

IN THE HIGH COURT OF SINDH, KARACHI

C.P No.D-6789 of 2015

(Abdul Ghaffar Mallah and another
Versus
Province of Sindh through Chief Secretary and others)

C.P No.D-6249 of 2015

(Sajjad Ahmed
Versus
Government of Sindh and others)

C.P No.D-7049 of 2015

(Shahid Nazeer Baloch
Versus
Province of Sindh through Chief Secretary and others)

C.P No.D-7070 of 2015

(Ali Sher
Versus
Government of Sindh and others)

C.P No.D-106 of 2016

(Habib-ur-Rehman
Versus
Province of Sindh through Chief Secretary and others)

**Before: Mr. Justice Muhammad Ali Mazhar &
Mr. Justice Zulfiqar Ahmad Khan**

Date of Hearing : 26.09.2016

Petitioners : Through M/s. Malik Naeem Iqbal, Faizan H. Memon and Muhammad Saleem Khaskheli, Advocates in C.P.No.D-6789 of 2015

: Petitioner Sajjad Ahmed Ansari, present in person in C.P.No.D-6249 of 2016

: Petitioner Shahid Nazeer Baloch, present in person in in C.P.No.D-7049 of 2015

: Through Mr. Abdul Salam Memon, Advocate in C.P.No.D-7070 of 2015

Through Mr. Habib Ahmed, Advocate in C.P.No.D-106 of 2016

Respondents : Through Mr. Sibtain Mehmood, A.A.G a/w Abdul Aziz, Assistant Director, SPSC

JUDGMENT

Zulfiqar Ahmad Khan, J.:- The Petitioners upon having been selected by Sindh Public Service Commission (SPSC) were offered the post of

Mukhtiarkar (BPS-16) in Revenue Department through a letter issued by Board of Revenue (BOR) Sindh dated 24.09.2011. The said offer was contingent upon the Petitioners having passed the requisite Revenue Qualifying Examination within six months before the expiry of the probationary period of two years commencing from the date of joining of the petitioners. Per counsel and record, the said examination comprised of three components namely Revenue (300 marks), Judicial (350 marks) and Accounts (300 marks), out of which every candidate has to secure at least 45% in each group to be declared a pass. Petitioners appeared in the said examination however failed the Revenue component by the difference of few marks.

Per counsel, the said failure of the Petitioners was caused on account of certain out of syllabus questions asked in the question paper on the subject of Sindh Land Revenue Act, 1967. Having failed the examination by narrow margin, the Petitioners filed an appeal before Respondent No.2 (SPSC) for the allotment of grace marks, alleging the above referred assertion that the questions in the Sindh Land Revenue Act, 1967 were out of syllabus. When the said appeals were received by Respondent No.1, the latter sought opinion of Respondent No.3 namely, Senior Member Board of Revenue with regard to the contents of questions asked in the paper of Sindh Land Revenue Act, 1967. Per counsel, Respondent No.3 vide its letter dated 31.08.2015 pointed out discrepancy and further opined that the paper setters could not have referred to the amended law. Per counsel, despite the above observation, the Respondent No.2 completely ignored the opinion of Respondent No.3 and declined the appeal of the Petitioner by refusing to give any grace marks. The said refusal order is impugned by the instant Constitution Petition.

The ground alleged in the instant petition is based on discriminatory treatment extended to the Petitioners since the Respondent No.2 when conducted screening test previously with regard to PCS Combined Competitive Examinations, 2012, where questions were raised about the papers of English and General Knowledge while the panel

established for attending the complaints of those students/candidates held that the complaints were frivolous, however, Respondent No.2 extended full benefit to the candidates across the board and granted grace marks.

Per counsel, a similar issue was already decided favorably by a Division Bench of this Court on 26.06.1999, thus, the case of the Petitioner was that by having refused to grant grace marks, the Respondent No.2 has acted discriminatory against the petitioners.

Since the controversy in question only revolves around the Revenue group, thus we will consider this group and give details of the syllabus of thereof. The revenue group had three subjects, each having maximum of 100 marks out of the following subjects:

- a. Sindh Land Revenue Act, 1967 etc.
- b. The Land Acquisition Act etc.
- c. Sindh Local Government Ordinance, 1979 etc.

