

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Const. Petition No. D – 1591 of 2021

Before:

**Mr. Justice Muhammad Junaid Ghaffar
Mr. Justice Zulfiqar Ali Sangi**

Petitioner: Sabrina Rashida Soomro, through her attorney (brother) Ateeq Ur Rehman Soomro Advocate.

Respondents No.3&4: Registrar & Project Manager, Sukkur IBA Testing Service, through Mr. Mukesh Kumar G. Karara, Advocate

Respondent No.1&2: Province of Sindh & Director, Primary School Education and Literacy Department, through Mr. Mehboob Ali Wassan, Assistant Advocate General-Sindh

Date of hearing & Order: **18-01-2022**

ORDER

Muhammad Junaid Ghaffar, J. – Through this Petition, the Petitioner has sought the following relief(s):

“A) That this Honorable Court may be pleased to declare that the Fundamental Rights of the Petitioner were violated due to the illegal/irregular/unlawful test conducted by the Respondent No.3 and 4 wherein 2 questions were out of course inserted wrongly and some were wrong and ambiguous.

B) That this Honorable Court may be pleased to direct the Respondents to produce the record including the original question paper taken on 26th September 2021 in the morning by SIBA Testing Service for determination of the legality/lawfulness of the questions in the said question paper through any means reasonable including appointing specialists.

C) That this Honorable Court may be pleased to look into the questions which are wrong, ambiguous and out of course and give such compensatory marks to the Petitioner and declare her successful whereby.

D) That this Honorable Court may be pleased to pass interim order against the respondents whereby restrain the respondents from issues of the Offer Order relying on the alleged wrong results till the final disposal of this petition.

E) To grant any other relief as Court deems fit and proper”.

2. Learned Counsel for the Petitioner appearing pursuant to grant of permission by us vide order dated 18.11.2021 as he is not an enrolled Advocate of High Court, submits that the Petitioner applied for the post of Primary School Teacher (“PST”) pursuant to an advertisement and

appeared in the test conducted by the Respondents No.3&4, wherein question paper was prepared in violation of the Circular dated 17.12.2020, as two questions specifically stated in the para-8 of the Petition, were out of course, by virtue of which the Petitioner could only obtain 49 marks; hence this Petition. According to him, such act is based on mala fides on the part of Respondents No.3&4 as they were required to conduct the test on the basis of the Circular. He has argued that valuable right has accrued to the petitioner which has been violated by the said respondents. In support of his contention, he has relied upon judgments reported as *Aqib Javed and another Vs. Higher Education Commission of Pakistan and 07 others* **(2021 MLD 1559 [Lahore (Multan Bench)]**; *Tehseen Mazhar and others Vs. Vice-Chancellor, University of Punjab, Lahore and 02 others* **(PLD 2008 Lahore 19)**; *Dr. Nosheen Fatima Vs. Federation of Pakistan and 05 others* **(2011 CLC 1253 [Karachi])**; *Imran Baddar Vs. Province of Sindh and another; Muhammad Ismail and others Vs. Province of Sindh and others* **(2012 PLD (C.S) 620)**; *Messrs Happy Manufacturing Co. (PVT. LTD. Vs. Federal Board of Revenue and others* **(2019 PTD 1922 [Lahore High Court])**; *Hakeem Muhammad Saeed Vs. Deputy Commissioner Vehari and others* **(PLD 2020 Lahore 110)**; *Pakistan Services Limited through Major ® Zia Ahmed Jan and another Vs. Sindh Labour Appellate Tribunal and another* **(2014 PLC 77 [Sindh High Court])**; *Shoukat Ali Vs. Allahabad Development Authority on 1 July 2003* **(Allahabad High Court)**; *Zareedah Begum and 02 others Vs. Abdul Rasheed and 04 others* **(2013 Y L R 831 [Sindh])**; *Addagada Raghavamma And Anr Vs. Addagada Chenchamma And Anr on 9 April, 1963* **(Supreme Court of India)** and *Masauddin Ahmed Vs. State of Assam on 6 July 2009* **(Supreme Court of India)**

3. On the other hand, learned Counsel for the Respondents No.3&4 has opposed the grant of Petition on the ground that the Petitioner who claims to be having a master's degree ought to have answered the said two questions, even if they were out of course; whereas the said two questions are common questions expected to be answered by applicants seeking an appointment for PST. According to him, 184593 applicants appeared in the test of PST, out of which 35502 have successfully passed; therefore, no case is made out.

4. Learned AAG has supported the arguments of the Respondents' Counsel and submits that test was conducted in accordance with law and no case is made out.

