

SUPREME COURT OF AZAD JAMMU AND KASHMIR
[APPELLATE JURISDICTION]

PRESENT:

Mohammad Azam Khan, C.J.
Raja Saeed Akram Khan, J.

1. Civil appeal No. 228 of 2015
(PLA filed on 23.6.2015)

1. Khawaja Tariq Iqbal, Assistant Engineer, Public Health Engineering Division, Azad Govt. of the State of Jammu & Kashmir.
2. Waqar Ahmed, Assistant Engineer, Highways Division, Azad Govt. of the State of Jammu and Kashmir.

.... APPELLANTS

VERSUS

1. Zaffar Ahmed Dar s/o Zahoor Ahmed Dar, Assistant Engineer, Public Health Engineering Division, Azad Government of the State of Jammu and Kashmir, Muzaffarabad.

.... RESPONDENT

2. Azad Government of the State of Jammu and Kashmir through its Chief Secretary, Muzaffarabad.
3. Secretary, Communication & Works, Azad Government of the State of Jammu and Kashmir, Civil Secretariat, Muzaffarabad.

4. Secretary Physical Planning & Housing, Azad Government of the State of Jammu and Kashmir, Civil Secretariat, Muzaffarabad.
5. Selection Board No. III, Azad Government of the State of Jammu and Kashmir through its Chairman Selection Board No. 3/Secretary, Communication & Works, Azad Government of the State of Jammu & Kashmir, Civil Secretariat, Muzaffarabad.

....PROFORMA-RESPONDENTS

[On appeal from the judgment of the High Court dated 24.4.2015 in Writ Petition No. 1564 of 2014]

FOR THE APPELLANTS: Mr. Abdul Rashid Abbasi,
Advocate.

FOR THE RESPONDENT: Raja Muhammad Hanif
Khan, Advocate.

2. Civil appeal No. 229 of 2015
(PLA filed on 23.6.2015)

1. Azad Government of the State of Jammu and Kashmir through its Chief Secretary, Muzaffarabad.
2. Secretary, Communication & Works, Azad Government of the State of Jammu and Kashmir, Civil Secretariat, Muzaffarabad.
3. Secretary Physical Planning & Housing, Azad Government of the State of Jammu and Kashmir, Civil Secretariat, Muzaffarabad.
4. Selection Board No. III, Azad Government of the State of Jammu and Kashmir through

its Chairman Selection Board No. 3/Secretary, Communication & Works, Azad Government of the State of Jammu & Kashmir, Civil Secretariat, Muzaffarabad.

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VERSUS

1. Zaffar Ahmed Dar s/o Zahoor Ahmed Dar, Assistant Engineer, Public Health Engineering Division, Azad Government of the State of Jammu and Kashmir, Muzaffarabad.

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2. Khawaja Tariq Iqbal, Assistant Engineer, Public Health Engineering Division, Azad Govt. of the State of Jammu & Kashmir.
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....PROFORMA-RESPONDENTS

[On appeal from the judgment of the High Court dated 24.4.2015 in Writ Petition No. 1564 of 2014]

FOR THE APPELLANTS: Ch. Muhammad Ismail,
Advocate.

FOR THE RESPONDENT: Raja Muhammad Hanif
Khan, Advocate.

Date of hearing: 8.12.2016

JUDGMENT:

Raja Saeed Akram Khan. J.— Both the titled appeals by leave of the Court have been directed against the judgment passed by the High Court on 24th April, 2015, whereby the writ petition filed the respondent, herein, in both the appeals has been accepted. Since both the appeals have been filed against the common judgment of the High Court, therefore, we intend to dispose of the same through this single judgment.

2. The gist of the facts forming the background of these appeals is that the respondent, herein, filed a writ petition in the High Court, alleging therein, that he is a permanent employee of the Public Works Department and at present serving as Assistant Engineer, (B-17) in Public Health Engineering Division, Muzaffarabad. The official respondents cancelled the provisional seniority list on 16th

July, 2011 and issued the final seniority list on 27.10.2011. The respondent challenged the final seniority list dated 27.10.2011, before the Secretary Works and Communication Department on 24.11.2011, by way of departmental appeal, which was dismissed on 9.1.2013. Feeling aggrieved, the respondent filed an appeal before the worthy Prime Minister of Azad Jammu & Kashmir. The Commissioner, Muzaffarabad Division was appointed as an authorized officer who after examining the record made the recommendations in favour of the respondent and declared that he is senior to Kh. Tariq Iqbal and Waqar Ahmed, appellants, herein. The recommendations were accepted by the worthy Prime Minister on 30.7.2013. The respondent filed the writ petition for implementation of the order passed by the worthy Prime Minister on 30.7.2013. The learned High Court vide impugned judgment

dated 24th April, 2015 accepted the writ petition and issued the direction to the official respondents to implement the order of the Chief Executive passed in the light of the recommendations of Commissioner, Muzaffarabad Division within a period of three months, hence, this appeal by leave of the Court.

