**SUPREME COURT OF AZAD JAMMU AND KASHMIR**

(APPELLATE JURISDICTION)

**PRESENT:**

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

Civil appeal No.86 of 2013
(PLA filed on 22.05.2013)

Abdul Rahim Zubair Butt, Judge Family Court, Azad Jammu & Kashmir Judicial Department (presently removed from service), r/o Mohallah Baliah, Kotli.

….APPELLANT

**VERSUS**

1. Competent Authority under the Removal from Service (Special Powers), Act, 2001 (Honourable Chief Justice of High Court of Azad Jammu & Kashmir), Muzaffarabad.
2. Honourable Judges of the High Court of Azad Jammu & Kashmir through Registrar High Court, Muzaffarabad.
3. Azad Jammu & Kashmir High Court through Registrar High Court, Muzaffarabad.

4. Registrar, High Court of Azad Jammu and Kashmir, Muzaffarabad.
5. Justice (Retired) Raja Muhammad Ashraf Kiani, Ex-Judge Ehtesab Court Mirpur/Chairman, Inquiry Committee, presently residing at Mirpur.
6. Malik Abdul Rashid Ex-Chairman, Service Tribunal, Azad Jammu & Kashmir (Member of the Inquiry Committee), presently residing at Kotli.
7. Sheikh Abdul Majid Ex-Registrar, High Court of Azad Jammu and Kashmir Muzaffarabad/Member, Inquiry Committee, presently residing at Mirpur.

….RESPONDENTS

8. Azad Government of the State of Jammu & Kashmir through Chief Secretary to Azad Government, Civil Secretariat Chatter, Domail, Muzaffarabad.
9. Prime Minister of Azad Jammu & Kashmir through Secretary Prime Minister’s Secretariat, Chatter Domail, Muzaffarabad.

….PROFORMA RESPONDENTS

(On appeal from the judgment of the Azad Jammu & Kashmir Subordinate Judiciary Service Tribunal dated 22.04.2013 in service appeal No.02 of 2011)

.....

FOR THE APPELLANT: Kh. Muhammad Nasim, Advocate, along with appellant.

FOR THE RESPONDENTS: Ch. Shoukat Aziz, Advocate, Raja Akhlaq Hussain Kiani, Addl. Advocate General.

*Date of hearing: 13.02.2017*

***JUDGMENT*:**

***Raja Saeed Akram Khan, J.*—** This appeal by leave of the Court has been directed against the judgment of the Azad Jammu and Kashmir Subordinate Judiciary Service Tribunal dated 22.04.2013, whereby the appeal filed by the appellant, herein, has been dismissed.

2. The facts necessary for disposal of this appeal are that the appellant, herein, was serving as Judge Family Court, Bagh. On 07.03.2002, a show-cause notice, issued by

the High Court, was served upon him to explain regarding the telephonic call made on 19.01.2002 at 12:00, a.m., from land line contact No.24206, installed at the residence of the appellant when he was posted as Senior Civil Judge, Kotli, to the learned Chief Justice of the High Court. In pursuance of the said notice, the proceedings were initiated against the appellant under the Azad Jammu & Kashmir Removal from Service (Special Powers), Act, 2001 (hereinafter to be referred as Act, 2001). An Inquiry Committee was constituted on 04.07.2002. After completing the inquiry proceedings, the committee submitted its report on 05.08.2002, to the Chief Justice High Court. Ultimately, the appellant was removed from service on 21.08.2002, by the learned Chief Justice of the High Court being competent authority. Thereafter, the appellant filed a representation

before the worthy Prime Minister. The representation was accepted and the order of removal from service dated 21.08.2002, was set aside. In this regard, a notification was also issued on 01.11.2002. The appellant presented his joining report to the Registrar High Court on 02.11.2002, but the same was refused by the learned Judges of the High Court in a meeting held on 21.01.2002, while declaring that no representation or appeal lies before the worthy Prime Minister against the order passed by the Chief Justice High Court being competent authority. The decision made by the Judges of the High Court was conveyed to the appellant by the Registrar High Court through letter dated 25.11.2002. The appellant challenged the decision of the Judges of the High Court before this Court by filing petition for leave to appeal which was dismissed vide order dated 13.12.2002. The

