

SUPREME COURT OF AZAD JAMMU AND KASHMIR

[Appellate Jurisdiction]

PRESENT:

Mohammad Azam Khan, C. J.

Raja Saeed Akram Khan, J.

Civil Appeal No.20 of 2016

(PLA filed on 15.12.2015)

1. Muhammad Luqman, Director Electricity Department, Muzaffarabad.
2. Temoor Idress, Deputy Director Commercial Department Electricity, Muzaffarabad.

....APPELLANTS

VERSUS

1. Malik Ejaz Ahmed, Deputy Director Computer, Directorate of General Commercial Electricity, Muzaffarabad.

..... RESPONDENT

2. Azad Government of the State of Jammu & Kashmir through its Chief Secretary, Muzaffarabad.
3. Secretary, Electricity/Hydro Board, Azad Jammu & Kashmir, Civil Secretariat, Muzaffarabad.
4. Director General Commercial Electricity, Azad Jammu and Kashmir, Muzaffarabad.

.....PROFORMA RESPONDENTS

(On appeal from the judgment of the Service Tribunal dated 5.12.2015 in service appeal No. 97 of 2011)

FOR THE APPELLANTS: Sardar Muhammad Resham Khan, Advocate.

FOR RESPONDENT NO.1: Mr. Mujahid Hussain Naqvi, Advocate.

FOR RESPONDENTS NO. 2 TO 4: Mr. Mansoor Pervaiz Khan, Advocate-General.

Date of hearing: 9.6.2016.

JUDGMENT:

Raja Saeed Akram Khan, J.— This appeal by leave of the Court has been directed against the judgment passed by the Service Tribunal on 5th December, 2015, whereby while amending the notification dated 4.11.2010 to the extent that respondent No. 1, herein, is entitled for promotion from 10.12.2004, the appeal filed by respondent No.1, herein, has been accepted.

2. The facts necessary for disposal of the instant appeal are that respondent No. 1, herein, filed an appeal in the Service Tribunal alleging therein that he is a permanent employee of the Azad Jammu and Kashmir Electricity Department. It is alleged that he was

appointed as Computer Programmer, B-17 on ad-hoc basis in the Electricity Department vide notification dated 11.8.1994. Thereafter, on the recommendations of the Public Service Commission, he was appointed as Computer Programmer, B-17 vide notification dated 1.7.1996. In the light of notification dated 10.12.2004, the respondent was appointed on current-charge-basis against the post of Chief Programmer, B-18. Thereafter, on 2.3.2010, he was promoted on officiating basis against the post of Deputy Director Computer, B-18. On the recommendations of the Azad Jammu & Kashmir Selection Board No.2, vide notification dated 4.11.2010, the respondent was promoted on regular basis as Deputy Director Computer, B-18. The respondent filed an appeal before the Worthy Prime Minister against the notification dated 4.11.2010 for giving him the retrospective promotion w.e.f. 10.12.2004. The

representation/appeal was not decided within 90 days, whereupon, the respondent constrained to file appeal before the learned Service Tribunal. The learned Service Tribunal after necessary proceedings, accepted the appeal filed by respondent No. 1, herein, amended the notification dated 4.11.2010 to the extent that the respondent is entitled for retrospective promotion with effect from 10.12.2004. Hence, this appeal by leave of the Court.

3. Sardar Muhammad Resham Khan, Advocate, the learned counsel for the appellants, submitted that the judgment passed by the learned Service Tribunal is against law and the facts of the case, which is not sustainable in the eye of law. He argued that the post of Deputy Director Commercial, B-18 and the post of Chief Programmer, B-18 are totally different in nature, therefore, the person who is holding the post of Chief Programmer

