

JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT
JUDGMENT

I.C.A. No.31531/2022

Province of the Punjab **VS.** Syed Danish Hussain Shah
through Chief Secretary etc.

Date of hearing : 23.01.2023

Appellants by : Ms. Aalia Ejaz, Additional Advocate General with Irfan
 Abdullah Khan, Law Officer of the Department.

Respondent : Ex-parte

Ch. Muhammad Iqbal, J:- This Intra Court Appeal under Section 3 of the Law Reforms Ordinance, 1972 is directed against the order dated 04.03.2022 passed by the learned Single Judge whereby Writ Petition No.72701/2017 filed by respondent was allowed.

2. Brief facts of the case are that the respondent filed a petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 and contended that the respondent applied for the post of Assistant Superintendent Jail (BS-16) in response to advertisement No.41/2017 published by the Punjab Public Service Commission, he appeared in competitive exam and stood at 13th position among successful candidates. Subsequently, the appointment letters were issued to the successful candidates but the respondent was denied appointment on the ground that his eyesight was not as per eligibility criteria. The respondent filed a representation which was rejected by

appellant No.2 vide order dated 21.06.2017. The respondent challenged the validity of order dated 21.06.2017 as well as Rule 1042(C) of Pakistan Prisons Rules, 1978 through Writ Petition [No.72701/2017] which was allowed by the learned Single Judge vide order dated 04.03.2022. Hence, this appeal.

3. We have heard the arguments of learned counsel for the appellants and have gone through the record with her able assistance.

4. The appellants through advertisement No.41/2017 invited applications for the post of Assistant Superintendent Jail (BS-16) with the following criteria:

- “i. Bachelor Degree (2nd Division) from recognized university, and
- ii. Physical Standards:

Height	173 CM
Chest	85 CM without expansion and 90 CM with expansion
Vision	Right 6/6 without glasses Left 6/6 without glasses.”

The respondent applied for the said post, qualified the written test and after completion of legal formalities, the PPSC announced the result and the respondent stood at Sr. No.13 but the appointment letter of the respondent was not issued on the ground that his eyesight was not up to the requisite standard i.e. **6x6 without glasses**. The respondent filed representation to the Additional Chief Secretary (Home), Government of the Punjab on 18.04.2017 which was rejected on 21.06.2017.

5. It is important to note here that in the paragraph No.8 of the writ petition, the respondent challenged the said order dated 21.06.2017 being void ab-initio but in the prayer clause, instead of requesting for setting aside of the said order, he prayed as under:

“Keeping in view above mentioned facts it is respectfully prayed Rule 1042(C) of Pakistan Prisons Rules (Annex-K) prescribing vision “without glasses” may be declared ultra vires of the constitution. Respondent No.2 may be directed to issue offer of appointment letter to the petitioner as he fulfills all other conditions of appointment as such.”

The respondent, after acceptance of the terms and conditions of the advertisement, filed an application for the post but he could not fulfill the required eligibility criteria. The respondent appeared before the Medical Board, Services Hospital, Lahore and the said Medical Board issued certificate on 08.02.2017 which shows the eyesight of the respondent as 6x6 with glasses. The said medical examination was conducted as required under the Punjab Prisons Service Rules, 2010. Under Rule 1042(c) of the Pakistan Prison Rules, 1978 the vision of both eyes of a candidate must be **6x6 without glasses** but as per report of Medical Board, the respondent lacks the requisite standard of vision. The respondent has not challenged the findings of the Medical Board but has prayed for setting aside the aforesaid Rule [1042(C)] through the constitutional petition which amounts to admission on his part regarding the findings and it is settled law that admitted facts need not to be proved. Reliance is placed on the cases of Mst. Nur Jehan Begum through LRs v. Syed Mujtaba Ali Naqvi (1991 SCMR 2300) and Mst. Rehmat and others Vs. Mst. Zubaida Begum and others (2021 SCMR 1534). Furthermore, Rules 602, 604, 1045 and 1047 Pakistan Prison Rules, 1978 deal with the nature and duties of an Assistant Superintendent Jail for which the vision of a candidate must be upto the best level, as settled by the department. Under Rule 21 of the Punjab Civil Servants (Appointment & Conditions of Service) Rules, 1974 a candidate must fulfill the prescribed criteria and if a candidate does not meet the physical and mental requirements as prescribed by the government, he shall not be appointed. Moreover, Rule 74(3) of the United Nations Standard Minimum Rules for the Treatment of Prisoners obliges government/authority to adopt suitability and physical standards for the recruitment of the Prison Staff and the Rule 1042(C) is

clearly in consonance thereof. When law prescribes anything to be done in a particular manner, it is to be done as mandated by law. In this regard, reliance may respectfully be placed on the case titled as Government of the Punjab, Food Department through Secretary Food & Another Vs. Messrs United Sugar Mills Limited & Another (2008 SCMR 1148).