appellant challenged the order of his removal from service before the Service Tribunal, however, during the pendency of appeal before the Service Tribunal, the Subordinate Judiciary Service Tribunal (hereinafter to be referred as Service Tribunal) was established under Azad Jammu and Kashmir Subordinate Judiciary Service Tribunal Ordinance, 2011, whereupon, in the light of section 8 of the said ordinance, the appeal filed by the appellant pending before the Service Tribunal being member of subordinate judiciary was transferred to the newly established tribunal for hearing and disposal under law. The learned tribunal after necessary proceedings dismissed the appeal vide impugned judgment dated 22.04.2013, hence, this appeal by leave of the Court.

3. Kh. Muhammad Nasim, Advocate, the learned counsel for the appellant argued that

the impugned judgment is against law and the facts of the case which is not sustainable in the eye of law. He submitted that the provisions of the Special Powers Act are applicable only to the employees of such Courts or Tribunals functioning under the Government, whereas, the appellant neither in his capacity as Presiding Officer of the Family Court nor as employee of the High Court was or could be deemed to be an employee of a Court or tribunal functioning under the Government. In such situation, the learned Chief Justice of the High Court was not competent authority but the learned Service Tribunal failed to take into consideration this aspect of the case. He further submitted that the inquiry committee in absence of any proof recommended for imposition of major penalty, i.e. removal from service. In such state of affairs, there was no occasion for the

competent authority/Chief Justice of the High Court to accept the recommendations of the inquiry committee. He strongly argued that the appellant in support of the stance that he never made any telephonic call to the learned Chief Justice of the High Court; produced many documents but the same were rejected by the inquiry committee as well as the authority, without assigning any reason. In this way, a grave-injustice has been done with the appellant. He further added that the Service Tribunal also failed to adhere to the fact that it was case of first impression and the appellant bona-fidely filed representation before the worthy Prime Minister on the advice of some senior counsel. Even otherwise, the relevant section of the Act, 2001 itself postulates that the competent authority is Prime Minister. In this scenario, there was no justification to refuse the condonation of delay.

He also stated that the learned Service Tribunal has also attended the merits of the case; therefore, it would be deemed that the Service Tribunal impliedly condoned the delay. He contended that the terms and conditions of service of a judicial officer are governed under the Judicial Service Rules, 1999 and liability of alleged misconduct was to be dealt with under the Efficiency and Discipline Rules, 1977 and the provisions of Act, 2001 were not applicable in the case of the appellant but this aspect of the case escaped the notice of the Service Tribunal while passing the impugned judgment. He drew the attention of this Court towards different documents including the letter written by the appellant to the Officer Commanding, Special Communication Organization (SCO) and submitted that the appellant himself made complaints that somebody made wrong telephonic calls from

the number installed at his residence and in response to the said letter the concerned officer of SCO categorically stated that the possibility cannot be ruled out that someone may be indulged to make such calls while connecting the phone with the wire of the land line number installed at the residence of the appellant. He strongly argued that it does not appeal to the prudent mind that a Presiding Officer of the Family Court make such a long telephonic call of the duration of 58 minutes with the Chief Justice of the High Court. He contended that all the witnesses strongly supported the version of the appellant; most of them are the senior members of the Bar. The witnesses also submitted their affidavits that at the relevant time, when the call was made to the Chief Justice of the High Court, the appellant was in the Court but the same have not been taken into consideration. He

added that normally the Courts believe the affidavits of the lawyers, but in the case in hand the same have not been considered. He maintained that under law no person can sit as judge in his own cause, therefore, the learned Chief Justice of the High Court who himself was complainant could not pass the order of removal from service against the appellant. In continuation of the arguments, he submitted that the findings recorded by the learned Chief Justice being competent authority as well as the learned Chairman of the inquiry committee to the effect that it is the appellant who could have been benefited by the alleged call, are based on presumptions and under law no case can be decided on the basis of presumptions. He added that the whole proceedings conducted by the inquiry committee are null and void and liable to be quashed. He further submitted that the proceedings were

