

SUPREME COURT OF AZAD JAMMU AND KASHMIR
[Appellate Jurisdiction]

PRESENT:

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

Civil appeal No.265 of 2017
(PLA filed on 17.08.2017)

Qadeer Hussain, Senior Scale Stenographer,
Office of the District & Sessions Judge, Poonch,
Rawalakot, Azad Kashmir.

...APPELLANT

VERSUS

1. The Appointing Authority/Honorable Chief Justice of High Court/High Court of Azad Jammu & Kashmir through Registrar High Court of Azad Jammu and Kashmir, Muzaffarabad.
2. Azad Jammu and Kashmir Judicial Officers Selection Board (For Civil Judges) through Registrar High Court of Azad Jammu and Kashmir, Muzaffarabad.
3. Syed Zulfiqar Hussain Shah, Currently appointed as Senior Civil Judge, Hattian Bala, Azad Kashmir.

.....RESPONDENTS

(On appeal from the judgment of the Subordinate Judiciary Service Tribunal dated 04.07.2017 in Service Appeal No.09 of 2011)

FOR THE APPELLANT: Barrister Humayun
Nawaz Khan,
Advocate.

FOR THE RESPONDENTS: Sardar Javed Naz
Khan, Additional
Advocate General
and Syed Sarosh
Gillani, Advocate.

Date of hearing: 13.12.2017

JUDGMENT:

Raja Saeed Akram Khan, J.– The above titled appeal by leave of the Court has been filed against the judgment of the Subordinate Judiciary Service Tribunal (hereinafter to be referred as Service Tribunal), dated 04.07.2017, whereby service appeal filed by the appellant, herein, has been dismissed.

2. The facts forming the background of the instant appeal are that the appellant,

herein, filed an appeal in the Service Tribunal, alleging therein, that he was appointed as Typist (BPS-5) in the subordinate judiciary on 08.12.1990. Later on, he was promoted as Stenographer (BPS-12) on 01.06.1994 and thereafter, he was promoted as Senior Scale Stenographer (BPS-15) on 04.12.2000. He alleged that respondent No.3, herein, was appointed as Stenographer (BPS-12) on 04.07.1994. The posts of Stenographer and Senior Scale Stenographer were upgraded to (BPS-16). Resultantly, the appellant and respondent No.3 were promoted to (BPS-16) with effect from 27.07.2002, by retaining their previous seniority vide notification dated 18.01.2006. In the previous seniority, the appellant and respondent No.3 were holding seniority position as serial No.4 and 9 respectively. The appellant averred that under the Azad Jammu & Kashmir Judicial Service

Rules, 1999, 10% posts of Civil Judges were to be filled in by promotion on the basis of selection on merit from amongst the law graduate employees of Administration of Justice with five years' service in (BPS-16). He claimed that vide notification dated 28.08.2010, upon the recommendations of the Selection Board, the incumbents who were at serial No.1 and 9 in the seniority list were appointed as Civil Judges on the basis of seniority, suitability and fitness. Thereafter, through corrigendum dated 02.09.2010, the word "seniority" was deleted. The appellant challenged the appointment of respondent No.3, being junior to him by filing an appeal in the Service Tribunal. The said appeal was dismissed by the Service Tribunal vide judgment dated 23.04.2016, however, the judgment of Service Tribunal was vacated by this Court in an appeal filed by the appellant

by leave of the Court and the case was remanded to the Service Tribunal for decision afresh. After remand of the case, the Service Tribunal through the impugned judgment dated 04.07.2017, again dismissed the appeal, hence, this appeal by leave of the Court.

3. Barrister Humayun Nawaz Khan, Advocate, the learned counsel for the appellant submitted that the impugned judgment of the Service Tribunal is against law and the facts of the case which is liable to be vacated. He drew the attention of this Court towards the concluding paragraph of the impugned judgment and contended that the learned Chairman of the Service Tribunal has failed to draw any definite conclusion. He added that the impugned judgment is self-contradictory as at one hand the learned Chairman observed that the record of Selection Board does not speak of any reason

