**SUPREME COURT OF AZAD JAMMU AND KASHMIR**

(Appellate Jurisdiction)

**PRESENT**

Mohammad Azam Khan, C.J.
Ch. Muhammad Ibrahim Zia, J.
Raja Saeed Akram Khan, J.

Civil Appeal No. 178 of 2016
(PLA filed on 13.10.2016)

Abdul Baseer Tajwar s/o Abdul Naseer r/o Authmuqam City, District Neelum.

…. APPELLANT

VERSUS

1. Azad Jammu & Kashmir Public Service Commission through its Secretary having his office at New District Complex, Muzaffarabad.
2. Secretary Public Service Commission having his office at new District Complex, Muzaffarabad.
3. Faisal Mughal s/o Shah Mir Khan r/o City Bagh.

…. RESPONDENTS

(On appeal from the judgment of the High Court dated 06.10.2016 in Writ Petitions No. 2167, 2238 and 2240 of 2016)

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FOR THE APPELLANT: Mr. Muhammad Hanif Khan Minhas, Advocate.

FOR RESPONDENTS NO. 1-2: Kh. Ataullah Chak, Advocate.

FOR RSPONDENT NO. 3: Sardar M. Resham Khan, Advocate.

Date of hearing: 20.10.2016.

**JUDGMENT:**

**Ch. Muhammad Ibrahim Zia, J.—** This judgment shall dispose of the titled appeal by leave of the Court filed against the judgment of the High Court dated 06.10.2016, whereby the writ petitions filed by the appellant, herein, and two others have been accepted in the following manner:

> "The upshot of the above discussion is that the petitions are accepted and remarking/re-evaluation made by the Public Service Commission is declared to have been made without lawful authority. Resultantly, the marks awarded by the Examiner earlier stands restored. The Public Service Commission may continue new selection process of the remaining units. A copy of the judgment shall be annexed with the connected petitions."

2. The relevant and necessary facts of the case are that the appellant, herein, filed a writ petition before the High Court claiming therein that the Public Service Commission of Azad Jammu and Kashmir advertised several posts of Assistant Commissioners and Section Officers vide advertisement No. 03/2011. Among others, he also applied for appointment against the quota reserved for District Neelum. A call letter was issued to him for the written test on 06.07.2015. He

accordingly participated in the test. It was further claimed that the Public Service Commission declared the result of the written test, wherein his name was not amongst the successful candidates. He was told that he could not qualify the paper of English Composition. He submitted an application alongwith prescribed fee for rechecking of the answer-sheets on the ground that he possesses the Master's degree in English and also teaching the English subject for the last 10 years. When the answer sheet was shown to him, it came into his knowledge that initially he was awarded 48 marks but thereafter, as a result of some rechecking, his marks were decreased and consequently declared failed. He requested for preparation of his result on the basis of first checking but without considering his request the Public Service Commission has scheduled to hold the interview of successful candidates from his unit i.e., District Neelum on 12.07.2016. He claimed that curtailment of marks is mala-fide and politically motivated for accommodating someone else. He sought a direction to the respondents to rectify the wrong and release of result on the basis of earlier marking. The learned High Court, after necessary proceedings, while

consolidating two other petitions involving the identical proposition, accepted the same in the manner mentioned in paragraph 1 herein above. The appellant has now challenged the impugned judgment to the extent of restoration of earlier marks and allowing the Public Service Commission to continue Selection process regarding the post in question.

3. Mr. Muhammad Hanif Khan Minhas, Advocate, the learned counsel for the appellant after narration of necessary facts submitted that the impugned judgment of the High Court is self contradictory. According to the enforced law the act of the Public Service Commission regarding rechecking of the answer-sheets is totally violative of law and without lawful authority. Although, the appellant in his writ petition has prayed for restoration of the result compiled prior to rechecking of the answer-sheets but the appellant having no detailed knowledge was unaware of the inside-story regarding Public Service Commission’s serious mal practices. This aspect has been highlighted by the inquiry Commission appointed by the High Court to inquire and probe into the matter. It has been discovered that the whole process has been

polluted by the Public Service Commission in violation of law just to accommodate their favourties. The Public Service Commission is a very important constitutional institution and if its business, specially, conducting of competitive examination, is not transparent and visibly found polluted, it will lose integrity and confidence of the public at large. In this state of affairs, the judgment of the High Court is against law and not sustainable. He further submitted that the findings of the High Court that tampering by any member of the Commission is not proved, are also against the fact and record. He referred to the case reported as *Naghmana Subhan vs. Islamia Univesity Bahawalpur & others* [2000 YLR 1735].