Also to note is the condition of the examination wherein every candidate had to pass each of the above subjects with minimum of 45 passing marks.

Examination of the aforesaid question paper on Sindh Land Revenue Act, 1967 shows that out of 7, every candidate had to attempt 5 question. As the objections are raised with regards Question 1 and 2 of the said examination of paper, these questions are reproduced hereunder:

SINDH PUBLIC SERVICE COMMISSION, HYDERABAD
REVENUE QUALIFYING DEPARTMENTAL EXAMINATION
HLED IN THE MONTH OF JANUARY, 2015

Sindh Land Revenue Act, 1967 etc
(without Books)

Wednesday 14th the January 2015
Time 02:00 P.M to 05:00 P.M

Max: Marks: 100

Note: (i) Attempt any 05 Questions. All question carry equal marks.

Q. No.1 Define any five (05) of the following terms quoting the law/rules:

- | | |
|--------------------------|--------------------------------------|
| (a) Procedure Index Unit | (b) Rates and cesses |
| (c) Permanent tenant | (d) Ordinary expenses of cultivation |
| (e) Encumbrance | (f) Assessment Circle |
| (g) Boundry marks | (h) Village note Book |
| (i) Incremental Housing | (j) Jagir |

Q. No.2 Differentiate between permanent record and periodical record. Explain the procedure of preparing periodical record which relates to land owner and that which relates to other person?

Q.No.3
Q.No.4
Q.No.5

Q.No.6
 Q.No.7

Also to note is that the syllabus of Revenue group (along with other two groups) was notified vide Notification dated 06.02.1999 and the said syllabus covered the following laws:

	REVENUE GROUP (PAPER-I)	WITHOUT BOOKS
1.	The Sindh Land Revenue Act-1967 with Sindh Land Revenue Rules, 1968.	
2.	The Board of Revenue Act-1957.	
3.	The Colonization of Government Land (Sindh) Act-1912. Section 1 to 31 excepting Section 2, 13, 14 and 30	
4.	The Sindh Tenancy Act-1950	
5.	The Sindh Irrigation Act-1879	
	REVENUE GROUP (PAPER-II)	WITH BOOKS
1.	The Land Acquisition Act-1894 amended from time to time.	
2.	The Mukhtiarkar's Court Act 1906	
3.	The Land Reforms Regulation 1972 (MLR-115) and Land Reforms Act-1977.	
4.	The Zakat and Ushr Ordinance 1960 with Assessment Rule.	
5.	The Civil Procedure Code Sections 5, 36 to 54, 60 to 64 and 64 to 78	
6.	The Sindh Rural Credit and Land Transfer Act-1947	
	REVENUE GROUP (PAPER-II)	WITH BOOKS
1.	The Sindh Gothabad (Housing Scheme) Act-1987.	
2.	The Sindh City Survey Act 1987 with City Survey Rules-1988.	
3.	The Limitation Act 1908.	
4.	The Sindh Court of Wards Act 1905.	
5.	The Sindh National Calamities (Prevention & Relief) Act-1958	
6.	The Sindh Local Government Ordinance 1979/2001.	
7.	The Registration Act 1908.	
8.	The Court Fees Act	
9.	The Stamps Act.	

As mentioned earlier, the Petitioners moved an appeal before the Respondent No.2 for the grant of compensatory marks. It would be useful to detail the grounds of such demand. In respect of definition (a) and (j) of the Question No.1, it was alleged that *the terms (a) Produce Index Unit and (j) Jagir do not pertain the paper of Land Revenue Act (without book), but they pertain to part of Martial Law Regulations, which is a paper taken as with books. The term "Produce Index Unit" can be referred at Section-2 (10) of Land Reform Regulations, 1972. The jagirs were abolished long time ago, and no 'Jagir' exists any more. 'Jagir' are not part and parcel of the paper of Land Revenue Act. With regards Question No. 2 it was stated that the periodical record pertains to Section-41, and preparing the periodical record of other persons pertains of*

Section-43 of the Land Revenue Act. Both the sections were omitted/repealed by Sindh Land Revenue (Amendment) ordinance XI of 1980. The omitted sections do not have any scope or use, and are not part and parcel of our syllabus.