conducted by the inquiry committee, in absence of the appellant, without associating him and without providing him opportunity to cross-examine the witnesses and explain his position. In this way, all the proceedings conducted by the inquiry committee are against the principle of natural justice. He prayed for acceptance of appeal. He relied upon the cases reported as *Chairman, Aklasc and 2 others v. Abdul Hameed Siddique and another* [2001 SCR 334], *Basharat Ali v. Director, Excise and taxation, Lahore and another* [1997 SCMR 1543], *Allah Yar v. General Manager, Railways Headquarters Lahore and another* [2001 SCMR 256], *University of AJ&K through its Registrar, Muzaffarabad and 4 others v. Kamran Niaz* [PLJ 2005 SC (AJK) 17], *Muhammad Mohsin Siddique v. Government of West Pakistan* [PLD 1964 SC 64], *Dr. Muhammad Shahbaz Mufti v.*

*Government of the Punjab through Chief Secretary and others* [2009 SCMR 160], *Karachi Electric Supply Corporation Ltd. v. Lawari and 4 others* [PLD 2000 SC 94], *Muhammad Riaz Khan v. Inspector General of Police and 19 others* [2010 SCR 131] and *Syed Lal Hussain Shah v. Lal Muhammad and 5 others* [2005 CLC 1076].

4. The appellant also appeared in person. An opportunity was also provided to him to address the arguments. He mostly adopted the arguments advanced by Kh. Muhammad Nasim, Advocate, however, while making addition, he submitted that he stood first in the examination held by Public Service Commission twicely and rendered his services to the entire satisfaction of the department and no such complaint was ever made against him. He earned considerable period of service in his credit and removed from service on such

evidence which does not connect him with the commission of misconduct. He added that he was condemned unheard even the request for recording his own statement was refused by the inquiry committee.

5. On the other hand, Raja Akhlaq Hussain Kiani, the learned Additional Advocate-General, strongly supported the judgment of the Service Tribunal while submitting that the same is perfect and legal which is not open for interference by this Court. All the issues involved in the matter have comprehensively been resolved by the Service Tribunal and has not committed any illegality. Whereas, Ch.Shoukat Aziz, Advocate filed written arguments, submitting therein, that the impugned judgment is in accordance with law which is not open for interference by this Court. Admittedly, the land line telephone No.44206, from which the alleged call was

made to the learned Chief Justice of the High Court was installed at the residence of the appellant. The objection of the appellant regarding the competency of the Chief Justice of the High Court is also not acceptable as this Court has already resolved this issue in the previous round of litigation while holding that the learned Chief Justice of the High Court is the competent authority in the case of the appellant. It has also been submitted in the written arguments that the appellant filed appeal before the Service Tribunal beyond the prescribed period of limitation; therefore, the learned Service Tribunal was fully justified to dismiss the appeal on the ground of limitation. The learned Chief Justice of the High Court constituted a inquiry committee to inquire into the matter whether the alleged telephonic call was made by the appellant or not; and whether the misconduct has been committed

by the appellant or not. The inquiry committee after requisite proceedings submitted its report to the learned Chief Justice of the High Court, thereafter; the learned Chief Justice passed the order of removal from service in accordance with law being competent authority. He referred to the cases reported as *Abdul Raheem Butt v. AJ&K High Court and 7 others* [2002 SCR 455], *Muhammad Yousaf Haroon v. Competent Authority & 4 others* [2014 SCR 1180] and *Agha Inam-ur-Rehman Khan v. Registrar, Lahore High Court Lahore* [2013 SCMR 109].