4. Kh. Ataullah Chak, Advocate, the learned counsel for respondents No. 1 and 2, while refuting the arguments of the learned counsel for the appellant seriously objected to the competency of appeal on the ground that the prayed relief has been granted, therefore, neither the appellant is an aggrieved person nor got any locus standi to file this appeal. He also seriously objected to the proceedings conducted by the High Court, specially the appointment of the inquiry

Commission. He submitted that it is very astonishing that without admitting the writ petition for regular hearing or applying judicial mind that whether the propositions raised have any substance, the inquiry Commission has been appointed in violation of law. According to the scheme of law, the propositions raised in writ petition are normally resolved on the basis of documents and affidavits brought on record by the parties and that stage comes when the writ petition is admitted for regular hearing and the parties are provided an opportunity to file documents and affidavits in support of their respective version. He further submitted that according to Azad Jammu and Kashmir Public Service Commission (Functions) Rules, the Chairman is vested with the powers to constitute the Committees for performing the functions of Commission. In this case, the Committee has been rightly constituted. The marking of answer-sheets was not found upto mark and according to required standard of competitive examination, thus, the same examiner was asked for rechecking. The rechecking conducted by him is speaking one and supporting proof of the opinion of Public Service Commission. In the writ

petition, the matter was agitated to the extent of one District, whereas, relating to the other Districts and units neither the process has been challenged by any person nor there was any controversy, therefore, the result has been compiled and recommendations have been made. He submitted that to the extent of unit/District, the subject-matter of this case, he has no objection on the direction of the High Court for compilation of the result on the basis of original mark excluding the process of rechecking. The matter is being processed to be finalized according to the direction of the High Court. He further submitted that according to the scheme of law, rechecking is not prohibited as according to Public Service Commission Rules, there is a concept of Head examiner and co-examiner. He also forcefully argued that the Public Service Commission is functioning transparently according to law. It appears that on motivation of some lobbies the media trial of Public Service Commission has been initiated. In this context he referred to some clippings of the newspapers brought on record alongwith his concise statement.

5. Sardar M. R. Khan, Advocate, the learned counsel for respondent No. 3, while forcefully defending the impugned judgment seriously opposed the appeal and submitted that the appeal is not maintainable as the relief prayed in the writ petition has been granted, therefore, the appellant is no more an aggrieved person. The writ petition and this appeal are also not maintainable in absence of necessary parties. The appellant's controversy relates only to the District Neelum, whereas, the result of all other units has been finalized and the candidates selected on merit have been recommended by the Public Service Commission. The vested rights have been accrued to the selected candidates who have neither been arrayed as party in this appeal nor in writ petition. They cannot be penalized according to wishes of a single person, thus, this appeal has no substance and the same is liable to be dismissed.

6. Mr. Raza Ali Khan, Advocate-General on Court's direction appeared and argued the case being one of public importance. He submitted that according to the Public Service Commission's own version the process adopted is not found fair. The examination of

all the units has been held simultaneously and result has been compiled for all units on the basis of such examination, therefore, it is not possible to adopt different modes for different units because the rule of proprietary demands for uniform policy and mode. The Public Service Commission is a selection authority. According to its version the disputed paper of English-B was not checked by the examiner according to required standard. As per celebrated principle of law, the Courts always declined to substitute the opinion of concerned selection authorities and left the matter for concerned authorities to be completed according to spirit of law. Thus, the process which according to Public Service Commission's own opinion is not of required standard, can neither be substituted by the Courts nor the Public Service Commission can be forced to treat the process valid which the learned High Court has declared as against law and set-aside the same.

7. After hearing the arguments, keeping in view the nature of the matter and public interest demanding prompt action, on 20.10.2016, we passed the following short order:-

> "For the reasons to be recorded later on, this appeal is disposed of under the provisions of

section 42-A of the Interim Constitution Act, with the following directions:

(i) In view of the propositions involved in the case, the process of examination of the Paper-B of English Precise Composition and Letter Writing has been found illegal which is set-aside

(ii) On Court's decision, the learned Advocate-General has submitted written information that the training course in the Academy has already commenced and no new nominee can join current training course.

(iii) As the competitive examination has already been held after considerable delay of years and further delay is against the Constitutional spirit and public interest, hence, the matter requires expeditious disposal. Thus, for doing complete justice and upholding the transparency of the competitive examination, the Public Service Commission is directed to take all necessary measures for holding the examination of Paper-B English Precise Composition and Letter Writing and finalize the result within one month time from today."

