

IN THE HIGH COURT OF SINDH AT KARACHI

C.P. No.D-5009 of 2014

Present:
Mr. Justice Irfan Saadat Khan
Justice Mrs. Kausar Sultana Hussain

J U D G M E N T

Date of hearings: 09.04.2019 and 15.04.2019.

Petitioners: Munir Hussain and four others through Mr. Ali Asadullah Bullo, Advocate.

Res. Nos.1 & 2: Province of Sindh and another through Mr. Miran Muhammad Shah, Addl. Advocate General Sindh.

Respondent No.3: Sindh Public Service Commission (SPSC) through Mr.Yousuf Alvi, Advocate.

IRFAN SAADAT KHAN, J. The instant petition has been filed with the following prayer:-

- i) *Declare the Petitioners as runner up successful candidates for the Combined Competitive Examination.*
- ii) *Direct the Respondents to appoint the Petitioners against the positions, which were left un-joined by others successful candidates.*
- iii) *Further prayer(s) shall be urged and brought in during the course of arguments.*
- iv) *Direct the Respondents to pay the legal costs to the Petitioner for filing of the instant Petition.*
- v) *Any other relief(s) this Honourable Court may deem fit in the given circumstances and in the great interest of justice."*

1. Briefly stated, the facts of the case are that an advertisement was published in different newspapers on 25.10.2008, whereby different posts were announced to be filled-up by Sindh Public Service Commission

(SPSC). The deserving candidates were asked to file their applications thereof. The petitioners applied and appeared in the test and interview. It is claimed that they passed the said test and interview but since they did not obtain the marks required for appointment they were not considered for appointment on the posts for which they applied. It is the claim of the petitioners that they came to know that a petition, bearing C.P. No.D-3506 of 2011, has been allowed vide order dated 15.5.2013 wherein the petitioner was directed to be given the post of DDO by a Division Bench of this Court. It is averred that against that order a Civil Petition No.302-K of 2013 was filed, which was dismissed by the Hon'ble Supreme Court of Pakistan vide order dated 13.11.2013 and against such order a Review petition bearing Civil Review Petition No.01-K of 2014 was preferred by the Province of Sindh and others, which was also disposed of by the Hon'ble Supreme Court of Pakistan vide order dated 21.07.2014. The petitioners are of the view that their case falls on the same pedestal, as decided in the above referred petition, hence are entitled for the same relief. The petitioner then filed the instant petition and claim that since they were the runner-up candidates, hence when some seats fell vacant due to non-joining of some of the successful candidates; therefore, they should have been appointed on those posts falling vacant.

2. Mr. Ali Asadullah Bullo Advocate has appeared on behalf of the petitioners and reiterated the above submissions and stated that it is now a settled proposition of law that in case of non-joining of certain successful candidates in the competitive examination, the candidates who are in the waiting list or runner-ups are to be offered and appointed on these posts. Hence, according to him the Respondent No.3 was not justified in recommending to the Respondents No.1 and 2 that certain posts falling vacant due to non-joining of certain successful candidates may be readvertised. He stated that the case of the petitioners is squarely

covered by the decision given by this Court in the above referred petition and affirmed by the Apex Court, hence the petitioners, who were runner-ups, may be appointed on the seats falling vacant due to non-joining of certain successful candidates and should not have been readvertised.

3. Mr. Yousuf Alvi Advocate has appeared on behalf of Respondent No.3 and stated that as per the Regulations of SPSC the posts, which were not filled by the successful candidates, had to be readvertised. He in this regard invited our attention to the Regulations of the SPSC and submitted that the decision of the High Court and the Hon'ble Supreme Court of Pakistan are quite distinguishable from the facts obtaining in this petition as according to him only the successful candidates who joined the service are entitled for appointment and in case of non-joining of any successful candidate that seat has to be considered as vacant and readvertised. According to him there is no provision in SPSC Regulations for appointing runner-up candidates or candidates who claimed themselves to be in the waiting list, as there is no criteria for appointment of persons on the basis of the waiting list as no waiting list is being prepared by the SPSC. Hence, according to the learned counsel when there is no criteria/formula/method for appointing candidates claimed to be in the waiting list, hence the seats which were not occupied by the successful candidates had to be considered as vacant and readvertised. He in this regard stated that this method of appointment is being followed since a number of years and has never been challenged by any candidate. He, therefore, stated that the instant petition is devoid of any merit and is liable to be dismissed.

