

SUPREME COURT OF AZAD JAMMU AND KASHMIR
[Appellate Jurisdiction]

PRESENT:

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

1. Civil Appeal No. 23 of 2015
(PLA filed on 9.9.2014)

Wajid Hssain s/o Mushtaq Hussain r/o Village
Goharabad, Tehsil and District Hattian Bala.

.... APPELLANT

VERSUS

1. Mehboob Hussain s/o Kaloo Khan, resident of village Nogaran, Tehsil and District Hattian Bala.
2. Selection Committee for appointment of Sub Engineers B-11 through Chairman Selection Committee/Chief Engineer Electricity, Azad Jammu & Kashmir, Muzaffarabad.
3. Chief Engineer Electricity Department, Azad Jammu & Kashmir, Muzaffarabad.
4. Executive Engineer Electricity Department Operation Division Ghari Dupatta, Muzaffarabad.
5. Abid Hussain Awan, Director Planning, office of Chief Engineer electricity Muzaffarabad.
6. Superintending Engineer Electricity Circle Muzaffarabad/Member Committee.
7. Ch. Anayatullah, Chief Engineer Electricity (now Secretary Sports), Azad Jammu & Kashmir, Muzaffarabad.

8. Azad Govt. of the State of Jammu & Kashmir through Chief Secretary to Azad Govt., Lower Chatter Civil Secretariat, Muzaffarabad.
9. Jumma Khan, Deputy Secretary Electricity, Azad Jammu & Kashmir, Muzaffarabad.
10. Rafique Abbasi, Admin Officer Electricity Department, office of Chief engineer electricity, Muzaffarabad.
11. Majid Hussain Awan, s/o Liaqat Hussain Awan, r/o village Nograan, Tehsil and District, Muzaffarabad.
12. Mudassar Jamil Qureshi s/o Muhammad Jamil Qureshi r/o Leepa, Tehsil and District Hattian Bala.
13. Raja Jawad s/o Raja Gulfraz Khan, resident of village Chelan Tehsil and District Hattian Bala.

..... RESPONDENTS

14. Naseer Ahmed s/o Bashir Ahmed r/o Dhani Shahdara, Tehsil and District Hattian Bala.
15. Shakeel Ahmed s/o Muhammad Munir r/o village Mera Bakot, Tehsil and District Hattian Bala.
16. Mansoor Ali Kiani s/o Abdul Raout Kiani, r/o village Garthama, Tehsil and District Hattian Bala.

..... PROFORMA RESPONDENTS

(On appeal from the judgment of the High Court dated 1.9.2014 in Writ Petition No. 1767 of 2011)

FOR THE APPELLANT:	Mr. Abdul Rasheed Abbasi, Advocate.
FOR RESPONDENT NO.1:	Sardar Karam Dad Khan, Advocate.
FOR RESPONDENTS NO. 2 to 6 & 9 and 10:	Raja Ikhlaq Hussain Kiani, Additional Advocate General.

FOR RESPONDENT NO.11. Mr. Muhammad Noorullah
Qureshi, Advocate.

FOR RESPONDENT NO.12: Raja Iqbal Rasheed Minhas,
Advocate.

FOR RESPONDENT NO. 13: Raja Sajjad Ahmed Khan,
Advocate.

FOR RESPONDENT NO.14: Khawaja Ansar Ahmed,
Advocate.

2. Civil Appeal No. 24 of 2015
(PLA filed on 3.10.2014)

Majid Hussain Awan s/o Liaqat Hussain Awan,
r/o village Nogran, Tehsil and District,
Muzaffarabad.

.... APPELLANT

VERSUS

1. Mehboob Hussain s/o Kaloo Khan, resident
of village Nogaran, Tehsil and District
Hattian Bala.

....RESPONDENT

2. Selection Committee for appointment of
Sub Engineers B-11 through Chairman
Selection Committee/chief Engineer
Electricity, Azad Jammu & Kashmir,
Muzaffarabad.