8. These detailed reasons are hereby recorded in continuation of our short order.

9. We have dispassionately attended the arguments advanced at bar by the learned counsel for the parties and made minute scrutiny of the record. In the background of legal and factual propositions, the material points involved in this case are as follows:-

(i) the authenticity of the result compiled by the Public Service Commission on the basis of rechecked answer-sheets;

(ii) the effect of finalizing the result of some of the units and recommendations made by the Public Service Commission; and

(iii) whether the conclusion drawn and direction issued by the High Court is practicable and fulfils the standard of equal treatment.

10. For resolution of the points formulated, the pleadings of the parties, specially the stance taken by the Public Service Commission is of vital importance. The relevant portion of the version of the Public Service Commission taken in paragraph 4 of the written statement filed before the High Court is as follows:-

> "....The Chairman PSC has constituted a two members committee consisting of Mr. Mohammad Saleem Bismal and Brig (Rtd) Jameel Azam to prepare the result and supervise the proceedings under the powers vested in him by Rule 9 of Azad Jammu and Kashmir Public Service Commission (Functions) Rules, 1978. According to the Government notification it is mandatory to obtain 33% marks in each subject and aggregate 45 marks for the success in the written paper. 2775 answer sheet of paper English composition were sent to the examiner for marking on receipt of the said marks sheet it is transpired that 2298 candidates have obtained, more than 33% marks in the said paper. The committee after going through some papers noted that a very

> poor and low standard of marking has been made by the examiner, which is against the spirit of competitive examinations. It was also noted that in the English essay paper the said candidates have obtained very low marks. The members brought the matter in the notice of the chairman and it was decided to contact the examiner and examiner was contacted on telephone, who could not satisfy the commission. On the instruction of Chairman the answer sheets and award list were sent back to examiner under the supervision of a Member and Director examinations.
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> The examiner after racking/remarking sent back the answer sheets and new award list to the commission. The examiner singed every answer sheet, where numbers were decreased and also singed the new award list. The committee once again visited the answer sheets and found that version of the PSC was correct as marks decreased after rechecking transpired that it was up to the required standard of marking and uniformity was also maintained.....”

According to the Public Service Commission’s own version, the marking of the disputed paper by the examiner was poor, low standard and against the spirit of competitive examination. Except the disputed units the result of all other units has been finally compiled on the basis of rechecked answer-sheets and the alleged recommendations have been made on the basis of this final result. Whereas, according to the impugned judgment of the High Court the act of re-evaluation and rechecking/remarking of the answer-sheets is declared

without lawful authority. In view of this divergent prevailing position a noval situation has been emerged. The counsel for the respondents very vehemently opposed the appeal and defended the impugned judgment as well as recommendations made by the Public Service Commission. It appears to be self-contradictory and a mutually destructive stand. Neither the recommended candidates nor the Public Service Commission have challenged the validity of the judgment of the High Court. On one hand they admit the impugned judgment as correct and on the other hand they defend the recommendations based upon the process declared without lawful authority. It is neither permissible in law nor justified or legally possible. It is like an impossible act of separating the water mixed in the milk.

11. Now, the question arises whether on the basis of such disputed result any legal right has been vested in favour of the recommended candidates. It is almost now settled that if the basic process is illegal the whole superstructure built upon it falls to the ground. No doubt, a valid final selection of the candidates is of legal importance but the legal right

vests when on the basis of such recommendations the matter is finalized and candidates selected are appointed. Before occurrence of final step of appointment, neither vested right is legally created nor cause of action arises. Our this view finds support from the principle of law laid down by the apex Court of Pakistan in the case reported as *Dr. Habib ur Rehman vs. The West Pakistan Public Service Commission and others* [PLD 1973 SC 144], wherein while discussing the status of the recommendations of Public Service Commission and on the basis of such recommendations the accrual of cause of action, it has been held as follows:-

> "Yet another aspect of the matter may also be noted, viz. that the recommendations of the Public Service Commission being only advisory in nature and it being open to the appointing authority under Article 188 of the Constitution not to accept its advice, it is difficult to see how a petition of this nature can be maintained. The grievance of the candidate would arise only when the Government has made an appointment in contravention of the rules; until that time the advice tendered by the Commission remains confidential and inchoate and cannot give rise to a grievance or cause of action within the meaning of Article 98 of the former Constitution."