6. We have gone through the record along with the impugned judgment in the light of the arguments of the learned counsel for the parties. The perusal of the record shows that the appellant was serving as Judge Family Court/Senior Civil Judge. He was removed from service after conducting an inquiry, vide

order dated 21.08.2002, by the learned Chief Justice of the High Court. Against the order of removal from service, the appellant initially filed a representation before the worthy Prime Minister while invoking section 9 of the Act, 2001 which was accepted and the worthy Prime Minister passed an order to reinstate him in service. In pursuance of the notification issued in this regard, the appellant submitted his joining report on 02.11.2002; however, the same was refused on the ground that the order passed by the learned Chief Justice High Court being competent authority is a final order against which no representation lies to the worthy Prime Minister. The Registrar High Court conveyed this position to the appellant vide letter dated 25.11.2002, whereupon, the appellant filed a petition for leave to appeal before this Court which was dismissed vide judgment dated 13.12.2002. The appellant

filed an appeal before the Service Tribunal which also failed. In the previous round of litigation, the crucial point involved in the matter, i.e. who was 'competent authority', in the case of the appellant, has been resolved by this Court along with some other points. The learned counsel for the appellant again raised this point during the course of arguments. It will be useful to reproduce here the relevant paragraphs of the previous judgment reported as *Abdul Raheem Zubair Butt v. AJ&K High Court and 7 others* [2002 SCR 455], which read as under:-

> "10. The contention of the learned advocate for the petitioner that the proceedings against the petitioner were taken under the Act which itself provides representation to the Prime Minister is misconceived and misunderstood. The word 'competent authority' is

defined in section 2(a) of the Act as follows:-

> 'a) 'competent authority' means the Prime Minister and where, in relation to any person or class of persons, the Prime Minister authorizes any Officer or Authority to exercise the powers of competent authority under this Act, that Officer or Authority, and, in relation to an employee of a Court or Tribunal functioning under the Government, the appointing authority or the Chairman or Presiding Officer of the Court or the Tribunal.'

11. I have considered the above argument of the learned advocate in the light of the provisions of the Act. The definition of the 'competent authority' given above visualizes two categories of the authorities, firstly the Prime Minister or any officer or authority authorized by him is 'competent authority, in relation to all persons in the service

of the Government and secondly, in relation to Court employees, 'the appointing authority', 'Chairman' or 'Presiding Officer' of the Court or Tribunal is the competent authority. The Courts and Tribunals have been separated and segregated from the authority of the Prime Minister. The wisdom behind this segregation is to upkeep the integrity, independence and authority of the judiciary as a special organ of the State and not a subordinate institution of the Government. All other provisions of the Act will have to be read in light of the definition given above.

12. Section 9 regulating representation and review postulates that when an order is passed under section 3 of the Act, by an officer or authority other than the Prime Minister, representation to the Prime Minister is competent, but where an order has been passed by the Prime Minister himself,

review is competent before the Prime Minister. The order passed by the appointing authorities of the Court employees is not catered by this section. The order in the case of the petitioner is initially passed by the learned Chief Justice and then endorsed by all the Judges of the High Court. The learned Chief Justice or the Judges of the High Court are not officers or authority subordinate to the Prime Minister nor authorized by the Prime Minister to be competent authority. In view of above definition of the competent authority, the learned Chief Justice is himself competent in relation to the petitioner for being his appointing authority and the learned Judges of the High Court are equally competent for being controlling and supervising authority of the Courts subordinate to it when a matter is placed before them by the learned Chief Justice.”

After going through the findings (supra), it is clear that this Court has already held that a judicial officer of the subordinate judiciary performs his duties under the control and supervision of the High Court and the Chief Justice being head of the High Court is the competent authority. Although, there is no ambiguity left behind regarding the point of competent authority, however, even then, we have examined the relevant provisions of Act, 2001. For better appreciation it would be relevant to reproduce here section 2(a) and 9 of the Act, 2001 which read as under:-

> "2(a). "competent authority" means, the Prime Minister and where, in relation to any person or class of persons, the Prime Minister authorizes any Officer or authority, to exercise the powers of competent authority under this Act, that officer or authority, and, in relation to an employee of a Court or Tribunal

functioning under the Government, the appointing authority or the Chairman or Presiding Officer of the Court or the Tribunal.

9. Representation and review: (1) A person who has been dismissed or removed or compulsorily retired from service or reduced to lower post or pay scale or against whom any order has been made under section 3 by the competent authority, may, within fifteen days from the date of communication of the order, prefer a representation to the Prime Minister or such officer or authority as the Prime Minister may designate:

Provided that where the order has been made by the Prime Minister such person may, within the aforesaid period, submit a review petition to the Prime Minister.

