

IN THE HIGH COURT OF SINDH, AT KARACHI

Present:

Mr. Justice Syed Hassan Azhar Rizvi
Mr. Justice Adnan-ul-Karim Memon

C.P No.D-1377of 2014

Akmal Hussain Petitioner

Versus

The Secretary Establishment Government
Of Pakistan & others Respondents

Date of hearing: 23.08.2017

Dr. Shah Nawaz Memon Advocate for the Petitioner.
Mr. Muhammad Aslam Butt DAG.

J U D G M E N T

ADNAN-UL-KARIM MEMON,J:- Through the instant
Petition, the Petitioner has sought directions to the Respondents to
issue Offer Letter to the Petitioner for appointment as Section
Officer (BS-17) in the Secretariat Group.

2. Brief facts of the case are that Petitioner is working as Patrol
Officer in National Highways and Motorways Police. Petitioner
averred that 50 vacant posts of Section Officer (BS 17) were
advertised by Federal Public Service Commission (hereinafter

referred to as FPSC) for appointment under Section Officers Promotional Examination (hereinafter referred to as SOPE), Rules 2012. Petitioner applied, through Proper Channel for the post of Section Officer under Section Officers Promotional Examination (SOPE) 2012 and qualified for the same and was placed at Serial No.53 in the Merit list. It is further averred by the Petitioner that out of 50 successful candidates, four candidates namely Mr. Alam Zeb at Serial No.15, Mr. Mukhtar Ahmed Khan at Serial No.28, Mr. Inam Ullah Jan at Serial No.30 and Mr. Muhammad Ashfaq at Serial No.51 did not join the service as they were appointed as Section Officer in Senate Secretariat; therefore, four vacancies fell vacant. Per Petitioner since he was placed at Serial No.53 and four seats are vacant, therefore he is eligible to be recommended by FPSC for the post of Section Officer. But, the Respondent No.2 (FPSC) has refused to recommend the name of the Petitioner inspite of clear instruction issued by the Respondent No.1 to the Respondent No.2 on the premise that Condition No. 28 of Section Officer Promotional Examination (SOPE) 2012 does not allow such recommendation of the Petitioner.

3. Upon notice, the Respondents filed para-wise comments and denied the averments of the Petitioner.

4. Dr. Shahnawaz, learned counsel for the Petitioner argued that the Petitioner qualified for the post of Section Officer under Section Officers Professional Examination (SOPE) 2012 and he was placed at Serial No.53 in the Merit list; that there were 50 seats and out of which four candidates borne at Serial No. 15, 28, 30

and 51 in the Merit List, opted not to join the service as they had qualified for the post of Section Officer in Senate Secretariat. Therefore, those vacancies fell vacant, thus liable to be filled on merit from candidates on waiting list, hence, the Petitioner is eligible to be recommended for the post of Section Officer (BS 17); that there is no need to go through a full-fledged recruitment process to be initiated again and waiting list mechanism saves public money, human resource and time spent on carrying out a full course recruitment process; that the Respondent No.1 requested the Federal Public Service Commission to nominate 3 other eligible alternate candidates in place of three nominees, who did not join the service, as per Merit List (After serial No.51) but the Respondent No.2 did not accede to the request of Respondent No.1 on the premise that the FPSC cannot issue alternate nomination in place of non-joiners and such vacancies are to be carried over to the next SOPE, which assertion is illogical and without sanctity of law; that the FPSC cannot take resort of SOPE conditions 2012 to refuse the request of Competent Authority. Even they have no power to frame the Rules 2012, without approval of the Federal Government as provided under Section 10 of Federal Service Commission Ordinance 1997, therefore declining to nominate the Petitioner for the post of Section Officer on the waiting list is illegal, unlawful and without lawful authority. He lastly prayed for allowing the Petition. In support of his contention, the learned counsel has relied upon in the case of Shabana Akhtar Vs. District Coordination Officer Bhakkar and others (2012 PLC (C.S) 366, Rafaqat Ali Vs. Executive District Officer Health and

others (2011 PLC (C.S) 1615, Muhammad Ashraf Vs. Government of Punjab Education Department (2012 PLC (C.S) 600.

5. Mr. Muhammad Aslam Butt, Deputy Attorney General, representing the Respondent No. 1 & 2, contended that Petition is not maintainable in law as the matters relating to terms and conditions of Civil Servant fall in the exclusive jurisdiction of Service Tribunal, in terms of Article 212(2) of the Constitution of Islamic Republic of Pakistan, 1973, read with Section 3 (2) of Service Tribunal Act 1973, therefore the Petitioner cannot invoke jurisdiction of this Court; that that Respondent No.1 being Appointing Authority in terms of Civil Servant (Appointment, Promotion and Transfer) Rules, 1973, can issue offer of appointment on the recommendation of Federal Public Service Commission and not on his own accord, even the FPSC cannot be approached to recommend particular candidates, who did not qualify for the post applied for within the availability of seats. Since no recommendation in respect of the Petitioner has been received from the Respondent No.2, offer of appointment to the Petitioner cannot be issued; that Federal Service Commission conducted Section Officers Promotional Examination 2012 under the instructions/conditions framed with approval of the Competent Authority; that the Petitioner participated under those instructions/conditions and policy, but he did not qualify for the post and meet the threshold as he stood at serial No. 53; whereas there were only 50 vacancies, which were advertised. The contention of the Petitioner is that these instructions/ conditions

are against the F.P.S.C Ordinance 1977 is not correct and misconceived by the Petitioner. He prayed for dismissal of the instant Petition.

