

IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA

Constt. Petition No. D- 438 of 2016.

Present:

Mr. Justice Aftab Ahmed Gorar.

Mr. Justice Nazar Akbar.

Imran Badar son of Badaruddin

Solangi.

.....Petitioner.

Versus

1. Province of Sindh, through
Chief Secretary to Govt. of Sindh, Karachi,
2. Sindh Public Service Commission, through its
Chairman having office at Thandi Sarak,
Hyderabad.

.....Respondents.

Mr. Athar Abbas Solangi, Advocate for petitioner.

Mr. Abdul Hamid Bhurgri, Advocate for respondents.

Date of hearing: 21.06.2016.

Date of Judgment: 21.06.2016.

J U D G M E N T

Nazar Akbar, J- The petitioner, a candidate, who appeared in Sindh Public Service Commission Combined Competitive Examinations 2013 (hereinafter referred to as CCE-2013) has obtained **472** marks in the written part of the examination. The minimum aggregate marks required for passing written part of the examination is **450**. However, the minimum aggregate marks criteria is further qualified by a restriction of obtaining at-least 33% marks in written examination in each of the 8 subjects. The petitioner was short of one mark in the subject of "Essay in Sindhi" to meet the second criteria, as he has obtained **16** marks instead of **17** marks. On **16.03.2016** respondent No.2 announced results of written examinations of CCE-2013 on its website. On **05.4.2016** on the basis of result of written examinations, respondent No.2 issued revised interview program for CCE-2013 for the successful candidates in written examination. Respondent No.2 (The Commission) has scheduled

interviews/ viva-voce examinations before providing marks sheets to the candidates, who have failed in written examination part of CCE-2013. However, somehow the petitioner has been able to obtain information that he has failed by one mark in the subject of "Essay in Sindhi", therefore, on **21.4.2016** sensing some foul play and malafide, the petitioner filed instant petition with the following prayer(s):-

- (a) To declare that the petitioner is entitled for grant of at least one (01) compensatory mark in the paper "Essay in Sindhi" and further declare that the petitioner has as such qualified the said examination;
- (b) To declare the petitioner to have passed the CCE based on re-totalling/re-counting of marks and entitled for all the benefits/rewards/protection/compensations/claims, which if the petitioner had passed in the CCE;
- (c) To restrain the respondent No.2 from conducting the viva-voce/ interview scheduled to be held from 25th April, 2016, till final decision of the instant petition, OR
- (d) At-least to allow the petitioner to appear in the viva-voce/ interview and thereafter prepare the merit list subject to final decision of the instant petition;
- (e) To pass any order(s) in favour of the petitioner against the respondents which may deem fit and proper under the circumstances of the case.
- (f) Award cost of the petition.

2. The Commission has filed comprehensive comments. In reply to para 8 & 9 of the petition that respondent No.2 has failed to issue marks certificates within one week from the date of announcement of results to the candidates, who have failed in the written test and that such marks certificate was not issued to the petitioner, the Commission has given an evasive reply that the details of marks of the un-successful candidates are being issued and it was done center-wise. Initially for Hyderabad and Sukkur followed by Karachi and Larkana. It is not specifically replied that when the marks sheet of the petitioner was issued. However, it has

been annexed as annexure-B to the comments and it is dated **04.05.2016**. The annexure-‘B’ confirms that the petitioner has obtained **472** marks in written test, but he has failed in one subject i.e. “Essay in Sindhi” by only one (01) mark. However, it has been empathized that it has already been mentioned on the marks sheet that “***no grace marks shall be allowed to any candidate***” and therefore, the petitioner was not called for the interview, as he has not successfully passed the written test.

3. We have heard the learned counsel for the petitioner and the learned Additional A.G.

4. The learned counsel for petitioner has contended that failure of respondent No.2 to issue marks sheet to the candidates before the start of the viva-voce/interviews program by Sindh Public Service Commission has deprived the petitioner from possibility of availing the opportunity of making an application for re-totaling/ re-counting of marks by Sindh Public Service Commission within fifteen (15) days from the date of receiving his marks sheet. He has referred to the marks sheet and on the bottom of this marks sheet following note has been printed:

“Note:- Inadvertent Errors & omissions can be rectified at any time on the basis of original records.”

Application regarding Re-totaling/Re-counting of Marks can be entertained if submitted alongwith an original copy of challan of Rs.250/- for each subject duly paid in the Head of Account “CO2101-Organ of State-Examination fee (SPSC Receipt)” within 15 days of issuance of this marks sheet. Application received after the prescribed time will not be entertained.”