12. The status of recommendations of Public Service Commission is neither final nor conclusive. It is

just advisory in nature, hence, the recommendations itself do not create any vested right. In this context there is a chain of authorities some of which are the cases reported as *Province of East Pakistan vs. Dr. K. A. Mansur and others* [PLD 1963 Dacca 211], *Sohrab Butt vs. Govt. of Punjab* [PLD 1982 Lah 42], *Raza Ali Zaidi vs. N.W.F.P Public Service Commission and another* [PLD 1984 Peshawar 225], *Muhammad Aslam Khan vs. Secretary to Government of the Punjab, Forestry and Wildlife Department* [1986 PLC (C.S.) 1021] and *Bahadur Shah and others vs. Pakistan through Secretary, Ministry of Communication and others* [1988 SCMR 1769]. The High Court has already held the act of rechecking as without lawful authority and these findings appears to be legal. Thus, any merit list prepared on the basis of marks awarded after rechecking is without lawful authority. When the basic merit list is not legal and valid, any recommendation on the basis of such list has no authenticity and does not create any vested right.

13. The counsel for the respondents also attempted to save the disputed process by attracting the principle of *Audi Alteram Partem* and submitted

that without impleading the candidates recommended by the Public Service Commission no adverse order can be passed. In our opinion, in the light of peculiar facts and circumstances of the case the argument is misconceived. The principle relied upon is not of universal application. There are some exceptions to this general rule of basic administration of justice such like when there is no legally vested right to be affected. In this context, it is suffice to refer here the judgment of the apex Court of Pakistan delivered in the case reported as *Abdul Haque Indhar and others vs. Province of Sindh and others* [2000 SCMR 907], wherein while dealing with this proposition it has been comprehensively held in paragraph 10 as follows:-

> "10. …. There is no cavil with the proposition that the principle of natural justice enshrined in maxim "audi alteram partem" is always deemed to be embedded in the statute and even if there is no such specific or express provisions, it would be deemed to be one of the parts of the State because no adverse action can be taken against a person without providing right of hearing to him. But at the same time this principle cannot be deemed to be of universal nature because before invoking/applying this principle one has to specify that the person against whom action is contemplated to be taken prima facie has a vested right to defend the action and in those cases where the claimant has no basis or entitlement in his favour he would not be

> entitled for protection of the principle of natural justice."

The same principle has been enunciated by this Court in the case reported as *Muhammad Rashid vs. Azad Jammu and Kashmir Government and 20 others* [PLJ 1987 SC(AJK) 57].

14. There is another exception to this general rule that when in the light of facts and circumstances of the case the version and defence of the person is obviously known and determinable in that case mere absence of the party will not be a ground to leave the case undecided. Even without calling such party the matter can be resolved. The apex Court of Pakistan in the case reported as *Federation of Pakistan through Secretary Ministry of Interior, Government of Pakistan vs. The General Public* [PLD 1988 SC 645] has held that wherein it is known to the extent of certainty that if and when an opportunity is afforded, a person would take a certain position already known there is no point of affording opportunity of hearing. As in this case the factual proposition is very precise that on one hand the Public Service Commission has declared the checking of answer-sheets as poor, low standard and against the spirit of the competitive examination but on the other

hand claimed the act, which has been declared illegal by the High Court, as valid. Thus, the proposition clearly relates to the record in possession of the Public Service Commission and the Rules and law. The candidates have nothing else to be brought on record. The possible stand which can be taken by the recommended candidates is already known. In this situation this Court in the case reported as *Secretary for Prime Minister Secretariat vs. Muhammad Aslam & others* [PLJ 2000 SC(AJ&K) 60] has observed as follows:

> "8. We agree with the learned counsel for the appellants that the learned Judge in the High Court did not lay down a correct law that the rule of *'audi alteram partem'* has universal application. It has been held by this Court in Mst. Rehana Aziz v. Mst. Shakeela Ashraf and 2 others (1998 SCR 281) that if a person is not qualified to hold a post it is not necessary to hear him before rescinding his appointment. The learned Judge in the High Court has himself referred in the judgment under appeal the judgment of the Supreme Court of Pakistan reported as *Federation of Pakistan through Secretary Ministry of Interior, Government of Pakistan, Islamabad v. The General Public* (PLD 1988 SC 645) wherein it is known to the extent of certainty that if and when an opportunity is afforded, a person would take a certain position already known there is no point in affording opportunity of hearing. In the present case if the respondents had been given an opportunity of hearing their answer could have been that posts were not advertised, as