6. The learned Single Judge while allowing the constitutional petition has held that the Rule 1042(C) of the Pakistan Prison Rules, 1978 is ultra vires of Article 18 of the Constitution of the Islamic Republic of Pakistan, 1973 [hereinafter referred to as “Constitution”]. It would be expedient to have glance at Article 18 of Constitution, which is reproduced as under:

“**Article 18: Freedom of trade, business or profession.** Subject to such qualifications, if any, as may be prescribed by law, every citizen shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business:

Provided that nothing in this Article shall prevent:-

- (a) the regulation of any trade or profession by a licensing system; or
- (b) the regulation of trade, commerce or industry in the interest of free competition therein; or
- (c) the carrying on, by the Federal Government or a Provincial Government, or by a corporation controlled by any such Government, of any trade, business, industry or service, to the exclusion, complete or partial, of other persons.”

There is no cavil or cudgel that the right of profession is treated as a fundamental right but it is subject to such qualification as settled by the law and every citizen has to follow the commandments of the law in this regard. The Hon'ble Supreme Court of Pakistan in a judgment cited as Lahore Development Authority through D.G and others Vs. Ms. Imrana Tiwana and others (2015 SCMR 1739) has held that the power to strike down or declare a legislative enactment as void is to be exercised with great care and caution and has laid down certain conditions for exercising such power. For reference, relevant portion of the judgment (supra) is reproduced as under:

“64. The power to strike down or declare a legislative enactment void, however, has to be exercised with a great deal of care and caution. The Courts are one of the three coordinate institutions of the State and can only perform this solemn obligation in the exercise of their duty to uphold the Constitution. This power is exercised not because the judiciary is an institution superior to the legislature or the executive but because it is bound by its oath to uphold, preserve and protect the Constitution. It must enforce the Constitution as the Supreme Law but this duty must be performed with due care and caution and only when there is no other alternative.

65. Cooley in his “Treatise on Constitutional Limitations”, Pages 159 to 186, H.M. Seervai in “Constitutional Law of India”, Volume I, Pages 260 to 262, the late Mr. A.K. Brohi in “Fundamental Law of Pakistan”, Pages 562 to 592, Mr. Justice Fazal Karim in “Judicial Review of Public Actions” Volume I, Pages 488 to 492 state the rules which must be applied in discharging this solemn duty to declare laws unconstitutional. These can be summarized as follows:

- I. There is a presumption in favour of constitutionality and a law must not be declared unconstitutional unless the statute is placed next to the Constitution and no way can be found in reconciling the two;
- II. Where more than one interpretation is possible, one of which would make the law valid and the other void, the Court must prefer the interpretation which favours validity;
- III. A statute must never be declared unconstitutional unless its invalidity is beyond reasonable doubt. A reasonable doubt must be resolved in favour of the statute being valid;
- IV. If a case can be decided on other or narrower grounds, the Court will abstain from deciding the constitutional question;
- V. The Court will not decide a larger constitutional question than is necessary for the determination of the case;
- VI. The Court will not declare a statute unconstitutional on the ground that it violates the spirit of the Constitution unless it also violates the letter of the Constitution;
- VII. The Court is not concerned with the wisdom or prudence of the legislation but only with its constitutionality;
- VIII. The Court will not strike down statutes on principles of republican or democratic government unless those principles are placed beyond legislative encroachment by the Constitution;
- IX. Mala fides will not be attributed to the Legislature.”

The respondent failed to bring on record that the Rule 1042(C) of the Pakistan Prison Rules, 1978 is in violation of the Article 18 of the Constitution or hit by any of the aforementioned conditions settled by the Hon’ble Apex Court of the country.

