

SUPREME COURT OF AZAD JAMMU AND KASHMIR

(APPELLATE JURISDICTION)

PRESENT:

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

Civil appeal No.118 of 2018
(PLA filed on 21.03.2018)

1. Zaffar Iqbal Khan ECG Technician CMH, Rawalakot.
2. Sayyad Nasab Khan Junior Medical Technican DHO Office, Muzaffarabad.
3. Wasim Pervaiz Junior Medical Technicain DHO Office, Muzaffarabad.
4. Qazi Tahir Sharif Junior Medical Technician DHO Office Hattian Bala.
5. Irfan Sarwar son of Muhammad Sarwar Junior Medical Technician/Dispenser.
6. Muhammad Ishtiaq ECG Technician.
7. Naeem Akhtar Junior Technician.
8. Arbad Shaheen Junior Technician.
9. Muhammad Aleem Khan Dispenser presently posted at Rawalakot.
10. Ubaid-ur-Rehman,
11. Tariq Mehmood,
12. Latafat Hussain, Junjior Technicians

Pathology DHQ Hospital Kotli.

13. Adnan Ashfaq Junior Technician
Pathology DHQ Hospital Kotli.
14. Muhammad Mehtab Sanitary Petrol DHQ
Office Kotli.
15. Muhammad Raza Attendant DHQ Office
Kotli.
16. Arshad Iqbal Junior Technician DHQ
Kotli.
17. Muhammad Masood Junior Technicain
Dialysis DHQ Mirpur.
18. Muhammad Afzal Nadim Junior
Technician Medical DHQ Mirpur.
19. Wasim Iqbal Junior Technician Surgery
DHQ Mirpur.
20. Irfan Talib Junior Technician Radiology
DHQ Mirpur.
21. Qamar Riaz Junior Technician (CHDC)
Communication Dialysis Center Program
DHQ Dudyal, Mirpur.
22. Khalid Hussain Junior Technician
Cardiology DHQ Bhimber.
23. Basharat Aziz Junior Technician Surgery
DHQ Bhimber.
24. Qasim Ali Junior Technician DHQ
Bhimber.

25. Syed Rehmat Elahi Kazmi Junior Technician Surgery AIMS, Muzaffarabad.
26. Majid Rasheed Junior Technician Surgery AIMS, Muzaffarabad.
27. Ch.Rehmat Din Junior Technician Surgery AIMS, Muzaffarabad.
28. Anees Ahmed Junior Technician Surgery AIMS, Muzaffarabad.
29. Muhammad Navid Junior Technician Surgery CMH Muzaffarabad.
30. Muhammad Afzal Khan Junior Technician Surgery CMH Muzaffarabad.
31. Riaz-ur-Rehman Riaz Junior Technician Pathology Azad Jammu and Kashmir Central Blood Transfusion Service AIMS, Muzaffarabad.
32. Intezar Hussain Junior Technician Pathology CBT, Muzaffarabad.
33. Mazhar Iqbal Junior Technician Pathology CMH, Muzaffarabad.
34. Abdul Sattar Khan Junior Technician Pathology DHQ, Bagh.
35. Raja Tahir Razaq Junior Technician Medical BHU City, Muzaffarabad.
36. Bilal Ahmed Junior Medical Store-Keeper, CMH, Muzaffarabad.

37. Shafqat Kiani Junior Technician, CMH Muzaffarabad.
38. Abdul Qadir Kiani Junior Technical Medical, CMH Muzaffarabad.
39. Arshad Junior Technician Medical, CMH Muzaffarabad.
40. Ch.Muhammad Sadaqat Junior Technician Medical, AIMS, Muzaffarabad.
41. Muhammad Aslam Khan Central Assistant DHO Office, Sudhnooti.
42. Majid Hussain Senetary Assistant DHQ, Sudhnooti.
43. Zulfiqar Ali Zia Junior Technician Medical, DHQ Sudhnooti.
44. Ghulam Murtaza Khan Junior Technician Radeology, DHQ Trarkhel.
45. Faiz Ullah Khan Junior Technician Surgical, DHQ Sudhnooti.
46. Yasir Arafat Junior Technician Surgery, DHQ Sudhnooti.
47. Atiq-ur-Rehman Junior Technical Medical, Neelum.
48. Asif Rashid Junior Technician Surgery Dowarian, Neelum.
49. Saira Maqbool Junior Technician

Medical, DHQ Authmuqam Neelum.