5. We have heard both the learned Counsel for the parties as well as learned AAG and perused the record.

6. Though the Petitioner's Counsel has vehemently argued as to the Petitioner's right for maintaining instant Petition on the ground of the same being a fundamental right; right to livelihood; right to information; right to access to justice; right to inviolability of dignity of man; however, with utmost respect we are not impressed with such line of arguments. As to the very maintainability of this Petition and accrual of any right in favour of the Petitioner we may observe that the right under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 is not absolute; nor a vested right; but a right which can only be exercised by this Court in favor of an aggrieved person through its discretion when the facts and circumstances of the case so warrants. Here, in the instant matter, mere appearance in an entrance test, does not ipso facto creates any vested right which could be enforced through Constitutional jurisdiction of this Court. The right so claimed has never accrued in the present facts and circumstances of this case.

7. In C.P.No.D- 2650 of 2019 (Ms.Saba v The Province of Sindh & Others) a learned Division Bench of this Court was seized of a question that can any declaration be given for annulment of first preliminary test merely on the ground that the second test was illegal and based on malafides. The petitioners claim was that she was successful in the first test. Through order dated 14.05.2019, the learned Division Bench of this Court as to maintainability of the petition and exercise of discretion has been pleased to observe as under:

16.The right which is foundation of an application under Article 199 of the Constitution is a personal. The legal right may be a statutory right or a right recognized by law. A person can be said to be aggrieved only when a person is denied a legal right by someone who has a legal duty to perform relating to the right. There must not only be a right but a justiciable right in existence to give jurisdiction to this court in the matter. The object of the proceeding initiated under Article 199 of the Constitution of Islamic Republic of Pakistan is the enforcement of a right and not the establishment of legal right and therefore, the right of petitioner must not only be clear and complete but simplicitor and

there must be an actual infringement of the right. Ref: Asdullah Mangi vs. PIAC (2005 SCMR 445),

17. A vested right is free from contingencies but not in the sense that it is exercisable anywhere and at any moment. There must always be occasions at which and circumstances under which the right may be exercised. Such rights have peculiar characteristics of their own. Here the petitioner has failed to rationalize any vested right and its violation. So far as plea of discrimination, it always involves an element of unfairness and bias. The factum of bias could not be substantiated without any convincing evidence which the petitioner has failed to bring in this case. A Court of Law cannot exercise unfettered or unrestricted powers to administer equity not based on justiciable foundation but it must be satisfied before exercising its power that some illegal wrong has been inflicted or is about to be inflicted.

18. A standard of unreasonableness used in assessing an application for judicial review in *Wednesbury Corporation* case which means a reasoning or decision unreasonable (or irrational) if it is so unreasonable that no reasonable person acting reasonably could have made it (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948) 1 KB 223*). The test is a different (and stricter) test than merely showing that the decision was unreasonable. <https://uk.practicallaw.thomsonreuters.com>. In the test of proportionality, the courts may quash exercise of discretionary powers in which there is no reasonable relation between the objective which is sought to be achieved and the means used to that end, or where punishments imposed by administrative bodies or inferior courts are wholly out of proportion to the relevant misconduct. So the administrative action which arbitrarily discriminates will be quashed by the court. The implication of the principle of proportionality is that the court will weigh for itself the advantages and disadvantages of an administrative action and such an action will be upheld as valid if and only if the balance is advantageous. If this action is disproportionate to the mischief then it will be quashed. <https://www.lawteacher.net/free-law-essays>. The Supreme Court of India in Civil Appeal No. 5675-5677/2007, Chairman, All India Railway Rec. Board versus K. Shyam Kumar & others have discussed the principle of *Wednesbury* and Proportionality in the following terms:

“36. *Wednesbury* and Proportionality - *Wednesbury* applies to a decision which is so reprehensible in its defiance of logic or of accepted moral or ethical standards that no sensible person who had applied his mind to the issue to be decided could have arrived at it. Proportionality as a legal test is capable of being more precise and fastidious than a reasonableness test as well as requiring a more intrusive review of a decision made by a public authority which requires the courts to ‘assess the balance or equation’ struck by the decision-maker. Proportionality test in some jurisdictions is also described as the “least injurious means” or “minimal impairment” test so as to safeguard fundamental rights of citizens and to ensure a fair balance between individual rights and public interest. Suffice to say that there has been an overlapping of all these tests in its content and structure, it is difficult to compartmentalize or lay down a straight jacket formula and to say that *Wednesbury* has met with its death knell is too tall a

statement. Let us, however, recognize the fact that the current trend seems to favour proportionality test but *Wednesbury* has not met with its judicial burial and a state burial, with full honours is surely not to happen in the near future.

