

## **IN THE HIGH COURT OF SINDH, AT KARACHI**

### **Miscellaneous Appeal No.59 of 2012**

Dates of hearing : 25.03.2013, 15.04.2013 & 20.05.2013.

Applicant Muhammad Ashraf Sangri through : M/s. Abid S. Zuberi and Ayan Mustafa Memon, Advocates.

Respondents Federation of Pakistan & others through : Mr. Dilawar Hussain, Standing Counsel alongwith Mr. Haroon Rashid, Assistant Director (Legal) FPSC Headquarter, Islamabad and Mr. Atiq Ahmed, Assistant Director, FPSC, Karachi.

### **ORDER**

**IRFAN SAADAT KHAN, J:** This Miscellaneous Appeal has been filed against the order dated 10.07.2012 passed by the respondent No.2 in respect of the second review petition filed by the appellant under Section 7(3)(b) of the Federal Public Service Commission Ordinance, 1977 (the Ordinance).

2. Briefly stated the facts of the case are that this is the second round of litigation between the appellant and the respondent No.2. The appellant appeared in the CSS examinations for the year 2010 and secured 704 marks in written examination which, according to him, were the highest in Sindh (Urban) of that year. However, the appellant failed in viva voce/interview of the said exam since he was awarded 88 marks only by the interview Panel, which was below the aggregate marks of 100 required for passing the said interview. Being aggrieved with the decision of the respondent No.2 the appellant filed a representation under Section 7(3)(a) of the Ordinance and even requested for reappearance in the said viva voce. The appellant stated that if he is inducted in service it will make no difference since a number of seats are lying vacant and unfortunately the appellant was the only candidate who failed in the said interview taken by the respondent No.2 and in the last six years no candidate from the Province of Sindh has failed in the said interview. The respondent No.3 then vide his order dated 20.08.2011 rejected the said representation by mentioning that since the appellant had failed in the interview his representation could not be accepted and the previous interview taken was in accordance with law. It was also mentioned in the said order that the proceedings of the interview could not be challenged in a Court of law. The appellant then filed a review

petition on 08.09.2011, which too was rejected vide order dated 22.09.2011 by mentioning that the reason assigned in the earlier order does not require any review and the appellant is not fit to be considered for the appointment. Being aggrieved with this order the appellant preferred an appeal before this Court and this Court vide order dated 17.11.2011 directed the respondent No.2 to keep a post vacant in all Pakistan Services till final decision in the instant case. Subsequently the appeal was allowed by this Court vide judgment dated 11.01.2012 and the orders dated 22.09.2011 and 20.08.2011 of the respondent were set aside. This Court while allowing the appeal observed that “the appellant is fit for appointment as a Civil Servant in the all Pakistan civil service” and directed the respondent to issue appointment letter within fortnight. Being aggrieved with the judgment passed by this Court leave to appeal was filed before the Hon’ble Supreme Court of Pakistan bearing No.263/2012 and the Hon’ble Apex Court was pleased to dispose of the matter vide order dated 26.04.2012 in the following terms:

*“7. We, therefore, convert this petition into appeal allow it, set aside the impugned judgment of the High Court and the one passed in review and send the case back to the Commission for decision afresh on review after hearing the parties as mentioned above. The respondent would be at liberty to raise all legal points”.*

In pursuance of the order passed by the Hon’ble Apex Court the appellant filed a fresh review application dated 09.05.2012 before the respondent No.2 with the prayer that the order dated 20.08.2011 be reviewed. A number of objections were also raised by the appellant in the newly furnished review application. The appellant was thereafter heard on 05.06.2012 and was informed that he will be apprised about the decision in the due course of time. The appellant thereafter made a number of attempts by approaching the respondent No.2 for giving the decision, however, the appellant received a memorandum letter dated 07.09.2012 on 10.09.2012 informing that the decision on his second review application has already been taken on 10.07.2012 and copy of the said decision was supplied to him. It is against this order of 10.07.2012 that the present appeal has been filed.

