

# IN THE HIGH COURT OF SINDH AT KARACHI

C.P. No.D-3555 of 2016

**Present:**

**Mr. Justice Irfan Saadat Khan**

**Mr. Justice Adnan-ul-Karim Memon**

Dates of hearing: 27.02.2018, 01.03.2018, 06.03.2018,  
08.03.2018 & 13.03.2018.

Petitioners: Muhammad Tariq Khan and others through  
Mr. Ahmed Ali Ghumro, Advocate.

Res. Nos.1 to 4: Federation of Pakistan and others through  
Salman Talibuddin, Additional Attorney  
General for Pakistan alongwith Shaikh Liaquat  
Hussain, Assistant Attorney General, Syed  
Hussain Jaffar, Director, Ministry of NFS&R,  
Mr. Atiq Ahmed and Mr. Haroon Rasheed,  
Assistant Directors, Federal Public Service  
Commission of Pakistan.

Res. No.5: Dr. Waqas Wakil through Malik Naeem Iqbal,  
Advocate.

## **J U D G M E N T**

**IRFAN SAADAT KHAN, J.** The instant petition previously was  
disposed of on 20.09.2017 by observing as under:

19. *In view of facts and circumstances of the case, the instant petition is disposed of with direction to Respondent No.2 to initiate recruitment process afresh for the appointment against the post of Plant Protection Adviser and Director General (BS 20) in accordance with Rule 14 of the Civil Servants (Appointment, Promotion & Transfer) Rules, 1973 as amended vide Notification dated 28<sup>th</sup> March 2017 issued by Respondent No.1.*

2. Thereafter two Civil Petitions bearing No.4307 & 4865 of 2017 were filed before the Hon'ble Supreme Court of Pakistan, one

by Dr. Waqas Wakil and the other by the Federal Public Service Commission (FPSC), which vide order dated 25.01.2018 were allowed with the following directions:

*“We, thus, convert these petitions into appeals, allow them, set aside the impugned judgment and send the case back to the Division Bench of the High Court for decision afresh after hearing the appellant and the Federal Public Service Commission. As it is an old matter, it be decided within a period of three months. Any party interested in seeking a restraint order may approach the High Court within a week. Till then status quo be maintained.”*

3. The matter then came up before this Court. In the meantime Dr. Waqar Wakil filed two applications one under Order 1 Rule 10 CPC and the other under Order 39 Rules 1 & 2 CPC. Thereafter notices were ordered to be issued to the petitioner as well as respondents No.1 to 4. Moreover in the meantime as an interim arrangement the respondents No.2 & 3 were directed that they may continue with the process but would not finalize the list of successful candidates.

4. Thereafter the application filed by Dr. Waqas Wakil under Order 1 Rule 10 was allowed and he was arrayed as the respondent No.5 in the instant matter. Mr. Ahmed Ali Ghumro, learned counsel for the petitioners, Mr. Haroon Rasheed, Assistant Director, FPSC, Islamabad (representative of the respondent No.4), Syed Hussain Jaffer, Director, Ministry of NFS&R, Department of Plant Protection, Islamabad (representative of the respondent No.2), Mr. Salman Talibuddin, Additional Attorney General for the respondent No.1 and Malik Naeem Iqbal, learned counsel for Dr. Waqas Wakeel (respondent No.5) then were heard at length on various dates.

5. Briefly stated, the petitioners claim that they are working with the respondent No.3 department in Grade 18. That a request was made by the respondent No.2 department to advertise a post for Plant Protection Advisor /Director General (BS-20) to the respondent No.4. Then vide public notice published in various newspapers on 20.06.2016 the Secretary FPSC called the suitable candidates for the above post. It may, however, be noted that a condition has been imposed in the said advertisement that only the persons having domicile of Punjab are eligible to apply for the said post. The qualification required for the candidate was also mentioned in the advertisement. The grievance of the petitioners being that if the said post is filled by appointing the person from outside, the door of their promotion would be closed and that they felt aggrieved on two counts, firstly the person appointed would come from outside and secondly in spite of appointing a person on open merit the condition imposed that the candidates should have the domicile of Punjab is violative of Article 25 of the Constitution of the Islamic Republic of Pakistan (**the Constitution**) since in this manner not only the petitioners but suitable candidates of other provinces, who could apply for the said post on open merit basis, would not be given a chance of appointment. It is in this backdrop that the instant petition was filed.

