

SUPREME COURT OF AZAD JAMMU AND KASHMIR

[Appellate Jurisdiction]

PRESENT:

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

Civil Appeal No. 198 of 2015

(PLA filed on 18.04.2015)

Khalida Shaheen, Associate Professor Government
Girls Degree College, Choki, Mirpur.

..... APPELLANT

VERSUS

1. Azad Govt. of the State of Jammu and Kashmir
through Chief Secretary, Muzaffarabad.
2. Services & General Administration Department
through Secretary Services and General
Administration Department.
3. Appellate Authority, Prime Minister of Azad
Jammu and Kashmir, through Principal
Secretary, Muzaffarabad.

.... RESPONDENTS

(On appeal from the judgment of the Service
Tribunal dated 16.02.2015 in Service Appeal
No.1336 of 2012)

FOR THE APPELLANT: Syed Nazir Hussain
Shah Kazmi, Advocate.

FOR THE RESPONDENTS: Mr. Raza Ali Khan,
Avocate-General.

Date of hearing: 11.04.2017.

JUDGMENT:

Ch. Muhammad Ibrahim Zia, C.J.— The captioned appeal by leave of the Court arises out of the judgment of the Service Tribunal dated 16.02.2015, whereby the appeal filed by the appellant, herein, has been dismissed.

2. The facts briefly stated are that the appellant alongwith other Lecturers, was promoted as Assistant Professors with effect from 01.12.1997 vide notification dated 07.04.2001. Later on against a vacant post of Associate Professor B-19 the promotion case of the appellant was sent by the department with retrospective effect i.e., 04.05.2010. Vide notification dated 11.01.2012 she was promoted on the recommendations of Selection Board No.1 as Associate Professor B-19 w.e.f 11.01.2012, instead of 04.05.2010. Against the said notification the appellant alongwith others filed review petitions before the Government on 18.01.2012. All the review petitions were accepted vide notification dated 05.10.2012 and

retrospective promotion was given according to the proposal dated 14.11.2011, but the name of the appellant was not included in the said notification. The appellant challenged the notifications dated 11.01.2012 and 05.10.2012 through an appeal before the Service Tribunal on 10.12.2012. The learned Service Tribunal dismissed the appeal on the ground of limitation, hence this appeal by leave of the Court.

3. Syed Nazir Hussain Shah Kazmi, Advocate, the learned counsel for the appellant after narration of the necessary facts submitted that the impugned judgment of the Service Tribunal is against the principle of administration of justice and equality before law. According to the facts of the case, the appellant has been deprived of her vested legal right, whereas, the other civil servants have been granted retrospective promotion. Mere non-filing of departmental appeal or review cannot be made a ground for depriving the appellant of her legal right. According to the constitutional spirit, there should be no discrimination among the civil

servants. The appellant proved that she held the post and is entitled for retrospective promotion from 04.05.2010. The appeal has been dismissed on the sole ground of limitation but in view of the peculiar facts and circumstances of this case the same is not attracted. Therefore, while accepting this appeal the grievance of the appellant may kindly be redressed. He further argued that if at all the appeal is not maintainable even then it is fit case for issuance of direction to the Government to exercise the powers vested under section 22 of the Azad Jammu and Kashmir Civil Servants Act, 1976 to save the vested legal right of the appellant according to constitutional spirit of equal treatment before law and avoid the mischief of discrimination.

4. Conversely, Mr. Raza Ali Khan, Advocate-General, the learned counsel for the respondents while forcefully defending the impugned judgment submitted that the appellant's grievance according to the stated facts, is relating to notification dated 11.01.2012. She failed to seek remedy against the order within prescribed limitation rather filed appeal

before Service Tribunal on 10.12.2012. According to her own averments in the memo of appeal before the Service Tribunal, it is proved that the appeal has been filed beyond the prescribed limitation. She could not succeed to bring on record any sufficient reason for condonation of delay rather according to her averments the order from which she is aggrieved was in her knowledge from the date of its issuance as mentioned in ground "८" of her appeal. The impugned judgment of the Service Tribunal does not suffer from any illegality, hence, this appeal is liable to be dismissed.

5. We have considered the arguments of learned counsel for the parties and gone through the record made available. The learned Service Tribunal has dismissed the appeal filed by the appellant on the ground of limitation. The contents of the memo of appeal filed by the appellant before the Service Tribunal clearly speaks that the appellant is aggrieved from the order dated 11.01.2012 which according to her own version was in her knowledge from the date of its issuance. She

kept mum for a pretty long time of one year and after lapse of prescribed limitation filed the appeal before the Service Tribunal. This legal proposition came under consideration before this Court in a number of cases. The basic judgment in this regard has been delivered in the case reported as *Shabbir Ahmed vs. Azad Govt. & others* [1996 SCR 382]. The latest one is the case reported as *Javaid Ejaz vs. Authority under AJ&K & others* [2015 SCR 744], wherein this Court has clearly held that the civil servant has to file the appeal before the Service Tribunal within a period of 90 days from the date of communication of order aggrieved from, irrespective of the fact whether any departmental appeal, representation or review is awaiting disposal or not. The relevant part of the judgment reads as follows:-

"2. The common moot legal proposition involved in the titled appeals is interpretation of section 4 of Act, 1975. For proper perception, it will be useful to have a study of the legislative history of the statutory provision of section 4 of Act, 1975. The proposition came under consideration before the full Bench of this Court in *Shabbir Ahmed's* case supra [1996 SCR 382]. After detailed deliberation, the matter was decided

by this Court and the gist of the judgment is summarized in para 12 and 13 as follows:-

`12. It is obvious that in the aforesaid authority the theory of double choice of appeal was departed from and it was held that after filing an appeal to the Service Tribunal, the aggrieved civil servant should not wait for the final disposal of his appeal etc. by a departmental authority.

