

SUPREME COURT OF AZAD JAMMU & KASHMIR

[Appellate Jurisdiction]

PRESENT:

Raja Saeed Akram Khan, J.

Sardar Abdul Hameed Khan, J.

1. Civil Appeal No.206 of 2017
(PLA filed 10.7.2017)

1. The Syndicate, University of Azad Jammu & Kashmir, Muzaffarabad, through Vice Chancellor, Chehla Bandi, Muzaffarabad.
2. The Vice Chancellor, University of Azad Jammu & Kashmir, Muzaffarabad.
3. The Registrar, University of Azad Jammu & Kashmir, Muzaffarabad.
4. The Selection Board of Scales BPS-20 and BPS-21, in the University of Azad Jammu & Kashmir, Muzaffarabad, through Chairman Selection Board, Muzaffarabad.
5. The Scrutiny Committee, University of Azad Jammu & Kashmir, through Chairman Scrutiny Committee, Muzaffarabad.
6. Director Finance and Planning, University of Azad Jammu & Kashmir, Muzaffarabad.

.... APPELLANTS

v e r s u s

1. Dr. Khizar-ul-Haq s/o Muhammad Din, r/o village Pothi (Seri), Tehsil & District Bhimber, currently holding the post of Associate Professor (BPS-20) in the Department of Physics, Mirpur University of Sciences & Technology, (MUST), Mirpur.

..... RESPONDENT

2. Dr. Muhammad Rafique, Professor B-21, Department of Physics, University of Azad Jammu & Kashmir, Muzaffarabad.

..... PROFORMA RESPONDENT

[On appeal from the judgment of the High Court, dated 26.5.2017 in writ petition No.2519/2014]

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2. Civil Appeal No.206 of 2017
(PLA filed 2.8.2017)

Dr. Khizar-ul-Haq s/o Muhammad Din, r/o village Pothi (Seri), Tehsil & District Bhimber, currently holding the post of Associate Professor (BPS-20) in the Department of Physics, Mirpur University of Sciences & Technology (MUST), Mirpur.

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1. The Syndicate, University of Azad Jammu & Kashmir, Muzaffarabad, through Vice Chancellor, Chehla Bandi, Muzaffarabad.
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4. The Selection Board of Scales BPS-20 and BPS-21, in the University of Azad Jammu & Kashmir, Muzaffarabad, through Chairman Selection Board, Muzaffarabad.
5. The Scrutiny Committee, University of Azad Jammu & Kashmir, through Chairman Scrutiny Committee, Muzaffarabad.
6. Director Finance and Planning, University of Azad Jammu & Kashmir, Muzaffarabad.
7. Dr. Muhammad Rafique, Professor B-21, Department of Physics, University of Azad Jammu & Kashmir, Muzaffarabad.

..... RESPONDENTS

[On appeal from the judgment of the High Court, dated 26.5.2017 in writ petition No.2519/2014]

FOR AJ&K UNIVERSITY: Mr. Farooq Hussain
Kashmiri, advocate.

FOR DR. KHIZAR-UL-HAQ: Ch. Muhammad Latif,
advocate.

Date of hearing: 14.11.2017

JUDGMENT:

Raja Saeed Akram Khan, J.—Both the above titled appeals by leave of the Court, arise out of the single judgment of the High Court, passed in writ petition No.2519/2014, on 26.5.2017, therefore, these have been heard together and are being disposed of through the instant proposed single judgment.

2. The common facts giving rise to the filing of the appeals are that Dr. Khizar-ul-Haq, appellant, filed a writ petition before the High Court alleging therein, that initially he was inducted into the service of the University of Azad Jammu & Kashmir as Lecturer (Physics) B-17 on 24.09.1997, and thereafter, he was appointed against the post of Assistant Professor (B-18), vide notification dated 13.09.2004. He averred that the basic pay scale of the post of Assistant Professor (B-18) was upgraded to (B-19) w.e.f. the date of his appointment as Assistant Professor i.e. 13.09.2004. Lastly, he was appointed as Associate Professor (BPS-20) in Mirpur University of Science and Technology (MUST),