(2) The Prime Minister, or an officer or authority, as may be designated for the purpose by the

> Prime Minister, may, on consideration of the representation, review petition and any other relevant material, confirm, set aside, vary or modify the order in respect of which such representation or review petition is made within sixty days thereof."

The bare reading of section 2(a) of Act, 2001 shows that there are two parts of this provision. In part first the Prime Minister is defined as the competent authority or any officer or authority authorized by him as 'competent authority' in relation to all persons in the service of the Government. The second part relates to the employees of the Courts or Tribunals where the 'appointing authority, Chairman or Presiding Officer' of the Court or the Tribunal is the competent authority. Thus, this statutory provision unambiguously speaks that in the matter of the judicial officers the worthy Prime Minister is not competent

authority. Both the supra sections are interlinked and section 9 of Act, 2001 cannot be read in isolation rather the same must be read with section 2(a). After juxtapose perusal of both the sections, it is clear that the order passed by the competent authority of the Court employees cannot be challenged before the worthy Prime Minister by invoking section 9 of Act, 2001. This proposition has further been elaborated in a full Court judgment reported as *Muhammad Yousaf Haroon v. Competent Authority & 4 others* [2014 SCR 1180], wherein it has been held that:-

> "46. Before parting, we would like to express our view regarding the contents of the memo of appeal filed by the appellant before the Judicial Service Tribunal and also before this Court. The appellant is not an ordinary person. He held an important responsible judicial office and has served for a considerable

> time in the judiciary. He has mentioned in the memo of appeal that he has sought remedy before the Prime Minister of Azad Jammu and Kashmir whereas on this specific legal aspect an authoritative judgment of this Court reported as Abdul Raheem Zubair Butt v. AJ&K High Court & other [2002 SCR 455] is holding the field. In this judgment it has finally been concluded that neither the Prime Minister is authority nor any representation lies before him in relation to orders passed by the Chief Justice High Court as authority under the provisions of Act, 2001."

In the referred report it has further been clarified that neither the Prime Minister is authority nor any representation lies before him in relation to the orders passed by the Chief Justice High Court as authority.

7. The argument of the learned counsel for the appellant that the provisions of Act,

2001 were not applicable to the case of the appellant, as the appellant being judicial officer was governed by the Judicial Service Rules, 1999 and liability of alleged misconduct was to be dealt with under the Efficiency and Discipline Rules, 1977, has also no substance. This proposition has already been resolved by this Court in *Muhammad Yousaf Haroon's* case (supra). In that judgment after a detailed survey of the statutory provisions as well as the case law on the subject, the majority view of the Court is that the persons holding the post in the judicial service in connection with the affairs of the Azad Jammu and Kashmir, fall within the definition of Government service for limited purpose of Act, 2001. Relevant portion of the judgment (supra) reads as under:-

> "20. The term "Government Service" under Act, 2001, is not

confined only to the persons who are under the direct control or subordination of the Government but it also includes all the persons holding the posts in connection with the affairs of the Azad Jammu and Kashmir. No one can interpret the law that the persons holding such post in judiciary of Azad Jammu and Kashmir are not holding the office/post in connection with the affairs of the Azad Jammu and Kashmir. Thus, a juxtaposed appreciation of the provisions dealing with the term " person in service of Azad Jammu and Kashmir" under Act, 1976 and Act, 2001, leads to the conclusion that subject to the Constitutional exceptions, the persons holding the post in the judicial service in connection with the affairs of the Azad Jammu and Kashmir, fall within the definition of Government service for limited purpose of Act, 2001."

Furthermore, in paragraph 9 of the referred pronouncement, it has specifically been held that Act, 2001 is applicable to the judicial officers. The relevant paragraph reads as under:-

> "9. The persons holding the judicial office in the Courts established by the subordinate legislation which are under the superintendence and control of the High Court are undisputedly governed under Act 1976. Therefore, following the principle of law laid down in *Malick Hussain Shah's* case, we are also of the opinion that Act, 2001 is applicable to such persons."