6. Mr. Ahmed Ali Ghumro Advocate has appeared on behalf of the petitioners and stated that the post requires appointment of a candidate having very high academic background whose job would be i) to advise Federal and Provincial governments on policy matters relating to Plant Protection, ii) to advise private sector (firms and individuals) interested in the import and manufacture of Plant

Protection material and equipment, iii) to supervise and coordinate the work of Locust, Plant Quarantine and Registration of Pesticides as per International obligation and iv) to represent Government in national and international conferences/meetings on Plant Protection. He, therefore, states that allocating the said post to a particular province thus is discriminatory as, in his view, there should be an open competition in case someone has to be appointed from outside, otherwise, in his view, the post has to be filled amongst the best suitable deserving candidates working in the department i.e. the petitioners. He states that fixing of the quota, in his view, is violative of Articles 4, 18, 25 and 27 of the Constitution. He stated that FPSC may be directed to carry out the recruitment process, which has already been initiated, on open merit basis and let the most suitable candidate from all over Pakistan occupy the post. He stated that SRO No.208(I)/2017, dated 28 March 2017, has been issued whereby it has been mentioned that the present post would be filled on open merit basis for a period of three years. He states that he is satisfied with the present SRO and let the FPSC complete the exercise of appointing the most suitable candidate amongst the persons who could apply for the said post. He states that he has no objection if the respondent No.5 qualifies or is appointed on the said post subject to the condition that he is appointed on open merit basis rather than on Punjab domicile. He further stated that, in his view, the Hon'ble Supreme Court of Pakistan, while remanding the matter, has not touched upon the merits of the case and has simply remanded the matter to give an opportunity of hearing to the respondent No.5, since he was not heard previously. He, in the end, stated that this petition may be allowed by directing the FPSC to continue their

process, against which an interim order has been obtained by the respondent No.5, of appointment of the most suitable candidate on open merit basis, which should be for whole of the country. In support of his contentions, the learned counsel has placed reliance on the following decisions:

1. *Nazir A. Khan Swati Vs. Ministry of Law & Justice and others (1998 PLC (CS) 372)*
2. *Sh. Muhammad Sadiq Vs. Federal Public Service Commission and others (2013 SCMR 264)*
3. *Mushtaq Ahmad Mohal and others Vs. The Honourable Lahore High Court, Lahore and others (1997 SCMR 1043)*
4. *Ali Azhar Khan Baloch and others Vs. Province of Sindh and others (2015 SCMR 456)*
5. *Suo Motu Action regarding eligibility of Chairman and Members of Sindh Public Service Commission and others (2017 PLC (CS) 652)*
6. *Suo Motu Action regarding eligibility of Chairman and Members of Sindh Public Service Commission etc. (2017 SCMR 637)*
7. *Shankarsan Dash Vs. Union of India [(1991)3 Supreme Court Cases 47]*
8. *State of M.P. and others Vs. Shyama Pardhi Etc. [(AIR 1996 Supreme Court 2219)]*
9. *Krishan Yadav and others Vs. State of Haryana and others [AIR 1994 Supreme Court 2166]*
10. *Union Territory of Chandigarh Vs. Dilbagh Singh and other [AIR 1993 Supreme Court 796]*
11. *Hanuman Prasad and others Vs. Union of India and others [1996 10 Supreme Court Cases 742]*

7. Malik Naeem Iqbal Advocate, representing the respondent No.5, submits that in response to the advertisement of the FPSC dated 20.06.2016 the respondent No.5 applied on Punjab seat and thereafter considering his academic and other qualifications he was placed at Sr. No.1 by the FPSC in provisionally pre-selected