3. Mr. Abid S. Zuberi, learned counsel for the appellant has reiterated the facts of the case and stated that the appellant secured highest marks in Sindh (Urban). He states that the powers of this Court are wider in appellate jurisdiction as compared to the jurisdiction as given to this Court under Article 199 of the Constitution. He states that a perusal of the relevant Rules would reveal that the decision of the Federal Public Service

Commission (FPSC) was challengeable before the High Court and this Court has the jurisdiction to dilate upon those issues and to hear and to dispose of the same in accordance with law. He further states that perusal of the decision taken by the respondent No.2 would reveal that the said order is biased, malafide and illegal and has been passed without considering the various averments made by the appellate in his review application. He states that if the order given by the Hon'ble Apex Court is seen it would be clear that the respondent No.2 has not acted as per the instructions issued by the Hon'ble Apex Court and has not considered the various legal issues and points raised by the appellant, hence the order passed by the respondent No.2 is sheer violation of the order of the Hon'ble Apex Court. While elaborating his viewpoint the learned counsel submitted that this Court while hearing the case of the appellant has considered various materials produced by the respondent No.2 and has even considered the confidential record. He further stated that the order passed by the respondent No.2 is merely an eyewash since no new fact has been recorded by the respondent No.2 and in a very summary and breezy manner the respondent No.2 has dismissed the said review application filed by the appellant. He states that it is evident from the said order that it appears to have been passed with a predetermined mind as cogent reasons were not given by the respondent No.2 for dismissing the said review application of the appellant. He further states that the Hon'ble Apex Court has granted full authority to the appellant to raise all the legal issues in his review application, which were duly raised, but the respondent No.2 with malafide intention has neither considered those objections nor has incorporated the same in its order and has not passed a judicious order. The learned counsel states that the order of the respondent No.2 is so defective that the respondent No.2 has not even considered its own guidelines as enshrined under the said Ordinance. He in this regard read out the provisions of Section 7 of the Ordinance and states that those guidelines have altogether been ignored while passing the impugned order. He states that no authority is above the law and every authority has to do the assigned work in accordance with the prescribed Rules. He further states that neither the Chairman nor the Panel is above the law to brush aside all the guidelines enumerated in this regard in the relevant law and to substitute their own reasonings in this behalf. He further states that the marks assigned to a candidate has to be given in accordance with the guidelines and in the present case those guidelines have not been followed, which smacks of arbitrariness on the part of the respondents. He further states that to assign marks to a candidate appearing in CSS

examination interview, psychological test, written test etc. are conducted for which prescribed rules and guidelines are given and no unbridled powers have been given to the respondent No.2 to either fail or pass a candidate on their own choice. He further states that since the matter pertains to Superior Services of Pakistan and the person appointed is to run the affairs of the country hence special care has to be taken in such appointment and in the case where these guidelines are not fulfilled, special provisions are provided under the same law for making representation, filing review applications and filing appeals before the High Court. The learned counsel states that it is hardly believable that the person obtaining highest marks in written test would fail in the viva voce, which had not been happened in the last six years. He further states that it is a trite proposition of law that when something has to be done in accordance with law it has to be done in that manner and not otherwise. He further states that three members of the Panel taking interview granted 100 marks on an average to the appellant, whereas the Chairman granted him only 50 marks with the result that the appellant failed in the interview, which speaks volume about the attitude of the Chairman, who has violated the guidelines as given in Section 6(f) of the Rules. In support of his above contentions the learned counsel has relied upon the following decisions:

1. *Muhammad Bashir Vs. Muhammad Hussain & 16 others* (2009 SCMR 1256)
2. *Nasir Ahmad & another Vs. Khuda Bakhsh & another* (1976 SCMR 388)
3. *Tariq Aziz-ud-Din and others: in re* (2010 SCMR 1301)
4. *Suo Motu Case No.18 of 2010: In the matter of [Violation of Public Procurement Rules, 2004]* (PLD 2011 SC 927)
5. [1985]1 All ER 40
6. *Abdul Rauf and others Vs. Abdul Hamid Khan and others* (PLD 1965 SC 671)
7. *Karachi City Cricket Association, Karachi Vs. Mujeebur Rahman, Chairman, Ad Hoc Committee, Pakistan Cricket Board, Lahore and 2 others* (PLD 2003 Karachi 721)

4. Mr. Dilawar Hussain, Standing Counsel, at the very outset, stated that the appeal is barred by limitation as the same has been filed after the prescribed period. He in this regard invited my attention to the date of the order and the date of the presentation of the appeal and states that since the appeal is barred by limitation the same is liable to be dismissed in limine.