4. Mr. Miran Muhammad Shah, AAG, has appeared on behalf of Respondents No.1 and 2 and has supported the arguments of Mr. Yousuf Alvi, the learned counsel for Respondent No.3, and added that had there

been rules or regulations of SPSC for considering the candidates who are stated to be in the waiting list then the assertion of the petitioner would have been correct but since no waiting list is being prepared or could be prepared, since there is no regulation or requirement of law for the SPSC to prepare such list, hence there is no question of appointment of the petitioners either being runner-up or waiting for their turn to be appointed in case of non-joining of certain successful candidates. He also submitted that this petition being meritless may be dismissed as the decisions relied upon by the learned counsel for the petitioners are quite distinguishable from the facts obtaining in the instant petition.

5. Mr. Ali Asadullah Bullo, learned counsel for the petitioners, in his rebuttal stated that some persons, who were working in the Revenue Department, were recruited on the posts of Mukhtiarkar (BPS-16) who were in the waiting list, hence a discriminatory treatment was meted out with the petitioners who even after qualifying the test and interview but obtaining lesser marks than the appointed candidates were entitled for appointment being runner-ups in case some of the successful candidates did not join their service. He, therefore, prays that this petition may be allowed.

6. We have heard all the learned counsel at considerable length and have gone through the record as well as the decisions relied upon by the learned counsel for the petitioners.

7. The record reflects that vide advertisement No.11 of 2008 dated 19.9.2008 43 Posts of DDO and 64 Posts of Section Officer were advertised among other posts. The petitioners opted for the posts of DDO and Section Officer. It is an undeniable fact that all the 43 posts of DDO were filled by successful candidates, who, admittedly, obtained higher marks than the petitioners. Even, all the seats of Section Officer were filed

by the successful candidates obtaining higher marks than the petitioners. However, few posts subsequently have fallen vacant due to the non-joining of certain successful candidates.

8. In the petition bearing C.P. No.D-3506 of 2011 a Division Bench of this Court while disposing of the matter vide order dated 15.5.2013 observed as under:-

"We are told that after selection of 43 Deputy District Officers no other batch has been selected for appointment. The forty third unoccupied post of Deputy District Officer is still lying vacant. In the circumstances, we direct the Respondents to issue amended list placing the petitioner at Sr. No.43 on the list of Deputy District Officers so that he could be accordingly given posting. Let this exercise be completed within a period of 30 days. With these directions, this petition is disposed of."

This matter was, however, challenged by the Province of Sindh through Civil Petition No.302-K of 2013 and the Hon'ble Apex Court was pleased to dispose of the matter vide order dated 13.11.2013 in the following manner:-

"8. Regulation No.0329 which has been reproduced above only provides that the post should be re-advertised when no suitable candidate is available and therefore it is not a mandatory clause that in any case when any vacancy occurs the post has to be re-advertised. The other regulation No.1108 also does not create any hurdle in accommodating the respondent. We have also perused the two judgments relied on by the learned AAG and have found that the facts in those judgments are clearly distinguishable. In Musa Wazir case (quoted supra) the question was whether after merit list of competitive examination has been prepared and selection of successful candidates has been made, a waiting list can be prepared for further requisition of vacancies occurring. In this case this Court has observed as under:-

"... Combined competitive examination --- Posts vacated by non-joinder of selected candidates or subsequent requisitions for additional posts---Remedy---Where posts were vacated by non-joinder of selected candidates or subsequent requisitions were received, the ordinary course for the Public Service Commission and the Government should be to readvertise those posts---Advisable practice in exceptional situation.

In the case of posts vacated by non-joinder of selected candidates or subsequent requisitions received the

ordinary course for the Commission and the Government should be to readvertise it.

In an exceptional situation such additional vacancies subsequently reported to the Commission would get assimilated to the vacancies already advertised and the selection would take place from the result of the combined competitive examination as a single selection."

This Court has also referred to letter dated 08.01.1989 issued by the Commission in which it was specifically pointed out as under:-

"The Federal Public Service Commission makes reallocation only in the cases where the original nominees fail to join the post. Therefore, this readjustment is only in limited cases and the new requisitions which are received thereafter are carried over to the next year examination which is their yearly feature."

It is, therefore clear that the Commission has already made clear that in case of non-joining of original nominee, re-allocation can be made for the post and this Court has not deprecated such practice.