The date of marks sheet of petitioner is **04.05.2016** and the Commission has started viva-voce/ interviews test from **25.4.2016** which is the third and final stage of CCE-2013, nine days prior to even finalization of the marks sheet of the petitioner. He has also referred to the newspaper cuttings showing reports of influences on respondent No.2. He has, however, empathized on the right of the petitioner to be given concession of one (01) grace mark in the written test of “Essay in

Sindhi” since he has otherwise qualified to appear in interview test by obtaining more than the required minimum aggregate marks for passing written examination of CCE-2013. He has further emphasized that in the past respondent No.2 has awarded grace marks upto 10 or even 11 to “**deserving candidates**”. Therefore, by disqualifying the petitioner from appearing in viva-voce/interview only because he is short of one mark in just one subject will amount to refusing to accommodate a “**deserving candidate**”. He has relied on the following case law:

- (i) Muhammad Saleem v. Punjab Public Service Commission and another (**1985 CLC 1544**).
- (ii) Punjab Public Service Commission and another v. S. Maruf Ahmad Ali (**PLD 1988 S.C 356**).
- (iii) Subah Sadiq Khan v. Punjab Public Service Commission and others (**1989 MLD 3859**).
- (iv) Sohail Ahmad Pathan v. Sindh Public Service Commission and another (**1996 PLC (C.S) 1004**).
- (v) Un-reported judgment of Division Bench, Sindh High Court, Sukkur Bench, in C.P. No. D- 141/1998 (**Shoukat Hussain v. Province of Sindh and others**), authored by my lord Mr. Justice Anwar Zaheer Jamaly, while sitting with Justice Syed Deedar Hussain Shah, as they were Judges of this Court then.

Learned counsel has also referred to a newsletter of Federal Public Service Commission published by the Commission on quarterly basis. In FPSC newsletter for 22nd issue of **July-Sept, 2012** quarter, it has been reported that FPSC has approved grant of one (01) grace mark to the candidates for CSS examination.

5. In reply learned Addl. A.G. appearing for the respondents has contended that it is not the policy of the respondents to award grace marks. Respondent No.2 has no such rules to award grace marks and in absence of rules as well as in absence of the allegations that respondent No.2 has awarded grace marks to any other candidate, the petitioner cannot claim to have been discriminated by the respondents. He has further contended that the case law referred by the learned

counsel for the petitioner deals with the cases of discrimination of awarding grace marks to a particular candidate while the other candidate had not been granted grace marks or otherwise at the relevant time Rules were available for grant of grace marks. However, he has no answer to the query from the Bench that whether the petitioner falls within the category of “*deserving candidate*”, since he has otherwise qualified the criteria of securing minimum aggregate marks in the written test. Learned Addl. A.G. has drawn our attention to the following passage on the covering page of the marks sheet and filed as annexure-“A” to the comments:

“NO CANDIDATE SHALL BE SUMMONED FOR VIVA VOCE TEST UNLESS HE/SHE OBTAINED ATLEAST 33 PERCENT MARKS IN EACH INDIVIDUAL WRITTEN PAPER AND 50 PERCENT MARKS IN THE AGGREGATE OF THE WRITTEN PORTION OF THE EXAMINATION. NO CANDIDATE SHALL BE CONSIDERED TO HAVE QUALIFIED IN THE EXAMINATION UNLESS HE/SHE ALSO OBTAINS ATLEAST 30 PERCENT MARKS IN VIVA VOCE FAILURE IN OR ABSENCE FROM VIVA VOCE SHALL MEAN THAT THE CANDIDATE HAS FAILED TO QUALIFY FOR APPOINTMENT AND HIS/HER NAME WILL NOT BE INCLUDED IN THE MERIT LIST.

NOTE: NO GRACE MARKS SHALL BE ALLOWED TO ANY CANDIDATE.

Again a query from the Court that above instruction/condition is Rule he replied that respondent No.2 has no written Rules. Then what is this?

6. We have given anxious consideration to the contentions of the counsel for either side and gone through the case law referred by learned counsel for the petitioner.

7. First we would take the last contention of learned counsel for the petitioner that on account of his overall performance in the written examination, the petitioner was a “deserving candidate” for award of one (01) grace mark. Learned Addl. A.G. has countered this contention simply by saying that there does not exist any rule, which may permit grant of grace mark. Admittedly, the Commission has not framed any

rules to follow while discharging its functions under **Section 7** of the Sindh Public Service Commission Act, 1989 (the Act of 1989). However, at the same time we find definite instructions printed on the annexures-“A” and “B” to the comments filed by Respondent No.2 and reproduced by us in para 4 and 5 above while incorporating the contention raised by the learned counsel. The perusal of the Act of 1989, reveals that in terms of **Section 11** of the said Act, the Commission is under an statutory duty to frame “**Regulations**” for performance of its functions and transacting business assigned to it by or under the said Act. **Section 7** of the Act of 1989, is reproduced below:-

“**11.** The Commission may frame regulations for performance of functions and transacting business assigned to it by or under this Act.”