13. After giving deep consideration to the matter, we are of the view that there is hardly any justification for approving the view that a civil servant has two options either to file appeal within 120 days or to wait indefinitely till the disposal of his appeal, review representation etc. and thereafter prefer an appeal to the Service Tribunal. We are of the opinion that he is bound to prefer an appeal to the Service Tribunal within 120 days, reckoned from the date of filing of an appeal etc. to the departmental authority for the following reasons:-

(a) The provisions contained in section 4(1) of the Service Tribunals Act indicate that the intention of Legislature is to finalise the matter pertaining to the disputes of civil servants as early as possible, because if the decision is belated, the other incumbents in civil service who might have been promoted by that time to higher grades might be adversely affected; many other situations can arise; for instance; new appointments by initial recruitment, promotion or transfer may take place in the concerned department; even some of the incumbents may have retired by the time the departmental remedy is finalised. This would result in hardships not only to the other civil servants serving in the department but may also

adversely affect the civil servants who might have already retired.

(b) If a civil servant prefers an appeal within 120 days as stipulated under proviso (a) to section 4(1) of the Service Tribunals Act and the matter is decided by the Service Tribunal and thereafter some other order is passed on his appeal, representation, etc. by the departmental authority that would create an anomalous situation. Because there is no stipulation in law that the order passed by the departmental authority would not prevail against the order of the Service Tribunal.

(c) Had the Legislature intended that a civil servant would be at liberty to prefer an appeal to the Service Tribunal even after an order on his appeal, representation or review by the departmental authority, it would have said so in the proviso to section 4(1) of the Service Tribunals Act that an appeal could be preferred to Service Tribunal after 90 days or for that matter 120 days, or after the final decision of his appeal, representation, review etc. by the departmental authority` but there is no such stipulation in the relevant provision.

(d) The phrase appearing in section 4(1) of the Service Tribunals Act, `whether original or appellate` made by the departmental authority cannot be interpreted to mean that an appeal against an order of a departmental authority can be preferred to the Service Tribunal even after the final decision of the departmental appeal, representation etc., because expression `appeal` in the aforesaid phrase means that if a civil servant aggrieved by an original order prefers an appeal, review, etc., to such authority and the

departmental authority accepts his appeal, review or representation etc., the other civil servant who may be aggrieved by such appellate order, is competent to prefer an appeal to the Service Tribunal after availing of the departmental remedy, if any, irrespective of the fact that the order was not an original order but an appellate order. Thus, the aforesaid expression in the main part of section 4(1) means that a civil servant can prefer an appeal against a final order whether 'original or appellate' and not that a civil servant who has preferred an appeal, review, representation under proviso (a) to section 4(1) of the Service Tribunals Act should wait for final disposal of his appeal etc.

(e) We have come across the cases where an aggrieved civil servant came up with appeals as many as ten years after filing his appeal, review etc. to the departmental authority contending that as the decision by the departmental authority was belated they were legally within their rights to file appeals to the Service Tribunal. It cannot be conceived that the Legislature intended that an aggrieved civil servant may sleep over the matter for such a long time in preferring an appeal to the Service Tribunal, despite the fact that he could have preferred an appeal to the Service Tribunal under proviso (a) to section 4(1) of the Service Tribunals Act. We may venture to add that in some cases civil servants purposely sleep over the matter with an ulterior motive to get a favourable decision by the departmental authority after a political change in the State. This gives rise to many complications and adversely affects the smooth working of the concerned department.

(*underlining is mine*).....

3-14

15. The logic and wisdom expressed in sub para (a) to (e) para 13 of full Court judgment in *Shabbir Ahmed*'s case supra is very much clear. The interpretation of section 4 of Act, 1975 in such a manner to provide the departmental authority with unguided powers for an indefinite period to decide the departmental remedy surely will result into arbitrariness coupled with violation of the spirit of the decision of this Court mentioned in these sub para (a) to (e) referred hereinabove."

Thus, in view of the principle of law enunciated by this Court the judgment of the Service Tribunal is valid and the same does not suffer from any illegality or infirmity calling for interference by this Court.

6. The request of the counsel for the appellant for issuance of direction to the Government to consider the case of the appellant under the provision of section 22 of the Azad Jammu and Kashmir Civil Servants Act, 1976, has substance. Although, technically the appeal filed by the appellant before the Service Tribunal is not maintainable, however, the authority or the Government is not debarred to deal with the case of

appellant while exercising powers vested under section 22 of the Civil Servants Act, 1976, and remove the mischief of discrimination, if the facts and circumstances demands so. We, while exercising the powers vested in this Court under section 42-A of the Azad Jammu and Kashmir Interim Constitution Act, 1974, deem it appropriate to observe for doing complete justice that the authority or Government is at liberty to consider the case of the appellant under the provision of section 22 of the Civil Servants Act, 1976 and if her version of discrimination is found correct, then while exercising the powers vested in the Government the wrong may be redressed for just and equitable purpose.

With the above observations, this appeal stands disposed of. No order as to costs.

Muzaffarabad,
_.04.2017

CHIEF JUSTICE

JUDGE
(J-I)

Date of announcement: 02.05.2017