2018 P L C (C.S.) Note 165

[Lahore High Court (Multan Bench)]

Before Muzamil Akhtar Shabir, J

ISHRAT BATOOL and another

Versus

GOVERNMENT OF PUNJAB and others

W.P. No.17088 of 2016, decided on 19th March, 2018.

(a) Constitution of Pakistan---

---Arts. 199, 25 & 27---Recruitment Policy 2016-17, Clause-7 (iv)---Constitutional petition---Maintainability---Educational institution---Debarring females to contest for the posts in a boy school---Policy decision of government---Discrimination in service---Scope---Department invited applications for recruitment debarring department females to apply for the posts---Contention of Department was that female candidates should have first availed remedy by filing petition before Complaint Redressal Cell---Validity---Complaint Redressal Cell itself being the creation of impugned Recruitment Policy could not set aside the said policy or its provisions---Remedy before Complaint Redressal Cell was not efficacious and adequate rather would be sham and illusory---Constitutional petition was maintainable in circumstances---Department was directed to entertain the applications of female candidates against the posts in question available in boys school---Constitutional petition was allowed in circumstances. [Paras. 8, 9, 11, 12, 13 & 14 of the judgment]

Dossani Travel (Pvt.) Ltd. v. Messrs Travels Shop (Pvt.) Ltd. and another PLD 2014 SC 1 and Government of the Punjab, Secretary Home Department through Deputy Secretary (Police) Interior Department and others v. Qanoot Fatima and others 2018 PLC (C.S.) 22 rel.

(b) Constitution of Pakistan---

---Art. 199---Constitutional petition---Maintainability---Policy decision of government---High Court had ample jurisdiction to review the administrative actions including policy decision of competent authorities---High Court was not to annul the policy framed by the competent authority in absence of any illegality, arbitrariness or established mala fides. [Para. 9 of the judgment]

Dossani Travel (Pvt.) Ltd. v. Messrs Travels Shop (Pvt.) Ltd. and another PLD 2014 SC 1 rel.

(c) Constitution of Pakistan---

---Art. 25---Equal treatment---Scope---All citizens should be treated equally---All citizens are to be treated equally and there cannot be any discrimination including gender discrimination, however, the State may make special provisions for protection of women and children---Constitution allows positive classification for the protection of the women and children---Where a provision is made for the

benefit of women and children the State may provide them some benefits but cannot deprive them of the same---Positive discrimination in favour of women and children is permissible and negative discrimination is barred. [Para. 11 of the judgment]

Raja Naveed Azam for Petitioners.

Muhammad Aurangzeb Khan, Assistant Advocate General, Punjab.

ORDER

MUZAMIL AKHTAR SHABIR, J.----Through this petition, the petitioners have made prayer as under:

> "this writ petition may kindly be allowed and the impugned discriminatory clause-7(iv) of Recruitment Policy 2016-17 to the extent of debarring the petitioners to contest against the post of SESE (PET) on male side may kindly be declared as null and void in the larger interest of justice.
>
> Further the respondents may kindly be directed to entertain the applications of the petitioners against the posts of SESE (PET) available on male side in the larger interest of justice."

2. The brief facts of the case are that the respondent/Education Department invited applications through National Testing Services, Pakistan ('NTS') for recruitment of Educators/SESE (PET) BS-14. The petitioners, who are both females submitted their applications for appointment in boys school. The Recruitment Policy 2016-17 does not allow a female to apply on the male side for the afore-referred posts. The petitioners have challenged the said clause of the recruitment policy. It is contended that the petitioners possessed the requisite qualification and also are in a position to compete with male candidates but the discriminatory clause 7(iv) of the Recruitment Policy, 2016-17 is debarring the petitioners to defeat the concept of healthy competition and the petitioners' applications are not being entertained for Boys Schools. It is further stated that for appointment in all categories of SESE, both male and female candidates are eligible to apply against the available posts but for the posts of SESE (PET) female candidate cannot apply in boys schools whereas in the earlier processes of recruitment, female candidates had been allowed to apply against the posts of SESE (PET) BS-14 and female educators were appointed in the boys schools but now the respondents without any legal and lawful justification have disallowed the petitioners to contest for appointment against the posts of SESE (PET) in boys schools, which condition is liable to be set aside.

