

SUPREME COURT OF AZAD JAMMU AND KASHMIR

[Appellate Jurisdiction]

PRESENT:

Ch. Muhammad Ibrahim Zia, C.J.
Ghulam Mustafa Mughal, J.

Civil Appeal No. 98 of 2018

(PLA Filed on 21.4.2018)

Muhammad Ashfaq s/o Mushtaq Ahmed r/o
Bhola Bajwa, Tehsil and District Narowan,
Refugee Settled in Pakistan.

.... APPELLANT

VERSUS

1. Azad Govt. of the State of Jammu & Kashmir through its Chief Secretary having his office at New Secretariat, Muzaffarabad.
2. Public Service Commission through its Chairman having his office at District Complex, Muzaffarabad.
3. Secretary Public Service Commission having his office at District Complex, Muzaffarabad.
4. Secretary Agriculture & Animal Husbandry, Azad Govt. of the State of Jammu & Kashmir having his office at New Secretariat, Muzaffarabad.
5. Imran Shoukat s/o Shoukat Hayat r/o Dhroti, Tehsil Fatehpur Thakiala Now r/o Jian Wali (Gharbi), Tehsil and District Gujranwala, Pakistan.
6. Deputy Commissioner Mirpur, Azad Kashmir.

..... RESPONDENTS

(On appeal from the judgment of the High Court dated

13.4.2018 in Writ Petition No. 1936 of 2017)

FOR THE APPELLANT: Ch. Ghulam Nabi,
Advocate.

FOR THE RESPONDENTS: Sardar Karam Dad Khan,
Advocate General and
Sardar Abdul Hameed
Khan, Advocate.

Date of hearing: 6.12.2018.

JUDGMENT:

Ghulam Mustafa Mughal, J— The captioned appeal by leave of the Court arises out of the judgment dated 13.4.2018 passed by the Azad Jammu & Kashmir High Court in writ petition No. 1936 of 2017.

2. The facts necessary for disposal of the captioned appeal are that appellant, herein, filed a writ petition before the Azad Jammu & Kashmir High Court on 21.11.2017 alleging therein that Azad Jammu & Kashmir Public Service Commission advertised 26 posts of Veterinary Officer (B-17) vide advertisement No. 2/2017, out of which 4 posts were allocated to the

refugees settled in Pakistan. It was averred that the petitioner is a refugee settled in Pakistan and being in possession of the required qualification applied for appointment against one of the advertised posts of Veterinary Officer (B-17). It was claimed that the petitioner participated in the test and interview and was placed at serial No. 5 of the merit list. It was further claimed that Imran Shoukat, private respondent, herein, who is a permanent resident of District Kotli and had obtained fraudulently his certificate of domicile and State Subject certificate as refugee settled in Pakistan, illegally applied for appointment against one of the posts reserved for refugees settled in Pakistan. It was averred that the Public Service Commission has declared the private respondent, herein, as successful for appointment against the post of Veterinary Officer (B-17) despite the fact that he was in possession of forged and bogus certificate of domicile and State Subject certificate of refugees settled in Pakistan. It was prayed that while

accepting the writ petition the hand out/ press release dated 18.10.2017 along with the certificate of Domicile of respondent No.5 dated 7.7.2017 as refugee settled in Pakistan may kindly be set aside and the official respondents be directed to select and recommend the petitioner against the post of Veterinary Officer (B-17) against the quota of refugees settled in Pakistan. The writ petition was contested by the private respondent by filing written statement. It was stated that the petitioner has no locus standi to file the writ petition as the writ petition has been filed on baseless and flimsy grounds. It was further stated that the petitioner has not appended with the writ petition the certified copies, which is the requirement of Rules 32 of the Azad Jammu & Kashmir High Court Procedure Rules, 1984, hence, the writ petition is not maintainable. It was further stated that the private respondent along with the whole family is settled in Pakistan (P/O Khas Chyanwali), Tehsil and District Gujranwala for the last many years

and he has completely abandoned his residence from District Kotli. The private respondent in support of his claim relied upon the report of Patwari and Tehsildar dated 27.7.2015; the I.D cards of the father as well as of his own issued by NADRA Office Pakistan dated 13.5.2015 and 26.12.2016 respectively; certificate of citizen as refugee settled in Pakistan in favour of him and his father, issued in the year 2017 and 2015 respectively, copy of record of rights pertaining to land in ownership and possession of his father in Gujranwala. It was requested that by accepting the written statement the writ petition filed by the petitioner may kindly be dismissed with costs. The learned High Court after necessary proceedings vide impugned judgment dated 13.4.2018 has dismissed the writ petition on the ground that the petitioner is not an aggrieved person in the eye of law and he has not attained the merit position in competition, hence, he cannot be allowed to

challenge the process of selection after being unsuccessful in the same.