candidates. He further submitted that the respondent No.5 has done his Ph.D in faculty of Geography/Geosciences from Germany as well as Ph.D. in Agricultural Entomology from University of Faisalabad and, in his view, he is the most suitable person for the said post. He states that by declaring the respondent No.5 to be provisionally pre-selected a vested right has been created in his favour and he being most suitable and qualified person deserves that he should be appointed on the designated post from the province of Punjab, as he has the domicile of Punjab. He stated that the subsequent action of the FPSC by relying on the SRO No.208(I)/2017 is an afterthought on their part and is detrimental to the interest of the respondent No.5 and hence the said SRO, in his view, is liable to be struck down. He further stated that the said SRO, through which Rule 14 of the Civil Servants (Appointment, Promotion and Transfer) Rules 1973 (**the Rules 1973**) has been amended, may be declared ultra vires, since in the said SRO the vacancy is to be filled on open merit on contract basis, which period is that of three years only whereas, according to him, previously no time limit for the appointment of a person on the said post was mentioned. He further stated that the petitioners have no locus standi to file the instant petition, since they do not fulfill the basic criteria for appointment and hence they cannot be considered to be aggrieved persons as, according to him, the petitioners are not in the run for the selection of a candidate for the said post, therefore, they have approached the Court with unclean hands with a view to jeopardize the process of selection of a suitable candidate on the said post. He further stated that adding a proviso to Rule 14 of the Rules 1973 by retrospective effect could not disturb the legitimate

expectation of the respondent No.5. He stated that since the Punjab has 50% quota and the advertisement of the present post is first of its kind hence the post was rightly advertised for Punjab domicile and no adverse inference in this behalf could be taken. He, in the end, stated that the instant petition may be dismissed by directing the respondents No.2 and 3 to implement the recommendations of the FPSC in appointing the respondent No.5 as Plant Protection Advisor /Director General in BS-20. In support of his above contentions, the learned counsel has relied upon the following decisions:

1. *Province of Baluchistan Vs. Murree Brewery Company Ltd. (2007 PTD 1195)*
2. *Miss Farzana Qadir Vs. Province of Sindh and another (2000 PLC CS 225)*
3. *Water and Power Development Authority, Lahore and others Vs. Haji Abdul Aziz and others (2012 SCMR 965)*
4. *Muhammad Fayaz and 4 others Vs. Shah Nawaz Khan, Lecturer English, Government Decree College, Gharhi Dupata and 32 others (1999 PLC CS 1493)*
5. *A.A. Calton Vs. Director of Education and another (1983(3) SCC 33)*

8. Mr. Haroon Rasheed, Assistant Director, FPSC, Islamabad stated that they received a summary from the respondent No.3 department wherein it has categorically been mentioned that a post is to be advertised by calling the candidates from Punjab only, which was done by the FPSC but after the change in the circumstances and amendment in Rule 14 fresh advertisement has been issued by the respondent No.3 calling the suitable candidates on open merit hence, it is for the respondent No.3 to do the needful in accordance with law.

9. The representative from the respondent No.3, namely, Syed Hussain Jaffar has adopted the arguments of Mr. Haroon Rasheed and stated that previously the FPSC was directed to select the candidate on Punjab domicile but due to changed circumstances the department has no objection if a candidate on open merit on contract basis is selected.

10. Mr. Salman Talibuddin, Additional Attorney General, representing the respondent No.1, stated that he has instructions from the Federation that due to amendment in Rule 14 of the Rules 1973 appointment now has to be made on open merit on contract basis and if the respondent No.5 is so highly qualified, he could compete in the open merit and hence by no stretch of imagination he could either be considered to be an affected person or any of his vested right has been infringed. He, therefore, supported the contention of the learned counsel for the petitioners by stating that let the respondent No.3 select the best suitable candidate for the designated post on open merit basis. He further added that quite recently the respondent No.3 has advertised the post of Plant Protection Advisor /Director General on contract basis hence, in his view, the respondent No.5 could participate and compete in the said process, as per law.

11. We have heard all the learned counsel and representatives from the respondent departments at considerable length and have perused the record and the decisions relied upon by them.