Mirpur, vide notification dated 20.05.2014. He claimed that Dr. Muhammad Rafique, private respondent, was appointed against the post of lecturer (Physics) B-17 on 26.07.2000, and thereafter, as Assistant Professor (B-18) vide notification dated 04.05.2007, with effect from 20th October, 2006. The post held by the said respondent was also upgraded in (BPS-19) and he was appointed on the recommendations of Selection Board as an Assistant Professor on Tenure Track System (T.T.S.) vide notification dated 20.02.2009, w.e.f. 25.08.2008. It is maintained that the private respondent again got his services shifted from T.T.S. to BPS cadre and was appointed against the post of Associate Professor in grade BPS-20, vide notification dated 23.02.2012 w.e.f. 21.10.2011. It is further maintained that a post of Professor (BPS-21), was advertised. He applied for the same, however, despite possessing higher qualification of Ph.D. from China and being the senior most, he was not appointed, whereas private respondent was appointed against the said post through the

notification dated 31.10.2014, by violating the T.T.S. and eligibility criteria. Moreover, the appellant/petitioner claimed in the writ petition that at the time of advertisement of the disputed post, another post was laying vacant, which was withheld and had the withheld post been advertised, he would have also been appointed. In the writ petition he prayed for setting aside the notification dated 31.10.2014 and also sought a direction to the respondents, therein, to appoint him against the disputed post or in alternate, against the vacant post withheld by the department. After necessary proceedings, the learned High Court through the impugned judgment dated 26.05.2017, partly accepted the writ petition with a direction to the official respondents to appoint him against the withheld post of Professor (BPS-21) within a period of one month. However, writ petition to the extent of impugned notification dated 31.10.2014 has been dismissed. Through the supra titled separate appeals by leave, the Azad Jammu & Kashmir University authorities and Dr. Khizar-ul-Haq have challenged

the vires of the judgment of the High Court dated 26.5.2017.

3. Mr. Farooq Hussain Kashmiri, advocate, counsel for the Azad Jammu & Kashmir University authorities, submitted that the impugned judgment is against law and the record. He submitted that the learned High Court has committed grave illegality while issuing direction to appoint the respondent, Dr. Khizar-ul-Haq, against the post of Professor (BPS-21), without taking into consideration that no other post was available and only one post was available which was duly advertised on 4.4.2014 and in pursuance thereof, both; the respondent as well as proforma respondent, participated in the selection process. The respondent failed to obtain the merit position and the other candidate namely Dr. Muhammad Rafique stood successful, who was appointed accordingly. The learned counsel added that the whole selection process was made in a transparent manner while complying with the rules and regulations. He added that the respondent duly participated in the selection process but failed to

fulfil the criteria determined for the appointment, thus he is estopped to challenge the process of selection. The learned counsel added that no such direction can be issued in favour of a person, who otherwise is not qualified as he does not possess the requisite qualification of Ph.D. (Physics). In this regard, the learned counsel referred to Ph.D. degree of the respondent by submitting that the same is of Doctor of Engineering (Meteorology), whereas for the disputed post, the requisite qualification was Ph.D. in Physics. Moreover, the respondent failed to obtain the requisite marks and secured 92.9 marks whereas proforma respondent obtained 113.4 marks and secured 1st position in the merit list. He forcefully argued that the stance taken by the University authorities before the High Court has not been considered while issuing direction for appointment of the respondent. In continuation of the arguments, the learned counsel submitted that the direction issued by the High Court is beyond its jurisdictional competence, which is a violation of the principle of administrative law, as the findings of the Selection

Board cannot be substituted by the High Court in writ jurisdiction. The learned counsel submitted that the conduct of the respondent is also a hurdle to favour him, but this fact has not been considered by the High Court while handing down the impugned judgment. He added that the High Court fell in error of law while not taking into account that the Selection Board has passed adverse remarks against the respondent. He added that the findings of the High Court regarding withholding of the post of Professor (BPS-21), in the Physics Department, are against the record, as no such document has been brought on the record by the respondent in support of his stand and without any cogent evidence, no such direction can be issued. He submitted that there is no concept of promotion on the teaching side and whenever a vacancy occurs, the same is filled in through direct recruitment. He argued that availability of the post in the budget and practical availability of the post are both different eventualities. He added that sometimes for budget allocation, posts are shown but practically the same

are not available.

