

IN THE HIGH COURT OF SINDH KARACHI

Before :

Mr. Justice Muhammad Iqbal Kalhoro
Mr. Justice Adnan-ul-Karim Memon

Constitutional Petition No. D –6939 of 2021
(Faraz Hussain v. Province of Sindh and 03 others)

Mr. Muhammad Haroon Khoso, advocate for the petitioner

Mr. Abdul Jalil Zubedi, AAG alongwith Ihsanullah Laghari, Focal Person, College Education Department.

Date of hearing &
order : 06.03.2023

ORDER

Through the captioned Constitution petition, the petitioner is seeking the appointment on the suitable post on deceased quota in respondent- Government College of Home Economics Karachi (`GCHE`), in terms of the policy decision of the Government of Sindh including the Rule 11-A of Sindh Civil Servants (Appointment, Promotion & Transfer) Rules, 1974 (Rules-1974).

2. The case of the petitioner has been objected to by the respondent College-Education Department, Government of Sindh, on the premise that his case does not cover under Rule 11-A of Rules-1974 as the father of the petitioner passed away on 16.01.2012 and he applied for appointment under the deceased quota on 25.05.2017 after the lapse of the stipulated two years as envisaged under the Rules.

3. We have given our anxious consideration to the contentions raised by learned counsel for the respective parties, perusing the material placed on record and the relevant provisions of law. It appears that the Government of Sindh while exercising power conferred under section 26 of the Sindh Civil Servants Act, 1973, amended Rules 10 and 11 of the Sindh Civil Servants (Appointment, Promotion, and Transfer) Rules, 1974 (hereinafter referred to as 'the appointment rules, 1974') which provided for initial appointments to the posts in Grade 16 to 22 through Public Service Commission and Grade 3 to 15 on the recommendations of Departmental Selection Committee by introducing Rules 10-A and 11-A respectively.

4. It appears from the record that the petitioner's father was working as a Lab Attendant at the Government College of Home Economics Karachi which is

under the Education Department of Government of Sindh, he passed away during service on 16.01.2012 thereafter his son/petitioner applied for a suitable post in terms of policy decision discussed supra, however, the respondent Education Department, is reluctant to issue him offer letter, though the mother of the petitioner applied on 22.12.2012 to the competent authority stating therein that her son was teenager, however after attaining the majority, he will apply for the subject post under the Rule 11-A of Rules, 1974, however, nothing could be done in the intervening period.

5. To go ahead further, initially, the Supreme Court has interpreted the law on the subject issue and interpreted and held that Rule 10-A was inserted in the appointment Rules, 1974 on 2.9.2002, and thereafter it was substituted and amended thrice; firstly on 15.10.2008, second on 30.7.2011, and finally on 16th of September, 2014.

6. Rule 10-A of the appointment rules, 1974 was originally introduced vide notification No. SOR-1(S&GAD)/2-3/2002 dated 2.9.2002 and started with a non-obstante clause thereby overriding all other provisions in the appointment rules and provided as under:-

"10-A. (1) Notwithstanding anything contained in these rules the appointing authority may appoint one of the children of a civil servant who dies during service to a post in any of the basic pay scales Nos. 11 to 20; provided that the child possesses the minimum qualifications prescribed for appointment to that post.

(2) The appointment as aforesaid shall be subject to the availability of a vacancy and where two or more vacancies in different pay scales are available at a time and the child possesses the qualifications to make him eligible for appointment to more than one post he will preferably be appointed to the post carrying higher pay scale."

7. A perusal of the above-reproduced rule reflects that in the eventuality of the death of a civil servant during service, it empowered the appointing authority to appoint one of the children of such deceased civil servant in any of the basic pay scales from 11 to 20 and the only requirement provided by the proviso was that the child must possess minimum prescribed qualifications. There was no condition of any examination, test, or interview, and such appointment could be made in any department of the government of Sindh only in case of the death of a civil servant during service. The effect of Rule 10-A was widened when it was substituted by notification No. SOR-1(S&GAD)/2-3/02, dated 15.10.2008 which provided:-

"10-A. Notwithstanding anything contained in these rules, where a Civil Servant dies while in service or is declared invalidated or incapacitated for further service, one of his unemployed children, may be employed against a post for initial appointment in BPS-16 and 17 for which he possess the minimum qualifications prescribed to that post;

Provided that such child may be given ten additional marks in the aggregate by the Public Service Commission or the appropriate Selection Board or Committee, if he, otherwise qualifies the test, examination or interview.

Provided further that a person who may have applied under this rule and qualifies purely on merit shall not be awarded any additional marks and his selection shall be made on merit and not under this rule."

8. Perusal of the substituted Rule 10-A reflects that with widening its scope, certain conditions were also imposed. Earlier the benefit of such rule was provided only to the children of the deceased civil servant who died during service whereas the substituted rule included the children of the civil servant who were declared invalidated or incapacitated for further service and the post against which such category of persons could be appointed, was curtailed to BS-16-17 only instead of BS 11-20.

9. The Supreme Court further held that under substituted rule 10-A, the powers of direct appointment were taken from the appointing authority, and the appointment was made subject to the qualifying of test, examination, or interview from the Sindh Public Service Commission or the appropriate Selection Board and the only concession which was extended through the substituted Rule 10-A was to give 10 additional marks in aggregate to such candidate by the PSC or appropriate selection board or committee and that too only when the candidate of such category qualifies the test, examination or interview just to enhance his/her chances of employment with a further addition that in case he/she qualifies on merits, he/she would not be given the benefit of additional 10 marks.