12. Before proceeding any further we deem it appropriate to reproduce hereinbelow Rule 14 of the Civil Servants (Appointment, Promotion & Transfer) Rules, 1973, (the Rule) as well as the SRO

No.208(I)/207 dated 28<sup>th</sup> March 2017 (the SRO) on which much emphasis has been laid by the respective parties:-

*“14. Vacancies in the under-mentioned posts shall be filled on All Pakistan basis in accordance with the merit and provincial or regional quotas prescribed by Government from time to time.*

- (1) All posts in basic pay scales 16 and above and equivalent.*
- (2) Posts in basic pay scales 3 to 15 and equivalent in offices, which serve the whole of Pakistan.”*

*“S.R.O. No.208(I)/207. In exercise of powers conferred by sub-section (1) of Section 25 of the Civil Servants Act, 1973, (LXXI of 1973) read with Notification No.S.R.O.120(1)/98, dated the 27<sup>th</sup> February, 1998, the Prime Minister is pleased to direct that the following amendment shall be made in the Civil Servants, (Appointment, Promotion and Transfer) Rules 1973, namely:*

*In the aforesaid Rules, in Rule 14, after proviso the following new proviso shall be inserted:-*

*Provided further that where the post of Head of an Organization is reserved for promotion and in the absence of suitable person, the post is required to be filled by initial appointment in accordance with the provisions of Recruitment Rules, the appointing authority may fill up the vacancy on open merit on contract basis and where such post is reserved for initial appointment, it may be filled on regular basis on open merit.”*

13. The arguments of the learned counsel for the petitioners could be summarized as under:-

- a) The petitioners working in the department are entitled for promotion.
- b) In the alternative, the post of Plant Protection Advisor/Director General (BS-20) is to be filled on open merit basis for a period of three years so that a chance would remain open to the petitioners to be considered for promotion on the said post after attaining proper qualification.

The arguments of Malik Naeem Iqbal, learned counsel for Respondent No.5, could be summarized as under:-

- a) The petitioners have no locus standi to file the instant petition, being unqualified persons.
- b) The Respondent No.5 being the most suitable candidate is liable to be appointed on this post since he has cleared test and interview and has been recommended for appointment, hence a vested right has been created in his favour.
- c) The SRO would have no bearing on the case of Respondent No.5 being subsequent in time and could not be applied retrospectively. The time limit of three years imposed in the SRO is also uncalled for.

The arguments of learned counsel appearing for Respondents No.1 to 4 could be summarized as under:-

- a) Whatever orders are passed by the High Court would be complied with in letter and spirit.
- b) Since a fresh process has been started, hence the Respondent No.5 may participate in the said process and if found suitable would be considered in accordance with law.

14. The submissions made by the learned counsel for the petitioners are two folds, firstly, the petitioners may be appointed as Plant Protection Advisor/Director General (PPA) and in the alternative any deserving person be appointed on open merit basis strictly as per the SRO. So far as the first limb of his arguments is concerned since it is an admitted position that none of the petitioners qualifies for the criteria and the demand of the qualification required for the appointment of the post, as provided under the SRO, hence

none of the petitioners could be considered to be in the run for the appointment of the post of PPA. However, the second argument of Mr. Ahmed Ali Ghumro, learned counsel for the petitioners, in our view, carries substantial weight. A perusal of Rule 14 of 1973 Rules clearly envisages that the post has to be filled on all Pakistan basis in accordance with the merit and provincial or regional quota prescribed by Government from time to time; meaning thereby that the post has to be filled on all Pakistan basis and while doing so provincial and regional quota has also to be kept in view.

15. We are mindful of the fact that the post previously advertised by FPSC was for Punjab domicile only in respect of which an answer was given by the representative of the FPSC as well as counsel for Respondent No.5 that since Punjab enjoys 50% quota, hence first preference for the appointment has to be given to the said province by keeping in view the provincial and regional quota. However, a legal issue was raised in the instant petition that by allocating the post to Punjab only there could be a possibility of feeling of discrimination amongst the other Provinces, etc. Apparently, it is in this backdrop that the Prime Minister was pleased to direct to make an amendment vide the above referred SRO to fill-up the vacancy on open merit on contract basis and where such post is reserved for initial appointment, it may be filled on regular basis again on open merit. During the course of the arguments Mr. Ahmed Ali Ghumro, learned counsel for the petitioners, has conceded that the petitioners would have no objection if the Respondent No.5 is selected on open merit, rather than on Punjab domicile, if he is found by the respondent No.3 to be the most suitable candidate on whole Pakistan basis, which view has

been endorsed by Mr. Salman Talibuddin, representing the Federation.