4. On the other hand, Ch. Muhammad Latif, advocate, while appearing on behalf of Dr. Khizar-ul-Haq, respondent, strongly controverted the arguments addressed by the counsel for the University authorities by submitting that the impugned judgment is in accordance with law and not open for interference by this Court. He added that the selection process was not conducted in a transparent manner and proforma respondent has been appointed without taking into account that he was not qualified to be appointed against the post of BPS-21. He further submitted that at the time of advertisement, two posts were available, but the University withheld one post. The stance taken by the University authorities that no other post was available, is against the record, as the appellants themselves admitted that at the relevant time, two posts of BPS-21, were available. He forcefully argued that the documents appended by the appellants with the memorandum of appeal are not relevant. Moreover, the advertisement dated 18.3.2011 was

also declared illegal by the apex Court through consolidated judgment 12.1.2016, delivered in the appeals titled *Abida Hanif & another vs. Fatima Yaqoob & others* (Civil Appeal No.180/2014), *Fatima Yaqoob & another vs. Mst. Tahira Anwar & others* (Civil Appeal No.194/2014) and *Vice Chancellor, University of Azad Jammu & Kashmir & others vs. Fatima Yaqoob & others* (Civil Appeal No.322/2014), decided on 12.1.2016, thus, the appointment of the respondent against the post of B-20, is illegal. He further submitted that the learned High Court has committed grave illegality while dismissing the writ petition to the extent of proforma respondent, herein, while endorsing the findings of the Selection Board. He added that under section 2(5) of the University of Azad Jammu & Kashmir Act, 1985, it is mandatory that the Selection Board, while making selection of candidates for the posts of Professors and Associate Professors, shall co-opt or consult two experts in the subject concerned and for other teaching posts, one expert in the subject concerned, to be nominated by the Vice-Chancellor from a

standing list of experts for each subject approved by the Syndicate on the recommendations of Selection Board and revised from time to time, whereas in the case hand, the said provision has grossly been violated. The learned counsel submitted that in the case of respondent, one Dr. Iftikhar Ahmed Raja, was co-opted, who was not an expert in the subject of Physics, rather he was Ph.D. in the subject of Solar Energy. He submitted that the University authorities placed on record a concocted report as a final result, only to damage the merit position of the respondent. He further submitted that the respondent is a foreign qualified and proforma respondent cannot be given preference over the respondent. The learned counsel referred to and relied upon the cases reported as *Abdul Qadeer & 148 others vs. AJ&K University & others* [2000 SCR 36], *Syed Miskeen Shah vs. Custodian of Evacuee Property & 4 others* [2000 SCR 153] and *Raja Tariq Aziz vs. Azad Government & 3 others* [2003 SCR 158]. The learned counsel lastly argued that the advertisement is not self-explanatory, as declared by

the apex Court in Abida Hanif's case (supra).

5. Mr. Farooq Hussain Kashmiri, advocate, raised a preliminary objection in respect of the appeal titled *Dr. Khizar-ul-Haq vs. The Syndicate of Azad Jammu & Kashmir University & others*, that the same is hopelessly time-barred, thus, at this score, it entails dismissal.

6. At this stage, the learned counsel for the appellant was asked to cross the barrier of limitation at first. The learned counsel submitted that he has moved an application for condonation of delay along with the petition for leave to appeal while showing the sufficient cause that he was not in possession of the certified copies of some documents and for obtaining the copies, he applied to the Department but the same were not provided within time. While addressing the arguments on merits, the learned counsel submitted that he has only challenged the validity of the judgment to the extent of eligibility of respondent No.7. He added that the criteria laid down for appointment against the post of Professor (BPS-21), as he lacks the required 15 years' length of

service but despite lacking the same, he has been appointed as Professor (BPS-21). He referred to various documents attached with the objections filed by the appellant and submitted that the private respondent, Dr. Rafique Ahmed, who was working as Associate Professor, cannot be considered against the post of Professor (BPS-21), whereas the appellant not only possesses the minimum length of service but also is holding a foreign degree. He added that the appellant submitted all the papers on the subject of Physics and his degree is also well-recognised, that's why, he was allowed to join the selection process. In continuation of the arguments, the learned counsel submitted that the statutory provisions have been violated while making the appointment of the respondent and the same cannot be approved by law.