3. Chief Engineer Electricity Department,
Azad Jammu & Kashmir, Muzaffarabad.

4. Executive Engineer Electricity Department
Operation Division Ghari Dupatta,
Muzaffarabad.

5. Director Planning, office of Chief Engineer
Electricity Muzaffarabad.

6. Superintending Engineer Electricity Circle
Muzaffarabad/Member Committee.

7. Ch. Anayatullah, Chief Engineer Electricity (now Secretary Sports), Azad Jammu & Kashmir, Muzaffarabad.
8. Azad Govt. of the State of Jammu & Kashmir through its Chief Secretary, Azad Govt. of the State of Jammu & Kashmir, having his office at New Secretariat Complex, Lower Chatter, Muzaffarabad.
9. Deputy Secretary Electricity, Azad Jammu & Kashmir, Muzaffarabad.
10. Administrative Officer, Electricity Department, office of Chief Engineer Electricity Muzaffarabad.
11. Mudassar Jamil Qureshi s/o Muhammad Jamil Qureshi r/o Leepa, Tehsil and District Hattian Bala.
12. Raja Jawad s/o Raja Gulfraz r/o village Chelan, Tehsil and District Hattian Bala.

....PROFORMA RESPONDENTS

(On appeal from the judgment of the High Court dated 1.9.2014 in Writ Petition No. 1767 of 2011)

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- FOR THE APPELLANT: Mr. Muhammad Noorullah Qureshi, Advocate.
- FOR RESPONDENT NO.1: Sardar Karam Dad Khan, Advocate.
- FOR RESPONDENTS NO. 2 to 6 & 9 and 10: Raja Ikhlaq Hussain Kiani, Additional Advocate General.
- FOR RESPONDENT NO.11. Raja Iqbal Rasheed Minhas, Advocate.
- FOR RESPONDENT NO.12: Raja Sajjad Ahmed Khan, Advocate.

Date of hearing: 13.3.2017.

JUDGMENT:

Ch. Muhammad Ibrahim Zia, C.J— Both the captioned appeals by leave of the Court arise out of the impugned judgment of the High Court handed down 1.9.2014 in writ petition No. 1767 of 2011, hence, it is felt advised to decide the same through the consolidated judgment.

2. The background of the case is that Mehboob Hussain, respondent No.1 filed a writ petition in the High Court alleging therein that some posts of Sub-Engineer (B-11) in the Electricity Department were advertised by the official respondents, including the post falling in the quota reserved for District Hattian Bala. Being resident of Hattian Bala, he also applied for appointment against the post. In the result of test and interview, a merit list was prepared, however, against one advertised post, two persons, Majid Hussain and Mudassar Jameel Qureshi were appointed. He alleged that Majid Hussain was not holding a valid Diploma at the time of advertisement of the posts. He was not eligible to participate in the test and interview.

He also challenged the manner of conducting the test and interview and transparency of process through which the merit list was prepared. He also alleged that the department has withheld some posts which were available at the time of advertisement. After necessary proceedings, a learned Judge in the High Court partly accepted the writ petition, set aside the appointment order of Majid Hussain and directed the department to appoint respondent No.1 in his place through the impugned judgment dated 1.9.2014, hence, these appeals by leave of the Court.

3. Mr. Abdul Rasheed Abbasi, Advocate, the learned counsel for Wajid Hussain seriously objected to the impugned judgment of the High Court and competency of the writ petition filed by respondent, Mehboob Hussain. According to his version, Mehboob Hussain, who was appointed on ad-hoc basis, filed the writ petition for protection of ill-gotten gains without any legal cause of action. According to the admitted

facts, one post of Sub-Engineer falling in the quota of District Hattina Bala was advertised and in furtherance thereof a final list of 20 candidates was prepared, which does not include the name of Raja Jawad. Finally, on the basis of interview held on 22.10.2011, merit list of 15 candidates was prepared, in which the name of Raja Jawad was included, who, in fact, has never applied. Thereafter, vide appointment order dated 25.10.2011 Majid Hussain, who was shown at the top of the merit list was appointed, but amazingly vide order dated 26.10.2011 the candidate who was next in the merit list, Mudasar Jamil Qureshi, respondent No.12 was also appointed without advertising the second vacancy. Thereafter, the respondent, i.e. the authority in violation of law appointed respondent No.13 Raja Jawad, vide order dated 24.2.2012, who according to record has neither applied for the post nor the vacancy was advertised, but illegally included in the merit list and shown at serial No.3 which is totally against