3. Ch. Ghulam Nabi, the learned Advocate appearing for the appellant argued that Imran Shoukat, private respondent, herein, is not a refugee settled in Pakistan, hence, was not entitled to apply against the quota reserved for the refugees settled in Pakistan. The learned Advocate submitted that Imran Shoukat has obtained the State Subject and the certificate of Domicile from District Magistrate Kotli on 17.6.2009, wherein he has shown his permanent place of abode as village Dhroti, Tehsil Fatehpur Thakiala. Subsequently, he has obtained the State Subject certificate as well as the certificate of Domicile posing himself as a refugee settled in Pakistan on 7.7.2017 and 23.1.2017, respectively. He had abandoned his permanent place of abode on 4th November, 2017 and obtained the certificate to the effect from District Magistrate Kotli, therefore, by no stretch of imagination, he can be treated as a refugee

settled in Pakistan. The learned Advocate argued that at the time of filing the application before the Public Service

Commission, he was in possession of two certificates of domicile, which comes in the ambit of fraud, thus he cannot be allowed to reap the fruits of his own fraud. The learned Advocate, in this regard has placed reliance on the case reported as 2014 SCR 327 and Civil Appeal No. 279 of 2018 decided on 10.10.2018 titled *Muhammad Qasim vs. Masood Iqbal and others*. Lastly, the learned Advocate argued that the appellant, at the most, can be considered against the category of the refugees of 1989 in view of his submission made in the written statement before the High Court.

4. Sardar Abdul Hameed Khan, the learned Advocate appearing for the private respondent argued that the appellant, herein, was not an aggrieved and entitled to any relief on the ground of estoppel and acquiescence because he has participated in the selection process and

did not raise any objection about the eligibility of the private respondent. The learned Advocate argued that the appellant has raised objection only when he became unsuccessful in the selection against the post in question. The

learned Advocate argued that the private respondent is a refugee settled in Pakistan for all practical purpose because he had to migrate from the native town Dhroti due to disturbance and got settled in Gujranwala from where he has obtained the certificate of domicile from local District

Magistrate and the State Subject certificate from the Deputy Rehabilitation Commissioner Mirpur. The learned Advocate argued that the private respondent has not committed any fraud and in view of his merit position he has rightly been recommended for appointment. The learned

Advocate submitted that D.R.C. Mirpur as well as District Magistrate Gujranwala, who were necessary parties, have not been impleaded as such, hence, the writ petition suffered from non-joinder of necessary party, was liable to be dismissed. In support of his submission the learned Advocate has placed reliance

on the cases reported as 2003 SCR 446, PLD 2006 SC (AJK) 10 and 2014 SCR 327.

5. Sardar Karam Dad Khan, the learned Advocate General has adopted the arguments advanced on behalf of the learned counsel for the private respondent.

6. We have heard the learned Advocates representing the parties and have gone through the record of the case. The contention of the learned Advocate for the appellant that the private respondent, herein, is not a refugee settled in Pakistan, hardly requires any deliberation. Suffice it to observe that private respondent, herein, is a permanent resident of village Dhroti, Tehsil Fatehpur Thakiala and even at the time of applying for appointment as a Veterinary Officer, he was in possession of the certificate of Domicile and the State Subject certificate issued by the District Magistrate Kotli. The record reveals that the private respondent and his family stood shifted somewhere in Gujranwala and obtained the State Subject and the certificate of Domicile as a refugee settled in Pakistan from that area. The pivotal question which needs

resolution is; whether, the private respondent can claim the status of refugee settled in Pakistan? Our answer is in negative. The identical question was raised in Imran Ali's case (2013 SCR 795). The facts of the cited case were that the appellant, therein, claimed the status of refugee settled in

Pakistan although he was not as such on the ground that he was permanently residing in

Pakistan due to upraising of Mangla Dam Project.

This Court has considered the

controversy in paragraph 10 of the report while reproducing the notifications on the subject as under:-

“10. Prior to year 1972, every State Subject had a right to apply against a post in the service of AJ&K under law, but on 12th March, 1972, a notification was issued whereby quota was reserved for refugees of Azad Jammu & Kashmir settled in Pakistan and the districts of Azad Jammu & Kashmir including Mirpur, Poonch and Muzaffarabad. In continuation of said notification, another notification was issued on 24.8.1972. This notification was basically issued for clarification of earlier notification dated 12.3.1972,

but in the new notification instead of words “refugees of Jammu & Kashmir settled in Pakistan” the words “persons who migrated from any part of occupied Kashmir and settled in Pakistan” have been used. It will be useful to reproduce both the notifications which are as under:-

A comparative study of both the notifications shows that in the first notification, posts in Government service are reserved for refugees of Jammu & Kashmir settled in Pakistan and in the second notification refugees have been

categorized. The first category of refugees of occupied Kashmir who are settled in districts of

Azad Jammu & Kashmir shall be treated as permanent residents of said districts and second category is for those State Subjects who have migrated from occupied Kashmir and settled in Pakistan. The refugees of 1965 shall also be treated as refugees till settlement. The spirit behind the notifications appears that these have been issued for reserving a quota in the service of AJ&K for refugees of occupied Kashmir settled in Pakistan. No other category of State Subjects, who have migrated from Azad Jammu & Kashmir territory to Pakistan under compulsion, is included in the aforesaid notification. We have also considered the definition of word "refugee" in the notification dated