for ignoring the appellant for required job of Civil Judge, but on the other hand dismissed the appeal. He forcefully contended that in view of the settled principle of law it was enjoined upon the Selection Board to determine the merit before making the recommendations, but the Selection Board failed to perform its duty in a legal manner. He added that for determining the merit, many factors are required to be taken into consideration amongst which the seniority is also one of the important factor, but in the matter in hand without any justification this factor has totally been ignored. Initially, the appointment order of the contesting respondent contained the word "seniority" but subsequently through corrigendum it was deleted which is also proof of the fact that the merit has not been determined according to the spirit of law. He forcefully contended that

it is settled law that when all the credentials of the incumbents are equal then for determining the merit the seniority is the deciding factor. In the case in hand, the credentials of the contestants were the same; however, being senior, the appellant was more experienced than respondent No.3 and had the preferential right for promotion. The Selection Board even has not mentioned a single reason for superseding the appellant and it is clear from the record that the Selection Board extended undue advantage to respondent No.3. Such like practice for promotion to a judicial post which is of very sensitive character, is highly unpleasant. He also contended that the appellant's seniority position has wrongly been worked out in the working papers by some officials with mala-fide intention just to accommodate respondent No.3. He added that selection on merit has to be made fairly and

not arbitrarily, whereas, in the matter in hand the selection of respondent No.3 has been made arbitrarily, hence, interference by this Court is warranted under law. He prayed for setting aside the impugned judgment and acceptance of appeal.

4. On the other hand, Sardar Javed Naz Khan, Additional Advocate-General and Syed Sarosh Gillani, Advocate, while appearing on behalf of the respondents strongly opposed the arguments advanced by the learned counsel for the appellant. They submitted that the impugned judgment is perfect and legal which is not open for interference by this Court. They contended that the appellant was considered for promotion but the Selection Board after taking into consideration all the relevant factors recommended respondent No.3 for promotion on merit, therefore, no illegality has been committed. They contended that

according to the Azad Jammu and Kashmir Judicial Service Rules, 1999, the post of Civil Judge is a selection post which as per rules has to be filled in on merit and not on the basis of seniority-cum-fitness. The word "seniority" was incorporated in the notification in question due to clerical mistake; therefore, the said mistake was later on rightly cured while issuing the corrigendum. Even otherwise, the length of service of the appellant and respondent No.3 in grade B-16, is equal as both were promoted in grade B-16, vide notification dated 18.01.2006, w.e.f. 27.07.2002, however, respondent No.3 passed the examination of L.L.B. in the year 2002, whereas, the appellant passed the same in the year 2008. In such state of affairs, it is amply clear that respondent No.3 acquired the requisite eligibility for promotion as Civil Judge prior to the appellant and the claim of the

appellant that he was senior to respondent No.3 is not supported by the record. They prayed for dismissal of appeal.

5. We have heard the arguments of the learned counsel for the parties and gone through the record along with the impugned judgment. The perusal of the record shows that the learned High Court through notification dated 28.08.2010, promoted Sardar Akhtar Hussain, Stenographer, and Syed Zulfiqar Hussain Shah, Superintendent, as Civil Judges, against the departmental promotion quota. The appellant challenged the said notification to the extent of Syed Zulfiqar Hussain Shah, respondent No.3, herein, before the Service Tribunal mainly on the ground that the appellant and respondent No.3 possess the equal qualification, however, the appellant is senior and more experienced than respondent No.3, but the respective Selection Board while

violating the rules and regulations recommended respondent No.3 and deprived the appellant of his legal right of promotion. The appellant is pursuing the matter since 2010, but unfortunately the record shows that without any valid ground, the service appeal remained pending for adjudication before the Service Tribunal for a long time. In the impugned judgment the findings have been recorded that nothing is available on record to show that why the Selection Board ignored the appellant for promotion as Civil Judge, however, the opinion of the Selection Board cannot be substituted by the Courts. For better appreciation the relevant findings are reproduced here which read as under:-

“It may be clarified here that record of the Selection Board does not speak of any reason for overlooking the appellant for the required job of Civil Judge, however, the fact

remains that Selection Board declared Zulfiqar Hussain Shah, the respondent fit for the job. Obviously, the Selection Board might have considered all the aspects of the case and would have reached the conclusion. Opinion of the Selection Board cannot be substituted by the Courts.”