7. Mr. Farooq Hussain Kashmiri, advocate, while appearing for the official respondents, submitted that the appeal filed by Dr. Khizar-ul-Haq is hopelessly time-barred, for having been filed beyond the period of limitation. He drew the

attention of the Court towards the record while submitting that the judgment was passed by the High Court on 26.5.2017, whereas the petition for leave to appeal has been filed on 2.8.2017, beyond the prescribed period of sixty days. The learned counsel submitted that under law the party has to examine the delay of each and every day and in the instant case, as argued by the learned counsel for the appellant that some documents were required for which he applied to the Department but the same were not provided. The learned counsel argued that these documents, for which the appellant claimed to have applied to the Department, were not mandatory documents. These documents become supporting documents, can be filed at the stage of filing the concise statement, thus, the appellant failed to furnish sufficient cause, therefore, the appeal may be dismissed.

8. We have heard the learned counsel for the parties and perused the record with utmost care.

9. In Civil Appeal No.239/2017 titled *Dr. Khizar-ul-Haq vs. The Syndicate, University of Azad*

Jammu & Kashmir & others, the question of limitation is involved, therefore, we intend to take up the same at first. From the record, it transpires that the judgment of the High Court, impugned in appeal, was announced on 26.5.2017. The appellant applied for the certified copy of the impugned judgment on 29.5.2017 and the same was issued on the same date. The appellant did not prefer any appeal within the period of limitation i.e. 60 days, and after expiry of the same, on 2.8.2017, he filed the petition for leave to appeal along with an application for condonation of delay by submitting that he applied for obtaining some documents from the University authorities, but the same were not issued well in time. The explanation is not satisfactory, as the certified copies of the documents mandatory for filing the petition for leave to appeal were obtained within limitation and he failed to file the petition for leave to appeal. It is a celebrated principle of law that delay of each and every day has to be explained and delay is only condoned if the circumstances were beyond the control of the party. No such eventuality

appears from the record, therefore, we are justified to hold that the petition for leave to appeal is hopelessly time-barred. Even otherwise, the documents, which the appellant wanted to append with the memorandum of petition for leave to appeal, were not mandatory and the certified copies of necessary documents, as required under rules, were already supplied to him, thus, he failed to file petition for leave to appeal within prescribed period of limitation, therefore, the same is not maintainable.

10. While adverting to the appeal filed by the Syndicate, University of Azad Jammu & Kashmir, it may be stated that the controversy involved in the matter is that both; the respondent as well as the proforma respondent, applied in pursuance to an advertisement, for appointment against the post of Professor (BPS-21) in the department of Physics. After completion of the selection process, proforma respondent, Dr. Muhammad Rafique, was recommended against the post, whereas, the respondent, Dr. Khizar-ul-Haq, could not be

appointed. He approached the High Court by way of constitutional petition on multiple grounds that at the time of advertisement, two posts were available but one was advertised and the other withheld by the University authorities. Had the post not been withheld, he would have been appointed. Although he has raised serious reservations on the appointment of Dr. Muhammad Rafique, on the ground that the selection process was not transparent and he was otherwise not eligible to be appointed against the post but the main question, which needs to be resolved, is that as to how many posts were available at the time of advertisement. For better appreciation of the controversy, the prayer-clause of the writ petition filed by the respondent before the High Court is reproduced as under:-

“It is, therefore, most humbly prayed that the impugned notification dated 31-10-2014 (Annexure PD-4) may kindly be declared null and void and set aside and the official respondents may graciously be directed to appoint the petitioner on the basis of having been considered by the selection board along with the

respondent No.7 against the post to be vacated by respondent N.7 or alternatively against the vacant post of Professor B-21 in the subject of Physics lying vacant at the time of advertisement dated 7-8-2014 as is evident from Annexure PE. Any other relief deemed just and equitable in the estimation of Honourable High Court may also be granted.”