10. Second time Rule 10-A was substituted vide notification dated 30.07.2011 and provided as follows:

"10-A. Notwithstanding anything contained in these rules, where a civil servant dies while in service or is declared invalidated or incapacitated for further service, one of his unemployed children or, as the case may be, widow (when all the children of the deceased employee are minor) may be employed against a post meant for initial appointment in BPS-16 and 17 for which he/she possesses the minimum qualifications prescribed to that post;

Provided that such child or widow may be given ten additional marks in the aggregate by the Sindh Public Service Commission or the appropriate Selection Board or Committee, if he or she otherwise qualifies the test, examination or interview;

Provided further that a person who may have applied under this rule and qualifies purely on merit shall not be awarded any additional marks and his selection shall be made on merit and not under this rule.

Provided further that the cutoff date shall be within two years of the death of the officer or official".

11. It appears that no substantial amendment was made except the entitlement of the widow of the deceased civil servant to such appointment in cases where all the children of the deceased employee are minors. Additionally, a cutoff date of two years was introduced restricting the rights of the children and the widow of such deceased civil servant for such employment within two years after the death of the civil servant.

12. It appears that lastly fourth proviso to Rule 10-A was introduced on 16th September 2014 to ensure that the cutoff date of two years provided vide 3rd proviso does not take away the right of employment from those to whom such right had accrued. The 4th proviso is reproduced to put the record straight.

"Provided further that if a right of employment has already accrued to any of the children of deceased or invalidated or incapacitated civil servant then the former shall not be deprived of the benefit accrued to him under Notification dated 11.3.2008 and 17.7.2009 of these rules".

13. Though the petitioner in his petition claim treatment in terms of rule 11-A for appointment in pay scale 1 to 10. However, the Government of Sindh, while exercising powers conferred under section 26 of the Sindh Civil Servants Act, 1973, made amendments to the Sindh Civil Servants (Appointment, Promotion, and Transfer) Rules, 1974, and vide notification No.SORI(SGA&CD)2-3/2002 (P-IV), dated the 10th October 2016 published in Sindh Government Gazette on 27.10.2016 deleted Rule 10-A.

14. In view of the above legal position of the case, we put the question to the learned AAG as to why the candidature of the petitioner has not been considered against the quota reserved for deceased civil servants. He replied that the petitioner's father had passed away in the year 2012 and he did not apply within two years of the death of his father. He submitted that the petitioner should have applied within time.

15. We do not agree with the contention of learned AAG as well as the Focal Person of the College Education Department on the aforesaid analogy for the reason that when the petitioner reached the age of majority i.e. 18 years on 25.05.2017, he applied for appointment on deceased quota vide applications dated 25.5.2017, 13.4.2018, 10.6.2019, and 23.7.2019, thus his case is covered under the policy decision of the Government of Sindh discussed supra, as the candidature of the petitioner has already been adjudged by the respondent-department and found him eligible for any suitable post, if this is the position of the case, respondents ought to have considered his case for appointment on any suitable post as per his qualification.

16. Before parting with this order, we may observe that the Supreme Court in the case of the *Province of Sindh and others Vs. Muhammad Taqi Shah* **2018 SCMR 1607** wherein the Supreme Court while taking cognizance of the appointment in BPS-17 directly by the Sindh Government under Rule 10-A of the Rules 1974, without Sindh Public Service Commission, held as under:-

“17. It must be kept in mind that Public Service Commission, may it be federal or provincial is a constitutional body created in terms of Article 242 of the Constitution to ensure that the process of appointments into the civil service is transparent, merit based through competitive process to provide equal opportunity to all the citizens to participate which not only create confidence in the system but earn respect for the meritorious selection and for this very reason this Court through its various pronouncements has held that the process provided in federal and provincial statutes for appointment through Public Service Commission is for public good and any deviation to bypass the competitive process would violate the right of equal treatment to the citizens of this country as guaranteed under Article 25 of the Constitution and, therefore, would not be sustained.

18. In these peculiar circumstances and in view of the dicta laid down by this Court in various judgments discussed above, even the Government of Sindh perhaps while taking cognizance of the fact that the amendments introduced in Rule 10 was in violation of Article 25 of the Constitution of Islamic Republic of Pakistan has deleted the provisions of Rule 10-A, the High Court should have been conscious in exercising powers under Article 199 of the Constitution of Islamic Republic of Pakistan by directing appointment in Grade 17 without the competitive process, that too with seven advance increments, without taking note of the series of the judgments and legislative changes, as discussed above.

19. In the foregoing circumstances and for the reasons detailed above, this appeal is allowed.”

17. In view of the aforesaid decision, we direct the Sindh Government to comply with the judgment passed by the Supreme Court in the case of the *Province of Sindh and others Vs. Muhammad Taqi Shah* **2018 SCMR 1607**, in its letter and spirit, and avoid making appointments in BPS-17 and above on a contract basis in any department of the Government of Sindh, without competitive process i.e. through Sindh Public Service Commission as discussed supra.

18. This being the legal position of the case. This petition is, therefore, allowed along with the pending application(s) with direction to the competent authority /Chief Secretary, Government of Sindh, and respondents to appoint the petitioner against any suitable post reserved for deceased civil servants in terms of the policy decision of the Government of Sindh.

19. The aforesaid exercise shall be undertaken by them within 15 days from the date of receipt of this order. Let a copy of this order be transmitted to the Chief Secretary Sindh and the Secretary College Education Department, Government of Sindh, for compliance.

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