After going through the findings supra, it is evident that the learned Service Tribunal at one hand has categorically mentioned that nothing is found from the record that why the Selection Board ignored the appellant for the required job of Civil Judge and on the other hand imagined that the Selection Board might have considered all the aspects of the case and would have reached the conclusion. It is worthwhile to mention here that when the learned Service Tribunal reached such conclusion that in the record no concrete reason has been found for ignoring the

appellant for promotion then the Service Tribunal should have accepted the appeal and cured the illegality committed by the authority. So far as, the view expressed by the Service Tribunal that opinion of the Selection Board cannot be substituted is concerned, it may be observed here that under the provisions of section 6 of the Subordinate Judiciary Service Tribunals Act, 2016, the Service Tribunal on appeal may confirm, set aside, vary or modify the order appealed against. In such scenario, if the order appealed is found issued on the recommendations made arbitrarily by the Selection Board then the Service Tribunal in the light of the statutory provision of law is very much empowered to set aside, vary or modify the said order. Thus, in the instant matter when the Service Tribunal once came to the conclusion that without any justification an employee has been superseded, then mere

the recommendations made by the Selection Board, were not a hurdle in the way of the Service Tribunal to perform its legal duty. It may also be observed here that under the statutory provisions the civil servants have been vested with the right to approach the proper forum for redressal of their grievances and when any Court or tribunal is of the opinion that some illegality or perversity is found in the order impugned before it, then the said Court or tribunal is under legal duty to cure such illegality or perversity while deciding the matter challenged before it. Keeping in view the facts of the case and relevant statutory provision of law, we are of the view that the findings supra recorded by the learned Service Tribunal are against the spirit of law which cannot be upheld.

6. As the post of Civil Judge is a sensitive in character in the judicial system

and the selection against such post in an arbitrary manner is alarming for the cause of administration of justice, therefore, keeping in mind this factor we have gone through the record. The perusal of the record shows that vide notification dated 18.01.2006, the contestant civil servants were promoted in B-16 w.e.f. 27.02.2002. It is also postulated from the said notification that at the time of its issuance the appellant was working as Senior Scale Stenographer, B-15, whereas, respondent No.3, was working as Stenographer, B-12. The record also reveals that the appellant joined the service in the judicial department prior to respondent No.3. The stance taken by the learned counsel for respondent No.3, in the written statement filed before the Service Tribunal, concise statement before this Court and during the course of arguments was that respondent No.3 acquired

the requisite degree of L.L.B. prior to the appellant, therefore, he became senior. This version seems to be funny as the seniority has to be determined according to the rules and no such provision is available in the relevant rules that an incumbent by acquiring the L.L.B. degree shall become senior to the others. At the relevant time when the selection was made, under the rules, the appellant was eligible for promotion and he cannot be considered junior to respondent No.3 mere on such a flimsy ground that respondent No.3 acquired the requisite degree of L.L.B. prior to the appellant. In a case reported as *Raja Javid Ahmad Khan v. Pervaiz Akhtar Abbasi and 5 others* [1998 SCR 278] this Court while dealing with the proposition held as under:-

“It may be observed here that mere fact that the respondent passed B.Ed. examination before the

appellant would not entitle him to seniority against the respondents, especially so when the appellant was allocated senior scale vide order dated 3.10.1995 with retrospective effect from 26.12.1994 and no remedy was sought against the said order before the proper forum."

Similarly, in a case reported as *Tanveer Ahmad v. Director-General, Pakistan Public Works Department, Islamabad and 6 others* [1994 PLC (C.S.) 887], the Federal Service Tribunal held as under:-

"8. This was evidently incorrect and preposterous, which is to say the least. The appellant was admittedly senior to the contesting respondents with reference to dates of appointment. He had completed 10 years service and had also already passed the departmental examination before 24.03.1992 when the impugned order of

promotion was passed. There was hardly any justification for ignoring him at the time of promotion. The date of passing the departmental examination was absolutely immaterial and could by no means change the seniority position of the parties. There was absolutely no reason whatsoever why his name should not have been considered for promotion at the relevant time alongwith others, especially when no departmental case was pending against him. The department's failure to consider him for promotion suffers from a palpable illegality, more so when we have documentary evidence on the record to prove that date of eligibility was not taken as a determining factor at the time of promotion of Sub-Engineers made by office order dated 5.9.1989 subsequently modified by O.M. dated 10.2.1991. These orders show that the concerned Sub-

Engineers were placed in BPS-16 in accordance with their seniority, regardless of the dates on which they had passed the prescribed departmental examination.”

