, 20 and 22 and further added that the respondent-Universities and Boards took the initiative and advertised the post for filling up the post of Controller of Examinations and Secretary and competency test was conducted by IBA Karachi ; and, the aforesaid recruitment process was conducted in a fair and transparent manner. He lastly prayed for dismissal of the petitions.

8. We have heard learned counsel for the parties and perused the material available on record and the case law cited at the bar.

9. The questions involved in the instant petitions are as follows :

- I) Whether petitioners on recommendation of Search Committee were lawfully notified as Controller of Examinations, Board of Intermediate Education Karachi ?
- II) Whether the private respondents can claim a right to be appointed through Search Committee ?, and
- III) Whether the Search Committee was competent to reduce the passing marks and facilitate private respondents for appointment to the aforesaid posts ?

10. Section 14(2) of the Sind Board of Intermediate and Secondary Education Ordinance, 1972, provides that the post of Secretary / Controller of Examinations (BPS-19) can be filled through initial appointment by effecting advertisement through a Public Notice issued in newspapers. It is a settled principle in Service Jurisprudence that the eligibility of a candidate has to be settled in accordance with advertisement for the post, Service Rules governing the assignment and any amendment or instruction backed by law. The issue of appointments of Chairman of Boards and Controllers of Examination has been put at naught by this Court in the case of Abdul Sami Soomro & others V/S Province of Sind & others, **2016 PLC CS 787**, an excerpt thereof is reproduced as under:

“23. As a result of above discussion the petitions are dismissed, however, the respondents are directed to ensure transparency in the appointment process without any favoritism or consideration other than merits. All the petitioners having qualification commensurate to the positions advertised in the newspapers may also apply and the respondents are directed to consider their

applications strictly on merits. The controlling Authority will also make sure not only the appointment of Chairman of Boards, the Secretary and Controller of Examinations will also be made through Search Committee's recommendations to maintain transparency.”

11. We have noticed that IBA Sukkur had conducted written test for the aforesaid posts on 28th July 2019. The minimum marks for passing the test was set at 50 out of 100. Prima facie, except for respondent No.5 Shariq Iqbal (51 marks), Shakeel Ahmed respondent No.8 (51 marks) and respondent No.21 Rizwan Ahmed (52 marks), all other private respondents failed to secure 50 marks out of 100. However, in disregard to the position, the competent authority constituted a Search Committee which reduced the minimum criteria of 50 marks to 40 marks after shortlisting 24 candidates, conducted interview and recommended them for appointment. The reasoning put forward by them through summary for post facto approval for grading of successful candidates for the aforesaid posts is as under :

- “01. *It is submitted that competency test was conducted on 28th July, 2019 by Institute of Business Administration, Karachi (IBA-Main Campus), which comprised of MCQ's Test of 90 minutes.*
02. *The minimum marks for passing the test was set at 50 & above. After declaration of result the ratio of successful candidates against vacant for Director Finance / Treasurer and Secretary / Controller of Examination was not sufficient. In order to fulfill to required ratio of successful candidates the minimum marks were again reduced to 45 & above, which was again insufficient.*
03. *Therefore, it was deemed appropriate and the minimum marks were reduced to 40 & above which was adequate to the ratio of successful candidates against vacant posts which came to 86 candidates for the post of Director Finance /Treasurer and 24 candidates for Secretary / Controller of Examination.*
04. *The Search Committee conducted interviews of successful candidates and based on passing marks of candidates and grading by the Search Committee the candidates were recommended for appointment.”*

12. In view of the above, the competent authority sought the views of the Law Department and the matter was again placed before the respondent-department for their view, who in their abortive attempt submitted as under:-

- “11. *Considering the total number of applications for the positions of Director Finance/Treasurer (at various public sector Universities). Secretary and Controller of Examination Boards, which was 910 (whereas the actual number of candidates was 490). **The Search Committee** decided to conduct the MCQs Test from Institute of*