8. It is strange that since 1989 the Commission is functioning without framing “Regulations” meaning thereby the authority exercised by the Commission is based on the sole discretion of the Chairman and its members and therefore, any discrimination, mala fide act or inadvertent conduct of the Commission in discharge of its duties cannot be questioned and the Commission can simply refuse to attend/ answer any request/ question on the ground that there is nothing wrong or nothing can be done because there is no rule available to check such unreasonable exercise of authority by the Commission. The very fact that the Commission has not framed its regulations nor it has any rules for the general public to know that how a particular adverse or perverse action of the Commission against the person(s) coming in contact with the Commission in the course of its statutory duties can be rectified. The failure of the Commission to frame “Regulations” in obedience to **Section 11** of the Act of 1989 by itself is mala fide behavior/ conduct on the part of the Commission throughout since its inception in 1989. The absence of “Regulations” of the Commission by itself is a big question mark on the transparency of its functioning. Therefore, the reference of learned Addl. A.G. to the “NOTE” printed on the annexure-“A”, that no “**grace marks shall be allowed to any candidate**” is an arbitrary decision of the Commission without any backing of Act/Rules/Regulations and in case of allowing grace marks to the “deserving candidates” the Commission shall not be guilty of violation of

any Act/ Rules or Regulations. This also leads us to believe that the discretionary power of the Commission seems to have been exercised by the Commission even before the occasion has come to exercise such discretion that whether grace mark(s) can or cannot be given.

9. Be that as it may, this fact cannot be denied that in the past the Commission has been empowered under the statutory rules to grant grace mark(s) and for various reasons grace marks were given to different candidates who appeared in the written test conducted by the Commission for various branches of government service. Before referring to the case law on this proposition, it is pertinent to mention here that the afore-quoted writing on the annexure-“A”, which denies the summoning of candidates for viva-voce is not without a background. In fact at one point of time this “NOTE” on the annexure-“A” has been a Statutory Rule framed by the West Pakistan Public Service Commission and it was called “**West Pakistan Civil Service (Judicial Branch) Rules, 1962,**” and Rule 5(a) of the said Rules is almost in the same language which is used by the Commission in the “Note” and the said Rule 5 (a) is reproduced below:

5. Method of Recruitment.

(a) Appointment to the service shall made by initial recruitment on the recommendation of the Commission based on the result of a competitive examination conducted by it in the subjects in the **appendix “A”** to these rules.

“NO CANDIDATE SHALL BE SUMMONED FOR VIVA VOCE TEST UNLESS HE HAS OBTAINED AT LEAST 30 PER CENT MARKS IN EACH INDIVIDUAL WRITTEN PAPER. NO CANDIDATE SHAL BE CONSIDERED TO HAVE QUALIFIED IN THE EXAMINATION UNLESS HE ALSO OBTAINS AT LEAST 30 PER CENT MARKS IN VIVA VOCE. FAILURE IN, OR ABSENCE FROM VIVA VOCE SHALL MEAN THAT THE CANDIDATE HAS FAILED TO QUALIFY FOR APPOINTMENT AND HIS NAME WILL NOT BE INCLUDED IN THE MERIT LIST.”

The same Rule was also incorporated in the “**West Pakistan Civil Service (Executive Branch) Rules, 1964**”. The “West Pakistan Civil service (Judicial Branch) Rules, 1962” was amended vide notification No.SOR-III-I-12/70, dated **19th October, 1972** and by an amendment in 1969 the “West Pakistan Public Service Commission (Executive Branch) Rules, 1964 was amended through the notification appearing in the

Gazette of West Pakistan, Extraordinary, dated **June 26, 1969**. Both the Rules i.e. Judicial Branch and Executive Branch Rules quoted above on amendments were to be read as under:-

“No candidate shall be summoned for viva voce test unless he has obtained at least 33 per cent marks in each individual written paper and 50 per cent marks in the aggregate of the written portion of the examination. **Five grace marks may however be given to really deserving candidates in one or two papers; provided that such grant of grace marks shall not entitle the grantee to have a better position in the merit list than those successful candidates who have not been granted any grace marks.** No candidate shall be considered to have qualified in the examination unless he also obtains at least 30 per cent marks in viva voce. Failure in or absence from viva voce shall mean that the candidate has failed to qualify for appointment and his name will not be included in the Merit List.”