9. *In the case of Dr. Faizur Rehman (quoted supra) again the question before this Court was whether waiting list can be maintained or not and therefore, it has no nexus with this case.*

10. *In the present case, the facts are very clear that admittedly the respondent had been placed at S. No.44 of the merit list and was allocated Section Officer group, however, due to non-joining of one of the original nominee Abdu Qudoos Sheikh s/o Muhammad Siddique a vacancy had occurred and since apparently the respondent had the rural domicile like that of the Abdul Qudoos Sheikh and was on the top of the list, therefore, there was no bar in re-allocating him to the DDO group, as he has already qualified competitive examination. The learned High Court had allowed the petition in the following terms:-*

"However, the case of the petitioner is different. In the present case the post did not fall vacant but was not occupied at all. Then such post had to be filled and should have been given to the candidate who was next on the merit list. The petitioner being the next in the line of the merit list should have been given the post of Deputy District Officer which was never occupied."

11. *The learned AAG has failed to convince us that the above observations of the learned High Court are un-reasonable or against the regulations of the Sindh Public Service Commission. On the other hand, we are of the considered opinion that the judgment of the learned High is unexceptionable and no interference is called from this Court. This petition being merit less is therefore dismissed."*

Thereafter a review petition bearing Civil Review Petition No.01-K of 2014 was preferred by the Province of Sindh before the Hon'ble Supreme Court of Pakistan, which was disposed of by the Apex Court vide order dated 21.7.2014 with the following observations:-

"3. This Court while dismissing the Petition of the Government has directed the Government to appoint Ghulam Hassan Bughio on the assumption that he was next in line. After perusal of the record placed before us by the learned Additional Advocate General Sindh, we are of the view that Ghulam Hassan Bughio the Respondent was not next in line and therefore, was not entitled to be appointed to the post of DDO in terms of the judgment of this Court, which has maintained the judgment of the Sindh High Court.

4. We accordingly, modify the judgment of this Court dated 13.11.2013 to the extent that Naeem Ahmed Abbasi be appointed as DDO in place of Ghulam Hassan Bughio, being next in line as per the merit list. Consequently, this Review Petition is allowed in the above terms."

9. It is the claim of the petitioners that since they were the runner-ups, hence in case some seats have fallen vacant due to the non-joining of certain successful candidates, therefore, they should have been given the post of either DDO or the Section Officer, as the case may be, and there was no occasion for the SPSC to suggest readvertisement of these posts. The record, however, reflects that the petitioners' names were not in the merit list since they obtained lessor marks than the candidates finding place in the merit list. Therefore, at the time when the seats were filled with the successful candidates they were not allocated/recommended for any post and their names were not mentioned in the merit list prepared by the SPSC. The Regulations of SPSC clearly demonstrate that there is no requirement for SPSC to prepare any list of runner-up candidates or a list which could show the names of prospect candidates for appointment on a seat in case the seat was not filled by a successful candidate. In the Regulation No.1106 it is mentioned that the basis of allocation of service would be based on performance and position

on the list. The candidates were to be given an Option Certificate to clearly indicate their order of priority and such option once exercised will be final as clearly mentioned in the Regulation No.1107. The Regulation No.1108 clearly demonstrate that finally selected candidate will be allocated the post and allocation was to be made on the basis of merit-cum-option of the said candidate, however, a candidate not allocated a post of his first choice will be allocated service on the subsequent choice. The facts of the petition bearing C.P. No.D-3506 of 2011, with all humility, appears to be different from the facts obtaining in the instant matter as in that case a post fell vacant due to non-joining of a successful candidate on the post of DDO and the petitioner, who was also a successful candidate, was allocated the post of Section Officer who was directed by a Division Bench of this Court to be given the vacant post of DDO being next in line on merit list, which aspect was affirmed by the Hon'ble Apex Court, however, slightly modified by the Hon'ble Apex Court in the review petition when it was found that it was not Ghulam Hussain Bughio the petitioner in C.P. No.D-3506 of 2011, who was next in line, rather, it was an another person, namely, Naeem Ahmed Abbasi, who was next in line, and it was then directed by the Hon'ble Supreme Court that Naeem Ahmed Abbasi be appointed as DDO in place of Ghulam Hassan Bughio. Whereas, in the instant matter no list of those candidates who did not find place in the merit list on the basis of obtaining lessor marks than the successful candidates not recommended by the SPSC was ever prepared since there was no requirement under the law for SPSC to prepare the same. It is an undeniable position that the petitioners obtained lessor marks than the candidates declared as successful meaning thereby that the SPSC considered the petitioners either as unsuccessful or failed or unrecommended candidates who did not meet the criteria of appointment which could entail or justify their appointments either as DDO or as