Business Administration (IBA) Karachi. The passing marks were initially set to 50 out of 100. But the qualifying candidates who secured 50 or above marks, were only 24 in total (Director Finance =21 Secretary / Controller of Examination Board=03) which were not enough to recommend 03 names for the respective positions. Therefore, the Search Committee decided to lower down the qualifying marks to 40, to gather enough candidates for interview.” (Emphasis added)

13. On perusal of the record and the documents furnished by the respective parties we have found that, prima facie, it was not the mandate of the Search Committee to reduce the minimum passing marks set forth in the test of IBA from 50 to 40 in order to accommodate those candidates who had actually failed and did not even qualify for interview. It is unfortunate that the Sindh Government, instead of following the principle of selection on merits, allowed the Search Committee to indulge in the above unauthorized and illegal act. Such conduct on the part of the Government of Sindh and the Search Committee ex-facie appears to be tainted with bias. We also record our displeasure over the conduct of officials of Sindh Government who, in spite of restraining order passed by this Court on 26.08.2019, continued the process of appointment of their own politically motivated candidates who had failed to secure 50 marks, except three candidates as discussed in the preceding paragraph, in order to qualify for interview. In this context, the law enunciated by the Hon’ble Apex Court in the cases of *Prof. Dr. Razia Sultana others V/S Prof. Dr. Ghazala 12 Yasmeen Nizam and others*, **2016 SCMR 992**, *Dr. Zahid Jawed vs. Dr. Tahir Riaz Chaudhary and others*, **PLD 2016 SC 637**, and unreported order dated 21.12.2017 passed by the Hon’ble Supreme Court of Pakistan in Civil Petition No.655-K of 2017 (*Re-Prof. Abdul Razak Shaikh V/S Province of Sindh and others*) covers the issue in hand. The relevant portion of the judgment is reported herein below :

“In the instant matter, absolute power of appointment was not given to authorities i.e. the Chancellor/Governor to appoint any person of their choice but the Search Committee consisting of eminent professionals was constituted who after detailed scrutiny of the credentials and lengthy interview of each candidate, recommended three names which as per para-wise comments, was not on the basis of any preference and the Chancellor/Governor, on the advice of the Chief Minister, appointed one candidate out of the three candidates in exercise of his powers, as mentioned above, Section 12(1) of the Khyber Pakhtunkhwa Universities Act, 2012, gives discretion to the Chancellor/Governor to appoint anyone out of the candidates recommended by the Search Committee on the advice of C.M.”

14. Before parting with this case, we are constrained to observe that the unauthorized act of reduction in the passing marks has not only defeated the entire purpose of selection on merits through a transparent competitive process, but has also given a chance of appointment to failed / unqualified candidates to which they were not entitled. Therefore, the Government of Sindh and all its officials, functionaries and departments who are or who may be involved in the process of recruitment at any level are, jointly and severally, directed to ensure that the criteria laid down in relation to passing / qualifying marks must not be changed, modified or altered in future under any circumstances ; and, to further ensure that interviews of the candidates must relate, inter alia, to the subject for which the post has been advertised.

15. For the aforesaid facts, reasons and circumstances of the case, we are of the view that Article 199 of the Constitution casts an obligation on the High Court to act in aid of law and to protect the rights within the framework of the Constitution. This extra ordinary jurisdiction of High Court may be invoked to encounter extraordinary situation. However, the jurisdiction conferred under Article 199 of the Constitution is discretionary with the object to foster justice in aid of justice and not to perpetuate injustice.

16. The case law cited by learned counsel for the private respondents is distinguishable from the facts and circumstances of the case and thus is of no help to the said respondents.

17. We in the aforesaid circumstances hold that recommendation of the Search Committee for appointment of unsuccessful candidates for the aforesaid posts and their subsequent appointments was without lawful authority. We direct the competent authority to hold a fresh interview for the subject posts of only successful candidates declared by IBA, and if the posts are leftover, the same shall be filled only through fresh advertisement on merits. All these petitions are allowed in the above terms with no order as to costs.

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