3. Report and parawise comments have been submitted by the respondents in which it has been stated that respondent No.1 being the Administrative Department and Policy Making Authority constituted the Recruitment Policy, 2016-17 for the entire Province of Punjab and District Recruitment Committee "DRC" headed by DCO is bound to follow the policy in letter and spirit, besides the recruitment process is at final stage and near completion. It is further contended that to secure the rights of the applicants, a Complaint Redressal Cell "CRC" has also been

constituted at divisional level for the redressal of grievances of the applicants, if any, therefore, the petitioners in the first instance should avail the remedy by filing petition before CRC. It is stated that the female candidates are not allowed to apply against the posts of afore-referred SESE (PET) in Boys High Schools. It has been argued by the learned Law Officer that clause 7(iv) of the Recruitment Policy is in accordance with law and no violation of rules is committed by the respondents while framing the afore-referred recruitment policy. It has further been argued that it is a settled principle of law that policy matter is the prerogative of the department which cannot be interfered through writ jurisdiction, therefore, prayed for dismissal of the instant petition.

4. Learned counsel for petitioners has argued that the bar on female candidates to contest against the afore-referred posts by inserting a discriminatory clause-7(iv) of the Recruitment Policy, 2016-17 is against the fundamental right of the petitioners and also depriving them from their right to compete for the posts available in the boys schools which is derogatory to the concept of equality and natural justice. Even otherwise, previously female have been posted as SESE physical education teachers for boy's schools, therefore, impugned action of the respondents about insertion of afore-referred discriminatory clause is bad in the eye of law and the same is liable to be struck down. It is prayed that as the seats are still lying vacant, therefore, petitioners be considered against the afore-referred SESE (PET) posts.

5. The learned Assistant Advocate General, Punjab on the other hand had vehemently defended the case of the respondents by claiming that policy decision of the respondent cannot be challenged in constitutional jurisdiction of this court.

6. Heard, record perused.

7. The controversy under consideration for appointment of female candidates as SESE (PET) in boys schools revolves around the provisions of Clause 7(iv)(a) of the Recruitment Policy, 2016-17, which is reproduced as under:

"iv) submission of application forms:

(a) For the post of ESE (all categories) and SESE (all categories) in Govt. Boys Schools, candidates (Male and Female) will apply to DEO (EE-M). However, female candidates cannot apply for the post of SESEs (PET) in Boys Schools;

(b) .

(c) .

(d) .

(e) ."

8. The objection raised by the learned Assistant Advocate General is that remedy before Complaint Redressal Cell is available to petitioners and the petitioners may avail the said remedy for redress of their grievance by filing a petition which shall be decided in accordance with law. In this regard, it is observed that the Complaint

Redressal Cell itself is the creation of afore-referred Recruitment Policy, therefore, the said Cell cannot set aside the policy or its provisions and cannot decide the validity or rationality of the same. In these circumstances, the remedy before the Complaint Redressal Cell would not be an efficacious and adequate remedy, rather would be sham and illusory. Hence this objection is without any merit and the same is declined.

9. The other objection of the respondents is that the afore-referred clause of the Recruitment Policy cannot be challenged as the same is a policy decision of the government. Although usually courts do not entertain constitutional petitions against policy decision of the Government but there is no absolute bar against exercise of constitutional jurisdiction to challenge the policy decision. Rather this court, has ample jurisdiction to judicially review the administrative actions including policy decision of competent authorities. However, such exercise of jurisdiction is subject to certain restrictions observed by the courts for regulation of the courts' procedure. The Hon'ble Supreme Court of Pakistan in a case reported as Dossani Travels (Pvt.) Ltd. v. Messrs Travels Shop (Pvt.) Ltd. and others (PLD 2014 SC 1) has laid down that in absence of any illegality, arbitrariness or established mala fides, it was not open for the High Court to annul the policy framed by the competent authority. This shows that a decision can be challenged if it fails to meet the criteria of legality or is mala fide or suffers from arbitrariness or is based on colourful exercise of jurisdiction.

10. Article 25 of the Constitution of the Islamic Republic of Pakistan, 1973 provides as under:

> **"25. Equality of citizens**. (1) All citizens are equal before law and are entitled to equal protection of law.
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> (2) There shall be no discrimination on the basis of sex.
>
> (3) Nothing in this Article shall prevent the State from making any special provision for the protection of women and children."

11. From the perusal of the Article 25 supra it is seen that all citizens are to be treated equally and there cannot be any discrimination including gender discrimination, however, the State may make special provisions for protection of women and children. This means that the constitution allows positive classification for the protection of the women and children. Where a provision is made for the benefit of women and children the state may provide them some benefits but cannot deprive them of the same. Positive discrimination in favour of women and children is permissible and negative discrimination is barred.