50. Naseer Ahmed Darkroom Attendant,
AIMS Muzaffarabad.
51. Khawaja Tariq Radiographer, DHQ
Kahuta.
52. Muhammad Ashfaq Junior Technician
Cardiology, DHQ Haveli.
53. Khawaja Muhammad Yasir Qayoom
Junior Technician Radiology Hattian
Bala.

....APPELLANTS

VERSUS

1. Azad Government of the State of
Jammu and Kashmir through its Chief
Secretary having his office at New
Secretariat, Muzaffarabad.
2. Secretary Services and General
Administration Azad Government of the
State of Jammu and Kashmir having his
office at New Secretariat, Muzaffarabad.
3. Secretary Health Azad Government of
the State of Jammu and Kashmir having
his office at New Secretariat,
Muzaffarabad.
4. Director General Health Azad

Government of the State of Jammu and Kashmir, Muzaffarabad.

5. Accountant General of Azad Jammu and Kashmir having his office at Sathra, Muzaffarabad.
6. Phool bibi w/o Altaf Ahmed Chief LHV, Muzaffarabad.

.... RESPONDENTS

(On appeal from the judgment of the Service Tribunal dated 27.02.2018 in service appeal No.592 of 2015)

FOR THE APPELLANTS: Syed Shahid Bahar, Advocate.

FOR THE RESPONDENTS: Raja Akhlaq Hussain Kiani, Addl. Advocate General and Mr. Muzaffar Hussain Mughal, Advocate for the respondent and Sardar M.R. Khan, Advocates, for interveners.

Date of hearing: 05.10.2018

JUDGMENT:

Raja Saeed Akram Khan, J.— This appeal by leave of the Court has been directed against the judgment of the Service Tribunal

dated 27.02.2018, whereby the appeal filed by the appellants, herein, has been dismissed.

2. The facts as emerged from this appeal are that the appellants are the permanent employees of Health Department and performing duties in different cadres. The appellants while filing appeal before the Service Tribunal challenged the *vires* of the Azad Jammu and Kashmir Health Department (Paramedics and Medical Assistants Dying Cadre (4 tiers formula) Service Rules, 2015 on the ground that by promulgating these Rules the right of promotion of the appellants have been curtailed/blocked with mala fide intention. The learned Service Tribunal after necessary proceedings dismissed the appeal of the appellant vide impugned judgment dated 27.02.2018, which is the subject matter of the instant appeal.

3. Syed Shahid Bahar, Advocate, the learned counsel for the appellants argued that the impugned judgment is against law and the facts of the case. The learned Service Tribunal while handing down the impugned judgment failed to adhere to the real controversy involved in the matter and the relevant law on the subject. He added that by promulgating the subject Rules, the channel of promotion of the degree holder Junior Technicians, having better qualification, has been blocked and undue advantage has been given to unqualified diploma holders, but the learned Service Tribunal has not appreciated this aspect of the case. He added that the newly framed Rules are against the Constitutional guaranteed fundamental rights; therefore, Service Tribunal as being appellate authority was under legal obligation to look into the *vires* of the Rules but the learned Service

Tribunal failed to perform its function. He forcefully contended that in the newly framed Rules preference has been given to the employees of lesser qualification over the highly qualified degree holders just to accommodate the persons of choice, thus, suchlike Rules are not sustainable. The learned counsel stressed on the point that the learned Service Tribunal dismissed the appeal mainly on the ground that the Tribunal has no jurisdiction to issue the direction, whereas, in the instant matter a declaration was sought for quashment of such Rules which deprived the appellants of the right of promotion. The impugned judgment has been passed in an arbitrary manner which is liable to be vacated.

4. On the other hand, Raja Akhlaq Hussain Kiani, Additional Advocate-General and Mr. Muzaffar Hussain Mughal Advocate, strongly controverted the arguments advanced

by the learned counsel for the appellants. They strongly supported the impugned judgment and submitted that the claim of the appellants that by promulgating the new Rules, the channel of promotion of the appellants has been blocked, is baseless as due opportunity of promotion has duly been given to the appellants. In this regard, they drew the attention of the Court towards the Rules available at page 54 of the record. They forcefully contended that framing of rules is the prerogative of the Government which can only be declared illegal if the same have been enacted in conflict with the Constitutional provisions/statute, whereas, no such eventuality is available in the instant case, thus, appeal of the appellants is liable to be dismissed. They lastly submitted that it is settled principle of law that rules cannot be

framed/amended at the sweet-will of any civil servant.

