

IN THE HIGH COURT OF SINDH AT KARACHI

Misc. Appeal. No.17 of 2020

Dates of hearing: : 06.10.2021

Date of Judgment : 22.10.2021

Appellant Dr. Farooq Ahmed : through Mr. Imran Ahmed
Advocate a/w appellant.

Respondents No.1 & 2 : through Mr. Jameel Ahmed
FPSC Shah, Assistant Attorney
General for Pakistan along with
Mr.Abdullah, A.D. Legal, FPSC.

JUDGMENT

Muhammad Saleem Jessar, J.- Through this Misc. Appeal appellant has sought following reliefs:

- a) Set-aside the subsequent order in the shape of report dated 06.04.2019, (Annexure A/1 to A/8) and letter dated 06.03,2019, (Annexure A/7) brought on record through statement dated 07.10.2019.
- b) The candidature / eligibility of appellant may be restored for interview for the post of “Port Health Officer” as per letter dated 07.08.2013, advertised on 2013 being case No.F.4-66/2013-R-FS-11 (Roll No.2-K).
- c) Any other appropriate order which may be deemed necessary in the interest of justice to prevent abuse of process of law.

Precisely, the facts giving rise to the filing of instant Misc. Appeal, as per contents of the memo of appeal, are that the appellant is serving as Deputy Port Health Officer (B-17), Port Health Department, Karachi under Directorate of Central Health and Establishment, Islamabad. On 04.04.2013, Federal Public Service Commission (FPSC) advertised on FPSC website, the post of “Port Health Officer” (B-18) inviting on-line

applications for the said job from the aspirant candidates. The appellant also applied for the same on the basis of required qualification being MBBS, MPH degree and with required experience. The appellant was then informed about rejection of his candidature for interview for the aforesaid post for the following reasons:

“REASON(S) OF REJECTION

You lack post qualification experience by one year, ten months and nineteen days from the required 5 years’ experience (i.e. after post graduate lower diploma in Public Health)

DEFICIENCIES IN DOCUMENTS

- i) One attested photograph.
- ii) Status of MPS from PMDC whether it is postgraduate Higher or Lower diploma required, to determine the eligibility.

The appellant was further informed that if he was aggrieved with the said rejection, he may make representation and request for personal hearing.

Accordingly, the appellant moved representation but the same was dismissed as conveyed to him vide letter dated 26th September, 2013 (*Annexure ‘F’ at page 173 of the case file*). In the said letter he was further informed that he may appear for Personal Hearing, if he so desires. The appellant appeared before the concerned authority, however the representation was again rejected vide Memorandum dated 18.07.2014 (*Annexure ‘F/1’ at page 175 of the case file*). The appellant then moved a review application as provided in the relevant rules which was also dismissed vide Order dated 18.09.2014.

Thereafter, appellant filed a constitutional petition being C.P. No.D-5400/2014. After hearing the parties, the Honourable Court disposed of the said petition vide Order dated 11.02.2016, by directing FPSC to decide appellant’s pending recruitment application strictly in accordance with law.

It is the grievance of the appellant that the respondents instead of considering recruitment of the appellant by restoring his candidature for interview, again rejected his candidature / eligibility vide order dated 8th and 14th December, 2016 (*Annexure ‘A/9’ at page 49 of the case file*), on the ground that *since the MPH degree held by the appellant is of one year*

duration (2 semesters), it cannot be treated as Higher Diploma after MBBS, because it has been equated to lower diploma by PMDC. Therefore, according to condition (ii) of the advertisement, the appellant after his MPH Degree was required to have 5 years post qualification experience upto hearing date, which he lacks.

