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Judgment Sheet

***IN THE LAHORE HIGH COURT LAHORE***  
**JUDICIAL DEPARTMENT**

**Writ Petition No.126194 of 2017**

**Muhammad Rafique, etc. v. Secretary Schools, Govt. of  
Punjab Lahore, etc.**

**JUDGMENT**

<b>Date of hearing</b>	<b>26.09.2018.</b>
<b>Petitioners by:</b>	<b>Mr. Muhammad Iqbal Mohal and Malik Muhammad Zarar Iqbal Awan, Advocates in writ petition No.126194 of 2017</b> <b>Mr. Saif ur Rehman Jasra, Advocate in connected writ petition No.127099 of 2017</b> <b>Mr. Muhammad Nasir Umer, Advocate in connected writ petition No.115197 of 2017</b>
<b>Respondents by:</b>	<b>Mr. Amar Sanaullah, AAG.</b> <b>Mr. Imran Aslam Kharal, Advocate</b> <b>Malik Muhammad Zarar Iqbal Awan, Advocate</b>

**ABID AZIZ SHEIKH-J.** This judgment will also decide Writ Petition Nos.127099 and 115197 of 2017 as common questions of law and facts are raised in these constitutional petitions. Through these constitutional petitions the petitioners have mainly challenged the condition in the Recruitment Policy, 2017-2018 for Educators and AEO dated 13.10.2017 (Policy), whereby in qualification eligibility criteria, it is prescribed that applicants having any 3<sup>rd</sup> division in their

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entire career, will not be eligible to apply against the posts advertised under the said policy (the said condition herein after be referred as **impugned condition**).

2. Because of commonality of the legal questions involved in these writ petitions, it is not necessary to narrate or advert to the facts of each case separately. However, to illustrate the factual aspects upon which these petitions are founded, facts of instant writ petition No.127099 of 2017 are that the government of the Punjab Schools Education department advertised number of posts of SESE-PET (BS.14) in daily Jang on 19.11.2017 and invited applications. The required qualification for the said post was M.A. Physical Education. The petitioners who were M.A. (B.Ed) in 1<sup>st</sup> Division possessed the requisite qualification and being eligible applied for the said posts. After the scrutiny of documents, the applicants were intimated about NTS test through SMS but surprisingly subsequently petitioners informed that they are not being called for NTS test, being 3<sup>rd</sup> divisioners in B.A. under impugned condition of recruitment Policy, 2017-2018. The petitioners being aggrieved filed these constitutional petitions. This Court

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as an interim measure allowed them to participate in NTS test and interview. Resultantly, petitioners appeared in NTS test and interview and were declared successful both in NTS test and interview but their names were not shown in the final merit list due to the pendency of these writ petitions filed against impugned condition in the recruitment policy. It is also pointed out that out of total 115 candidates appeared in NTS test only 21 candidates including petitioners were declared successful.

3. Learned counsel for the petitioners argued that the impugned condition of recruitment policy is violative of Articles 4 and 9 of the Constitution of Islamic Republic of Pakistan, 1973 (**Constitution**), as same amounts to deny the petitioners right of job and livelihood, which is also part of right to life. Learned counsel submits that as the petitioners fulfilled the required qualification of M.A. Physical Education through their degrees in 1<sup>st</sup> Division and also cleared the NTS test and interview, they could not be denied the opportunity to apply for the job just because in their entire career they once acquired 3<sup>rd</sup> Division. Learned counsel submits that the impugned recruitment policy is

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unreasonable, harsh, arbitrary and offensive to human dignity. Submits that if once the petitioners got 3<sup>rd</sup> Division in their entire career it does not mean that they cannot improve their academic qualification in future and become eligible for the posts in the Education Department. Further submits that this condition is introduced for the first time in year 2017-2018, when the petitioners already became over aged and cannot retake the exam of B.A. to improve their academic qualification. Learned counsel submits that under Articles 25-A and 37 of the Constitution, it is the responsibility of the State to provide quality education to the students but this responsibility is not fulfilled by the State and by imposing this condition, the respondents have now also deprived those students, to even compete for the job in the Education Department, which is absolutely unjustified and irrational. Learned counsel finally argued that the fundamental right of livelihood and to compete for job in Government department is a vested right of the petitioners, which cannot be taken away through executive order by way of policy but could only be effected through the Act of Parliament. Learned counsel further submits that the impugned policy is also

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discriminatory as this policy is only made applicable to the Education Department, whereas in no other Government department the impugned condition of 3<sup>rd</sup> Division in entire career has been applied.