5. Sardar M.R. Khan, Advocate, filed an application for impleadment of some employees of Health Department in the line of the respondents. The learned counsel for the appellants has seriously opposed the application. Keeping in view the controversy involved in the matter, we do not intend to accept the application at this stage, however, if the Court while drafting the judgment deems that to reach the right conclusion it is appropriate to hear the interveners then opportunity shall be given to them.

6. We have heard the arguments of the learned counsel for the parties and gone through the record along with the impugned judgment. The appellants, herein, has challenged the *vires* of Azad Jammu and

Kashmir Health Department (Paramedics and Medical Assistants Dying Cadre (4 tiers formula) Service Rules, 2015. It is an admitted position that prior to the promulgation of the newly framed Rules, through policy notification dated 15.05.2009, a method was provided for filling-up the vacancies in the Health Department as stopgap arrangement. The appellants are claiming that the mechanism introduced in the policy notification dated 15.05.2009, for promotion was in accordance with law which has been changed with mala fide intention. Before attending the merits of the instant case, we make it clear that it is settled principle of law that the rules cannot be framed/amended at the sweet-will of any civil servant as the same is the sole prerogative of the Government; moreover, the Rules can only be abolished if it is proved that the same have been enacted in conflict with the provisions of

parent Act or Constitution. In the instant case, the claim of the appellants is that by promulgating the Rules, the way of promotion of the appellants has been blocked/curtailed. From the deep scrutiny of the policy notification dated 15.05.2009 and the newly framed Rules it postulates that the way of promotion of any employee of Health Department has not been blocked rather the Government in the Rules only altered the ratio of quota fixed for initial recruitment/promotion as well as the qualification prescribed in the policy notification for different posts, which is well within the domain of the Government and the appellants failed to substantiate the element of mala-fide on the part of the Government in this regard. During the course of arguments, the learned counsel for the appellants was confronted that how the appellants are aggrieved as in the Rules, for

promotion not only seniority rather the condition of seniority-cum-fitness has been provided and if the appellants have the better qualification etc., as has been claimed by them, then they have the broad chance of promotion, he failed to satisfy the Court and only reiterated the point that almost all the appellants have obtained degree of B.Sc./B.S. (4 years in the relevant field) Health Sciences, but their right of promotion have been curtailed in disregard of the original service structure and preference has been given to the unqualified diploma holders. After going through the record of the case it appears that the appellants are defending the policy notification mere on the ground that the criterion for promotion given in the policy notification dated 15.05.2009, is suitable for them; except this reason nothing is available on record to show that what sort of violation of

the provision of Civil Servants Act or the Constitution has been made by the Government while framing the Rules. It may be observed here that a civil servant cannot claim a vested right for promotion to a particular post with the claim that the Rules be framed in such a manner so that he may be promoted. As we have already observed hereinabove that it is settled principle of law that rules cannot be enacted, altered or amended on the sweet-will of any civil servant and to declare the same as illegal/*ultra vires* the Constitution, the aggrieved civil servant has to prove that the Rules are inconsistent with the provisions of the parent Act or the Constitution, whereas, no such eventuality is available in the case in hand; thus, keeping in view the circumstances of the case, law does not permit us to interfere with the powers legally exercised by the Government.

7. We deem it proper to observe here that the learned Service Tribunal although rightly dismissed the appeal of the appellants on merits, however, the findings recorded by the Service Tribunal that as the Tribunal has no jurisdiction to issue the direction, therefore, the prayed relief cannot be granted, in view of the controversy involved in the matter are irrelevant as in the instant case the appellants challenged the *vires* of Rules and this Court in a number of pronouncements has held that the *vires* of the rules can be challenged before the Service Tribunal as the same is the Tribunal of exclusive jurisdiction. In this regard, reference may be made to a case reported as *Syed Rasheed Hussain Shah v. Azad Government and 6 others* [2014 SCR 883]. Thus, the afore-discussed findings of the Service Tribunal are hereby quashed; however, the conclusion

drawn by the Service Tribunal on merits is upheld.

Resultantly, this appeal stands dismissed with no order as to costs.

Muzaffarabad, **JUDGE** **CHIEF JUSTICE**