As it could be seen from the above, the claim for the grant of compensatory marks was based on the assertion that:

- (1) With regards Question No.1, the examiner asked to define the terms namely 'Produce Index Unit' and 'Jagir'. As it could be seen from the appeal that the case has been made that 'Produce Index Unit' and 'Jagir' do not pertain to Land Revenue Act, but rather to Martial Law Regulations, which was to be attended by the candidates with books open (i.e. the students had no need to memorize these definitions). Further it was contended that the term 'Produce Index Unit' referred to Land Reforms Regulations, 1972 and 'Jagirs' have been abolished long time ago, these questions did not find part and parcel of the Land Revenue Act, therefore, the compensatory marks become due, and
- (2) Question No.2 of the paper Land Revenue Act, 1967 held on 14.01.2015 was entirely out of syllabus. By making reference to Question No.2, it was alleged that since material part of the above referred question was in relation to Sections 41 and 43 of the Land Revenue Act, 1967, however, since the above referred two sections were omitted and repealed by the Sindh Revenue Amendment Ordinance 1980, a case was made that the examiner has asked the question relating to omitted provisions thus he has committed illegality, therefore, compensatory marks become due.

Be that as it may, it is also important to note that while there are only handful of students, who have filed the instant petition, there were more than 40 candidates, who appeared in the said examination who took the identical examination paper, out of which 14 candidates passed the

examination, therefore, Court posed a question to the learned counsel appearing on behalf of the Petitioners that when identical paper in respect of which the identical syllabus was also provided to those students, who have passed it, wouldn't grant of grace marks to the petitioners be unfair and discriminative towards those students who attempted the same question paper and passed it? The learned counsel at this juncture placed reliance on the judgment passed by the Division Bench of this Court in CP No.D-141/1998 (to which we will deal at length in the later part of this judgment).

Now taking head-on with the assertions of the petitioners that option (a) and (j) of Q.No. 1 were out of syllabus, it is worth pointing out that neither Q.No.1 nor Q.No.2 was compulsory, as well as, for Q.No.1, candidates were given 10 options and they only need to answer any 5, thus even if they did not know answers to option (a) and (j), they had 8 different options to try, therefore such a contention that all the options (10/10) needed to be known to the students is not the case. In Multiple Choice Questions (MCQ) usually one or two options are intentionally kept as bouncer options. If one even eliminate any of these options, MCQs still leave a big margin to choose from. In this case, even if it is considered that option (a) and (j) were bouncer options, candidate still has 5 out of 8 options to choose from and answer them correctly. That gives more than 62% passing margin to the students out of which the candidate has only had to secure 45% marks to pass. Notwithstanding therewith the respondents insisted that these options were not out of syllabus anyway. The learned counsel for the respondents submitted that the petitioners' appeals wherein they contended therein that they remained unsuccessful owing to the inclusion of out of syllabus questions in the paper of the Land Revenue Act, 1967 particularly Q.No.2 being entirely out of syllabus and omitted is incorrect. With regards Q.No.2 regarding 'Periodical Record' of Paper I is concerned, per counsel, the provision of Periodical Record were part and parcel of Land Revenue Act, 1967 and were validly implemented by the Revenue Administration till the Amendment Ordinance 1980

omitted them from the said Act. The learned counsel for respondents submitted that Mukhtiarkar being vital functionary of Revenue Department and custodian of revenue record of a Taluka cannot discharge his duties, if he does not possess sufficient knowledge about the gradual development leading to present form of the Land Revenue Act, 1967 till date and old records still refer to old terminologies. Per counsel if a Mukhtiarkar does not possess any knowledge about different types of Land (Revenue) records, he cannot understand the cases and spirit of other precedents relating to various kinds of allied records. As explained by the learned counsel, Q.No.2 regarding Periodical Record was not a compulsory question in the paper of Land Revenue Act, 1967 and the candidates had a choice of attempting any five questions out of seven questions given in the said question paper. If the petitioners, as they contend that Q.No.2 was out of syllabus, they should have pointed it out to the invigilator in the Examination Hall and avoided this question, which they failed to do. Students exercised their choice and attempted this very question in the said paper despite sufficient choice, which reveals that they had no better answers for the remaining questions either. Now having failed after attempting the said Question, students cannot take a plea that the question was faulty (even if that was the case).

