

SUPREME COURT OF AZAD JAMMU AND KASHMIR
(APPELLATE JURISDICTION)

PRESENT:

Raja Saeed Akram Khan, J.

Civil PLA No.367 of 2016
(Filed on 16.11.2016)

1. Azad Government of the State of Jammu & Kashmir through its Chief Secretary, having his office at New Secretariat Complex Lower Chatter, Muzaffarabad.
2. Finance Department through Secretary Finance, Azad Government of the State of Jammu & Kashmir, having his office at New Secretariat Complex, Lower Chatter, Muzaffarabad.
3. Finance Minister, Azad Government of the State of Jammu & Kashmir, having his office at Minister's Block, New Secretariat Complex Lower Chatter, Muzaffarabad.

....PETITIONERS

VERSUS

1. Muhammad Arshad Khan, Deputy Director B-18, Estate Management, Development Authority Muzaffarabad.

....RESPONDENT

2. Secretary, Physical Planning & Housing, Azad Government of the State of Jammu & Kashmir, having his office at New Secretariat Complex, Lower Chatter, Muzaffarabad.
3. Development Authority Muzaffarabad through its Chairman, having his office at Tariqabad Bypass Road, Muzaffarabad.
4. Muhammad Latif Khokhar, Director B-19, Estate Management Development Authority Muzaffarabad.

....PROFORMA-RESPONDENTS

(On appeal from the judgment of the High Court dated 17.09.2016 in writ petition No.2280 of 2015)

FOR THE PETITIONERS: Mr. Muhammad Noorullah Qureshi, Advocate.

FOR RESPONDENT NO.1: Mr. Tahir Aziz Khan, Advocate.

Date of hearing: 08.03.2017

ORDER:

Raja Saeed Akram Khan, J.— This petition for leave to appeal has been directed against the judgment of the High Court dated 17.09.2016, whereby the writ petition filed by the respondent, herein, has been accepted.

2. The facts as emerged from this petition for leave to appeal are that the respondent, herein, filed a writ petition before the High Court stating therein that he is serving as the Deputy Director (BPS-18), Estate Management in Development Authority Muzaffarabad, and no further avenue of promotion is available to him in the service structure of the Development Authority Muzaffarabad. It was averred that a proposal was sent by the Chairman Development Authority on 03.09.2010, for upgrading the post occupied by the petitioner as Director Enforcement (BPS-19). Thereafter, the case was submitted to the Finance Department for

financial concurrence but no action was taken by the said department. Consequently, Chairman Development Authority directly placed the case of the petitioner for creation as well as up-gradation of the post occupied by him before the Worthy Prime Minister/Chief Executive. The learned Chief Executive approved the same and the matter was again sent to the Finance Department by Secretary Works and Communication but no action was taken. It was further averred that the respondent has been suffering discriminatory treatment as he has been serving in the same scale for the last 19 years. The Finance Department contested the writ petition by filing written statement whereby the claim of the petitioner was refuted. The learned High Court after necessary proceedings accepted the writ petition filed by the respondent, herein, vide impugned judgment dated

17.09.2016, hence, this petition for leave to appeal.

3. Mr. Muhammad Noorullah Qureshi, Advocate, the learned counsel for the Petitioners, submitted that the judgment passed by the High Court is based on misinterpretation of law and the facts of the case which is not sustainable in the eye of law. He added that the learned High Court fell in error while not taking into consideration that the post in dispute has already been upgraded to BPS-17 to BPS-18 and the nomenclature has also been changed. He further added that presently, there are already three posts of BPS-19, in the Development Authority Muzaffarabad, therefore, there was no occasion to create/up-grade the post held by the respondent but this important aspect has not been taken into account by the learned High Court. He contended that up-gradation of

any post cannot be made without approval of the Finance Department, which has already refused in this regard but despite this fact, the direction has been issued by the High Court for up-gradation of the post which is not warranted under law. In support of his arguments, he referred to pages No. 24 to 26 of the paper book while submitting that the impugned judgment has been passed while not adhering to Rule 15 (c) of Rules of Business, 1985. He further contended that the writ petition can be filed if there is any violation of law or infringement of right but in the case in hand no such situation is involved, therefore, the writ petition was liable to be dismissed on this sole ground but this important legal aspect of the case escaped the notice of the learned High Court. He has relied upon the case law reported as *Ch. Muhammad Arif vs. Azad Govt. & 2 others* [2008 SCR 175] and *Win Pipe*

Industry (PVT) Ltd. Vs. Azad Government & 2 others [2001 SCR 88].