After going through the prayer made in the writ petition before the High Court, it appears that two prayers have been made; i.e. for setting aside the appointment notification of the respondent, and for a direction for his appointment against the withheld post. The learned High Court has attended the point of eligibility of Dr. Muhammad Rafique, respondent, in para 8, as under:-

“8. A perusal of record reveals that at the time of advertisement dated 07th August, 2014, (Annex-PE-I) 03 posts of Professors BPS-21 were available with University of Azad Jammu & Kashmir. However, it appears that out of 03, the official respondents advertised 01 post to be filled in as per open merit basis. A comparative study of educational carrier of petitioner and private respondent reveals that former possessed Ph.D. degree from China who also obtained degree of M. Phil (Physics) 1st division and M.Sc. (Physics) 1st division, with PGD Computer Science. It further reflects from record that petitioner

was senior to private respondent No.7, in BPS-17, BPS-18, BPS-19 and BPS-20 respectively. I have scrutinized the written statements filed by official as well as private respondents, along with plethora of Annexures with the respective Selection Board, might have passed any adverse remarks against petitioner. The private respondent No.7, at the relevant time also possessed degree of Ph.D. from Pakistan, however, was destitute of M. Phil and PGD Computer Science. As private respondent was selected and recommended by the Selection Board hence, I am not inclined to disturb his appointment pertaining to the post of Professor B-21, made through the impugned notification dated 31st October, 2014. However, according to my humble view, petitioner is entitled to equitable relief of writ jurisdiction against second withheld post in respect of which no any valid reason was placed on record that why the same was not advertised by the official respondents. The case of petitioner is supported by rule of law laid down by the Apex Court in case titled "*Azad Gout. & others Vs. Famida Abdul Hussain and others*" [2001 SCR 368]."

After going through the above-reproduced findings of the High Court, it appears that the same have been passed on the strength of record as well as the written statement filed by the official respondents i.e. the University authorities and the

learned High Court has rightly held that no such document is available from where it could be ascertained that any adverse remarks have been passed against the respondent, therefore, the High Court endorsed the findings of the Selection Board to the extent of proforma respondent. Although, the private respondent has challenged the eligibility of Dr. Muhammad Rafique, who has been appointed against the advertised post through a separate appeal, but in the preceding paragraph we have already declared the appeal filed by him as hopelessly time-barred, therefore, the argument addressed by the counsel for the respondent regarding the eligibility of Dr. Muhammad Rafique, cannot be taken into account, as the judgment of the High Court has attained finality and we confine ourselves to the direction issued by the High Court for appointment of the respondent against the post, which was allegedly withheld. From the record it appears that the argument of the counsel for the respondent has substance that at the time of advertisement, another post of Professor (BPS-21)

was available. For proper appreciation, it would be appropriate to reproduce here paragraph 7 of the writ petition filed by respondent, petitioner before the High Court, which reads as under:-

"7. That two posts of Professor B-21 (Physics) were lying vacant with the University of Azad Jammu & Kashmir during the Financial year 2014-2015 on 7-8-2014. Copy of the extract of the budget summary of the University is attached and marked as Annexure PE."

The official appellants-non-petitioners, in their written statement have replied the averments made in para 7 of the writ petition, as under:-

"7. That the Para No.(07) of the writ petition is correct, with the submission Selection of a suitable candidate for the appointment against the advertised post is an exclusive jurisdiction of the competent forum known as Selection Board under the Sub-article (1) of the Article 3 of the First Schedule of the University of Azad Jammu & Kashmir Act, 1985, and the Selection Board has only recommended the Respondent No.07 being a suitable candidate, whereas, on the other and the Petitioner has not succeeded to satisfied the Selection Board, hence mere availability of the vacant post is no ground for the appointment of the Petitioner against the same, especially, when the competent

authority has not recommended the Petitioner for the appointment. In this connection, the humble Respondents are also referring a reported judgment from the Pakistan Jurisdiction. *PLJ 2004 Karachi 249.*"

(Underlining is ours)

A perusal of the above-reproduced portion of the written statement, reveals that the University authorities have not categorically denied the stand taken by the respondent, petitioner before the High Court, regarding withholding of the post, rather, impliedly they have admitted the same while taking the stance that mere availability of the post is no ground for appointment of the petitioner, who, even otherwise is not eligible for appointment. The denial of availability of the post by the University authorities is not specific, rather it is evasive one and now it is settled principle of law that evasive denial amounts to admission.