3. Mr. Abdul Rasheed Abbasi, Advocate, the learned counsel for the appellants in appeal No. 228 of 2015 titled *Khawaja Tariq Iqbal & another vs. Zaffar Ahmed Dar & others*, argued that the judgment passed by the High Court is against law and the facts of the case, which is not sustainable in the eye of law. He further argued that the learned High Court fell in error while not taking into consideration that the respondent had chosen a wrong forum while challenging the same seniority list before the Secretary Works & Communication Department.

He contended that the matter pertains to terms and conditions of the service of the contesting civil servants for which the proper forum was the Service Tribunal. He contended that five appeals regarding the final seniority list are still pending adjudication before the learned Service Tribunal. The learned High Court while accepting the writ petition failed to adhere to the relevant provisions of section 47 of Azad Jammu and Kashmir Interim Constitution Act, 1974, which clearly debar the jurisdiction of the High Court in such like matters. He further submitted that after dismissal of appeal by the wrong forum, i.e., Secretary Works & Communication Department, the appeal before the Prime Minister was time-barred. The worthy Prime Minister vide order dated 18.7.2014, reviewed his earlier orders, therefore, the respondent has not approached the Court with clean hands and suppressed the order of the worthy Prime

Minister dated 18.7.2014. He submitted that the worthy Prime Minister was fully justified to review its order as under section 21 of the General Clauses Act, the authority who passed the order is fully competent to review the same but this legal proposition escaped the notice of the learned High Court.

4. Ch. Muhammad Ismail, Advocate, the learned counsel for the appellants in appeal No. 229 of 2015, argued that the matter pertains to terms and conditions of service, therefore, the learned High Court has no jurisdiction to entertain the writ petition but the learned High Court has not taken into account this important legal aspect of the case while delivering the impugned judgment.

5. On the other hand, Raja Muhammad Hanif Khan, the learned counsel for the respondent, strongly opposed the arguments addressed by the learned counsel for the

appellants. He submitted that the learned High Court has passed the judgment in accordance with law which is not open for interference by this Court. He argued that the respondent after dismissal of the departmental appeal immediately approached the worthy Prime Minister who was competent authority, therefore, the appeal filed by the respondent before the worthy Prime Minister was well within time. He further contended that in the instant case the Service Tribunal was not proper forum to seek the direction for implementation of the order passed by the worthy Prime Minister. He argued that if the respondent filed appeal at the wrong forum then it was the duty of the Secretary Works & Communication Department to return the appeal to the respondent but instead of returning the same, he kept pending the appeal and on reminder, he decided the same, therefore, there was no fault on the part

of the respondent in this regard. The learned counsel relied upon the cases reported as *Raja Naveed Hussain Khan and others vs. Qazi Khalil ur Rehman & others* [1994 SCR 267], *Mir Abdul Hamid vs. Azad Govt. & 2 others* [1997 SCR 96] and *Syed Shamshad Hussain vs. The Controller of Post Offices, Karachi & 2 others* [PLD 1987 SC 256].

6. We have heard the arguments of the learned counsel for the parties and gone through the record made available. The respondent, herein, challenged the final seniority list dated 27.10.2011 before the Secretary Works & Communication on 24.11.2011, which was turned down vide order dated 9.1.2013 with the observation that the appeal was filed incompetently for which no provision of law exists. The argument of the learned counsel for the respondent that if the respondent had chosen a wrong forum i.e. Secretary Works &

Communication then it was the duty of the Secretary Works & Communication to return the appeal but he kept the same pending for a considerable time, cannot be made a ground for the condonation of delay as laid down in a case reported as *Mumtaz Hussain Khan and 5 others vs. Muhammad Hussain & 3 others* [2000 SCR 618], wherein it has been held by this Court as under:—

“12. The plaintiff-appellants could also not claim the benefit of pursuing their remedy before a wrong forum. If a forum is not chosen with due care and diligence the same cannot be made a ground for the condonation of delay.....”

