

SUPREME COURT OF AZAD JAMMU AND KASHMIR

[Appellate Jurisdiction]

PRESENT:

**Ch. Muhammad Ibrahim Zia, J.
Raja Saeed Akram Khan, J.**

Civil Appeal No.144 of 2015
(PLA filed on 25.05.2015)

Nazir Ahmed, Girdawar, presently posted in
Chamb, Tehsil Barnala, District Bhimber, A.K.

....APPELLANT

VERSUS

1. Muhammad Iqbal Mir s/o Sahib Ditta, r/o village Mughaloor, Gurah Kalan, Tehsil Bhimber, A.K, presently posted as Patwari, Halqa Sehlar, District Bhimber, A.K.

..... RESPONDENT

2. Collector/Deputy Commissioner, Bhimber, A.K.
3. Departmental Selection Committee No.3, through its chairman, Deputy Commissioner/Collector Bhimber, A.K.
4. Fazal Karim, Patwari/Qanongo/Settlement Officer, Revenue, Bhimber, A.K.
5. Commissioner, Mirpur Division, Mirpur, A.K.
6. AJK Board of Revenue through its Secretary, Muzaffarabad, A.K.

7. AJK Government through Chief Secretary,
Muzaffarabad, A.K.

.....PROFORMA-RESPONDENTS

(On appeal from the judgment of the Service Tribunal
dated 21.02.2015 in Service Appeal No.83 of 2012)

FOR THE APPELLANT: Mr. Abdul Razzaq
Chaudhary, Advocate.

FOR THE RESPONDENT: Mr. Muhammad Rafique
Dar, Advocate.

Date of hearing: 14.12.2016.

Judgment:

Raja Saeed Akram Khan, J.— The supra appeal by leave of the Court has been filed against the judgment of the Service Tribunal dated 21st February, 2015, whereby the appeal filed by the respondent, herein, has been accepted.

2. The facts in brief as emerged from this appeal are that the appellant and respondent No.1, herein, are permanent employees of the Revenue Department. Vide order dated 11.09.2012, the appellant and one, Fazal Kareem were promoted as

Girdawars. Respondent, herein, challenged the said promotion order by way of appeal before the Service Tribunal. The Service Tribunal after necessary proceedings accepted the appeal vide impugned judgment dated 21st February, 2015, hence this appeal by leave of the Court.

3. Mr. Abdul Razzaq Chaudhary, Advocate, the learned counsel for the appellant, argued that the judgment passed by the Service Tribunal is against law and the record of the case which is not sustainable in the eye of law. He added that the judgment is illegal and is liable to be dismissed as the same has been passed without application of judicial mind. He submitted that the learned Service Tribunal erred in law while accepting the appeal on the ground that respondent, herein, is senior to the appellant and in presence of a senior, Junior cannot be promoted. He further submitted that the seniority is not the sole criterion for promotion but fitness is also to be considered by the competent authority. He added that the Departmental

Selection Committee recommended the names of the appellant and proforma-respondent No.4, herein, for promotion after taking into consideration their experience and fitness but this important aspect of the case escaped the notice of the learned Service Tribunal while passing the impugned judgment. He further added that the learned Service Tribunal erred in law while not taking into account that Departmental Selection Committee duly considered the case of the respondent for promotion but he was found ineligible for promotion because of possessing lessor experience and not fit for the requisite post. He further submitted that the Service Tribunal cannot substitute the findings of selection board/committee who has the only authority to judge the suitability of a candidate for promotion. He has relied upon the cases reported as *Dr. Abdul Ghaffar Sulehria vs. Azad Govt. & 4 others* [2008 SCR 230], *Muhammad Arif vs. Raja Muhammad Farooq Niaz* [2009 SCR 140] and *Muhammad Sharif vs. Minister for Forests & 4 others* [2005 SCR 282].

4. On the other hand, Mr. Muhammad Rafique Dar, Advocate, the learned counsel for the respondent, strongly controverted the arguments advanced by the learned counsel for the appellant. He submitted that the order passed by the Service Tribunal is perfect and legal which is not open for interference by this Court. He added that the proceedings of the Departmental Selection Committee are nullity in the eye of law as it has acted in an arbitrary manner while depriving the respondent of his legal right of promotion. He added that the name of the respondent falls at serial No.10, whereas, the name of the appellant appears at serial No.11 of the seniority list. In this way, the respondent is senior to the appellant and in presence of senior, a junior cannot be promoted, therefore, the learned Service Tribunal recorded well-reasoned findings. There was no reason to give the appellant preference over the respondent while issuing the promotion order. He added that the qualification of the appellant and the respondent is same and in such like situation, the seniority is one

of the relevant factor which was ignored by the Departmental Authority while issuing the promotion order of the appellant which was rightly set aside by the learned Service Tribunal. He has relied upon the case reported as *Basharat Hussain and 2 others vs. Muhammad Imtiaz & 6 others* [2009 SCR 530]

