

SUPREME COURT OF AZAD JAMMU AND KASHMIR

[Appellate Jurisdiction]

PRESENT:

Ch. Muhammad Ibrahim Zia, C.J.
Sardar Abdul Hameed Khan, J.

Civil Appeal No.273 of 2017

(PLA filed on 21.07.2017)

Khurram Shahzad Khan s/o Raja Shahzaman Khan
r/o Kot Tarala, Tehsil and District Muzaffarabad.

... APPELLANT

VERSUS

1. Secretary Agriculture and Animal Husbandry, having his office at New Secretariat, Muzaffarabad.
2. Deputy District Crop-Reporting Service Agriculture, Muzaffarabad having his office at New Secretariat, Muzaffarabad.
3. Syed Aqeel Hussain Shah, Statistical Assistant BPS-11, Crop Reporting Service Agriculture Department, Muzaffarabad.
4. Selection Committee through Secretary Agriculture/Chairman Selection Committee, Muzaffarabad.

.....RESPONDENTS

(On appeal from the judgment of the High Court dated 24.05.2017 in writ petition No.1857/2015)

FOR THE APPELLANT: Raja Sajjad Ahmed Khan, Advocate.

FOR THE RESPONDENTS: Sardar Javaid Naz, Addl. Advocate-General and Ch. Shoukat Aziz, Advocate.

Date of hearing: 09.01.2018.

JUDGMENT:

Ch. Muhammad Ibrahim Zia, C.J.— The titled appeal by leave of the Court has arisen out of the judgment of the High Court dated 24.05.2017, whereby the writ petition filed by the appellant, herein, has been partly accepted.

2. The precise facts of the case are that the appellant, herein, filed a writ petition before the High Court on 08.09.2015 claiming therein that a post of Statistical Assistant (BPS-11) was advertised on 21.04.2015. He, being eligible applied for the position and contested the test and interview among other candidates. The qualification for appointment to the post as per rules was prescribed in the advertisement as BA/B.Sc/BCS 2nd division with one of the subject as Statistics/Economics/Physics/Mathematics from any recognized University. He claimed that with mala fide intention the application of respondent No.3, despite the fact that he did not possess the requisite qualification, was entertained and his appointment has been made against the disputed

post vide order dated 06.07.2015. He prayed for setting-aside the appointment order of respondent No.3 and also sought a direction for his appointment as Statistical Assistant. After necessary, proceedings, the learned High Court through the impugned judgment dated 24.05.2017 declared the appointment order of respondent No.3 as illegal, however, the direction prayed for appointment was refused on the ground that no proof has been appended with the writ petition that the petitioner (appellant, herein) holds the merit position next to the private respondent.

3. Raja Sajjad Ahmed Khan, Advocate, the learned counsel for the appellant after narration of necessary facts submitted that through the impugned judgment the learned High Court has partly issued the writ to the extent of declaring the appointment of respondent No.3 as against law but at the same time the other relief prayed for by the appellant regarding issuance of direction for his appointment, has not been properly appreciated. The relief has been denied merely on the ground

that the appellant could not succeed to prove his merit. The appellant in ground "F" of the writ petition has clearly stated that he applied for the certified copies of impugned order, merit list etc. but the same were not provided. In this context, he also filed an affidavit. The appellant in paragraph 5 of the memo of the writ petition also prayed for summoning of the record of the test and interview. According to the statutory rules, in the writ proceeding normally the party has to prove the facts through affidavits and the High Court is vested with the powers to decide the questions on such other evidence and in such manner as it may deem fit as postulated in rule 38 of the Azad Jammu and Kashmir High Court Procedure Rules, 1984. The learned High Court failed to act according to law and rules and deprived the appellant of his vested legal right. He further submitted that according to appellant's information after declaring respondent No.3 ineligible the appellant is at top of the merit list. The appellant in memo of appeal before this Court has also categorically prayed for summoning

of the record as despite making utmost efforts by him, the same has not been supplied to him. In this regard, he referred to Annexure "PC", copy of the application submitted for issuance of the certified copies. He submitted that the vested legal rights have been accrued in favour of the appellant, thus, the prayed relief of issuance of direction for his appointment may kindly be granted.