Thus from 1969, the concept of grace marks to the really deserving candidates was practically introduced in the Public Service Commission. If we delete underlined bold portion from the above quoted Rule followed by the Commission for grant of grace mark(s), we would be left with the exact wording printed by the Commission on annexure-“A” to its comments and reproduced by us in para 5 above. The amended rule which provide for grace marks to really “deserving candidates” was in vague since 1969 and it was followed by all the Provincial and Federal Service Commissions on dissolution of one unit (West Pakistan) through **Dissolution Order No.8 of 1970** giving way for the creation of the Provincial Public Service Commission.

10. The Public Service Commissions continued to follow aforesaid Rules until **1982**. On refusal to grant concession in marks probably first such petition was filed before the Lahore High Court in **1985**. This petition was allowed as the “policy decision” of the Commission was found not only violative of the Statutory Rules but also on the ground that it contravenes the principles of consistency inasmuch as till before 1983 the Commission has been allowing grace marks since 1972 to all candidates who become eligible for such marks in accordance with rules reproduced above. The above amended rule was again quoted in para

3 of the judgment reported as Muhammad Saleem v. Punjab Public Service Commission (**1985 C L C 1544**) and the relevant operative part of the judgment is as follows:

“This policy decision also contravenes the principle of consistency inasmuch as till before 1983, the Commission has been allowing grace marks since 1972 to all candidates who become eligible for such marks in accordance with the rules reproduced above. It is certainly discretionary with the Commission to allow or not to allow grace marks to a candidate but this discretion has to be exercised by the Commission in each individual case and **the Commission cannot take a policy decision that in future no grace mark would be allowed to any candidate at all**. This policy decision could not lawfully be made so long as the statutory rule making provision for the grant of grace marks is not omitted through amendment to be made by the competent authority.” (Emphases provided)

The Courts have always been in favour of grant of grace marks to the “deserving candidates” by directing the Commission time and again to award grace marks and the concept of “deserving candidates” has been explained by the Hon’ble Supreme Court in the case of *Punjab Public Service Commission and another v. S. Maruf Ahmad Ali* (**PLD 1988 S.C 356**). In this judgment the Hon’ble Supreme Court in para 5 has reproduced the aforementioned Rule and defined the word “deserving candidate” in placitum “C”, in the following terms:-

“What has influenced us in this behalf is that language used in the rule itself; namely, that such grace marks will be given only “to really deserving candidates”. **It cannot at all be said that the performance of a candidate at the examination is not the most relevant consideration in determining whether he is or is not a really deserving candidate**. Beyond that we would not make any comment in this case. (Emphasis provided)

In the case in hand the performance of the petitioner is such that except for one (01) mark in the subject of “Essay in Sindhi”, he has otherwise performed well by obtaining more than the required aggregate marks to qualify written examination and therefore, in our view following the dictum laid down by the Hon’ble Supreme Court quoted above on the basis of his performance in written test the petitioner falls within the class of “deserving candidates”.

11. It may be mentioned here that in **1985** and **1988** the formal Rule to grant grace marks was not in existence. Then we have case of Sohail Ahmed Pathan reported in **1996 P L C (C.S) 1004**) and an un-reported judgment of this Court mentioned at serial No.5 in para 4 above. In both these cases, the Division Benches of this Court have come to the rescue of “deserving candidates”. In the case of Sohail Ahmed Pathan (supra), we found that even after the promulgation of Sindh Public Service Commission Act, 1989, the Court had relied on old Rule of 1964 and quoted the same in para 5 of the judgment and ultimately awarded one grace mark. The relevant operative part from the case of Sohail Ahmed is as follows:

“In conclusion, all that we need to say is that unless the rule is beneficially construed, the whole concept would become redundant because in that case even a “**really deserving candidate**” with the addition of legitimate grace mark(s) would never benefit from the provision. That indeed seems to have been the case with the Commission because we are informed that in no case whatsoever, over the years, has anyone been allowed to benefit under the rule. This implies that the Commission has been interpreting the concept in a manner, encouraging redundancy to an absolutely valid and perfectly just promulgation. Redundancy is impermissible in law and we have, accordingly, allowed the petition in the foregoing terms duly detailed in our short order.” (Emphasis provided)

In the un-reported judgment the Commission has awarded ten marks to the candidate who appeared in the examination of Assistant Collector (Departmental Examination) Part-I and Part-II held in the year **1996** by the Sindh Public Service Commission. The Commission, despite the fact that no such Rule was available, awarded ten marks to certain candidates and declared that such ten marks were “moderation marks” awarded to those candidates whose cases were found as hardship cases, therefore, the petitioner of un-reported judgment who appeared in written examination in **1997** was declared entitled for grant of ten marks on the principle of equal treatment.