5. We have heard the learned counsel for the parties and perused the impugned judgment along with the record made available. The record reveals that the appellant was promoted as Girdawar on the recommendations of the Departmental Selection Committee vide order dated 11.09.2012, which reads as under:-

"آزاد حکومت ریاست جموں و کشمیر

از دفتر ڈپٹی کمشنر/کلکٹر ضلع بھمبر

حکم:

بروئے نوٹیفیکیشن بورڈ آف ریونیو مظفر آباد زیر نمبری 15802-13/12 مورخہ 13.8.12 ضلع بھمبر اور کوٹلی میں آغاز کام بندوبست کیلئے نو تخلیق شدہ آسامیاں گرداوران پر جناب کمشنر میرپور ڈویژن میرپور کے حکم نمبر کمشنر/انتظامیہ/1752-64/12 مورخہ 4-9-12، حکم دفتر ہذا مکتوب نمبر/ص ق/1524-29/12 مورخہ 5-9-12 کے تحت محمد رشید، صابر حسین گرداوران تحصیل سماہنی کا تبادلہ تنظیم بندوبست بھمبر ہونے کی وجہ سے دو خلو آسامیاں گرداوران پر حسب سفارش محکمانہ سلیکشن کمیٹی فضل کریم پٹواری تحصیل بھمبر، نذیر احمد پٹواری

تخصیل ساہنی کو در سکیل بی۔11 مع مروجہ الاونسز ترقیاب کیا جاتا ہے ایڈجسٹمنٹ کے احکامات بعد میں جاری کیئے جائیں گے۔

ڈپٹی کمشنر/کلکٹر ضلع بھمبر"

Before passing the aforesaid order, a meeting of the Departmental Selection Committee was convened for determination of suitability and fitness of employees of revenue department from amongst the patwaris for promotion as Girdawars. The case of the appellant and respondent No.1 was duly considered for promotion. The appellant was found fit for promotion on the basis of experience, whereas, the respondent, who is although senior to the appellant was found unfit and not recommended for further promotion by the Departmental Selection Committee on the ground that he is relatively inexperienced. The relevant portion of the findings recorded by the Departmental Selection Committee is reproduced as under:-

"---- اور نمبر شمار 9 فضل کریم ولد محمد بوٹاجو کہ تعلیمی لحاظ سے میٹرک پاس ہے۔
کام مال/بندوبست سے بخوبی واقف ہے۔ اچھی شہرت اور حاضری کا پابند ہے۔ نمبر شمار

10 محمد اقبال میر ولد صاحب دتہ جو کہ تعلیمی لحاظ سے میٹرک پاس ہے۔ پرانا ملازم ہے، گو کام مال / بندوبست جانتا ہے۔ لیکن ایک تجربہ کار گرداور کی حیثیت سے کام لینے کا اہل نہ ہے۔ نمبر شمار 11 نذیر احمد ولد رحمت علی جو کہ تعلیمی لحاظ سے میٹرک پاس ہے۔ اور کام مال / بندوبست سے بخوبی واقف ہے۔ اور محکمہ میں اچھی شہرت کا مالک ہے۔ کام بندوبست انتہائی پیچیدہ اور مشکل ہے۔ گرداور کے زیر کنٹرول 4/5 پٹواریاں ہوتے ہیں۔ گرداور سرکل نے اپنی کارگزاری کے علاوہ پٹواریاں سے بھی کام مطابق معیار حاصل کرنا ہوتا ہے۔ اگر کمزور اور ناتجربہ کار کسی اہلکار کو ترقیاب کیا بھی جائے تو شاہد وہ اپنا کام تو کر ہی ہے۔ لیکن اپنے ماتحت ناتجربہ کار تعینات پٹواریاں سے کام مطابق معیار احسن طریقہ سے نہ حاصل کر سکے۔ موجودہ آسامیاں گرداوران / پٹواریاں تنظیم بندوبست سے متعلق ہیں۔ کام بندوبست کی اہمیت کے پیش نظر سنیا رٹی سے ہٹ کر کسی تجربہ کار اہلکار کی ترقیابی محکمہ اور کام بندوبست کے بہتر مفاد میں ہوگی۔ اہلکاران جن کو زیر کار لایا گیا ہے ان میں سے نمبر شمار 9 فضل کریم پٹواری اور نمبر شمار 11 نذیر احمد پٹواری کام بندوبست سے بخوبی واقف ہیں۔ اور خاصا تجربہ رکھتے ہیں۔ ان ہر دو پٹواریاں کو ترقیابی کیلئے موزوں قرار دیا جاتا ہے۔

جہاں تک نمبر 7 محمد لطیف پٹواری، نمبر 10 محمد اقبال پٹواری کا تعلق ہے، نمبر شمار 11 محمد نذیر سے سینئر ہیں البتہ کام بندوبست کے مفاد میں ان پر دو پٹواریاں نمبر 7، 10 کو سردست ترقیاب نہیں کیا جاسکتا۔ آئندہ جوں ہی کوئی آسامی گرداور خالی ہونے پر مطابق سنیا رٹی فہرست ان اہلکاران کو ترقیاب کیا جائے گا۔