Computer, B-18 cannot claim the seniority in the list of the Deputy Directors Commercial, B-18. He argued that the learned Service Tribunal failed to understand that the respondent at the time of promotion was holding the post of Chief Programmer Computer, B-18, therefore, he was not entitled to be promoted as Deputy Director, B-18 w.e.f. 10.12.2004. He further submitted that the appellants were holding the post of Deputy Director Commercial, B-18 since 10.12.2004, therefore, the respondent is most junior to the appellants. He averred that the learned Service Tribunal has accepted the appeal filed by the respondent, which is against the final seniority list of the Deputy Directors, B-18 issued by the official respondents on 27.2.2013. He further submitted that the appellants fall at serial No. 1 & 2, whereas, the respondent falls at serial No. 4 of the final seniority list. The learned Service Tribunal while

handing down the impugned judgment failed to adhere to the relevant provisions of the Azad Jammu and Kashmir Civil Servants Act, 1976. The learned counsel for the appellants has relied upon the cases reported as *Dr. Shaukat Tanveer vs. Azad Government & another* [2003 SCR 177] and *Ejaz Ahmed Khan & another vs. Mehboob Ahmed & 2 others* [2005 SCR 242].

4. At the very outset, Mr. Mujahid Hussain Naqvi, Advocate, the learned counsel for respondent No.1, raised a preliminary objection that the petition for leave to appeal has not competently been filed. Under Rule 8 of the Azad Jammu & Kashmir Service Tribunals (Procedure) Rules, 1976, the competent authority has to be arrayed as first respondent in the memo of appeal before the Service Tribunal as well as in this Court, whereas, the appellants failed to array the Azad Government as first party in the line of the respondents,

therefore, the petition for leave to appeal is not competent and liable to be dismissed. The learned counsel further submitted that the provisions of Order XIII, Rules, 1, 2 & 3 of the Azad Jammu & Kashmir Supreme Court Rules, 1978 have been violated. The affidavit as required under Order XVII, has not been filed. The learned counsel raised another objection that the memo of application for issuance of stay order filed in this Court is unsigned. It is neither signed by the party nor the counsel. He further submitted that the provisions of Order VI, Rules 1 & 2 of the AJ&K Supreme Court Rules, 1978 have also been violated. During the course of arguments, the objections raised by the learned counsel for respondent No. 1, were overruled and the learned counsel for the respondent was directed to address the arguments on merits.

5. While arguing on merits of the case, the learned counsel for respondent No. 1,

strongly opposed the arguments addressed by the learned counsel for the appellants, while submitting that the judgment passed by the learned Service Tribunal is perfect and legal which is not open for interference by this Court. He argued that the respondent was inducted into service as Computer Programmer, B-17 on 1.7.1996. He had been working continuously from 2004 to 2010 as Chief Programmer, B-18 in the Electricity Department. The appellants were appointed as Deputy Directors Commercial on 5.5.2006 and have been given promotion retrospectively from 10.12.2004, which is discriminatory in nature. He argued that the respondent also deserves to be promoted from 10.12.2004. The learned counsel has relied upon the cases reported as *Muhammad Arshad Khan v. Chairman MDA and 6 others* [1997 SCR 5], *Ch. Ajaib Hussain & another vs. Mst. Zareen Akhtar & 11 others* [2000 SCR 70] and *Vice Chancellor*

& 4 others vs. Raja Fazal Hussain Rabbani [2001 SCR 541].

6. We have heard the arguments addressed by the learned counsel for the parties and perused the record made available. The only controversy involved in the matter is whether the learned Service Tribunal while giving the retrospective effect of permanent promotion to the respondent was justified to amend the notification dated 4.11.2010 or not. To examine the proposition involved in the matter, we have examined the record minutely. It is evident from the record that the appellants, herein, were promoted on current-charge-basis as Deputy Director, Commercial on 10.12.2004. They were promoted on regular basis on the recommendations of the Selection Board vide notification dated 5.5.2006 as Deputy Director Commercial, B-18 and they were given the promotion from 10.12.2004. The respondent,