The appellant then filed a contempt application in disposed of C.P. No.D-5400 of 2014, on the ground that direction issued to the FPSC was to decide pending applications of the appellant *in accordance with law* and as the same were not decided *in accordance with law*, therefore, the concerned officials of the FPSC committed contempt of court. However, vide order 24.02.2017 contempt application was disposed of in the following terms:

“There is no denial to the fact by learned counsel for the petitioner that pending application of the petitioner has been decided by the Respondent No.1 as directed by this Court on 11.2.2016. Now the question, whether the same has been decided in accordance with law or not, in our view, is a separate cause of action and if the petitioner is aggrieved with the order passed by respondent No.1 on the pending application filed by the petitioner, he could seek his remedy as available to him under the law and not by way of a contempt application.

We, therefore, are of the view that no case of contempt has been made out and dismiss the CMA No.31221 of 2016 in the above terms. However, the petitioner if aggrieved with the decision made by the Respondent No.1 may seek his remedy as available to him under the law.”

The appellant, thereafter moved Misc. Appeal No.29/2017 which was disposed of vide order dated 09.05.2018. Relevant portion from the said order is reproduced as under:

“In view of the above, the impugned order is set aside. The case is sent back to the Federal Public Service Commission to decide the same strictly in terms of comments of PMDC that were filed in the aforesaid C.P. No.D-5400/2014, standing Recognition Committee’s decision dated 13.08.2012 and all his credentials for consideration of petitioner for the subject post. The matter shall be decided within two weeks from today since the post is lying vacant for last four years.”

According to petitioner, although the directions contained in the aforesaid order was complied with to the extent of awarding level II-b as per classification of PMDC (now PMC), but the FPSC did not accept appellant 's candidature for the post of "Port Health Officer" by altering their stand treating level II-B too as not equivalent to higher diploma. It is further pleaded by the appellant that as FPSC did not comply with the aforesaid directions of the Honourable Court within stipulated time of 15 days, and the decision was kept pending for over six months, the appellant moved a contempt application being CMA No.7120/2018 in M.A. No.29 of 2017. However, Honourable Court while treating the contempt application as an application under Section 151 CPC, disposed of the same vide order dated 29.01.2020. Relevant portion from the said order is reproduced as under:

"3. Prima facie, the order was to the effect of considering the appellant which the FPSC did and has passed an independent order. This, prima facie, is a subsequent order of the FPSC and appellant has remedy to challenge the same in independent appeal, as such controversy cannot be decided in application U/s. 151 CPC in the disposed of appeal, however, the contention raised by representative of FPSC that post is not available at this stage is having no weightage as the present proceedings are continuity of that earlier requisition, thus, in case appellant succeeds, he would be entitled to receive the due post for which he was entitled on that requisition. Accordingly, instant application is disposed; appellant would be at liberty to file fresh appeal, however, it is observed that limitation will not come in the way of appellant as the application U/s. 151 CPC is within time and subsequent order was, per appellant, brought to light during proceedings. "

Consequently, the appellant being aggrieved by the decision of Federal Public Service Commission made in pursuance of the direction contained in the Order dated 9th May, 2018 in M.A. 29 of 2017, communicated to the appellant vide Letter dated 6th March, 2019 (*Annexure A/7 at page 43 of the case filed*), has filed instant Misc. Appeal.

I have heard learned counsel for the parties and have gone through the material available on the record.

Learned counsel for the appellants contended that although learned Single Judge of this Court in appeal and a Division Bench in C.P. No.D-5400 of 2014, have already declared the appellant in level II-b on the basis of comments and ruling of PMDC, but the FPSC without any lawful authority, has placed one year' course of MPS in level II-A treating the same as *lower diploma* and two years' course of MPS in level II-b as *higher diploma*. He further submitted that FPSC is estopped by their own conduct to take inconsistent position by denying the status of level II-b, as higher diploma which conduct is resulting in non-filling of important post of "*Port Health Officer*" for the last seven years due to malafides of the respondents.