37. Proportionality requires the Court to judge whether action taken was really needed as well as whether it was within the range of courses of action which could reasonably be followed. Proportionality is more concerned with the aims and intention of the decision-maker and whether the decision-maker has achieved more or less the correct balance or equilibrium. The Court entrusted with the task of judicial review has to examine whether decision taken by the authority is proportionate, i.e. well balanced and harmonious, to this extent court may indulge in a merit review and if the court finds that the decision is proportionate, it seldom interferes with the decision taken and if it finds that the decision is disproportionate i.e. if the court feels that it is not well balanced or harmonious and does not stand to reason it may tend to interfere”.

8. In another unreported order dated 16.01.2019, passed in C.P.No.D-7150 of 2018, learned Division Bench of this Court has been pleased to observe as under:

“Case of the petitioner is that he applied for admission in law (BS-Hon’s) 05 years’ program announced by respondents 2 to 4. The petitioner was issued hall ticket/gate pass for appearance in aptitude test required to be passed before admission in the Shaheed Zulfikar Ali Bhutto University of Law (SZABUL). The Petitioner has sought the declaration that the test conducted by respondents 2 to 4 for admission be declared null and void with directions to respondents 2 to 4 to stop procedure of admission and classes in 05 years program till final disposal of this petition with further directions to them to reconduct the test for admission.

2. Learned counsel for respondents 2 to 4 invited our attention to the reply submitted by them in which it is clearly mentioned that the petitioner appeared in the Law Admission Test (LAT), but he could not succeed. He further argued that approximately 1300 applicants appeared in the entry test and 900 applicants had cleared the test, whereas 325 seats were available in the University and further selection could be based on interview.

“3. The petitioner in this petition has not said that he cleared the LAT but he has challenged the procedure for LAT to which, in our considered view, he is not entitled to challenge. Since the petitioner failed to qualify to LAT, therefore, he cannot agitate any vested right to get admission. The petition is dismissed accordingly”.

9. In another unreported order dated 03.09.2021, passed in C.P.No.D-4691 of 2011, learned Division Bench of this Court has been pleased to observe as under:

“The Petitioners, numbering 5 in all, have come forward espousing a grievance against the test conducted by the University of Karachi on 18.07.2021 for admission to its LL.M Programme. They have stated that 61 Students had applied for admission to the 50 allocated seats in the aforesaid Programme, but only 26 candidates were declared successful. Their contention is that the question paper was set at an extremely difficult level and did not encompass the areas of law that one would expect to have been covered for purposes of the test. As such, they have invoked the jurisdiction of this Court under Article 199 of the Constitution seeking that the question paper and admission test be declared void and that they be granted admission to the aforementioned Programme.

Having examined the matter, we are of the view that the instant Petition is entirely misconceived, as no fundamental right stands violated under the circumstances. Indeed, on query posed, learned counsel for the Petitioners was unable to advance any cogent argument as to how any such right of any of the Petitioners had been transgressed. That being so, the Petition stands dismissed accordingly”.

10. As to the merits of the case it is an admitted position that total marks of the question paper were 100; whereas, Petitioner has obtained 49 marks. Even if we leave out the two questions, Petitioner ought to have answered the remaining questions, and in that case this controversy would not have arisen. Even otherwise, when the Petitioner claims to be having a master’s degree, then objection to the fact that two questions under dispute have been asked, which as claimed pertained to grades 9 & 10; whereas, for PST, the questions could have specifically been asked up to grade-8, does not appear to be an appropriate argument. We must also keep in mind that the petitioner is attempting to become a teacher, and therefore, this sort of objection, otherwise disentitles the petitioner from being appointed as a teacher and may be a case of incompetency. It is not in dispute that it is only the Petitioner who is before us in this matter; whereas the test was attempted by 184593 applicants, and out of them, 35502 applicants have passed; hence, as to merits of the case, we do not see any reason to interfere in the conduct of the test, as valuable rights have accrued to others which cannot be disturbed through these proceedings.

11. As to reliance on the case law as noted above, it would suffice to hold that none of them is relevant to the present facts of the case, whereas, it also needs to be appreciated that insofar as appearance of a student in any examination is concerned, the same is altogether different as against appearance in a test or interview for seeking a specific

employment or job. Both are to be looked at differently while determining the eligibility and competence of an aggrieved person.

12. In view of hereinabove facts and circumstances of this case, no case for indulgence is made out so as to exercise any discretion vested in this Court under Article 199 of the Constitution. Hence, this Petition being misconceived is hereby dismissed.

13. Before parting, we may observe that the Petitioner's Counsel, who is not even an enrolled Advocate of High Court, has given valuable assistance to us with proficiency which needs to be appreciated.

14. This Petition stands dismissed in the above terms with pending application.

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