He further states that the Rules of FPSC are very clear and if a person fails in viva voce, he is declared fail. He in this respect invited my attention to Rule 2(iv) and Rule 11(i) available at pages 115 and 119 of his counter affidavit, respectively. He states that he agree with the contention of Mr. Abid S. Zuberi that the examination is that of Superior Services of Pakistan and only the candidate fulfilling the criteria has to be appointed in this regard and since admittedly the appellant had failed in the interview, he does not deserve to be appointed for the said post. He further states that the Panel and the Chairman comprises of very senior, learned and able members and the Chairman is directly appointed by the President of Pakistan, who has no bias against the appellant and he is as good a candidate appearing before the said Panel as other candidates. He further states that no doubt the appellant had passed the written test, which alone could not be considered to be a sole criteria for appointment since, according to him, as per the examination rules, prescribed by the FPSC, it is categorically mentioned that the competitive examination comprises of written test, medial test, psychological test and viva voce and a candidate appearing in the examination has to pass all these four examinations and even a candidate passing in three tests and failing in the fourth one is not liable to be appointed, which is the case of the appellant. He further states that to pass and fail a candidate is an exclusive domain and authority of the respondent No.2, who after judging a candidate declares him pass or fail. He vehemently opposes the present appeal and states that since the appellant was not found fit and suitable for the above post, he cannot claim the same as that of vested right. He submits that a failed candidate could not be considered a pass candidate and a pass candidate could not be considered a failed candidate and since the appellant was declared a failed candidate, by no stretch of imagination, he could be considered a pass candidate. He further submits that the learned counsel for the appellant has only read the order of the Hon'ble Apex Court in piecemeal and he may be allowed to read the whole order. The learned counsel then read out the whole order of the Hon'ble Apex Court and invited my attention to para-5 of the said order, which reads as under:

*“5. After going through the record and hearing the parties at length, we have no doubt in our mind that the High Court while hearing an appeal against an order passed in review could not have substituted its own view for that of Commission. Yes, bias, error of judgment or any other impropriety, if any, could have been made basis for substituting the view of Commission but unfortunately that is woefully lacking in this case. The judgment of the High Court in this background cannot be maintained and has to be set at naught”.*

5. The learned counsel states that the reading of the above para would clearly reveal that the Hon'ble Apex Court has disapproved the judgment of the High Court and has categorically observed that the High Court while hearing an appeal against an order passed in review could not have substituted its own view for that of Commission. He states that nothing more now is left to argue in this case as the Hon'ble Apex Court has categorically observed that the views of the Commission are final. He further states that the Hon'ble Apex Court has further observed that bias, error of judgment or any other impropriety is also lacking in the case and the Hon'ble Apex Court thereafter set at naught the judgment of the High Court. He states that this matter was only remanded with the directions to consider the legal aspects raised by the appellant, which the respondent No.2 considered and thereafter dismissed the said review application and hence the present appeal being an offshoot of the previous appeal is nothing but an afterthought on the part of the appellant and no lease could be given in view of the clear verdict given by the Hon'ble Apex Court in the instant case. He further states that in the case of Federation of Pakistan Vs. Ghulam Shabbir Jiskani (2011 SCMR 1198) appeal filed under identical issues had been dismissed. He further states that in Civil Appeal No.99/2011 the Hon'ble Apex Court in its judgment dated 12.05.2011 has categorically observed that "merit is the only criteria which could lead our beloved country to prosperity in every walk of life". He further states that for the superior most civil service of Pakistan superior most candidates are required and not failed candidates, since admittedly the appellant is a failed candidate in one facet of the test he is a failed candidate for all practical purposes. Learned counsel states that under identical circumstances the Peshawar High Court in Writ Petition No.1381/2009, filed by one Rasheed Ahmed, has dismissed the said petition. He, therefore, states that this petition being devoid of any merit is liable to be dismissed with cost.