> has been admitted by them in their written statement. These two cases show that hearing was not necessary before termination of service of the respondents"

This principle has also been followed in the full Court judgment delivered in the case reported as *AJ&K Govt. and others vs. Dr. Muhammad Amin* [2014 SCR 258] wherein in paragraph 8 it has been observed as follows:-

> "... No doubt, the doctrine of Audi Alteram Partem, is the basic golden principle of administration of justice but while applying this principle, one should be mindful to take into consideration the legal and factual proposition of each case. If according to facts of the case, and clear statutory provisions, a party has opted and accepted the conditions of appointment resisting upon the pleasure of the appointing authority and the appointing authority is vested with the powers to remove him at any time, in such case if removal order is passed, the question of *Audi Alteram Partem* does not arise. In the case in hand, the order of removal is quite in accordance with the conditions pre-settled among the parties. Even otherwise, the apex Court of Pakistan as well as this Court has also in many cases observed that when it is established from record that the party will take a specific stand in defence which is already known and clear, in that case, principle of *Audi Alteram Partem* is not attracted."

15. The parties could not succeed to bring on record any provision of Rules or enforced policy of Public Service Commission dealing with the eventuality of rechecking of the answer-sheets. Although, under

the Public Service Commission Act and Rules made thereunder, the Public Service Commission is authorized and empowered to hold test and examination but there is no statutory provision or policy authorizing it to take decision of rechecking of answer-sheets once checked and marked by the examiner. The High Court in this context has drawn the right conclusion and perhaps that is why the Public Service Commission and the respondents have not challenged the impugned judgment. However, we are unable to agree with the final conclusion drawn by the High Court that the action of the Public Service Commission has only been challenged to the extent of District Neelum and Mirpur. The High Court has also drawn the conclusion that the Public Service Commission would have been directed to go for fresh papers but as the result of seven units has already been issued and neither the recommendations have been challenged nor the recommendees have been impleaded as party, therefore, their selection will not be affected. The examination of all the units has been simultaneously held and the result is to be compiled on the basis of uniform papers but on one hand the act of

rechecking of the answer-sheets has been found illegal and on the other hand the result finalized on the basis of such illegally rechecked answer-sheets has been protected merely on the ground that the handouts and recommendations have not been challenged. This situation clearly calls for exercise of inherent powers vested in this Court under section 42-A of the Interim Constitution Act, 1974. The declaration of recommendations of the Public Service Commission as valid on the basis of act which has been declared illegal for some units and direction for compiling the result of other units on different criteria, will amount to pollute the whole process, make the selection disputed, create doubt in the mind of candidates and also shake the confidence of public in such an important state institution.

16. The status and role of Public Service Commission is also of worth consideration. According to the provisions of section 48 of the Azad Jammu and Kashmir Interim Constitution Act, 1974, the Public Service Commission is a constitutional institution having pivotal role in civil services of Azad Jammu and Kashmir. It is not an ordinary executive body

constituted by the Government but owes its existence to the constitution. This Court in this regard has observed in the case reported as *AJ&K Government and others vs. Javed Iqbal Khawaja and others* [1996 SCR 40] as follows:

> "20. I may observe that Public Service Commission of Azad Jammu and Kashmir is an institution which follows an international pattern. Such institutions exist in many countries of the world. In England recruitment of all permanent civil servants is in the hands of Civil Service Commission which conduct competitive examination for the purpose. The qualifications for appointment to any appointment under the Crown, whether permanent or temporary, are also subject to the approval of the Commission. The functions of Canadian Civil Service Commission is to conduct recruitment to civil servant. It also supervises promotion and organization of services. In Australia the Public Service Board recruits and qualifies personnel and also makes suggestions for promoting departmental efficiency and economy. It is the power of the Board to report to the House of Parliament if its suggestions are not accepted. There is a similar Commission in United States and is known as "Federal Service Commission" and covers practically the entire Federal Services. However, it is, like the Public Service Commission of Azad Jammu and Kashmir, an advisory body. Public Service Commission is in existence from the very birth of Pakistan. Such a Commission was in existence in undivided India under Government Act of 1935.
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> 21. Service Commissions are constitutional bodies and enjoy independence in their functioning so that the best results are