4. On the other hand, learned counsel for the respondents argued that the impugned recruitment policy is purely a policy matter and it is the prerogative of the department to frame policies as per its job requirement. Learned counsel further submits that this Court has no jurisdiction to interfere in the policy matters. Further submits that no fundamental right of the petitioners has been violated under the policy, as there are other departments of the government where the petitioners can apply for recruitment.

5. I have heard learned counsel for the parties and perused the record with their able assistance. The moot legal issue involved in these cases is regarding the vires of impugned condition prescribed under clause 4(a)(III) of the Recruitment Policy, 2017-2018. For convenience the said impugned condition is reproduced hereunder;-

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*“Applicant having any 3<sup>rd</sup> division in his/her entire career will not be eligible to apply against the posts advertised under the policy ibid.”*

Plain reading of above impugned condition shows that a restriction has been imposed against recruitment in the Education Department for the applicants having 3<sup>rd</sup> division in his/her entire academic career.

6. Article 18 of the Constitution guarantees freedom of lawful trade, profession and occupation, which for convenience is reproduced as under;-

***“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.*

Plain reading of Article 18 of the Constitution shows that every citizen has right to enter upon any lawful

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occupation or profession subject to qualification as may be prescribed by the law. The august Supreme Court in Arshad Mahmood's case (PLD 2005 SC 193) held that the restriction imposed under Article 18 of the Constitution is not only required to be imposed by law but the said restriction must also be reasonable. The impugned condition which restricted the applicants having 3<sup>rd</sup> division in their entire career, to even apply for the posts advertised under the policy, is not prescribed by any Act of the Parliament nor same is shown to be backed by any provision of law. The said condition has been prescribed through an administrative decision by way of policy, which on the face of it is not permissible under Article 18 of the Constitution.

7. The next question is whether at all such restriction is a reasonable restriction. There are not strict standards or general patterns of reasonableness, while determining the reasonableness of a particular restriction under law or policy. The Court has to bear in mind that the nature of the rights infringed through such restriction should be proportionate to the urgency of the evil sought to be remedied by said restriction. This Court in case

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reported as “City School Private Limited v. Government of the Punjab and others” (PLD 2018 Lahore 509) held that restriction on fundamental rights can only be upheld if it is established that it seeks to impose reasonable restriction in the interest of general public and as less drastic restriction will not have ensured the interest of the general public.

8. The above test of reasonableness when applied to the impugned condition, the same is not only found to be unreasonable but also harsh and irrational. According to the impugned condition an applicant who has 3<sup>rd</sup> division once in her/his entire career will not be eligible to apply against the post advertised means that it is presumed that a candidate who has secured 3<sup>rd</sup> division once in his/her life time can never improve his/her educational career in future. This presumption is not only absurd rather against the dignity of such candidates and students. By way of illustration even in the present case the petitioners who got 3<sup>rd</sup> division in B.A. have not only got first division in their M.A Physical Education, which was prescribed qualification for the job but according to petitioners they also stood second position in the entire

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district Sialkot in their NTS test. The situation would have been different if the policy was that a person having 3<sup>rd</sup> division of prescribed qualification shall not be eligible for the posts advertised. But the impugned condition is that a candidate, who had 3<sup>rd</sup> division in his/her entire career would not be eligible to apply for the posts advertised. This means that a candidate who due to some unavoidable, financial or family circumstances etc could not get 1<sup>st</sup> or 2<sup>nd</sup> division in his/her initial academic career, will not be able to improve his/her entire subsequent academic career of education.

9. It is not the case of the respondents that 3<sup>rd</sup> division amounts to fail in a particular academic course. Once it is admitted that 3<sup>rd</sup> divisioner amounts to passing of a particular academic class and same also entitled the students to promote in the next class, then imposing a condition that such candidate will not even be eligible to apply for the post is absolutely irrational unreasonable and harsh.