8. One of the argument advanced by the learned counsel for the appellant is that the Service Tribunal has not dismissed the appeal of the appellant only on the ground of limitation rather the Service Tribunal also

discussed the merits of the case, therefore, the Service Tribunal has impliedly condoned the delay. It may be stated that mere discussion of the merits of the case, is not sufficient to draw the inference that the delay has been condoned. The learned Service Tribunal after detailed discussion of law on the subject has held in paragraph 20 of the impugned judgment that the appeal is hopelessly time barred and at the end also dismissed the appeal on the ground of limitation, therefore, it cannot be said that the learned Tribunal impliedly condoned the delay. It may also be observed here that the remedy available to the appellant against the final order dated 21.08.2002, was in shape of appeal before the Service Tribunal and the limitation provided for the same is 90 days. The appellant after dismissal of petition for leave to appeal by this Court filed an appeal

before the Service Tribunal on 31.12.2002, after more than 4 months' period from the final order passed by the competent authority which was hopelessly time barred. The appellant also filed an application for condonation of delay under section 5 of the Limitation Act, 1908. The perusal of the application filed by the appellant for condonation of delay shows that he sought condondation for the period consumed in pursuing the remedy at the wrong forum and in this regard he has taken the stance that on the advice of some senior advocates he had chosen the said forum. During the course of arguments, the learned counsel for the appellant has also submitted that the appellant bonafidely filed representation before the worthy Prime Minister on the advice of some senior Advocates. We are afraid, that delay cannot be condoned on the ground that

someone has given ill-advice to a person to choose a wrong forum for redressal of grievance. It may be observed here that law is settled on the point since long that if a litigant spends time in pursuing a remedy under a mistaken/negligent advice the period spent by him goes waste and in such situation delay cannot be condoned. Reference may be made on a case reported as *Masud Ahmad and others v. United Bank Limited* [1992 SCR 98], wherein, it has been held that:-

> "8. This takes us to the question whether the appellants can successfully urge that the appeal filed in the Court of district judge and been filed and prosecuted with good faith. If the appellant's contention is shown to be well founded, it would furnish a "sufficient cause" for condonation of delay. Notwithstanding the fact that both the learned counsel who

> appeared in this appeal were not aware of it, this proposition stands concluded by judgments of this Court that circumstances as appearing in the present case cannot be termed as being the result of "good faith" rather in fact they constitute "gross negligence" and cannot be treated as a sufficient cause for condonation of delay. Where the provision of law is clear question of condonation does not arise. It may arise when a litigant is misguided by some practice of a Court or by an erroneous judgment."

In a recent unreported judgment titled *Kh. Tariq Iqbal & another v. Zaffar Ahmed Dar* (civil appeal No.228 of 2015 decided on 07.02.2017), this Court has held as under:-

> "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'."

In this regard, the learned High Court has also rightly relied upon the case law reported as *Mirza Lal Hussain v. Custodian of Evacuee Property and others* [1992 SCR 214] and [1997 SCR 71]. It is an admitted position that appeal was filed beyond prescribed period of limitation as the final order was passed by the competent authority, i.e. Chief Justice of the

High Court on 21.08.2002 and against that order the appellant filed appeal before the Service Tribunal on 31.12.2002, whereas, under the relevant law he had to file appeal within a period of 90 days from the date of final order. As we have reached the conclusion that appeal before the Service Tribunal was hopelessly time barred and the explanation offered by the appellant in support of application for condonation of delay is not convincing in nature, therefore, the discussion on the other points involved in the matter will be a futile exercise. The case law referred to and relied upon by the learned counsel for the appellant having distinguishable facts and features is not applicable to the case in hand, therefore, need not be discussed.

In the light of above discussion, we are of the considered view that the learned Subordinate Judiciary Service Tribunal rightly

dismissed the appeal of the appellant on the ground of limitation and has not committed any illegality. Hence, while upholding the judgment of the Court below the appeal is dismissed being devoid of any force. No order as to costs.

Muzaffarabad, **JUDGE** **CHIEF JUSTICE**
__.02.2017

Date of announcement: 25-02-2017