achieved. These Commissions are manned by persons nominated by executive but it is universally recognized that they have to be free from executive control. This is not a pious wish but is explicitly found in the laws of Azad Jammu and Kashmir. Section 48 of the Interim Constitution Act gives constitutional status to Public Service Commission and its functions. Then it is laid down in Section 10 of the Public Service Commission Act that the Commission shall present to the President annually a report on the work done by the Commission, and the President shall cause a copy of the report to be laid before the Legislative Assembly of Azad Jammu and Kashmir. It is further laid down that the report to be submitted by the Commission shall set out the cases in which the advice of the Commission was not accepted and the matters on which the commission was, where the required, not consulted. The reasons for not accepting the advice or for not consulting it have also to be stated. It is provided in the Public Service Commission Act that Chairman and members of the Commission shall be appointed by the President and on ceasing to hold office they shall not be eligible for further appointment in the service of Azad Jammu and Kashmir. All these provisions show the independence of the Public Service Commission. On the contrary there is no law which may directly or indirectly, laydown that the Government may control the functioning of the Public Service Commission or may otherwise give directions to that constitutional body. Our Constitution lays down separate functions for all organs set up by it. These functions cannot be controlled or circumvented except in accordance with the Constitution. Thus in my view para (1) of Notification No. 1 is without lawful authority."

This situation calls for extraordinary special measures to rule out the possibilities of making the process polluted and disputed as well as uphold the dignity of such important institution. This purpose can only be achieved while conducting the fresh examination of the disputed paper.

17. There is also another aspect to be considered that in the process of litigation, the holding of inquiry and communication of secrecy relating to record could not be maintained, therefore, the possibility of passing of such record through unconcerned hands cannot be ruled out. The Public Service Commission cannot be forced for compilation of result on the basis of such rechecked answer-sheets which are now open secret being examined and passed through unconcerned hands and specially when the Public Service Commission has observed that the marking is sub-standard and against the spirit of competitive examination.

18. It does not require any further deliberation that the matter of holding the examination and evaluation and checking of the answer-sheets exclusively falls within the domain of the Public Service

Commission and no other institution including the Courts can substitute its opinion. The Courts under the judicial review powers can only determine whether an act is in accordance with law or not but they cannot perform the act by themselves rather they have to direct the concerned authorities to act according to law. In this case, the Public Service Commission cannot be directed to compile the result on the basis of marks awarded by the examiner relating to which it has formed the opinion that the marking is not in accordance with the required standard. In this situation, there is no other alternate except to direct the Public Service Commission for reholding the examination of the disputed papers. In such like situation, the Courts ordinarily deemed it appropriate to order for reholding the examination. In this context, in the case reported as *Zafrullah Khan vs. Punjab Public Service Commission and others* [1985 SCMR 1293], it has been held as follows:-

> "The objection is that as not less than two members are a Committee entitled to interview, the examination only by one member was not an act performed under law. The defect, therefore, is not of a nature which stood cured. Even otherwise, the members who interviewed the respondent No. 3 should have examined the petitioner as

> well so as to decide who out of them was more suitable candidate.
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> In view of the above, the omission/refusal to interview the petitioner is without lawful authority. The respondent Commission is directed to examine both the candidates again and make fresh recommendations, Meanwhile, respondent No.3 may continue to function."

19. Kh. Ataullah Chak, Advocate, the learned counsel for the Public Service Commission also argued that under rules in practice relating to competitive examination held by the Public Service Commission there is also concept of head-examiner and the act of Public Service Commission for evaluation of answer-sheets should be deemed as valid act exercised as head-examiner. In our opinion, the argument in the light of facts of the case is not correct. The principle of head-examiner is applied ordinarily for achieving the uniformity of the standard of marking where there are more than one examiner whereas no such proposition is involved in the case in hand. In this context, we would like to refer here the observations of apex Court of India made in the case reported as *Sanjay Singh and others vs. U.P. Public Service Commission & others* [AIR 2007 SC 950], wherein in paragraph 23, it has been held as follows:-

"23. When a large number of candidates appear for an examination, it is necessary to have uniformity and consistency in valuation of the answer-scripts. Where the number of candidates taking the examination are limited and only one examiner (preferably the paper-setter himself) evaluates the answer-scripts, it is to be assumed that there will be uniformity in the valuation. But where a large number of candidates take the examination, it will not be possible to get all the answer-scripts evaluated by the same examiner. It, therefore, becomes necessary to distribute the answer-scripts among several examiners for valuation with the paper-setter (or other senior persons) acting as the Head Examiner. When more than one examiner evaluate the answer-scripts relating to a subject, the subjectivity of respective examiner will creep into the marks awarded by him to the answer-scripts allotted to him for valuation. Each examiner will apply his own yardstick to assess the answer-scripts. Inevitably therefore, even when experienced examiners receive equal batches of answer scripts, there is difference in average marks and the range of marks awarded, thereby affecting the merit of individual candidates. This apart, there is 'Hawk-Dove' effect. Some examiners are liberal in valuation and tend to award more marks. Some examiners are strict and tend to give less marks. Some may be moderate and balanced in awarding marks. Even among those who are liberal or those who are strict, there may be variance in the degree of strictness or liberality. This means that if the same answer-script is given to different examiners, there is all likelihood of different marks being assigned. If a very well written answer-script goes to a strict examiner and a mediocre answer-script goes to a liberal examiner, the mediocre answer-script may be awarded more marks than the excellent answer-script. In other words, there is 'reduced valuation' by a strict examiner and 'enhanced valuation' by a liberal