Per counsel, with regards Q.No.1 petitioner's contentions that terms 'Produce Index Unit', 'Jagir' and 'Incremental Housing' were out of syllabus fail on the account that these three terms were out of the ten options present in Q.No.1 and the candidates were to give answers to five terms only. The petitioners now alleging that these terms were out of syllabus once having given wrong answers cannot take a second chance to answer the same questions. The counsel explained that "Produce Index Unit" is the term defined as Sub-Section 19-A of Section 4 of the Land Revenue Act, 1967 which was amended by Sindh Amendment Act of 1972. Notwithstanding that the said section has been omitted by Land Revenue Amendment Ordinance, 1982 a fairly large number of land records are based on the allotments made on the basis of PIUs as early as 1947 since

PIUs have importance in deciding comparative productivity of agricultural lands in different areas on the basis of which valuation was carried out for the purpose of payment of compensation, exchange of land, grant of agricultural credits etc. and there are a number of decisions of the Board of Revenue and Higher Courts in which the term “Produce Index Unit” is used. Per counsel, knowledge of PIU (despite amendments) is vital for the computation for comparative valuations of land of different areas by the Revenue Officers, particularly the Mukhtiarkar whose office forms the foundation of entire Revenue administration of the Province.

Per counsel, while the petitioners have conceded that the term PIU is referred at Section 2 (1) of Land Reforms Regulation 1972, the said Regulation is still a part of syllabus of Revenue group Paper-2 which paper, the petitioners have attempted. Hence it may validly be construed that despite amendment or omitting in Land Revenue Act, 1967, the term PIU still exists in Land Reforms Regulation, 1972, which is very much included in Paper-2 of the same Revenue group. Hence contention of the Petitioners that the term the Produce Index Unit is out of syllabus is totally incorrect.

With regards Jagir and Jagirdar, per counsel these terms are defined in sub-sections (6) and (7) of Section 4 of the Tenancy Act, 1950 and there are various decisions of the Board of Revenue Sindh and Higher Courts pertaining to provision of Jagir and one questions as to how a Mukhtiarkar who deals with the lands which falls in the purview of provision of Jagir can understand the cases pertaining to Jagir if he does not know anything about the term Jagir *per se*. The learned counsel summed that the term as stated above originated in the Tenancy Act, 1950 and it was part of the syllabus of the paper titled Land Acquisition Act, 1967 and has not been taken from any other law.

Now coming to the assertions of the learned counsel for the petitioners as to the judgment passed by the Division Bench of this Court on 26.06.1999 (CP No.D-141/1998), we take a look at the same. In that case the petitioners appeared in the Assistant Commissioner

Departmental Examination Part-I and Part-II, held by SPSC in 1997 and while the petitioner cleared Part-I, however, they could not secure minimum required 45 marks in one paper of Part-II examination, thus failed the examination in total. The petitioners alleged that certain questions in the examination, were out of syllabus and when this fact was realized by the respondents, they sent a note to the examiner for taking lenient view while checking the examination papers of the respective subject, however, when the result came, the petitioners were declared fail in the said subject, whereupon the petitioners reached SPSC for grace marks, which were already granted to other 19 candidates, who appeared in same examination in the previous year. The respondents rejected that request of the petitioners, which actuated the constitution petition. The Court after considering the matter at length, came to the conclusion that the petitioners were not given equal treatment as in past grace marks were granted to other students in similar exam held under the similar circumstances, therefore, petitioners were held to be eligible to obtain the similar treatment of grant of grace marks.

However in this case, as seen from the appeal and pursuant to the assertions made by the learned counsel for the petitioners, there is no precedent of granting similar grace marks for the post of Mukhtiarkar in the past examinations, therefore, since the Respondent has not granted any such marks in the past, the claim of the petitioners that they have been discriminated is not valid since dissimilar treatment in dissimilar circumstances is not discrimination.