herein, was appointed on current-charge-basis against the post of Chief Programmer, B-18 in the department vide notification dated 10.12.2004. After the recommendations of the selection board, the respondent was promoted on regular basis as Deputy Director Computer, B-18 on 4.11.2010. On 27.2.2013, the official respondents issued the final seniority list of Deputy Directors, B-18, wherein, the names of the appellants were placed at serial No. 1 & 2 and the name of the respondent was shown at serial No. 4 of the seniority list. The final seniority list issued by the department on 27.2.2013 shows that at the time when the respondent was promoted as Deputy Director Computer, B-18, he was occupying the post of Chief Programmer, B-18. It is settled principle of law that retrospective or notional promotion can be given to a civil servant only in case when the post was available in the department or the

same was occupied by the civil servant in any capacity. The appellants are holding the posts of Deputy Director Commercial since 2004, whereas, when the respondent was promoted as Deputy Director Computer, B-18 on 4.11.2010, he was holding the post of Chief Programmer, B-18. He was not occupying the post of Deputy Director Computer, B-18 in the year 2004, therefore, no retrospective effect to his promotion can be given from 10.12.2004. The learned counsel has rightly relied upon a case reported as *Dr. Shaukat Tanveer vs. Azad Govt. and another* [2003 SCR 177], in which it has been held as under:—

“7. After hearing, the learned counsel for the parties and perusing the relevant record, it may be stated that as pointed out by the Service Tribunal it is a settled principle of law that retrospective or notional promotion can be given to a civil servant only in case when the post was available in the

department or the same was occupied by the civil servant in any capacity. There is no cavil with the argument that the appellant was not occupying the post, however, the post became vacant on promotion of Dr. Saif-ud-Din on 14.6.1990, but on that date the appellant had not qualified the grading examination. It was on 7.4.1991 that the appellant passed the grading examination, therefore, it was in accordance with law and in the fitness of things that like other doctors the appellant should have been given proforma promotion since 7.4.1991 instead of 28.10.1991. It is true that merely on the ground of passing the grading examination the proforma promotion could not be given but the two necessary prerequisites are that in case of retrospective promotion either the post should be occupied by the civil servant concerned or the same should be vacant."

7. The argument of the learned counsel for the respondent that the post of Deputy

Director Commercial, B-18 and the post of Chief Programmer, B-18 are at par, whereas, he failed to substantiate his stance through any documentary evidence. In this regard the learned counsel for the appellants has rightly referred to the relevant rules, i.e., section 6 (6) of the Azad Jammu and Kashmir Civil Servants Act, 1976, which is reproduced as under:—

“6. Confirmation:- (1) A person appointed on probation shall, on satisfactory completion of his probation, be eligible for confirmation in a service or a post as may be prescribed.

2.

3.

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6. Confirmation of a Civil Servant in a service or against a post shall take effect from the date of the occurrence of a permanent vacancy in such service or against such post

or from the date of continuous officiating, in such service or against such post, whichever is later.”

A plain reading of section 6(6) of the Azad Jammu & Kashmir Civil Servants Act, 1976, provides that confirmation of a Civil Servant against a post shall take effect from the date of the occurrence of a permanent vacancy. The respondent was holding the post of Chief Programmer Computer, B-18 in the year 2004 and not the post of Deputy Director Computer, B-18, therefore, in this state of affairs, we are of the view that the learned Service Tribunal has wrongly amended the notification dated 4.11.2010 and held that the respondent, herein, is entitled for retrospective permanent promotion from 10.12.2004. The respondent at the time of his promotion was not occupying the post of Deputy Director Computer, B-18. The retrospective effect given to the promotion of

the respondent by the Service Tribunal is against the provisions of law which cannot be protected. The law referred to by the learned counsel for the respondent being irrelevant is not discussed.

For the above stated reasons, this appeal is accepted and the judgment passed by the learned Service Tribunal on 5.12.2015 is set aside. No order as to costs.

Muzaffarabad.
7.2016

JUDGE

CHIEF JUSTICE