6. We have heard learned counsels for the parties and perused the material available on record and case laws cited at the bar.

7. First of all we take up the issue of the maintainability of the instant Petition under Article 199 of the Constitution. We are of the view that the grievance of the Petitioner does not relate to the terms and conditions of service, but he has sought relief of appointment, therefore the Petition is not barred by Article 212 of the Constitution and is maintainable to be heard and decided on merit.

8. Respondent No.1 initiated the process of recruitment of vacancies of Section Officers (BS-17) under Section Officers Promotional Examination 2012, through Federal Public Service Commission/Respondent No. 02. Perusal of record reflects that only 50 candidates were declared successful out of that four candidates standing at Serial No. 15, 28, 30 and 51 in the Merit List opted not to join the service as they qualified for the post of Section Officer in Senate Secretariat. Therefore, only 46 candidates were recommended by the FPSC as Section Officers in BS-17, which were appointed accordingly by the Government of Pakistan. As per record, Federal Public Service Commission was requested to recommend four candidates next in merit list, but Federal Public Service Commission, in view of Conditions No. 25, 26 and 28 of

SOPE 2012 contended that no candidate can be recommended over and above 50 qualified candidates. Reverting to the claim of the Petitioner that the SOPE instructions/conditions 2012, framed by Federal Service Commission have no approval as required under Section 7-A of Federal Public Service Commission Ordinance 1977, therefore these conditions are not valid; the learned DAG representing Respondent No.1 denied assertion of the Petitioner and these conditions are valid and approved by the Competent Authority. Since, pure question of law is involved in the present proceedings is whether a waiting list candidate, not declared successful, can be recommended for appointment against any vacancy occurring due to non-joining of any successful candidate. We, however, do not agree with the contentions of the learned counsel for the Petitioner, who cannot be recommended in view of Condition No. 25 laid down for the said examination by the Federal Public Service Commission, reproduced below:-

25. Appointment: - The candidate who finally qualifies the Examination will be recommended by the Commission in order of merit and number of advertised vacancies announced by the Government. In case of non-joiner or if a successful candidate in the Promotional Examination does not report for training within specified date due to the reason whatsoever, no alternate nomination will be issued and such vacancies will be carried over to the next Promotional Examination.”

9. Perusal of record shows that the candidates Ghulam Ahmed & others filed Writ Petition No.190 of 2014 before the learned Islamabad High Court, Islamabad on the similar issue involved in the present proceedings, their Petition was dismissed vide order dated 16.06.2015, same was upheld by Honourable Supreme

Court of Pakistan in Civil Petition No.2524 of 2015 vide Order dated 09.11.2015. The operative part of the Order is reproduced as follows:-

“ 2. It is contended by the learned counsel that 50 posts of Section Officers were lying vacant as advertised by the Respondents and out of over 1600 candidates only 148 were able to qualify the written test, however, 46 were appointed as against 50 vacant posts. It is further contended that there are over 200 vacancies still lying vacant and the petitioners deserve to be appointed on the said vacant posts.

“3. Admittedly, only 50 vacancies were advertised and the petitioners cannot compel the employer to fill up the vacancies as are available today. Contention of the learned counsel that the Petitioners ought to have been appointed was elaborately dealt with by the learned Judge in Chambers in the High Court in para 12 of the judgment which runs as follows:-

“ 12. Foremostly it would be important to address the point of maintainability. Petitioners are claiming their entitlement for appointment pursuant to a competitive examination held under the auspices of Respondent No.2, the FPSC, therefore, foundation of their grievance stems from appointments made under the decision of FPSC. Secondly, preserving the waiting list and catering subsequent requisition through earlier competitive process has been declined by FPSC, therefore it would be in the propriety of the matter that petitioner should avail remedy under Section 7(3) (a) of FPSC Ordinance 1977”

“ 4. No vested right for appointment as Section Officers has been created in favour of the petitioners under the given facts and circumstances of the case, more so, when 1/3rd quota has already been exhausted. No exception could be taken to the conclusion drawn at by the learned High Court. Therefore, the Petition is dismissed and leave refused.”

10. In view of the case of Ghulam Ahmed and others (supra) we are not convinced with the contentions of the learned counsel for the Petitioner as no vested right for appointment as Section Officer has been created in favour of the Petitioner.

11. This being the position coupled with the fact that exercise of jurisdiction by this Court under Article 199 of the Constitution is purely discretionary in nature and meant to foster the cause of justice and fair play, we do not find any valid reason for indulgence. Consequently, the Constitutional Petition merit no consideration and stand dismissed with no order as to costs.

Karachi
Dated:

JUDGE

JUDGE