7. Now coming to the real controversy involved in the case, it may be observed that the final seniority list was issued on 27.10.2011 and the respondent after a lapse of 15 months from the date of issuance of the final seniority

list filed second appeal before the worthy Prime Minister on 4.2.2013. The Commissioner, Muzaffarabad Division was appointed as an authorized officer by the worthy Prime Minister who after examining the record made the following recommendations on 29.7.2013:—

"موجودہ حالت بالا جملہ صورت حال کا جائزہ لینے کے بعد یہ پایا جاتا ہے کہ اپیل کنندہ کو از تاریخ ترقیاتی (کرنٹ چارج) مورخہ 14.10.2008 سے قائم مقام نائب مہتمم بخلاف 15% کو ترقیاتی کیے جانے کی مذکورہ کی استدعا قابل پریرائی ہے۔ ان جملہ حقائق کے تناظر میں پیش کردہ اپیل ایپلٹ کے مندرجات درست پائے جاتے ہیں۔ اس طرح مذکورہ کی یہ استدعا قابل پریرائی ہے کہ اسے 15% کو ترقیاتی بلور نائب مہتمم ترقیاتی ازاں سب انجینئرز سے متعلق جو نیارٹی لسٹ زیر نمبر 04-2007/9500 مورخہ 7.11.2007 جاری ہوئی تھی اس کے مطابق اسے سیکرٹریٹ ورکس امور اصلاحات سے مجریہ حکم نمبر ورکس اسٹاٹسٹ 1/146/2011/11 مورخہ 27.10.2011 (جس کے تحت نائب مہتمم صاحبان بخلاف 15% کی نیارٹی لسٹ جاری ہوئی تھی) میں میسر ز خواجہ طارق اقبال اور وقار احمد نائب مہتمم صاحبان سے نقل اندراج کیا جانا قرین انصاف ہے۔"

After going through the above said recommendations, it reveals that the Commissioner, Muzaffarabad Division declared the respondent senior to Kh. Tariq Iqbal and Waqar Ahmed, appellants, herein. The recommendations submitted by the Commissioner, Muzaffarabad Division were approved by the worthy Prime Minister. From

the record, it reveals that the Secretary Works & Communication again submitted a summery before the worthy Prime Minister for reconsideration/review of his earlier order on the principle of 'audi alteram partem'. The relevant portion of the summery submitted by the Secretary Works & Communication Department reads as under:—

"اس حتمی شیارٹی فہرست کے خلاف بذیل سب انجینئرز نے سروں ٹریبونل میں اپیل باہر دائر کی ہوئی ہے۔ جو هنوز زیر سماعت ہیں۔

- (i) رضوان آزاد نام سیکرٹری ورکس
- (ii) رضوان آزاد نام سیکرٹری ورکس
- (iii) تجل حسین نام سیکرٹری ورکس
- (iv) اشتیاق احمد نام سیکرٹری ورکس
- (v) آصف اسد اللہ نام سیکرٹری ورکس

بالا صورت حال میں مقدمات زیر سماعت ہونے کے دوران شیارٹی میں کسی قسم کا روپول ممکن نہ ہے۔ البتہ شیارٹی کے حوالہ سے دائر مقدمات کے فیصلہ جات آنے پر مطلقاً عملدرآمد کیا جائے گا۔"

The worthy Prime Minister accordingly reviewed his earlier order in the following manner:—

"چونکہ سب انجینئرز کی شہادتوں سے متعلق معاملہ سرویس ٹریبونل و دیگر عدالتوں میں زیر سماعت ہیں لہذا قلم ازیں دی گئی منظوری کو بعینہ نظر ثانی منسوخ کیا جانا مناسب ہوگا۔ عدالت ہاء سے معاملات شہادتوں کی سماعت پر مزید کارروائی عمل میں لائی جائے گی۔"

The recommendations made by the Commissioner, Muzaffarabad Division as an authorized officer were approved by the worthy Prime Minister without giving an opportunity of hearing to the appellants. In this way, the principle of natural justice i.e. '*audi alteram partem*' has grossly been violated. The appellants were condemned unheard. Be that as it may, the earlier order passed by the worthy Prime Minister was reviewed by him on 18.7.2014. Thus, the stance taken by the respondent that the earlier order passed by the worthy Prime Minister was in accordance with law has no substance. Keeping in view the circumstances of the case it can safely be held that the earlier order passed by the worthy