لہذا کمیٹی متفقہ طور پر کام بندوبست کے بہترین مفاد کی خاطر فضل کریم پٹواری تحصیل بھمبر، نذیر احمد پٹواری تحصیل ساہنی کو بسلسلہ ترقیابی موزوں قرار دیتی ہے۔"

After going through the findings of the Departmental Selection Committee reproduced (supra), it is clear that the appellant and proforma-respondent No.4, herein, were considered for promotion as Girdawars on the basis of suitability, experience and fitness. It is well settled principle of

law that when the matter of fitness is involved while making promotion to a particular post, the seniority alone cannot be considered as sole criterion but it is the seniority-cum-fitness which is to be determined by the competent authority. Reference may be made to a case reported as *Muhammad Arif vs. Raja Muhammad Farooq Niaz and 3 others* [2009 SCR 140], wherein, it has been observed by this Court that:-

4.As the promotion of respondent No.3 is concerned, it may be stated that it is not only the seniority which is to be considered for promotion alone but the fitness is also considered by the competent authority. As no order of this Court has been violated in this case, therefore, this petition has no substance. It is hereby dismissed.”

So far as the argument of the learned counsel that the learned Service Tribunal cannot substitute the wisdom of Selection Committee/Board, is concerned, it may be observed here that suitability of the candidate can only be judged by the

concerned competent authority. The same cannot be substituted until and unless some violation of law is found or the same is found arbitrary and against the record. The learned Service Tribunal while handing down the impugned judgment took the role of selection committee while determining the suitability of the candidate and set aside the promotion order only on the ground of seniority. The findings of the learned Service Tribunal recorded in para 7 of the impugned judgment that a person cannot be deprived of his right of promotion when possessing equal qualification to the one who is recommended for promotion by giving the reason of other extraordinary qualification, is against law. The case of both the candidates was considered thoroughly by the Departmental Selection Committee and it was up to the said committee to judge the fitness of the candidate for promotion. The appeal to the Service Tribunal does not lie against an order or decision of a departmental authority determining the fitness of a person to be promoted. In this regard, reliance may be made on

a case reported as *Dr. Abdul Ghaffar Sulehria vs. Azad Govt. & 4 others* [2008 SCR 230], wherein, it has been observed as under:-

12. Now attending to the second point whether the findings or recommendations made by a Selection Board while determining the fitness of an incumbent to hold a post is sacrosanct and immune from judicial review and that no appeal lies to the Service Tribunal, we may in the very outset admit the legal position that the appeal to the Service Tribunal doesn't lie against an order or decision of a departmental authority determining the fitness or otherwise of a person to be appointed or to hold a particular post or to be promoted to a higher grade. The authorities relied upon by Mr. M. Tabassum Aftab Alvi, the learned counsel, particularly the case reported as *Secretary Govt. of Sindh Education Department & others vs. Syed Riyazul Hssain Zaidi* [1986 SCMR 64] clearly lay down that the appeal

doesn't lie to the Service Tribunal against the order of the authority determining the fitness for promotion of a civil servant. The judgment reported as *Sarwar Hussain Shah vs. Azad Govt. and 3 others* [1996 SCR 185] has been recorded mainly on the basis of this judgment. The Supreme Court of Pakistan in a case reported as *Mrs. Aqeela Asghar Ali and others vs. Miss Khalida Khaton Malik and others* [PLD 1991 SC 1118] directly addressed the proposition and held that the question of promotion involve only the question of fitness and nothing else would amount to limiting the scope of promotion. There are three things to be seen while considering a case of promotion. The first rule is that is it a part of selection or of seniority-cum-fitness or of seniority alone? The second is where the promotion is to take place by seniority-cum-fitness; the question would necessarily be assignment of the correct seniority and proceedings to determine the entitlement of

promotion on its basis. The third question necessarily would be of a fitness for promotion. The Supreme Court finally in para 10 of its report held that the first two questions, namely the principle of promotion and the assignment of proper seniority for consideration for promotion are matters which don't stand excluded from the jurisdiction of the Service Tribunal because they don't involve the question of fitness which has been expressly reserved for the departmental authority and outside the jurisdiction of the Tribunal. The first two questions relate to law and its application to the civil servant awaiting promotion. A distinction was drawn between the question of fitness of a civil servant for promotion and question of eligibility to promotion in another case reported as *Mian Abdul Malik vs. Dr. Sabir Zameer Siddiqui and 4 others* [1991 SCMR 1129] wherein it was held that the jurisdiction of the Service Tribunal is barred where the question of fitness of a civil servant for promotion is involved."

Therefore, it can safely be held that while substituting the findings of the Selection Committee the Service Tribunal acted beyond its jurisdiction as the learned Service Tribunal cannot play the role of Selection Board/Committee. The correct and relevant law has been referred to and relied upon by the learned counsel for the appellant.

In view of the above, this appeal is accepted and the judgment passed by the Service Tribunal is hereby set aside.

Mirpur
____.01.2017.

JUDGE

JUDGE