Conversely, Assistant Attorney General for Pakistan submitted that after disposal of C.P.No.D-5400 of 2014 the appellant filed M.A. No.29 of 2017 before this Court which too was disposed of vide order dated 09.5.2018, with directions to respondent No.1 to decide the appellant's matter strictly in terms of comments filed by respondent No.3 / PMDC in C.P. No.D-5400 of 2014. While referring to the comments of respondents No.1 and 2, he drew attention of this Court towards letter dated 29.12.2014 issued by respondent No.4 through its Section Officer, available at Page-23, which reveals that respondent No.4, while referring to letter No.F.4-238/2014-R dated 9th December, 2014 for the subject advertisement in respect of unfilled post of Port Health Officer (B-18) requested respondent No.1 to stop / discontinue the recruitment process against the subject post. According to learned Assistant Attorney General, when the post advertised stands withdrawn, then how instant appeal is maintainable, which besides above legal position is also hopelessly time barred. He, therefore, prayed for dismissal of instant appeal.

Learned counsel for the appellant, when confronted with above factual position of the record, submitted that respondent No.4 was not competent to discontinue the process of appointment for the subject post. According to him, once the post was advertised and the appellant having

applied for the same, it becomes right of the appellant to be considered for the same, hence withdrawal of the post by respondent No.4 was unjustified.

It appears that instant case has a checkered history, however, instant Misc. Appeal has been filed in pursuance of Order dated 29.01.2020 passed in M.A. No.29 of 2017 whereby the said Misc. Appeal was disposed of while observing that the order dated 06.03.2019 passed by FPSC during the pendency of the aforesaid Misc. Appeal, was a **subsequent order** of the FPSC and appellant has remedy to challenge the same in independent appeal, as such controversy cannot be decided in application under Section 151 CPC in the disposed of appeal i.e. M.A. No.29 of 2017. In this view of the matter, it was held that the appellant would be at liberty to file fresh appeal against the decision of FPSC. It was further observed that limitation would not come in the way of appellant as the application under Section 151 CPC was within time and subsequent order of FPSC was brought to light during proceedings of the said Misc. Appeal.

Respondents No.1 and 2 have filed Parawise Comments to the instant appeal wherein they have made elaborate submissions in reply to the contents of the memo of appeal filed by the appellant. The respondents have also raised preliminary legal objections. The main legal objection raised by the respondents, so far as maintainability of instant appeal is concerned is to the following effect:

“A. The appellant has impugned FPSC’s letter No.F.4-66/2013-FS-IV dated 6.3.2019 (Annex. A/7 of Appeal) wherein he was informed the outcome of his personal hearing held on 1.6.2018 in compliance of court’s judgment dated 9.5.2018 in Misc. Appeal No.29 of 2017 (Annex. A/3 of Appeal). If he was aggrieved by the impugned order of the Commission, then he was required to file a representation before the Commission under Section 7 (3) (a) of FPSC Ordinance, 1977 (Annex.I) within 30 days from the date of its issuance i.e. on or before 5.4.2019, but he did not do so. Hence, the instant appeal is hopelessly time barred by 10 months and 27 days. Further, the condonation of delay is not admissible in the instant appeal because it has been filed under specific law i.e. FPSC Ordinance, 1977. Hence, it is not maintainable and to be dismissed on this score alone.”

B. That the appellant before institution of the instant appeal has not availed the alternate statutory remedies of Representation and Review Petition against the impugned order dated 6.3.2019 under the provisions of clause (a) & (b) of Sub-Section (3) of Section 7 (3) (d) & (b) of the Federal Public Service Commission Ordinance, 1977, therefore, the instant appeal is not tenable and liable to be dismissed with costs on this score alone.

Before proceeding further, it would be just and appropriate to point out at this juncture that, now it is well settled proposition of law that when a preliminary legal objection is raised with regard to the maintainability of certain proceedings, such legal objection is required to be dealt with and decided in the first instance. In this connection, reference may be made to the case of **MOHAMMAD ATHER HAFEEZ KHAN Vs. MESSRS SAANGYONG AND USMANI J.V. AND OTHERS (2017 CLC NOTE 135 [SINDH])**

“The Court should always hear the legal objections as well as merits and while deciding such legal objections if it comes to the conclusion that they are to be sustained, then perhaps the Court on its own may not decide the merits of the case and give its findings on the legal issues, but, if the Court after hearing the matter on legal issues as well as on merits comes to the conclusion that the legal objections are not to be sustained, then the matter has to be decided on its own merits.”