7. Further, the prerogative of setting the eligibility criteria of a certain post exclusive falls within the domain of the concerned authority/executive and interfering in that domain would amount

to committing judicial overreach which is unwarranted by law. Reliance in this regard placed on a recent pronouncement cited as Chief Executive Officer, Multan Electric Power Company Ltd. Khanewal Road, Multan Vs. Muhammad Ilyas and others (2021 SCMR 775) wherein the Hon'ble Supreme Court of Pakistan has held as under:

“6. In the instant case, the judge instead of deciding the case on merits, passed the final order of appointment of respondent no.1 without adjudicating the issue in hand and then executed the order by directing the petitioner that the Appointment Letter be issued by the next date of hearing. By assuming the role of the Executive the judge disregarded his core function of adjudication, in accordance with law. Ignoring the constitutional boundaries of separation of powers can easily equip a judge with a false sense of power and authority. This is a dangerous tendency and must be guarded against to ensure that the judicial role continues to remain within its constitutional limits.

7. When judiciary encroaches upon the domain of the Executive, as in this case, where the learned judge disregarded the eligibility criteria and the recruitment policy of the Executive Authority and assumed the function of the Executive, it is said to commit judicial overreach – which occurs when a court acts beyond its jurisdiction and interferes in areas which fall within the Executive and/or the Legislature’s mandate. Through such interference the court violates the doctrine of separation of powers by taking on the executive functions upon itself. The instant case is a textbook case of judicial overreach, where a judge directs an authority to issue an Appointment Letter disregarding the recruitment process, merit and the employment policy of the executive authority. Such judicial role imperils the separation of powers, jeopardizes the legitimacy of the judicial institution and undermines constitutional democracy. It is imperative that the courts do not derogate from their constitutionally mandated oversight function of judicial review. Certain values in the Constitution have been designated as foundational to our democracy which means that, as corner-stones of our democracy, they must be scrupulously observed. It is a sure recipe for a constitutional crisis if these values are not observed and their precepts are not carried out conscientiously.”

(emphasis supplied)

It is settled law that it is not for the Court to examine the qualification and eligibility in a recruitment process and it cannot delve deeper into the design and need of the employing institution or second guess their selection criteria and job recruitment and these matters can be best resolved by the institution itself according to the suitability and requirements of a certain post. The Hon'ble Supreme Court of Pakistan in a case

cited as Muhammad Ashraf Sangri Vs. Federation of Pakistan and others (2014 SCMR 157) has held that the question of fitness of any candidate for a particular post is subjective matter and can best be assessed by the functionaries who are entrusted with this responsibility. In another case cited as The Secretary Punjab Public Service Commission, Lahore and others Vs. Aamir Hayat and others (2019 SCMR 124), the Hon'ble Apex Court has held that the jurisdiction of the High Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 is limited to the extent of ensuring that state functionaries do what they are required by law to do and refrain from doing what they are prohibited by law to do and unless an act or omission of a state functionary falls within the above parameters it is not liable to be interfered with. It has further been held that such interference would constitute overstepping its jurisdiction by the High Court and entering the domain of the executive which is contrary to the concept of trichotomy of powers as per the scheme of the Constitution. In this regard, the reliance is placed on a case cited as Government of Khyber Pakhtunkhwa through Chief Secretary, Peshawar and others Vs. Hayat Hussain and others (2016 SCMR 1021).

In these circumstances, the prescribed vision **6x6 without glasses** is an essential requirement which cannot be dispensed with and any deviation from the said criteria would allow entry to ineligible persons and deprive many eligible candidates. Thus, the autonomy and free choice of the employing institution/appellants must be respected and be allowed to recruit according to the criteria advertised. Reliance in this regard is placed on a recent pronouncement of the Hon'ble Supreme Court of Pakistan rendered on 07.12.2022 in **Civil Petition No.4806 of 2019** titled as Waqas Aslam & others Vs. Lahore Electric Supply Company Limited etc.

8. In view of above, this appeal is **allowed**, the order dated 19.11.2021 passed by the learned Single Judge is set aside and resultantly, the constitutional petition filed by the respondent is hereby **dismissed**.

(Muzamil Akhtar Shabir)
Judge

(Ch. Muhammad Iqbal)
Judge

Approved for reporting.

Judge

Judge

Abdul Hafeez