3. On the other hand, Mr. Tahir Aziz Khan, Advocate, while appearing on behalf of the respondent strongly controverted the arguments addressed by the learned counsel for the petitioners. He submitted that the judgment passed by the learned High Court is perfect, legal and in accordance with law which is not open for interference by this Court. He added that in pursuance of the direction issued by the High Court notification was issued on 03.11.2016, through which the post of the Deputy Director Estate Management (BPS-18) has been up-graded to the Deputy Director Estate Management (BPS-19) w.e.f. 17.09.2016. He further added that after issuance of the notification there was no occasion to file petition for leave to appeal before this Court rather the proper course was

to challenge the notification before the competent forum as notification was issued on 03.11.2016, and the PLA has been filed on 12.11.2016, against the order of the learned High Court which has been implemented in letter and spirit.

4. I have heard the arguments of the learned counsel for the parties and gone through the record made available along with the impugned judgment. The respondent herein who was serving on the post of the Deputy Director Estate Management (BPS-18), Development Authority Muzaffarabad, approached the High Court seeking direction to the petitioners, herein, for up-gradation of the post to BPS-19. The learned High Court passed the following order:-

“In the present case, the Development Authority who has initiated the proposal has clearly stated that upgradation/creation

of the post is its need and its requirements would be fulfilled from its own budget but this aspect of the matter has not been considered. There are various notifications which have been placed on the record and available as annexure "PG" to "PG/6" in which, various posts have been upgraded and individuals have been benefitted, therefore, this question also needs consideration of the competent authority in view of rule of equality and equal protection of law.

Be that as it may, I am of the view that case of upgradation of the petitioner shall be submitted to the Chief Executive under law by the Secretary Works and if order is approved then necessary action shall be taken by issuing notification.

The petition stands disposed of in the manner indicated above."

In pursuance of the direction issued by the learned High Court, notification dated 03.11.2016, has been issued and the post has been upgraded. It would be advantageous to

reproduce the said notification which is as under:-

نوٹیفکیشن:

نمبر/پی پی اینڈ ایچ/ترقیاتی ادارہ جات/13-
2016/3905 جناب صدر آزاد جموں و کشمیر نے بمطابق فیصلہ عدالت
العالیہ آزاد جموں و کشمیر مصدرہ 17 ستمبر 2016 ڈپٹی ڈائریکٹر اسٹیٹ
مینجمنٹ ترقیاتی ادارہ مظفر آباد کی آسامی سکیل B-18 سے سکیل B-
19 میں تاریخ فیصلہ 17 ستمبر 2016 سے بدیں شرط اپ گریڈ کئے جانے
کی منظوری صادر فرمائی ہے کہ آسامی متذکرہ پراٹھنے والے اخراجات ترقیاتی
ادارہ مظفر آباد اپنے وسائل سے برداشت کرے گا ”نیز آفیسر موصوف کی
ریٹائرمنٹ پر یہ آسامی از خود ڈاون گریڈ تصور ہوگی“

After going through the notification (supra), it appears that the same has been issued in the light of the direction of the High Court, meaning thereby, that the judgment of the High Court is implemented in letter and spirit. Surprisingly, after 8 days of issuance of the notification dated 03.11.2016 in pursuance of the judgment of the High Court, the impugned judgment has been challenged by way of petition for leave to appeal before this Court on 12.11.2016, whereas, under law nobody

can be allowed to blow hot and cold in one breath. The learned counsel for the petitioners failed to substantiate any legal question of public importance which is pre-requisite for grant of leave.

5. The case law referred to and relied upon by the learned counsel for the appellants having distinguishable facts and circumstances need not to be discussed.

On the basis of what has been discussed above, this petition for leave to appeal, having no force, is hereby dismissed. No order as to costs.

Muzaffarabad,
___ .03.2017

JUDGE

Date of announcement: 14.03.2017