Prime Minister has come within the definition of void order and on the strength of the same no right can be claimed. Reliance may be placed on a case reported as *Muhammad Akram and another vs. Custodian Evacuee Property and 7 others* [2003 SCR 442], it has been held as under:—

“7.In our view, the proprietary rights obtained on the basis of defective allotment order and sale-deed executed by appellant No. 1, in favour of appellant No.2, on the basis of his Proprietary Rights Transfer Order, were rightly cancelled by the Custodian because it is a celebrated principle of law that if basic order is void then all superstructure built upon such order is also liable to be set aside along with the basic order.”

In another case reported as *Farkhanda Javeen & 94 others vs. Azad Govt. & 57 others* [2015 SCR 1362], it has been held as under:—

“10. According to the celebrated principle of law, void or illegal orders do not create any right or interest in any person. Therefore, the respondents are directed to take up the matter seriously and initiate for necessary action regarding the illegal regularization notifications issued by the authorities. The persons who have exercised the authority for passing such notifications shall also be taken to the task.

The argument of the learned counsel for the respondent that the order passed by the appellate authority (Prime Minister) was final and under law the same was not open to review, is not convincing in nature, as under section 21 of the General Clauses Act, 1887, the authority empowered to pass an order can vary, amend, add to or rescind that order. The apex Court of Pakistan in a case reported as *Government of Sindh through Secretary, Board of Revenue, Hyderabad and another* [1991 SCMR 2293],

while dealing with the proposition has held that:—

“The principle of *locus poenitentiae* (power of receding till a decisive step is taken) is well-recognized and it stipulates that the authority that has the power to make an order has also the power to undo it. But in the cited case the limitations placed upon this power have been pointed out. Following is the enunciation of law laid down in that case:

‘There can be hardly be any dispute with the rule as laid down in these cases that apart from the provisions of section 21 of the General Clauses Act, *locus poenitentiae*, i.e., the power of receding till a decisive step is taken, is available to the Government or the relevant authorities. In fact, the existence of such a power is necessary in the case of all authorities empowered to pass orders to retrace the wrong

steps taken by them. The authority that has the power to make an order has also the power to undo it. But this subject to the exception that where the order has taken legal effect, and in pursuance thereof certain rights have been created in favour any individual, such an order cannot be withdrawn or rescinded to the detriment of those rights."

8. The respondent filed a writ petition for implementation of the decision of the worthy Prime Minister which had already been withdrawn by the Prime Minister on the principle of '*audi alteram partem*'. In this state of affairs, the learned High Court was not justified to issue the direction for implementation of the decision of the worthy Prime Minister which was no more in the field. After careful examination of the record, it is spelt out that the respondent filed the writ petition just to protect the *ill-gotten-gain* which is not permissible under law as has

been held in a case reported as *Azad Jammu and Kashmir Government & 4 others vs. Mohi-ud-Din Islamic University & 2 others* [2014 SCR 382] that:—

14. Now we advert to the argument advanced by the learned counsel for the appellants that the writ jurisdiction cannot be invoked to protect the *ill-gotten-gain*. As we have observed in the preceding para that MOU/agreement dated 14.9.2006 was not executed in accordance with law, therefore, the benefits derived by the respondents under this agreement can be termed as *ill-gotten-gains*. It is now settled that the writ jurisdiction of the High Court cannot be invoked to protect the *ill-gotten-gains....*”

9. As we have reached the conclusion that the respondent filed the writ petition in the High Court for implementation of such an order of the worthy Prime Minister which had already rightly been withdrawn by the worthy Prime Minister on

the principle of '*audi alteram partem*'. Thus, the writ petition filed by the respondent before the learned High Court was against law, hence, there is no need to discuss the other points raised by the parties. The case law referred to by the counsel for the respondent having distinguishable facts is not applicable to the case in hand, therefore, need not be discussed.

In view of the above, this appeal is accepted and the impugned judgment is hereby set aside. Consequently, the writ petition filed by the respondent is hereby dismissed with no order as to costs.

Mirpur,
.1.2017

JUDGE

CHIEF JUSTICE