law. Respondent No.1, who could not succeed to obtain merit position and was at serial No.10 in the merit list, for protection of ill-gotten gains filed writ petition challenging the appointment orders of Majid Hussain and Mudassar Jamil Qureshi on the ground that the merit list has been prepared illegally. He prayed for advertisement of three posts which were withheld and constitution of an impartial selection committee for conducting the selection process of the posts. He also prayed for seeking direction for his appointment against the withheld post. The learned High Court through the impugned judgment has illegally issued the writ for appointment of respondent No.1 against law and the record. He argued that mere on the ground that the candidates holding the positions at serial No.3 to 9 have not filed writ petition, a person holding merit position at serial No.10 is not entitled for induction. He submitted that by accepting the appeal and recalling the impugned judgment of the High Court a direction be issued

for advertisement of all the posts of Sub-Engineer falling in the quota of District Hattian Bala and appointments on merit after completion of the process.

4. Sardar Karam Dad Khan, Advocate, the learned counsel for respondent No.1, submitted that it is proved from the record and act of the respondent/authority that the posts more than one were and illegally withheld. Subsequently, against one advertised post three persons have been appointed and respondent No.1 is holding the post. None of the others has approached the Court. He argued that in view of the principle of law laid down by this Court referred to in the impugned judgment, the High Court has rightly issued direction for appointment of the respondent, which does not call for interference. The learned counsel also argued that the process of selection was not transparent. In this state of affairs, the High Court has committed no illegality while passing

the impugned judgment. The judgment of the High Court is perfect.

5. Raja Ikhlaq Hussain Kiani, Additional Advocate General representing respondents No. 2 to 6 and 9 & 10 argued that the concise statement filed by respondent No.11, Majid Hussain is fully supported. He argued that no post was withheld. The posts became available subsequently against which according to law the candidates from the waiting list have been appointed according to merit.

6. Mr. Noorullah Qureshi, Advocate, the learned counsel for respondent No.11, argued that his client found the place at the top of merit list. The writ petition filed by respondent No.1 was not maintainable under the rule of acquiescence as he participated in the selection process and failed to achieve the merit position. The writ petition was filed in violation of statutory rules and was not maintainable. In support of his version, he referred to the cases reported as *Umar Hayat vs. Azad Govt and 3*

others (1999 SCR 243), *Shahid Hussain Malik vs. Azad Government and 3 others* (2014 SCR 466) and *Sardar Zaheer Ahmed Khan and another vs. Azad Government and 4 others* (2005 SCR 89). He argued that the High Court fell in error of law while declaring the appointment of Majid Hussain as without lawful authority as admittedly his client is duly qualified and at the time of interview he was in the possession of the required qualification/certificate. Hence, by setting aside the impugned judgment his appointment order according to merit position be restored. He further argued that not only his client but also another candidate, respondent No.13, who has been shown the holder of 3rd position in the merit list due to non-completion of the course at the time of submission of the application could not applied but after the announcement of the result he was included in the merit list and appointed, therefore, his client also deserve for equal treatment. Thus, he had rightly been appointed. It does not make any

difference whether there was more than one post or not. The selection process has been completed in a transparent manner according to law. Respondent No.1 has got no locus-standi to challenge the same. His writ petition was not maintainable.

7. Kh. Ansar Ahmed, Advocate, the learned counsel for proforma respondent No.14, Naseer Ahmed submitted that respondent No.13, Raja Jawad has been illegally appointed because neither he applied for the post nor was qualified and eligible to participate in the test and interview as till the last date of submission of application he was not holding the requisite qualification. The post was clearly available which was illegally withheld. Thus, after exclusion of the name of respondent No. 13, his client's merit position becomes No.2 in the merit list, as such, he deserves to be appointed against one of the posts against which Majid Hussain and Raja Jawad were illegally appointed.