10. No doubt ordinarily the Courts should not interfere in the policy matters, however, if the policy is in conflict with any provision of law or is violative of the

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fundamental right of the citizens the same can be called in question in constitutional jurisdiction of this Court. In this context the august Supreme Court in judgment reported as “Al-Raham Travels and Tours (Pvt). Ltd. and others v. Ministry of Religious Affairs, Hajj, Zakat and Ushr through Secretary and others” (2011 SCMR 1621)

held as under;-

*“As regards the contention of the learned counsel that the High Court cannot interfere with the policy matters in its jurisdiction, we have some reservations, as if the policy is in conflict with any provision of law or is violative of the fundamental rights of a citizen, the same can be called in question before the High Court in its writ jurisdiction. Reference can be made to Watan Party v. Federation of Pakistan (PLD 2006 Supreme Court 697) and Shaheen Cotton Mills v. Federation of Pakistan (PLD 2011 Lahore 120).”*

Similarly, in judgment reported as “Messrs Shaheen Cotton Mills, Lahore and another v. Federation of Pakistan, Ministry of Commerce through Secretary and another” (PLD 2011 Lahore 120) it was held that;-

*“However, it may not be correct to hold that there is an absolute bar to the exercise of judicial review by this Court in all matters pertaining to a policy of the Government. The Hon'ble Supreme Court of Pakistan in the judgment reported as: Muhammad Iqbal Rafi v. The Province of Punjab (1986 SCMR 680) was pleased to hold as follows:-*

*“Whatever be the thinking on either side, the Government has the right of laying down the policy and if it chooses to do so and there is*

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*no law on the subject which it offends, it is not the right of any Court to throw it out, other than hold, in any genuine case, that the same is unreasonable or arbitrary."*

*In Arshad Mehmood's case the Hon'ble Supreme Court of Pakistan has observed as follows:--*

*If any law is promulgated in derogation of fundamental rights, it would be declared void because at the cost of fundamental rights guaranteed by the Constitution, the executive Government is not empowered to frame a policy.*

*Thus, in cases where the policy collides with the Law or the Constitution or it arbitrary or unreasonable, this Court, in view of the afore-quoted judgments of the Hon'ble Supreme Court of Pakistan, can intervene though it may not substitute the policy of the Government by laying down a new policy on the subject. Thus, this Court is not persuaded to hold that it has no jurisdiction to examine the offending Order/notification or the policy of the Government that it manifests. Even in policy matters, this Court can always exercise its powers of judicial review so as to ascertain that the said policy does not violate any law or the Constitution and that the same is not arbitrary or unreasonable.*

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*Policies in the ultimate analysis tend to be translated into Executive action. It is equally settled law that Executive has no inherent power to pass any order or take any action, as has been repeatedly held by the Hon'ble Supreme Court of Pakistan including in the judgment reported as: Pakistan Muslim League (N) through Khawaja Muhammad Asif, M.N.A. and others v. Federation of Pakistan through Secretary Ministry of Interior and others (PLD 2007 SC 642) in the following terms: --*

*"There is no inherent power in the Executive, except what has been vested in it*

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*by law, and that law is the source of power and duty."*

*Therefore, executive action would necessarily have to be such that it could not possibly violate a Fundamental Right. The only power of the Executive to take action would have to be derived from law and the law itself would not be able to confer upon the executive any power to deal with a citizen or other persons in Pakistan in contravention of a Fundamental Right. Functionaries of State, are to function strictly within the sphere allotted to them and in accordance with law. No Court or Authority is entitled to exercise power not vested in it and all citizens have an inalienable right to be treated in accordance with law. Therefore, an action of an Authority admitted to be derogatory to law and Constitution, is liable to be struck down."*

11. In case reported as "Asaf Fasihuddin Khan Vardag v. Government of Pakistan and others" (2014 SCMR 676), Hon'ble Supreme Court held as under:-