4. Conversely, Sardar Javaid Naz, Additional Advocate-General and Ch. Shoukat Aziz, Advocate, the learned counsel for the respondents submitted that the appellant has failed to bring on record the copy of merit list, thus, the relief to the extent of issuance of direction for his appointment has been rightly refused by the High Court. During pendency of the writ petition the post has been upgraded and can only be filled on the recommendations of Public Service Commission. At the moment, no post of Statistical Assistant (BPS-11) exists, therefore this appeal has no substance and is liable to be dismissed. They further argued that the appellant has never filed any application for issuance of

certified copies. He has misstated the same in the memo of appeal as well as in the arguments.

5. After hearing the learned counsel for the parties Sardar Javaid Naz, Additional Advocate-General was directed to produce the record which has been produced along with the certified copy of the merit list which is placed on the file of this Court.

6. The perusal of the record reveals that the appellant has obtained the second position in the merit list, whereas, the candidate shown at the top of list, Syed Aqeel Hussain Shah (respondent No.3) has been declared ineligible by the High Court being lacking the requisite qualification, thus, the appellant is now at the top of the list. The impugned judgment of the High Court to the extent of declaring respondent No.3 as ineligible has attained finality as the petition for leave to appeal filed by him before this Court has been dismissed.

7. The learned High Court in paragraph 4 of the impugned judgment refused the relief of issuance of direction for appointment of the

appellant on the ground that he has failed to bring on record any document to prove that he has obtained the second position. The learned Judge of the High Court has not properly appreciated the contents of the writ petition, specially, the request made by the appellant in paragraph 5 of the memo of writ petition for summoning of the record, has not been considered. According to the principle of law, the petitioner can only be blamed for failure to produce the record which is in his possession or can be made available by making efforts. Where any person despite efforts is not supplied with the record, he cannot be penalized rather for doing the complete justice the learned High Court has to exercise the powers vested in it under rule 38 of the Azad Jammu and Kashmir High Court Procedure Rules, 1984 which empowers the High Court to decide the questions raised in the writ petition on such other evidence and in such manner as it may deem fit. The High Court is further empowered in such case to follow such procedure or pass such order as appears to it just. In view of peculiar facts

of this case, for doing complete justice the learned High Court should have summoned the record but due to failure of the High Court the question of merit position remained unattended.

8. The record furnished by the department reveals that before filing of the writ petition the appellant filed an application for issuance of the certified copy of the merit list which was received in the office of the Secretary Agriculture on 13.08.2015 but the required copies were not supplied. This act of the concerned public official is regrettable and amounts to misconduct. As it is proved from the record that after deletion of the name of Syed Aqeel Hussain Shah from the merit list due to lack of requisite qualification, the appellant comes at top of the list, hence, vested legal rights have been accrued in his favour and he cannot be deprived of such legal rights in an arbitrary manner merely by withholding of the record by the concerned.

9. So far as the question that the post has been upgraded, is concerned, it makes no

difference. According to the celebrated principle of law the Court has to consider the facts prevailing at the time of the selection and filing of the writ petition. Moreover, the notification of upgradation clearly speaks that only the posts of qualified civil servants have been upgraded. Had the departmental authority acted according to law, the appellant, in whose favour the right accrued, would have been appointed in the year 2015 prior to upgradation of the post and consequently his post would also have been upgraded. Mere on the pretext of upgradation of post, the appellant cannot be deprived of his legal right.

10. In the light of the official record, the appellant has succeeded to prove his merit position and deserves to be appointed against the advertised post, therefore, while accepting this appeal the relief prayed in the writ petition is granted and the respondents are directed to appoint the appellant against the post, he was selected. The upgradation of the post, as hereinabove discussed, makes no difference as a

right has been accrued in favour of the appellant, consequently, he being qualified is entitled for benefit of upgradation of the post.

11. Before parting with the judgment, we deem it necessary to observe in the public interest that the misconduct and mal-practice of non-issuance of the copy of public documents by the public office holders, as noticed in this case, is mockery of law. All the concerned and public civil servants are directed to act according to law and no one should be deprived of his right of information. The copies of documents prayed for should be promptly issued according to rules. Any misconduct in this context amounts to violation of law and in future such acts will be dealt with iron hands. A copy of this judgment shall be sent to the Chief Secretary for compliance of all the concerned.

The appeal stands accepted in the manner indicated hereinabove. No order as to costs.

CHIEF JUSTICE

JUDGE
(J-III)

Muzaffarabad,
11.01.2018