16. We are of the view that the nature of the SRO issued by the Prime Minister appears to be that of an explanation to avoid any eventuality so that no one should feel discriminated. We, therefore, so far as this issue is concerned, are of the considered view that the SRO issued by the Government of Pakistan could not be declared to be ultra vires or a nullity in the eyes of law. Since the said SRO, as stated above, appears to be in the nature of an explanation added in Rule 14 through a proviso. It is the settled principle of law that the explanation added for removal of doubt, removing of obscurity or an ambiguity is always retrospective in nature. Reference in this regard may be made to the decision given by a learned Division Bench of this Court in the case of COMMISSIONER OF INCOME TAX VS. M/S. NAZIR AHMED & SONS (PVT.) LTD. KARACHI (2004 PTD 921). Here a question would arise that what was the need of inserting proviso to Rule 14. The answer of this question appears to be quite obvious that in order to avoid any discrimination the said proviso was added that the post, firstly, where the post of a Head of an Organization is reserved for promotion and in the absence of suitable person is required to be filled by initial appointment in accordance with the recruitment rules and the appointing authority may fill-up the vacancy on open merit on contract basis and where such post is reserved for initial appointment, it may be filled on regular basis on open merit. It is seen that the word "*open merit*" has been used twice in the said SRO just to clarify any confusion or eventuality that could arise in the matter to denote the clear intention of the law-framers that the post has to be filled on open merit basis.

It would not be out of place to mention here that the word “*open merit*”, in our view, means all Pakistan basis. We, therefore, do not find any illegality and irregularity in the said SRO and found the same to be intra vires that the post of PPA has to be filled on open merit basis all over Pakistan; hence, in our view no Article of the Constitution appears to have been violated to declare the SRO as ultra vires, nullity in the eyes of law, illegal and of no legal effect.

17. Though, the Respondent No.5 has claimed that the SRO is prejudicial but if the said SRO is seen in a broader spectrum on all over Pakistan basis, it would be seen that the said SRO talks about filling-up the post on open merit since it is an admitted position that the person required for the said post should possess extra-ordinary academic and other qualifications, hence selection of a person on open merit on all Pakistan basis, in our view, would provide an atmosphere of healthier competition amongst the suitable/deserving candidates all over the Pakistan, rather than restricting it to a province only.

18. Apropos, the contention of the learned counsel for the Respondent No.5 is concerned that he has been pre-selected as well as recommended by the FPSC for the selection, hence a vested right has been created in his favour, suffice to state that, firstly, no notification of his final selection has yet been issued by the concerned department, though, he has been recommended for the said post but, in our view, the Respondent No.5 could only claim vested right had a notification for his final selection been issued by the concerned authority, which is not the case in hand. Therefore, the decisions relied upon by the learned counsel for the Respondent

No.5 in this behalf are quite distinguishable on the facts obtaining in the instant petition.

19. During the course of the arguments a question was asked by the Bench from the counsel for the Respondent No.5 that if he is so highly qualified that no other candidate could compete with his qualification, as stated by the learned counsel for the respondent No.5, why is he afraid of not participating in the fresh process of selection, which has already been initiated by the respondent No.3. The learned counsel for Respondent No.5 submitted that, in his view, the Respondent No.5 due to efflux of time is now over-age, hence could not participate in the selection process. We, in this regard, are of the view that since the Respondent No.5 had already participated in the selection process but due to the litigation the process of selection has been delayed, hence the same should not come in the way of Respondent No.5, so far as his age is concerned, as he had already participated in the selection process and it is due to the pending litigation that he has crossed the maximum age limit, if any, rather, his case should be considered alongwith other candidates on all Pakistan basis on open merit and the best suitable candidate may thereafter be selected in accordance with law, if he intends to compete in the said process.

20. We, therefore, dispose of this petition by observing that let the respondent No.3 complete the process of selecting best suitable candidate for the post of PPA on all over Pakistan basis keeping in view Rule 14 as well as the proviso added vide SRO and while doing so they are directed to consider the case of Respondent No.5 also as one of the prospect candidate, if he applies for the above post

without objecting to his age, which aspect has already been discussed above. We expect that the said exercise/process would be completed within two months in accordance with law from the date of receipt of this judgment.

21. With the above directions the instant petition alongwith the listed applications stand disposed of.

JUDGE

JUDGE

Karachi:  
Dated: \_\_\_\_\_.