In another case reported as **SAJJAD HUSSAIN Vs. STATE (2014 MLD 400 KARACHI)**, it was held that *point of maintainability of the proceedings was to be decided at the first instance.*

In view of this legal position, in the first instance, I would proceed to deal with aforesaid preliminary legal objection raised by the respondents.

Clause (a) to Sub-section (3) of Section 7 of the Federal Public Service Commission Ordinance, 1977 deals with the Representation to be filed by any candidate against any decision of FPSC, whereas clause (b) relates to the filing of Review Petition against the decision of FPSC made under clause (a). Clause (d) provides an appeal to be filed before High Court against the decision made by FPSC, while hearing Review Petition under clause (b). It would be advantageous to reproduce hereunder the said

provisions of Federal Public Service Commission Ordinance, 1977 for the sake of convenience:

“7(3) (a) A candidate aggrieved by any decision of the Federal Public Service Commission may, within thirty days of such decision, make a representation to the Commission and the Commission shall decide the representation within fifteen days after giving the candidate a reasonable opportunity of hearing. The decision of the Commission, subject to the result of review petition, shall be final.

(b) A candidate aggrieved by the decision of the Commission made under paragraph (a) may, within fifteen days of the decision, submit a review petition to the Commission and the Commission shall decide the review petition within thirty days under intimation to the petitioner.

(c)

(d) 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.”

Now, from the minute scrutiny of the concluding part of the Order dated 29.01.2020 passed in M.A. No.29 of 2017, it appears that it was observed therein that the order challenged in the said Misc. Appeal was treated to be a **subsequent order of the FPSC**. It was further observed that the appellant has got remedy to challenge the said **subsequent** order and that such controversy cannot be decided in application under Section 151 CPC which was being heard in the aforesaid disposed of appeal being M.A. No. 29 of 2017. In such circumstances, it was held that appellant would be at liberty to file fresh appeal. However, it was observed that limitation will not come in the way of appellant as the application under Section 151 CPC was within time and subsequent order was brought to light during proceedings.

From above, it is apparent that, in short, while holding that the aforesaid application under Section 151 CPC, which, in fact, was a contempt application and was subsequently treated as an application under Section 151 CPC, was not maintainable, the appellant was given an option that he may challenge the **subsequent decision of FPSC**, as provided under the provisions of Section 7 of the Federal Public Service Commission

Ordinance, 1977. Now, from the perusal of clause (a) to Subsection (3) of Section 7 of the FPSC Ordinance, 1977 it is crystal clear that whenever a candidate has become aggrieved by any decision of the Federal Public Service Commission, like in the present case, he may file a representation before the Commission, within thirty days of such decision, and the Commission was obliged to decide such representation within fifteen days after giving the candidate a reasonable opportunity of hearing. In the circumstances, under the law, the appellant, in the first instance, was required to file such Representation against the **subsequent decision** of FPSC. However, instead of adopting that legal course, he straight away filed instant Misc. Appeal which, as per provisions of clause (d) to Subsection (3) of Section 7 of the Ordinance, 1977, was to be filed against the decision of the Commission made in the Review Petition which was provided to challenge the decision of Commission made while hearing the Representation filed by any candidate. In instant case, no occasion arose to the appellant to file Review Petition as he did not even move any Representation as provided in Section 7 (3) (a) of the Ordinance, 1977, therefore, question of filing instant Misc. Appeal did not arise as, under the law, the appeal could be filed against any decision of the Commission in the Review Petition, as provided in Section 7 (3) (d) of the Ordinance, 1977. In the circumstances, it is obvious that the appellant has miserably failed to adopt the legal course as provided in the Ordinance, 1977, therefore, it can safely be held that instant appeal is not maintainable.