11. So far as the eligibility of respondent is concerned, that doctorate degree of the respondent is not in the subject of Physics, it is surprising aspect of the case that at the time of entertaining the

application, he was allowed to participate in the selection process. If there was any reservation regarding the degree, the proper course was to turn down the application but the same has not been done, therefore, this argument is not available to the appellants at this stage. It admitted on the part of the University authorities that the respondent participated and was considered in the selection process and the stance of the University authorities is that he has not secured the marks more than the proforma respondent, meaning thereby that the University authorities have not ever questioned the eligibility of the respondent, rather, their stance was and is that the respondent could not succeed to obtain the merit position ahead to the proforma respondent, Dr. Muhammad Rafique. Now the University authorities cannot turn around and take the position that the respondent is not eligible to be considered for appointment against the post of Professor (B-21). Even otherwise, we sought explanation in this regard from Dr. Khizar-ul-Haq, respondent, who came at the rostrum and stated

that mere mentioning the word "meteorology" does not disentitle him to be appointed against the post of Professor of Physics, as his whole work including the papers submitted, is in the field of Physics. This fact is not specifically denied by the appellants.

12. Moreover, it appears from the record that during pendency of the writ petition, the second post was advertised and the advertisement was got suspended by the High Court through a restraint order, which reads as under:-

"The instant case is fixed for filing written statement on behalf of respondents on 10.06.2015. However, an application has been moved on behalf of petitioner for suspension of impugned advertisement dated 07.04.2015, through which one post of Professor B-21 has been advertised by the official respondents. As the writ petition of applicant has been admitted against the aforesaid post allegedly withheld, therefore, keeping in view the prima facie case, balance of convenience and irreparable loss, the impugned advertisement dated 07.04.2015, is hereby suspended till further order. This order is, however, subject to objections from the other side. The instant application shall be placed along with writ petition on 10.06.2015."

This fact also shows that the University authorities intentionally withheld the post till the appointment of proforma respondent and the intension of the authority was to fill in the vacancy through this subsequent advertisement. It is also not denied that at the time of conducting selection process, only two candidates participated and one of them was appointed and the other was ignored on the ground that he could not qualify. Such act of the University authorities cannot be approved because no reason has been shown as to why the post was not advertised, therefore, the direction of the High Court to appoint the respondent against the withheld post, is not against the record or law.

13. So far as the argument of the counsel for the respondent that the advertisement dated 18.3.2011, through which proforma respondent was appointed in grade B-20, was quashed by this Court in Abida Hanif's case (supra), thus the appointment of the proforma respondent is illegal, is concerned, it may be observed that the appointment of the proforma respondent in grade B-20 was not

specifically challenged by the respondent, herein, before the High Court. Moreover, his appeal against the eligibility of proforma respondent being time-barred, has been dismissed, therefore, dilation upon this point would be of mere an academic nature, however, it may be clarified that the judgment delivered in Abida Hanif's case (supra), through which the advertisement dated 18.3.2011 was quashed, was challenged through two review petitions titled *Muhammad Salim Mughal & others vs. Fatima Yaqoob & others* (Civil Review Petition No.07/2016) and *Fatiha Shahzadi & others vs. Fatima Yaqoob & others* (Civil Review Petition No.08) of 2016, whereupon, this Court vide judgment dated 17.6.2016, clarified and observed in para 8, as under:-

"8. Keeping in view the peculiar facts and circumstances of this case while exercising the powers vested in this Court, for doing complete justice, in the light of the above background, it is observed that the judgment under review and judgment of the High Court with reference to the advertisement of the post shall be construed to be confined to the posts in dispute between the contestant

parties and not to the other posts or persons who were not party. The authorities while implementing the judgment will have to confine its scope strictly upon the contestant parties.”

On the basis of what has been discussed above, Civil Appeal No.239/2017 titled *Dr. Khizar-ul-Haq vs. The Syndicate, University of Azad Jammu & Kashmir & others* is hereby dismissed on the ground of limitation, whereas Civil Appeal No.206/2017, titled *The Syndicate, University of Azad Jammu & Kashmir & others vs. Dr. Khizar-ul-Haq* is dismissed being devoid of any force. No order as to the costs.

JUDGE

JUDGE

Muzaffarabad

Date of Announcement: 21-12-2017