6. Mr. Ayan Mustafa Memon in his rebuttal has stated that firstly the appeal is not barred by limitation as the same has been filed within 30 days of the receipt of the impugned order and secondly as an abandoned precaution an application under Section 5 of the Limitation Act has also been filed. He further states that the decisions relied upon by the learned Standing Counsel are distinguishable. He further states that no doubt the Hon'ble Apex Court has observed that the High Court in review could not substitute its own view for that of Commission and that element of bias, error of judgment etc. are missing but after considering all these aspects the

Hon'ble Apex Court has directed the respondent No.2 to consider review application of the appellant and it was also observed that the appellant would be at liberty to raise all legal points in his review before the Commission, hence in a way the Commission was directed to consider the review application as well as the various legal aspects raised in the said application, which has not been considered and against that illegal order, which, according to him, is in violation of the Hon'ble Apex Court's order, the present appeal has been filed. He further states that if the observations of the Commission are considered to be final, then what is the fun in providing in the law the provision of appeal, which clearly means that the said orders are appealable and the aggrieved person is entitled to agitate the same before the High Court. He further states that the present appeal has not been filed against the previous order rather since a new cause of action has arisen in the case and a new order has been passed, a fresh appeal has been moved.

7. Mr. Dilawar Hussain in his final rebuttal has reiterated his earlier submissions and has placed before me a decision given by a Division Bench of this Court in the case of Syed Mashkoo Ali Vs. Pakistan through Secretary (Establishment) & others (Appeal No.03/2008) wherein, according to him, the Division Bench of this Court under identical circumstances has observed that this Court while exercising constitutional jurisdiction cannot call in question the evaluation of FPSC. He states that in view of this decision of the Division Bench and the decision given by the Hon'ble Apex Court this appeal may be dismissed.

8. I have heard both the learned counsel at considerable length and have perused the record, the law and the decisions relied upon.

9. Since an issue has been raised by the learned Standing Counsel that the appeal is barred by limitation and hence is liable to be dismissed in limine, it is seen from the record that the said order of the review dated 10.07.2012 was received by the appellant on 10.09.2012. Even the stamp on the envelope is that of 07.09.2012 and the appeal has been preferred on 02.10.2012 that is within 30 days of the receipt of the order by the appellant. The objection of the learned Standing Counsel that the said order was that of 10.07.2012 and hence the appellant should have preferred the appeal within 30 days of the order that is on or before 09.08.2012 is found to be devoid of any merit, since the said appeal has been preferred within 30 days of the receipt of the said order. Moreover, as an application under

Section 5 of the Limitation Act has been filed by the appellant for condoning the delay, if any, and the reasons furnished in this regard appears to be plausible, the delay, if any, in filing the appeal is hereby condoned and the contention raised by the learned Standing Counsel is hereby repelled.

10. The learned Standing Counsel has raised another legal issue that no appeal is provided under the law against the order passed by the Commission. Suffice it to observe that the provisions of Section 7(3)(b), in my view, are quite clear in this regard, which states as under:

*“Any candidate aggrieved by a decision of the Commission under paragraph (b) may, within thirty days of the decision, prefer an appeal to the High Court”.*

The paragraph (b) speaks of giving a decision on the review petition by the Commission. Hence, perusal of the above referred provision of law leaves no room of doubt that an order passed by the Commission on a review petition filed by a candidate is appealable within thirty days before the High Court. Therefore, this ground also, taken by the learned Standing Counsel, that there is no appeal, is also found to be devoid of any merit and is hereby rejected.