For taking this view, I am fortified by the decisions of the Superior Courts. In the case of *Mohammad Anwar Vs. Federal Public Service Commission through Chairman / Secretary and 2 others* reported in **2004 P L C (C.S.) 172 [Lahore]**, while dealing with similar issue, it was held as under:

“Needless to state that the appellant has not at all questioned the decision of the respondent No.1 refusing to recommend him. In this view of the matter, I do agree with the learned counsel of respondent No.3 that the present appeal praying for annulment of the nomination of respondent No.3 is not competent inasmuch as no steps have been taken by the appellant on which an order could

be passed under section 7(3) of the Federal Public Service Commission Ordinance, 1977 against which an appeal in terms of section 7(3)(d) of the said Ordinance would lie.”

Another case is of **MAQBOOL HUSSAIN, EXCISE CONSTABLE Vs. COMMISSIONER INLAND REVENUE (COMPETENT AUTHORITY) MIRPUR AZAD JAMMU AND KASHMIR and 8 others (2019 PLC (C.S.) 512 [SC AJ&K])**. Although this was a service matter; however, the principle enunciated is same. It was held in the said case as under:

“The hereinabove quoted statutory provision clearly provides that no appeal shall lie to the Tribunal unless the aggrieved civil servant has preferred an appeal or application for review or representation to such departmental authority and a period of ninety days has elapsed from the date on which such appeal, application or representation was so preferred. In the case in hand, admittedly, the appellant filed appeal before the Service Tribunal without availing the remedy of departmental appeal, whereas, under the provisions of section 4(1)(a) of the Council Service Tribunals Act before filing appeal in the Service Tribunal, he had to fulfill the mandatory provisions of exhausting departmental remedy.”

Needless to emphasize the well settled principle of law that when a thing is required to be done in a particular manner, that should be done in that very manner and not otherwise.

Now adverting to the plea raised by the respondents that instant appeal is time barred by ten months and 27 days, suffice it to observe that while disposing of M.A. No.29 of 2017 by order dated 29.01.2020, learned Single Judge of this Court specifically and categorically observed, *“..however, it is observed that limitation will not come in the way of appellant as the application U/s. 151 CPC is within time and subsequent order was, per appellant, brought to light during proceedings.”* It was for the respondents that if they were not agree and satisfied with such finding regarding limitation, they should have contested and challenged the same before the appropriate forum. However, they remained mum on this point, therefore, now after lapse of considerable time during the proceedings of

instant appeal, they cannot take a somersault and come with a plea that the appeal is time barred. It was incumbent upon the respondents to challenge the said finding regarding limitation if they were not satisfied with the same and as they did not do so, their acquiescence would amount to admission on their part and it can safely be held that such finding has attained finality in view of the settled principle of law that a person cannot be allowed to approbate and reprobate in the same breath. In this connection, reference may be made to the case of *OVERSEAS PAKISTANIS FOUNDATION and others Vs. Sqn. Ldr. (Retd.) Syed MUKHTAR ALI SHAH & another (2007 S C M R 569)*, wherein it was observed:

“It is also a settled law that nobody is allowed to approbate and reprobate as law laid down by this Court in Ghulam Rasool's case PLD 1971 SC 376.”

The upshot of above discussion is that *instant appeal is not maintainable* as the appellant miserably failed to adopt legal course by filing Representation and Review Petition as provided in Section 7 of the Ordinance, 1977. However, the appellant would be at liberty to approach the Federal Public Service Commission by availing his remedies as available under the provisions of Section 7 (3) (a), (b) and (d) of the Ordinance, 1977. It may be clarified that bar of limitation shall not come in the way of appellant as observed in the previous order dated 29.01.2020 passed in M.A. No.29 of 2017.

Instant Misc. Appeal **stands disposed of** in the above terms.

JUDGE