Section Officer, as the case may be, since, admittedly, they obtained lesser marks than the successful candidates, who were appointed either as DDO or as Section Officer. It is also seen that a merit list, which is available at page 41 of the file, was prepared by the SPSC of successful candidates only, as specifically required under its regulations. The names of 43 successful DDOs and 64 successful Section Officers were mentioned in the list, who were duly appointed on the allocated seats, however only those seats were recommended for readvertisement, which, subsequently, have fallen vacant due to the non-joining of certain successful candidates. In the instant petition, however, as stated earlier, no list of the candidates not qualifying to be declared as successful candidates was prepared by the SPSC since they were not legally required as per their regulations to do so. Hence, we do not find any merit in the submissions of the learned counsel for the petitioners that the petitioners were prospect candidates for the designated posts of DDO and Section Officer and, in case, of non-joining of certain successful candidates they automatically became eligible for appointment on these posts, as admittedly no merit list so far as unsuccessful candidates, was prepared by the SPSC. It may further be noted that the SPSC was required to forward the names of "successful" candidates only who qualified in the merit list and there is no requirement for SPSC to send any list of the candidates not finding place in the merit list. It is evident from the record that SPSC was required to recommend the names of the successful candidates who qualify on the merit list and those recommended candidates were then invited for appointment on the designated posts. It is also to be noted that the petitioners appeared in the test in the year 2008 and since then much water has flown under the bridge and the petitioners, admittedly, now are over age and how they could be accommodated, even if assuming for argument's sake that the instant petition is allowed; whereas it has duly been noted above that

they did not meet the criteria of being selected as per the merit list prepared by the SPSC since they obtained lessor marks than the successful selected candidates. Hence, when the petitioners were not found to be the successful candidates they have to be considered as unsuccessful candidates and no vested right, in our view, could accrue to them in this regard.

10. We, therefore, find the facts in the petition bearing C.P. No.D-3506 of 2011, Civil Petition No.302-K of 2013 and Civil Review Petition No.01-K of 2014 to be different from the facts obtaining in the instant petition. It is seen from the record/list as issued by the SPSC that the posts of Section Officer and DDO were filled by successful candidates and as per SPSC Regulations there is no provision for accommodating those candidates not finding place in the merit list to be recommended for selection in case any post falling vacant due to non-joining of a successful candidate. So far as the claim of the learned counsel for the petitioners that some Mukhtiarkars, who were in BPS-16, were considered and recommended by the SPSC is concerned. We again tend to disagree with the submissions of the learned counsel for the petitioners as in that matter selection of Mukhtiarkar was cancelled twice, moreover, the selection was being made after seven years, hence it was recommended that all the seats may be fulfilled by those candidates who were found eligible. We further would like to observe that if something is not provided under the law how the same could be granted in a writ petition. It is an admitted fact that in the SPSC Regulations there is no requirement to prepare a list of unrecommended or runner-ups candidates.

11. The unfilled vacancies, as seen from the record, have always been advertised and filled via next exam by SPSC as SPSC is required to recommend the candidates falling under each category on merit alone. It

is also to be noted that Regulations of FPSC are different from those of SPSC. FPSC does issue and prepare list of runner-ups whereas the SPSC send the names of successful candidates only to the relevant administrative department for appointment alongwith full credentials of the said successful candidates as per their rules/regulations and policy. There is no policy of the SPSC regarding preparation of a list of waiting, unrecommended, unsuccessful or runner-up candidates or have any power of recommending runner-ups candidates for appointment in case any of the successful candidate who did not turn-up for joining the service. As per Regulation 1108, as stated earlier, the SPSC is required to prepare merit list of the successful candidates. The Hon'ble Supreme Court of Pakistan in the case of Ghulam Hassan Bughio has observed that Regulation 1108 does not create any hurdle in accommodating the respondent (Ghulam Hassan Bughio). Whereas, in the instant petition, the petitioners were never declared as successful candidates by the SPSC, which in our view, distinguishes the case of the petitioners from that of C.P. No.D-3506 of 2011 and Civil Petition No.302-K of 2013. In our view, the petitioners could claim that they have passed the exam but could not claim that they obtained such marks so as to entitle and warrant them to be selected on the advertised posts, which clearly shows that for all practical purposes, reasons and assignments the petitioners have to be considered as unsuccessful candidates who were not recommended by the SPSC for appointment on the designated/advertised seats of their choice. As per the list provided by the SPSC the last selected candidate against rural quota was at Serial No.87 whereas admittedly the petitioners stood at Serial No.92 and below, hence were not considered as successful candidates and not recommended for appointment on the post of their choice. Therefore, the seats falling vacant subsequently were

recommended for readvertisement to be filled by subsequent successful candidates in the next examination.

12. We, therefore, on the basis of above facts do not find any merit in the instant petition and dismiss the same accordingly alongwith the pending application.

JUDGE

JUDGE

Karachi:
Dated: