

IN THE HIGH COURT OF SINDH, KARACHI
C. P. NO. D-4096 / 2015

Present:

Mr. Justice Syed Sajjad Ali Shah C.J.

Mr. Justice Muhammad Junaid Ghaffar.

Dr. Umesh Kumar ----- Petitioner

Versus

The Chancellor of University of Sindh & Others----- Respondents

Date of hearing: 14.03.2016, 21.03.2016 & 28.03.2016

Date of Order: __.04.2016

Petitioners: Through Dr. Rana Khan Advocate

Respondents: Through Mr. Kamaluddin Advocate

J U D G M E N T

Muhammad Junaid Ghaffar, J: Through this petition the petitioner has impugned the results of viva voce examination of M.D. (General Medicine) conducted by the Liaquat University of Medical and Health Sciences Jamshoro.

2. Briefly the facts are that the petitioner was enrolled in the year 2007 at the respondent University and appeared in the examination of M.D General Medicine. The petitioner passed his theory examination of M.D Part I for the Session of October 2008 and thereafter appeared in the theory examination of M.D Final in the October 2013 Session and admittedly cleared the theory examination and became eligible to sit in the viva voce examination. However, despite appearing in three consecutive viva voce examinations held in October 2013, April 2014 and October 2014, the petitioner was unsuccessful.

3. Counsel for the petitioner has contended that the results of the viva voce examination in question were manipulated by the internal staff of the respondent University, as according to the Counsel the external

staff had informed the petitioner that he had passed the viva voce examination. She has further contended that in terms of Para 12.5 and 12.7 of the Prospectus (2007) issued by the University, the petitioner was required to obtain only 40% marks in the Viva Voce exams, which he has done and therefore, he is entitled to be declared as successful. She has further contended that in view of Para 12.5 of the prospectus (2007), both theory and practical exams carry equal marks and therefore, the University cannot fix a different threshold of minimum aggregate in respect of theory and practical examination separately. In support of her contention she has relied upon the cases reported as *Zarqa Haq V. Government of Baluchistan and 2 others (PLD 1994 Quetta 47)*, *Amna Sharif and another V. POF Board and others (2015 MLD 229)*, *Syed Faiuzur Rehman V. Principal Sheikh Zayed Medial College Rahimyar Khan and 4 others (2004 CLC 661)*, *Farva Saeed V. Government of Punjab and 2 others (2003 CLC 1278)*, *Uzma Jamshed V. Bahauddin Zakariya University and 2 others (2008 CLC 514)*, *Neelam Khan and others V. University of Health Sciences, Lahore and others (2013 MLD 701)*, *Ms. Shakeela V. University of Peshawar and another (PLD 2003 Peshawar 69)*, *Farva Saeed Vs. Government of Pakistan (2003 CLC 1278)*, *Farmanullah Khan Vs. Controller of Examination, Karachi University (2010 MLD 85)*, *Dr. Nosheen Fatima Vs. Federation of Pakistan (2011 CLC 1253)*, *Tehseen Mazhar Vs. Vice Chancellor University of Punjab (PLD 2008 Lahore 19)*.

4. Conversely, learned Counsel for the Respondent University has contended that the petitioner has failed in three consecutive viva voce exams, whereas, such result have been signed and tabulated by all the examiners, including internal as well as external examiners. He has further submitted that during pendency of this petition the petitioner has already applied for a fresh examination of theory and if he had appeared and cleared the same, then he would have been entitled to appear in the next three consecutive viva voce exams. He has further referred to Rule 10.9(b) & (e) of the 2005 Rules of the University, whereby, minimum threshold of passing and aggregate marks in respect of theory and practical examination have been fixed by the University. He further submits that as a concession, if the petitioner still wants to appear in the theory examination again, he would be allowed to sit in such examination and if he clears the theory examination he would be entitled for making three consecutive attempts in the viva examination, and further, he would be dealt with fairly and in accordance with law as well as rules prescribed by the University.

5. We have heard both the Counsel and perused the record. Insofar as the interpretation as advanced by the Counsel for petitioner in respect of Para 12.5 and 12.7 of the Prospectus of respondent University is concerned, it would be advantageous to refer to both these provisions which read as under:

12.5 Theory and practical examinations will carry equal marks unless mentioned otherwise.

12.7 Student will be allowed to appear in the viva / practical if they Secure at least a minimum of 40% marks in each theory paper or on aggregate of all theory papers if the contents of the papers are not separately earmarked.

6. After a bare reading of the above we are totally in disagreement with the line of argument adopted by the Counsel for the petitioner as Para 12.5 only provides that theory and practical examination will carry equal marks unless mentioned otherwise, whereas, 12.7 provides that student will be allowed to appear in the viva / practical if they secure at least a minimum of 40% marks in each theory paper, or on aggregate of all theory papers if the contents of the papers are not separately earmarked. In our view both these clauses are independent in nature and cannot be read together as contended by the Counsel for petitioner. In our view Para 12.7 only provides a threshold of 40% minimum marks insofar as eligibility of a candidate to appear in the viva examination is concerned. Whereas, in terms of clause 12.5 the total marks of theory and practical papers are also same i.e. 100 for each subject, including the passing marks i.e. 50, and the only distinction is in respect of the minimum aggregate marks i.e. 165 in theory (For Paper-I, II & III) and 180 in practical / viva voce (For Long Case, Short Case & O.S.C.E.). Clause 12.5 cannot be interpreted in a manner so as to suggest that the words “will carry equal marks” also means that the minimum aggregate marks in theory and practical will also be equal, for the reason that it is within the discretion of the University Management to prescribe such minimum aggregate specially in case of Viva exams, as it provides a better opportunity for the University Management to assess the calibre of a student appearing after passing of his theory exams. Therefore, the contention of the Counsel for petitioner to this extent being misconceived is hereby repelled.

7. Moreover, Rule 10.9(b) of the 2005 Rules provides that “*only such students can appear in Viva exams who obtain at least a minimum of 50% in each theory paper*”, whereas, in Rule 10.9(e), it has been provided that

a student shall be considered successful in the practical examination if he / she secures 60% marks, whereas, the said Rule has been relaxed in 2013 benefit whereof has been extended to the petitioner, whereby, it has been provided that a student shall be considered successful, if he or she secures 60% marks in aggregate and must secure 50% marks in each component of practical examination. This resultantly means that passing marks in practical(s) have been reduced from 60 to 50 and it is only the aggregate of 60% which is to be achieved by the student i.e. he may obtain less marks in one subject, but can improve such shortfall by securing more marks in another subject so as to achieve the minimum aggregate of 180 in all three subjects, however, subject to a minimum of 50% marks in each subject independently. The petitioner has failed to achieve the minimum aggregate of 180 in all his 3 attempts in the Viva / practical exams.

8. Insofar as merit of the controversy raised before us is concerned, it is entirely dependent on assertions of facts by the petitioner which are seriously disputed by the Respondent University. The petitioner asserts that the external examiners had verbally informed him that he has passed in viva voce examination, whereas, the results are contrary to such assertions of the petitioner. At the very outset we had asked the Counsel for petitioner as to how such disputed facts could be adjudicated upon by this Court in its Writ Jurisdiction, the Counsel though could not satisfactorily respond to the query of the Court however, pleaded that justice may be done. We are afraid that the contention so raised by the Counsel for the petitioner has no merits as factual disputes cannot be resolved by this Court under its Writ Jurisdiction. The matter requires recording of evidence as until the external examiners are put in the witness box so as to substantiate the assertion of the petitioner, no just conclusion can be reached and we have no intention to undertake such exercise while exercising Constitutional jurisdiction. In the circumstances, the objection as raised on behalf of the petitioner in respect of any alleged change in the final marks of viva voce stands rejected.

9. Lastly the entire case law relied upon by the Counsel for the petitioner appears to be laid down in entirely different facts and circumstances, whereas, most of the authorities are only persuasive in nature as they relate to different High Court(s) other than this Court,

whereas, the judgment in the case of *Farmanullah Khan (Supra)* and *Dr. Nosheen Fatima (Supra)* of this Court are also on different facts in that the issue was that of rechecking / re-evaluation of theory papers of which the answer sheets were available, and or the question papers had flaws in itself, whereas, in this case the issue is in respect to viva examination already conducted, assessed and tabulated by the external and internal examiners, hence of no help to the petitioner's case.

10. In view of herein above facts and circumstances of the case we are of the view that instant petition is not maintainable as it involves factual dispute vis-à-vis. the marks obtained by the petitioner and therefore, the same is accordingly dismissed. However, as submitted by the learned Counsel for the respondent University, if the petitioner appears in the fresh theory examination and passes the same, he would be eligible to appear in the viva examination and shall be dealt with fairly and in accordance with law without being prejudiced by any of the observations made hereinabove. Petition stands dismissed with the above observation.

Dated: __.04.2016

Judge

Chief Justice

ARSHAD/