*"It is well settled by now that this Court has wide powers in terms of Article 184(3) of the Constitution to ensure that acts/actions of the other organs of the state, namely, Executive and Legislature do not breach the fundamental rights guaranteed by the Constitution. Under the principle of trichotomy of powers, the Judiciary is entrusted with the responsibility of enforcement of Fundamental rights, which calls for an independent and vigilant system of judicial administration so that all acts and actions leading to infringement of Fundamental Rights are nullified and the rule of law upheld in the society. The discharge of constitutional duty by the State functionaries in deviation to the spirit of the*

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*Constitution is anathema to the Constitution and is challengeable on diverse grounds including mala fide and colourable exercise of power for ulterior motive. It is not possible for judiciary to confer validity and immunity to the acts or actions which suffers from mala fide in exercise of power of judicial review.”*

In another case reported as “Salahuddin Dharaj v. Province of Sindh through Secretary, Local Government Department and 4 others” (PLD 2013 Sindh 236), it was held as under;-

*“We may endorse here that there can be no cavil to deny the legally established position that dispensation of justice is not alone the function of the Court but public functionaries are equally responsible to act fairly and keeping in view the law, relevant rules, regulations, notification or the policy etc. in view because the public functionaries are the trustees of the public power hence are required to act accordingly. It is not always that each and every affected person has the courage and resources to approach the court challenging the vires, implication or ramification of law, rule etc. by an authority.*

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*The Honourable Supreme Court of Pakistan in the case of "M/s Al-Raham Travels and tours (Pvt.) Ltd. and others v. Ministry of Religious affairs", reported in 2011 SCMR 1621, in paragraph 33, has held that :--*

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*In the same case, at paragraph 50, it was further held that:--*

*"If policy is in conflict with any provision of law or is violative of fundamental rights of a citizen the same can be called in question before High Court in writ jurisdiction".*

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*Bare perusal of case law it is clear that even a policy can be called in question in writ jurisdiction if the same is either in conflict with any provision of law or same is in violation of fundamental rights of a citizen.”*

12. There is another important aspect of the matter which relates to the duty of the State relating to the education and academic qualification. The right of education strictly flows from right to life guaranteed under Articles 9 and 14 of the Constitution. The right of education is also guaranteed under Article 37(a) and 37(d) of the Constitution and now after 18<sup>th</sup> amendment in the Constitution the right of education has been made as an independent fundamental right under Article 25A of the Constitution. In view of the above Articles, every citizen has a right of quality education and State is under an obligation to establish best educational institutions to enable its citizens to ensure the said right. However, hard reality is that State is neither providing best educational institutions nor it is in a position to meet the demand of quality education in entire country. In the given circumstances on one hand, when the State/government is not in a position to provide quality education to the citizens especially in rural areas then there is no

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justification to impose a condition that a candidate who ever secured 3<sup>rd</sup> division in his/her entire educational career will not be eligible to even apply against the post advertised by the Education Department. Indeed the State could impose such condition if it could show that government is providing best academic qualification throughout the country or province of Punjab, with quality educational institutions and despite the said quality education the particular candidates have secured 3<sup>rd</sup> division in his/her career.

13. It is also admitted position between the parties that the impugned condition has only been imposed in the Education Department, whereas apparently in no other government department such condition is being imposed, which amounts to violative of Article 25 of the Constitution. The impugned condition also violative of right of livelihood, which being part of right to life as guaranteed under Article 9 of the Constitution, a candidates despite having prescribed qualifications will not be in a position to even apply for the posts advertised. Just because he/she had 3<sup>rd</sup> division in his/her entire educational career.

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14. I have also found substance in the arguments of learned counsel for the petitioners that imposing such condition at this stage when the petitioners are not in a position to improve their past academic qualification due to over age or other circumstances beyond their control is harsh and unreasonable.

15. In view of the above discussion, these constitutional petitions **are allowed to the extent** that impugned condition in the recruitment policy, 2017-2018 is declared to be ultra vires of the Constitution, hence, struck down and petitioners shall be entitled to apply for the posts advertised. However, recruitment shall be subject to fulfilment of other prescribed conditions, qualifications and on open merit basis.

**(ABID AZIZ SHEIKH)**  
**JUDGE**

*Approved for reporting.*

**JUDGE**