12. The next ground raised is that for the physical education of boys, female cannot be appointed as physical education teacher (PET) but in this time of era, females are working in various departments and unless there are some reasons disqualify them the same for appointment to a particular post they cannot be deprived of the same by discriminating in the negative sense. Reliance in this regard is placed on Government of the Punjab, Secretary Home Department

through Deputy Secretary (Police) Interior Department and others v. Qanoot Fatima and others (2018 PLC (C.S.) 22) wherein it is observed as under:

> "9. Article 4 of the Convention for the Elimination of all forms of Discrimination against Woman ("CEDAW") obligates member states to take temporary measure, such as quotas, to neutralize the effect of barriers hindering women's participation in the public sector. Article 5 of the CEDAW also requires that appropriate measures are taken to modify social and cultural patterns of conduct for men and women with a view to achieve the elimination of prejudices, customary and other practices which are based on the idea of inferiority of women or on stereotype roles for men and women. Pakistan is a signatory of CEDAW since March, 1996, hence is required to take positive steps to achieve the standards set by CEDAW. The Government is therefore required to devise policies which will remove obstacles and barriers for the participation of women in all walks of life, be it political, social, economic or cultural. This participation is based on the fundamental principle that men and women must be treated equally and there can be no discrimination on the basis of gender. The Government of Punjab amongst other measures took some positive steps when introducing the Punjab Women Empowerment Package 2012 which required quota for women in public service employment to be increased. However, the essence of fixing this quota and the commitment under CEDAW has been compromised by relegating female candidates who competed on open merit and satisfy the merit criteria, yet are adjusted against reserved seats. In our opinion, the essence of fixing quotas for women in public service was to enhance their participation and to ensure that equal opportunity is given to women applying for public sector jobs. The objective was never to reduce female participation to a quota."

13. Even otherwise, Constitution of the Islamic Republic of Pakistan, 1973 provides equal rights and equal treatment to all citizens/persons, without any distinction including on the basis of gender. Article 27 of the Constitution provides as under:

> **"Article 27. Safeguard against discrimination in services.** (1) No Citizen otherwise qualified for appointment in the service of Pakistan shall be discriminated against in respect of any such appointment on the ground only of race, religion, caste, sex, residence or place of birth:
>
> Provided that ..
>
> Provided further that, in the interest of the said service, specified posts or services may be reserved for members of either sex if such posts or services entail the performance of duties and functions which cannot be adequately performed by members of the other sex.
>
> ."

From the perusal of the afore referred Article, it is abundantly clear that if a citizen is otherwise qualified for appointment in service of Pakistan, he/she cannot be

discriminated against on the ground of race, religion, caste, sex, residence or place of birth. Therefore, women are sufficiently protected under the Constitution for appointment in service for which they are qualified, however, the restriction put upon the same by the proviso is that in the interest of the service, posts may be specified or reserved for members of either sex if such posts or services entail the performance of duties and functions which cannot be adequately performed by the members of the other sex. The respondents were to explain as to how female candidates cannot adequately perform the function of SESE (PET) in boys school which has not been done through a logical explanation. The said Article also resolves to eliminate negative customary practices by increasing awareness of women about their fundamental rights convergent with provision of support system for facilitating their appointment in service and access to law and justice. Ensuring effective implementation of existing legal frameworks and introduction of legal reforms for removing gender disparity are the fundamentals of the said Article which is inclined to synthesize its dedication on legal empowerment of women with international women rights, treaties and commitments to come in confluence with other nations. Besides, many other departments have significant representation of women and women are actively participating in all the fields in Pakistan as well as in other countries. Besides, a number of legislations have been passed by the Parliament with the support of all the political parties for the protection and empowerment of women. Moreover, seats in boys' school for SESE (PET) could earlier be occupied by females and no rational criteria has been laid down in the policy or the reply submitted by the respondents for discontinuing the same.

14. For what has been discussed above, this petition is allowed by observing that the gender stereotyping or classification based on stereotype roles or social expectations tantamount to discrimination which is not permissible under the Constitution and goes against the constitutional mandate of equality and safeguard against discrimination in service, therefore, the impugned discriminatory clause 7(iv) of the Recruitment Policy, 2016-17 to the extent of debarring the petitioners to contest against the post of SESE (PET) for boys schools is declared to be illegal and ultra vires to the Constitution of the Islamic Republic of Pakistan, 1973 and as such the respondents are directed to entertain the applications of the petitioners against the posts of SESE (PET) available in boys schools.

ZC/I-5/L Petition allowed.

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