11. Before proceeding further with the case it would be in fitness of things, if the relevant portion of the decision given by the Hon’ble Supreme Court in CPLA No.263/2012, reproduced, even at the cost of repetition:

*5. After going through the record and hearing the parties at length, we have no doubt in our mind that the High Court while hearing an appeal against an order passed in review could not have substituted its own view for that of Commission. Yes, bias, error of judgment or any other impropriety, if any, could have been made basis for substituting the view of Commission but unfortunately that is woefully lacking in this case. The judgment of the High Court in this background cannot be maintained and has to be set at naught.*

*6. The argument addressed by the learned counsel for the respondent that representation and review being different and distinct remedies were to be disposed of distinctly and independently of each other is not without substance. A look at the order disposing of the review would reveal that the Commission acted in a mechanical manner. It has not recorded a reasoned order. The reasons recorded for disposal of representation have been treated as reasons for disposal of review. Such an order is no order in view of the provision contained in Section 24(A) of the General Clauses Act which provide that where, by or under any enactment, a power to make any order or give any direction is conferred on any authority, office or person such power shall be exercised reasonably, fairly,*

*justly and for the advancement of the purposes of the enactment. It, thus cannot be maintained.*

7. *We, therefore, convert this petition into appeal, allow it, set aside the impugned judgment of the High Court and the one passed in review and send the case back to the Commission for decision afresh on review after hearing the parties as mentioned above. The respondent would be at liberty to raise all legal points in his review before the Commission.*

12. The following points emerge from the decision given by the Hon'ble Apex Court:

- *High Court while hearing an appeal against an order passed in review could not have substituted its own view for that of Commission.*
- *The argument of the learned counsel that representation and review being different and distinct remedies were to be disposed of distinctly and independently of each other is not without substance.*
- *The Commission acted in a mechanical manner, as it has not recorded a reasoned order, since reasons given for disposal of representation have been treated as reasons for disposal of review.*
- *The matter was sent back to the Commission for decision afresh on review after hearing the parties and the respondent (the present appellant) would be at liberty to raise all legal points in his review before the Commission.*

13. Now coming to the main controversy involved in the case if judged in the light of the decision given by the Hon'ble Apex Court it would become quite clear that the matter was remanded back to the Commission for decision afresh on the review of the appellant and he was at liberty to raise all legal points in his review, which the appellant did. The Commission then on the review passed a detailed order by mainly observing as under:

- *In contradiction to his previous review petition, he took various grounds and also attributed bias and malafide on the part of the Commission. However, the question of bias and malafide by the Commission does not arise and specially when no such allegation has been raised by the candidate in his previous representation and review petition.*
- *The candidate also raised the ground of not taking into account the "note for Guideline for Members of Interview Board for the viva-voce". This contention of the candidate is baseless. The method provided by these guidelines is kept in mind while interviewing the candidates.*

- *The Ordinance and Rules for Competitive Examination 2010 have not made these guidelines binding on the Member of the Commission during viva voce, therefore, its non-application cannot be made a valid ground.*
- *The candidate failed to point out any material ground whatsoever worth re-calling of the decision.*
- *The candidate also failed to show any malafide.*
- *Under Rule 2(iv) of the Rules for Competitive Examination, 2010 a candidate failing in any part of the exam is considered as failed. Hence, the contention of the candidate that he obtained highest marks in written part of the examination is based on wrong assumption as each part of examination is distinct and separate.*
- *The candidate also raised objection regarding discrepancy in awarding the marks in viva voce. Individual marking by the Members of the Interview Committee is transformed into final and collective decision and since the candidate does not obtain the required marks, hence, the question of low marking by one Member does not hold ground.*

14. If the above decision of the Hon'ble Supreme Court, the decision given by the Commission in the review petition, the relevant Rules, decisions relied upon by both the learned counsel and material available on record are considered in juxtaposition, it would be seen that it has categorically been mentioned in the Federal Public Service Commission Competitive Examination Rules that a candidate failing to obtain 100 marks in viva voce is considered to have failed in examination. It has further been mentioned that the suitability and unsuitability of the candidate will be determined by the Commission as set out in Rules for Competitive Examination 2010. It is seen from the letter addressed by the appellant to the Chairman that he has mentioned that his case favourably be considered to save him from the possible nervous breakdown and to allow him to reappear in viva voce, when admittedly there is no provision in the Ordinance and the Rules for such reappearing in viva voce, which has categorically been brought to the knowledge of the appellant vide Memorandum dated 20.08.2011, wherein it was explained that no review of viva voce is possible under the Rules. It was also mentioned in the said Memorandum that his performance during the viva voce was found to be below average. In the Personal Hearing Proforma of the FPSC also he has been mentioned as failed in viva voce and in the decision of the Personal Hearing Committee dated 12.08.2011 his representation was rejected by clearly mentioning that no review of viva voce is possible. The appellant then furnished another application dated 08.09.2011 to review this decision and to revisit his case, which, too, was dismissed.