8. Raja Sajjad Ahmed Khan, Advocate, the learned counsel for respondent No. 13, Raja Jawad submitted that his client has been appointed against a temporary post. He was not party before the High Court, therefore, his appointment order cannot be called in question. The grievance raised against him is uncalled for. So far as the objection that he has not applied for the post on the last date of submission of application, the learned counsel argued that as at that time the result was not announced, subsequently, before the date of interview was fixed, he participated in the interview and obtained 3rd position, therefore, his appointment is valid.

9. Raja Iqbal Rasheed Minhas, Advocate, the learned counsel for Mudassar Jamil Qureshi, submitted that his client's appointment order is valid as after exclusion of Majid Hussain from the merit list he comes at the top of the merit list. Thus, he has rightly been appointed against one of the advertised

posts. Majid Hussain was not eligible to participate in the test and interview as till the last date of submission of applications against the advertised post, he was not holding the requisite prescribed qualification, therefore, his appointment has rightly been set aside by the High Court.

10. We have heard the learned counsel for the parties and perused the record with utmost care. From the perusal of record it clearly reveals that one post of Sub-Engineer, Hattian Bala was advertised in the year 2010 and the last date for submission of applications was fixed as 13th November, 2010. Majid Hussain, appellant and respondent No.12, Raja Jawad were not qualified till the last date of submission of the applications. Raja Jawad passed the examination held in the year 2011 and the certificate was issued on 9th January, 2012, whereas, the appellant, Majid Hussain also not holding the valid diploma/degree till the last date of submission of the applications. He

submitted that course completion certificate was issued by Tameer-e-Millat Institute of Technology, which is vague as it does not contain any date of the completion of the course. Same like to the extent of respondent Raja Jawad, it is also proved that his name was not included among the candidates who have submitted applications but subsequently his name was entered in the merit list. In view of the facts proved on record, there is no hesitation in holding that both Majid Hussain and Raja Jawad were not holding the requisite qualification prescribed for the post till the last date of submission of applications. Thus, neither they were eligible nor under law they could participate in the process of selection. Our this view finds support from an unreported judgment titled *Farkhanda Ikram & another vs. Dr. Ejaz Ahmed and others* (Civil Appeal No. 73 of 1995 decided on 3.12.1995). The principle of law enunciated in the referred unreported judgment has been followed in the case reported as

Muhammad Shakeel Khan vs. AJK Public Service Commission and 3 others (1998 SCR 359), Para 10 and 11 of the referred judgment are relevant, which are reproduced as under:-

“10. In an unreported case of this Court titled *Farkhanda Ikram and another v. Dr. Ejaz Ahmed and others* [Civil Appeal No. 73 of 1995 decided on 3.12.1995] while giving detailed history of public service Commission Act and quoting its various sections it was opined at page 15 of the judgment in the following manner:-

“It is evident that power to conduct tests and examinations for recruitment are to be exercised by the Public Service Commission according to the rules made under section 11 of the Act. Rules 4 and 5 reproduced above, have been framed under section 11 of the Act whereby only the Public Service Commission has been invested with the powers to determine the merit of the candidates through tests/interviews etc. The final date for receiving the applications from the candidates is to be fixed by the Public Service Commission and if a candidate fails to apply within the period fixed by it or submits and incomplete application, his application must be rejected under sub-rules (1) and (2) of Rule 4. Similarly, Rule 5 empowers the Public Service Commission not only to prescribe the syllabus for the examination for various posts but also to lay

down 'the mode of determination of the eligibility'

It has been further observed at page 17 as under:-

It is admitted that the Commission has issued instructions under Rule 5 of the Rules. Obviously, the non-compliance of any of the instructions would render an application 'incomplete' within the meaning of Rule 2 of the Rule and it is liable to be dismissed.

11. It becomes evident from the analysis of the case law that on the basis of test and interview conducted by the Commission the appellant was declared successful for one of the posts of Assistant Director/Social Welfare Officers reserved for District Poonch and his name was shown in the merit list but ultimately on the basis of a document which was obtained on 9.12.1997 and placed on record of the Commission on 16.12.1997 could not have been considered by the Commission as the application of respondent No.4 on the stipulated date i.e. 10.11.1996, was incomplete and the same should not have been considered after a couple of days. Thus it follows that the Commission was not justified to retrace its steps having once decided in favour of appellant on the relevant date."