examiner. This is known as 'examiner variability' or 'Hawk-Dove effect'. Therefore, there is a need to evolve a procedure to ensure uniformity *inter se* the Examiners so that the effect of 'examiner subjectivity' or 'examiner variability' is minimised. The procedure adopted to reduce examiner subjectivity or variability is known as moderation. The classic method of moderation is as follows:

(i) The paper-setter of the subject normally acts as the Head Examiner for the subject. He is selected from amongst senior academicians / scholars / senior civil servants / Judges. Where the case of a large number of candidates, more than one examiner is appointed and each of them is allotted around 300 answer-scripts for valuation.

(ii) To achieve uniformity in valuation, where more than one examiner is involved, a meeting of the Head Examiner with all the examiners is held soon after the examination. They discuss thoroughly the question paper, the possible answers and the weightage to be given to various aspects of the answers. They also carry out a sample valuation in the light of their discussions. The sample valuation of scripts by each of them is reviewed by the Head Examiner and variations in assigning marks are further discussed. After such discussions, a consensus is arrived at in regard to the norms of valuation to be adopted. On that basis, the examiners are required to complete the valuation of answer scripts. But this by itself, does not bring about uniformity of assessment *inter se* the examiners. In spite of the norms agreed, many examiners tend to deviate from the expected or agreed norms, as their caution is overtaken by their propensity for strictness or liberality or erraticism or carelessness during the course of valuation. Therefore, certain corrective steps become necessary.

(iii) After the valuation is completed by the examiners, the Head Examiner conducts a random sample survey of the corrected answer scripts in the meetings of examiner have actually been followed by the examiners. The process of random sampling usually consists of scrutiny of some top level answer scripts and some answer books selected at random from the batches of answer scripts valued by each examiner. The top level answer books of each examiner are revalued by the Head Examiner who carries out such corrections or alterations in the award of marks as he, in his judgment, considers best, to achieve uniformity. (For this purpose, if necessary certain statistics like distribution of candidates in various marks ranges, the average percentage of marks, the highest and lowest award of marks etc. may also be prepared in respect of the valuation of each examiner.)

(iv) After ascertaining or assessing the standards adopted by each examiner, the head Examiner may confirm the award of marks without any change if the examiner has followed the agreed norms, or suggest upward or downward moderation, the quantum of moderation varying according to the degree of liberality or strictness in marking. In regard to the top level answer books revalued by the Head Examiner, his award of marks is accepted as final. As regards the other books below the top level, to achieve maximum measure of uniformity *inter se* the examiners, the awards are moderated as per the recommendations made by the Head Examiner.

(v) If in the opinion of the Head Examiner there has been erratic or careless marking by any examiner, for which it is not feasible to have any standard moderation, the answer scripts valued by such examiner are revalued either by the head Examiner or any other Examiner who is found to have followed the agreed norms.

> (vi) Where the number of candidates is very large and the examiners are numerous, it may be difficult for one Head Examiner to assess the work of all the Examiners. In such a situation, one more level of Examiners is introduced. For every ten or twenty examiners, there will be a Head-Examiner who checks the random samples as above. The work of the Head Examiners, in turn, is checked by a Chief Examiner to ensure proper results.
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> The above procedure of 'moderation' would bring in considerable uniformity and consistency. It should be noted that absolute uniformity or consistency in valuation is impossible to achieve where there are several examiners and the effort is only to achieve maximum uniformity."