15. A perusal of the present order of the Commission on the review petition clearly reveals that full opportunity of hearing was given to the appellant and it was also noted that in contradiction to his previous review, he took various other grounds including the ground of bias and malafide and the Commission after considering all these points did not find his review to be maintainable. The learned counsel appearing before me has failed to prove any bias or malafide on the part of the Commission. Apart from raising the above grounds it was stated that the order of the respondent No.2 is in violation of Section 24-A of the General Clauses Act, which I am of the view it is not. The Commission has not only discussed the issues raised by the appellant in his previous review application but has also dilated upon the new grounds taken by him and thereafter have come to the conclusion that since he has failed to obtain the desired marks, he is not fit to be considered for this post and when a candidate has been declared as failed he cannot be considered as pass, which would be totally against all norms of law. From the perusal of the record and the law it is clear that it is the discretion of the Interview Committee to assess the candidate according to his ability and thereafter to assign marks. In the Rules of the Competitive Examination it has clearly been provided that a candidate who unless secures 40% marks in compulsory subjects, 33% marks in optional subjects and 50% in the aggregate and 100% in viva will be considered a failed candidate and is not eligible for appointment and it is the position in the instant case that the said Commission has not granted 100 marks in the viva voce to the appellant, meaning thereby that as per the said Rules he has been termed and declared as a failed candidate. It has been explained that to consider a candidate fit for the superior services he has to pass through the Competitive Examination comprising of four different stages and the candidate has to pass all these four and failing in one will automatically entail him as a failed candidate, even if he has secured highest marks in rest of the three hurdles. A candidate is judged by all the four methods by person having expertise of the said field and it has nowhere been stated by the learned counsel for the appellant that the Panel comprising of the Members was, in any manner, not competent enough to judge the appellant or that the said Members were, in any manner, biased against him. It is also an undeniable position that there is no provision in the Rules for any re-interview or reappearance in viva voce. It is also seen from the record that the respondent No.2 instead of filling the vacancies with undeserved candidates deemed it appropriate to keep the post lying vacant. It was also explained that the appellant was not the only candidate who has failed in

viva voce but there were some 106 candidates who passed the written exam but failed in viva voce but none of them has challenged the same, meaning thereby that no discrimination has been made with the appellant, as alleged by him. It is also seen that if the procedure of interviewing a failed candidate is adopted, it will open a flood gate of yet another interview, which would defeat the very purpose of appointing the deserved candidate on a respective post and the Court while hearing an appeal could not substitute its own views for that of Commission, as observed by the Hon'ble Apex Court. A perusal of the decision given by a Division Bench of this Court in M.A. No.03/2008 further reveals that the Court has observed as under:

*“This Court while exercising Constitutional Jurisdiction cannot call in question the evaluation of Federal Public Service Commission when there is no material to show that there was colourable exercise of power or the decision was tainted with malice. Section 24A of the General Clauses Act does not take away the discretion of public functionaries to select right person for the job by evaluating suitability of a candidate. In our view no foul play is reflected from their conduct in the selection of department for the petitioner. We do not find any reason to distinguish the judgment of the Supreme Court delivered in Civil Appeal No.104/1994 as referred to above which is binding on us. Hence we are left with no option but to dismiss this appeal”.*

16. In the light of the facts and the reasonings mentioned above and in the light of the decision given by the Division Bench of this Court, I have come to the conclusion that the appellant has failed to make out a case of interference in the order of the Commission. The decisions relied upon by the learned counsel for the appellant are examined and are found to be distinguishable. The present Miscellaneous Appeal, therefore, is found to be devoid of any merit and the same is hereby dismissed alongwith the pending applications.

JUDGE