Another plea taken by the learned counsel for respondent No.3, that both the contestant were promoted in B-16 on the same day, i.e. 27.07.2002, therefore, the appellant cannot claim himself senior to respondent No.3, has also no substance. The record shows that vide notification dated 18.01.2006, the post of Stenographer was upgraded to B-16 w.e.f. 27.02.2002, in the result thereof the contestant were also promoted against the upgraded posts but prior to the up-gradation of the post the appellant was serving in B-15, whereas, respondent No.3 was in B-12 and it is settled principle of law that when an employee is senior in lower grade to the other and both are promoted in the next higher

grade then the employee who was senior in lower grade shall retain his seniority. Thus, it is clear that the appellant senior in lower grade was also senior to respondent No.3, after promotion in the equal grade. Reference may be made to a case reported as *Chaudhry Muhammad Zaman v. Azad Government & 4 others* [1996 SCR 171], wherein, it has been held that:-

“When a civil servant who is senior in lower grade to other civil servant and both are promoted to next higher grade the person who is senior in lower grade without superseding him shall retain his seniority.”

7. It may be observed here that in the case in hand, the post in question was to be filled in on the basis of merit and not on the basis of seniority-cum-fitness. To appreciate the point; whether the Selection Board judged

the merit in accordance with law or not, we summoned the record of selection process but failed to find out anything which may indicate that the Selection Board considered the relevant factors requisite for determining the merit. It is pertinent to mention here that no doubt that the seniority is not a sole criterion to determine the merit, but the same is considered as one of the relevant factors for determining the merit and cannot be ignored entirely. It is now settled that when all other credentials/qualities are equal the seniority plays vital role in the determination of merit. In this regard reliance may be placed on a case reported as *Mrs. Shaheen Ashai v. Muhammad Anhwar Chaudhry & 5 others* [2014 SCR 1169] wherein it has been held by this Court that:-

“The term ‘Merit’ in relation to service is not specifically defined. It

includes all the qualities of an employee such like academic qualification as distinction in education matters, integrity, devotion of duty and the manner in which a person discharges his duties. While determining the merit of a civil servant some other factors including the punctuality in work, the work done by him, the manner and behaviour of such officer with superior and subordinate and with general public, have to be considered. The seniority may be considered as one of the factors for determination of merit and if all other qualities are equal then seniority may be a deciding factor of merit.

7. For determining the merit, seniority is one of the factors, which has to be considered....”

Astonishingly, the learned Service Tribunal discussed the aforesaid case law in the impugned judgment but despite that buried

the claim of the appellant mere on the ground that opinion of the Selection Board cannot be substituted. The record also shows that working papers have not been prepared to judge the merit position. From the scarce data available on record it assumes that exact picture has not been placed before the Selection Board/Authority while preparing the same. There are only 3 column in the available working paper; one for serial number, second for name of the candidate and third for year of passing L.L.B. examination, the name of respondent No.3 has been incorporated at serial No.2, whereas, the name of the appellant at serial No.3 and the year of passing the L.L.B. examination has been mentioned to the next column. It is also spelt out from the record that without consulting the record even some wrong years of passing the L.L.B. examination by the candidates have

been shown in the said working paper which is very deplorable aspect of the matter and needs consideration by the concerned authority. It is an admitted fact that the credentials of the contestants are equal; the seniority of the appellant is also proved from the record; moreover, the respondents failed to bring on record anything adverse to the appellant, thus, keeping in view these entire things it is very much clear that the appointment of respondent No.3 was made without adopting the proper course and the appellant has been ignored without any reason despite the fact that his case was at strong footing than respondent No.3.

8. Although, it is clear from the record that without determining the merit in a proper manner the Selection Board recommended respondent No.3, however, we do not intend to preempt the jurisdiction of the Selection

Board rather deem it proper to remand the matter to get the wisdom of the Selection Board. Thus, the matter is remanded to the High Court with the direction to place the same before the respective Selection Board for re-examination. The Selection Board/Authority while revisiting the matter shall look into all the aspects discussed in the preceding paragraphs and conclude the same afresh in accordance with law within a period of one month positively.

This appeal stands disposed of in the above terms. No order as to costs.

JUDGE

Muzaffarabad,
_.01.2018

CHIEF JUSTICE