20. The counsel for the appellant has seriously objected to the observations made by the High Court that the tampering by any member of the Commission has not been proved, whereas, the counsel for the respondents as seriously objected to the appointment of the inquiry Commission by the High Court being without lawful authority. In our considered view, the whole discussion on behalf of the parties as well as by the High Court in the impugned judgment is uncalled for and unnecessary. It appears that in the impugned judgment due to typing mistake the word "tempering" is written, whereas, in the light of facts of the case it is infact "tampering". The word "tampering" has not been defined by law, therefore, its dictionary meaning has to

be considered. Some of the dictionary meanings of the term "tamper (tampered, tampering)" are as follows:-

> "verb (tampered, tampering) *intr* (usually tamper with something) 1 to interfere or meddle, especially in a harmful way, 2 to attempt to corrupt or influence, especially by bribery..." *[Chamber's 21st Century Dictionary Revised Edition page 1443].*
> "To meddle so as to alter a thing, especially to make illegally, corrupting or perverting changes; as, to tamper with a document or a text; to interfere improperly; to meddle; to busy oneself rashly; to try trifling or foolish experiments. United States v. Tomicich, D.C.Pa., 41 F.Supp. 33, 35. To illegally change as to tamper with the mileage reading on an odometer of a motor vehicle, or a motor vehicle identification number (18 U.S.C.A. $$ 511, 512), or consumer products (18 U.S.C.A. $ 1365), or a witness or victim (18 U.S.C.A. $ 1512 et seq.)" *[Black's Law Dictionary with Pronunciations, Sixth Edition, Centennial Edition (1891-1991].*

> "Tamper ..... 1: to carry on underhand or improper negotiations (as by bribery) 2a: to interfere so as to weaken or change for the worse --- used with with b: to try foolish or dangerous experiments --- used with with." [Webster's new Explorer Encyclopedic Dictionary, page 1885]

Thus, the act of tampering has to be considered in broader sense and cannot be confined only to the person who practically made any change in the document but also includes the person who meddle so as to alter a thing or to make illegal changes or to interfere for change in harmful manner or to influence

etc. Before the High Court the proposition was only regarding the act of rechecking by the Public Service Commission as to whether it is legal or illegal and no matter relating to holding of inquiry in relation to the conduct of the members of the Public Service Commission was under consideration. Therefore, in our opinion the observation made by the High Court in this context is premature, uncalled for and not according to law on the subject. This proposition can only be considered when under section 6 of the Azad Jammu and Kashmir Public Service Commission Act, 1986 the matter is referred by the President for inquiry to a Judge of High Court appointed by him. The President's power under the statutory provisions are there and if there is any sufficient material for forming opinion that the members of the Public Service Commission are guilty of misconduct the law can take its recourse. In this regard the observation made by the High Court is unnecessary, hence, not sustainable.

21. As it has already been observed that keeping in view the peculiar facts and circumstances of this case, leaving aside the relief claimed by the appellant, we deem it necessary and proper for doing complete

justice to exercise the inherent powers vested in this Court under section 42-A of the Interim Constitution Act, 1974. While upholding the opinion of the High Court that the act of rechecking of the answer-sheets by the Public Service Commission is without lawful authority, consequently the result of the other units compiled on the basis of such rechecking is also decaled illegal, without lawful authority and that cannot be protected merely on the ground that the recommendations of other units have not been challenged.

22. The learned counsel for the Public Service Commission in his arguments has also raised the point that some lobbies have launched media trial against the Public Service Commission. He has also referred to some press clippings. In our considered opinion, this matter cannot be conclusively resolved in this case. Although, the right of information is now universally recognized fundamental right of peoples but the concerned should maintain the limits. The information should be correct, accurate, positive and for the purpose of guidance. This right or concession should not be misused for scandalizing, falsely propagating,

disgracing or degrading the persons and institutions. It has been rightly said that 'the press and nation rise and fall together'. The media has to play important role in building of nation and institutions but if the media does not realize its responsibility and fail to watch and protect the national interest, it might have adverse effects. Instead of leading the nation to rise, it may create instability and hyperness. Therefore, keeping in view the broader national interest, all the concerned should realize their responsibilities and specially the positive information should be furnished for building the nation and restoring the public confidence in the institutions. The situation also demands from the head of the institutions and all the other public office holders to discharge their duties honestly, fairly and transparently.

Consequently, this appeal stands disposed of with the direction given in the short order passed on 20.10.2016. No order as to costs.

Muzaffarabad,
09.11.2016 JUDGE (J-I) CHIEF JUSTICE JUDGE (J-II)

Abdul Baseer Tajwar VS Azad Govt. & others

**ORDER:**

The judgment has been signed. The parties shall be intimated accordingly.

Muzaffarabad,
09.11.2016 CHIEF JUSTICE JUDGE (J-I) JUDGE (J-II)