As to the question posed by the Court that if grace marks were allowed to the petitioners, wouldn't such exercise be discriminatory to those candidates who passed the examination without having been given the benefit of any grace marks? A review of the case law decided by the Apex Court shows that Court has acceded to the concept of grant of grace marks only in special circumstances. For example in the case reported as 2012 SCMR 848, the Apex Court consented to the grant of grace marks since there was a provision under rule 6 of the NWFP Judicial Service

Commission Rules, wherein five grace marks could have been allowed. This view also echoes in the Apex Court Judgment reported as PLD 1988 SC 356, where the Court held that if a provision of grant of grace marks is available in the relevant rules, these marks should be granted and also be added to the aggregate. Also of importance is the case reported as 1999 PLC (CS) 1574 relating to the Promotion Rules of Customs Department, where certain candidates were granted grace marks, but a few were discriminated and the Court held that the principle of consistency requires similar treatment to be followed.

To the contrary, Court held a different view in the case of MBBS examination in the case reported as 2006 PLD 243, wherein MBBS students made a claim for the grace marks, the Court held that *since the medical practitioners have to deal with the pursuance of human life and they should be fully equipped with professional skills, knowledge and expertise in medical discipline, therefore, award of grace marks would be against the principles of good governance and improving higher standard of professional education.*

The dictum as emanated from the above referred cases of the Apex Court is that until and unless there are any provision for the grant of grace marks, no such claim of grant can be made as a matter of right and in the interest of higher standards of education, adjudicators to refrain from granting grace marks.

Be that as it may, if at all hypothetically grace marks are to be allowed, one has to ponder should these marks be awarded for the alleged out of syllabus/omitted questions (as referred hereinabove) or to treat these questions as non-existent and evaluate the candidates for the remaining questions, with a pro-rata scaling up of their score to add them to the maximum score? Also to keep in mind that whether such remedy is to be applied to all candidates, irrespective of whether they had attempted those questions or whether the grant of grace marks is to be restricted to only those candidates who had attempted these question, as candidates who have not attempted these questions had nothing to lose. But even in

that case, the deciding factor would be that since none of the above referred questions (or part thereof) were compulsory, and the candidates had only 5 questions to be answered from 7 questions, therefore if they had studied well, they could at least have secured mere passing marks, if not gotten 100 out of 100. Also in the grant of any grace marks, there is a danger of succumbing to the grievance of unrepresented candidates who have passed the examination and have proceeded with their employment. Would this forced and pumped-up injection (by the grant of grace marks to the petitioners) would not be anti-competitive, prejudicial and causing injury to them? These are serious question. That is why a lot of studies have been made on the subject of grace marks. In *Revamping the Examination System* by Dr. Beena Shah, Northen Book Center, New Delhi the author while asking question as to *how many marks should be given as grace marks* writes that the procedure of assigning grace marks is unscientific. Also of valuable resource is the work entitled TAYLOR, H.J., and TLUANGA, L.N., *Grace Marks*, Examination Research Unit, Gau. U., 1963 which states that the method of adjusting examination by grace marks is open to objection on the grounds that (1) it is based on arbitrary rules; (2) adjustment is done in one direction only, i.e. marks are only added not subtracted and; (3) the term 'grace mark' suggests that the mark is awarded as an act of compassion. The research paper prescribes that no candidate should pass an examination on compassionate grounds. Also *Doled out Grace Marks Do Harm* by Sridhar Vivan, Bangalore Mirror Bureau (<http://bangaloremirror.indiatimes.com>) suggests that that grace marks have a negative effect on the student community and the good student will always be at a disadvantage if such a system of examination is employed. It concludes that grace marks spell doom in a student's career.

Coupled with the aforementioned hazards associated with grant of grace marks, the conduct of the petitioners may also be viewed from the Statement filed by AAG Sindh dated 30.04.2016 with which a letter from SPSC dated 28.04.2016 is attached which suggests that most of the petitioners re-appeared in the Revenue Qualifying Departmental

Examination held in Feb-2016 without prejudice to their case but (minus one who remained absent) all of those who re-appeared failed the exam, again.

Not that their second attempt to cause them any prejudice, for the aforementioned detailed reasons, we do not see any merit in the instant petitions seeking grant of grace marks, these along with all pending applications are hereby dismissed.

Provided however, if rules permit, this judgment shall not to pose any bar on petitioners' right of re-appearing in the aforesaid departmental examination afresh.

Karachi: 26th., December, 2016

Judge

Judge