12. We have purposely reproduced case law from 1985 onwards to appreciate that the Commission has been exercising its discretionary powers to grant grace marks in the past irrespective of existence or non-existence of such Rule in writing and the Courts, whenever found that such discretionary powers have not been exercised without assigning any reason, have been pleased to direct the Commission to award grace marks to the “deserving candidates”. May be in line with the above circumstances and consistent view of our Superior Courts for the last 30 years, former Judge of the Hon’ble Supreme Court Mr. Justice Rana Bhagwandas in the capacity of Chairman, Federal Public Service Commission, has been pleased to approve the agenda of giving one (01) grace mark by the Commission for CSS examinations and that decision of FPSC reported in FPSC newsletter, is reproduced below:

“Important Decision of the Commission

148th meeting of the Commission was held on **24th August, 2012** at FPSC HQs, Islamabad which was presided over by Former Justice Rana Bhagwandas, Chairman FPSC. The Commission discussed agenda items related to General Recruitment/ Competitive Examination and decided that:-

(i) After combining the marks of MCQ part with that of subjective part in each respective subject, candidates who have failing by one (01) mark less than the qualifying marks will be given one (01) grace mark by the Commission for CSS Examination only.”

13. The other contention of the learned counsel for the petitioner that the Commission has malafidely thrown the petitioner out of the competition also has weight. It is an admitted position from the record that marks sheet of the petitioner was prepared/finalized on **04.05.2016** and by that date the Commission has already taken practical steps for the next phase of CCE-2013 on the basis of the result of written examination without realizing that the number of qualified candidates for viva-voce test is to be determined on completion of 15 days time mentioned on marks sheet to rectify “inadvertent errors or omission” on the applications of candidates pursuant to the “**NOTE**” mentioned at the bottom of the marks sheet and reproduced in para 3 above. Whether the said note on the marks sheet is a prescribed “**Rule**” or not, it has

provided a legitimate right to the candidates who have appeared in the written test to get their MARKS re-counted within fifteen (15) days to re-assure their possibility of qualifying for the next phase of CCE-2013. The action/manner in which the Commission has exercised its power on **05.04.2016** to release the interview program for the successful candidates of written examination has violated the petitioner's right to get his marks sheet rectified within 15 days and qualify, if possible as a result thereof. In our humble view, the Commission is not supposed to be unaware of a possibility of filing of such applications by the petitioner and/or other candidates and in case such an application is allowed and the anomaly or error or omission is rectified, the petitioner and/or such other candidates, would become eligible to appear in the interview program. This hasty decision of the Commission to start interview test before the cutoff date for making an application for re-totaling/re-counting of marks has definitely curtailed the prospects of petitioner to qualify for the next stage of CCE-2013 in an unfair and arbitrary manner. It amounts to taking away the right given by the Commission itself to the petitioner even before he could have the opportunity to exercise his such right on receiving the marks sheet. It was not bona fide discharge of public duty assigned to the Commission appointed/created under **Section 3** of the Act of 1989. We believe, to avoid the casual and arbitrary use of power by the Commission, the law makers in **Section 11** of the Act of 1989 have directed the Commission to frame regulations for performance of functions and duties assigned to it under the said Act. The framing of regulations was mandatory for the Commission and use of work "may" in **Section 11** of the Act of 1989 was not directory; it was mandatory and in any case it cannot be read as "may not". The failure of the Commission to frame its regulations since 1989 has rendered **Section 11** of the Act of 1989 redundant and meaningless. The redundancy is impermissible under the law. The regulations are also required to ensure transparency in the performance of the Commission.

14. In view of the above historical background of the importance of grace mark(s) for the "deserving candidates" and keeping in view the malafide conduct of the Commission to start viva-voce/ interview test before the lapse of a period of fifteen (15) days from the date of

providing marks sheet to the candidates who were entitled to get the “inadvertent error or mistake” rectified on receiving their marks sheet; we have granted this petition by short order dated **21.06.2016**.

15. The above are the reasons for the short order. However, before parting with the judgment, we feel it necessary to direct the Commission to frame its regulations in exercise of power conferred on the Commission under **Section 11** of the Act of 1989. In framing the “Regulations” the Commission may take guidance from the previous statutory rules and the judgments of the Hon’ble Supreme Court on the subject. In any case the Regulations should be formed within (4) four months and placed on the website of the Commission for the benefit of the candidates in future.

JUDGE

JUDGE