In this context the case reported as Tabassum Arif vs. Azad Govt. and others (2013 SCR 134) can also be relied upon.

11. So far the appointment order of respondent No. 12, Mudassar Jamil Qureshi is concerned, as after exclusion of the name of Majid Hussain, he comes on the top of the merit list. As admittedly one post was available which was advertised, thus, according to the facts of the case the appointment of Mudassar Jamil Qureshi has rightly been made, which does not suffer from any illegality, therefore, it is declared valid and kept intact.

12. So far the case of Mehboob Hussain, respondent No.1 is concerned, admittedly he was appointed on ad-hoc basis, he competed for the advertised post but could not obtain the merit position and in the merit list, he is at serial No.10 and after exclusion of the name of Majid Hussain he comes at No.9 position. Therefore, according to the record, he can neither claim his appointment against the post nor any vested right is created in his favour. His arguments relating to withholding of posts is concerned, it has substance and also finds

support from the subsequent appointment order issued by the authority through which after appointments of Majid Hussain and Mudassar Jamil Qureshi Raja Jawad was also appointed. Thus, it is proved that the posts were available which have not been advertised. It is also proved from the record that one post was advertised in the year 2010, the interview was conducted in the year 2011, whereas the appointments were made after nearly one year's period. Majid Hussain and Raja Jawad claimed that they at the time of interview were qualified although till the last date of submission of applications they were not holding the requisite qualification. As respondent, Mehboob Hussain despite knowledge of the fact that only one post was advertised has not challenged the advertisement that more than one posts were available. He participated in the whole process of selection and on failure, he turned around and filed the writ petition. To this extent the rule of acquiescence is fully attracted. After

participation in the selection process and on failure he cannot turn around and challenge the selection process. Our this view finds support from the judgment reported as *Electrical Engineer Syed Attezazul Hassan vs. Azad Govt. and 15 others* (2008 SCR 67), wherein in para 5 it was observed as under:-

“5. We have heard the learned counsel for the parties, perused the relevant record and have given our utmost ponder to the respective arguments advanced by the learned counsel for the parties. The primary question requiring determination is what would be the effect of conducting examination on 7th October instead of 9th October, 2006. No doubt the test was conducted on 7th October instead of 9th October, 2006. It was done so because no building was available at Muzaffarabad due to earthquake and the building at Islamabad was also not available for 9th October, therefore, test was conducted on 7th October, 2006, but all the candidates were informed accordingly and the appellant also participated in the test and remained silent. He did not raise any objection during the examination and even after the examination but when he could not succeed, then he has raised this objection. Therefore, he cannot raise this objection at this stage.”

13. The question whether the appointment of Raja Jawad, whose name appears at serial

No.3 in the merit list, is valid or not. In view of the peculiar facts and circumstances of the case in our opinion it will be injustice to allow such appointments or action as it has already been observed that there is a gap of considerable time between the advertisement of the post and holding of interview. Moreover, his name has been entered in the merit list without any application filed by him till the last date fixed in the advertisement. He was also not qualified at the relevant time because of completion of his course after almost one year's period. Thus, the justice demands that the posts should be advertised for competition and after competition of the eligible candidates merit should be determined. In this state of affairs, the appointment of Raja Jawad is declared without lawful authority. The direction of the High Court for appointment of Mehboob Hussain, respondent No.1, in view of the merit position and facts of this case is also not sustainable as Mehboob Hussain is at serial No.10 in the merit

list, which is much lower. Thus, in our opinion, in this case, for meeting the ends of justice the advertisement of the remaining posts excluding one which was advertised have to be made afresh and after due course of law the candidates attaining merit position should have been appointed. Therefore, the judgment of the High Court is modified. The direction issued for appointment of Mehboob Hussain is recalled. The authority is directed to advertise two posts and after completion of the process appoint the candidate on merit within a period of three months from the communication of this order.

The appeals are disposed of in the manner indicated above. Nor order as to costs.

CHIEF JUSTICE
Muzaffarabad
.3.2017

JUDGE

Date of announcement: 21.03.2017