26.8.1968. It will be useful to reproduce the said notification which is as under:--

"Azad Government of the State of Jammu & Kashmir. (Administration and Establishment Secretariat)

Dated: August 26, 1968

NOTIFICATION:

No. ADMIN. 4090-4130/SS/68: in pursuance of the provisions of section 7 of the Azad Kashmir Adaptation of Laws Act, 1959 read with the Administration of Evacuee Property Act, 1957 and the Rehabilitation Act, 1956, the Azad Government of the State of Jammu & Kashmir is pleased to direct and to notify that the expression “refugee” or “displaced person” occurring in any of the said Acts or previous laws or in any rules or orders made thereunder shall include Jammu & Kashmir State Subject refugees from the Jammu and Kashmir State who have taken refuge in Azad Kashmir Territory or in Pakistan following the War of Liberation in the Jammu & Kashmir State in the year 1947 or owing to war in the year 1965 or at any time thereafter and who could not return to their homes in the Indian occupied part of the said State or who though resident in Azad Kashmir have been deprived of the enjoyment of immovable property in the Indian occupied part of the said Jammu & Kashmir State.

Sd/-
(Abdul Ghani)

Deputy Senior Secretary”

A study of the aforesaid notification reveals that it has been issued under the provisions of section 7 of the Azad Kashmir Adaptation of Laws Act, 1959 read with the Administration of Evacuee Property Act, 1957 and the Rehabilitation Act, 1956, for definition of the word “refugee” used in the said laws. It speaks that the expression “refugee” or displaced person” shall include those State Subjects from Jammu & Kashmir State who have taken refuge in Azad Kashmir Territory or in Pakistan following the War of Liberation in the Jammu & Kashmir State in the year 1947 or owing to war in the year 1965 or at any time thereafter and who could not return to their homes in the Indian occupied part of the State. The Rehabilitation laws are enacted for restoration, maintenance and settlement of economic issues of the State Subjects, who have taken refuge in Azad Jammu & Kashmir or Pakistan as a result of war of liberation. This definition is confined only for the purpose of referred laws and for the allotment of land or permanent

settlement of refugees, who could not return to their homes in occupied Kashmir.

Admittedly this definition excludes the case of the present appellant from the definition of the word “refugee”.

Again at page 809 of the report (supra) it was observed by this Court as under:-

“The Constitution guarantees the right in service and the appellant is being deprived of the fundamental right due to act of the Government. In such eventuality, the principles of beneficial construction have to be applied, but the difficulty before the Court is that the notification dated 12.3.1972 and 24.8.1972, dealing with the subject of quota in the Government service, specifically provide “refugees of Jammu & Kashmir settled in Pakistan” and “refugees from occupied Kashmir settled in Pakistan”, respectively. It has been observed in para 10 of this judgment that the intention of both the notifications appears that the quota has been reserved for

refugees from occupied Kashmir, settled in Pakistan and not for the State Subjects, who migrated from Azad Jammu & Kashmir under compulsion, therefore, the principle of beneficial interpretation for extending the definition of word

“refugee” to Mangla Dam displaced persons settled in Pakistan is not applicable in the case and such persons cannot be considered as “refugees” for the purpose of aforesaid notifications.”

The objection of the learned Advocate for private respondent that D.R.C. Mirpur as well as the District Magistrate Gujranwala is a necessary party in the case, is devoid of any force. The admitted position of the case is that they are not necessary party. It can be concluded on the strength of these notifications and legal position which has already been settled that private respondent was not a refugee settled in Pakistan, therefore, he was not entitled to apply against the said quota and the recommendations

made by the Public Service Commission in his favour are bad in law. The contention of the learned Advocate for the appellant that the writ petition as well as the appeal was liable to be dismissed on the ground of acquiescence and estoppel is also devoid of any force because it is not established that all these facts were in the knowledge of the appellant at the time when the private respondent applied against the quota of refugees settled in Pakistan. When a fact is not directly in the knowledge of a party, the principle of acquiescence and estoppel does not come in its way. Reference can be made to a case reported as *Umar Hayat vs. Azad Govt. of the State of J&K and others* (PLJ 1999 SC (AJK) 190), whereby at page 201 of the report the scope of acquiescence and estoppel was examined by this Court in depth and it was opined as under:-

“It is difficult to summaries in a few words all the shades of the meaning of the acquiescence as defined and interpreted in the judgments and the celebrated words mentioned above, but it can

be safely stated that there can be no acquiescence unless two ingredients are present. Firstly, there should be expressed or implied, abandonment of a right or failure to enforce it. The second ingredient is that the act by which acquiescence is inferred should be inconsistent with the right. In the present case both these factors are absent. So far as inconsistency is concerned, it needs to be emphasized that the appellant's contention never was that the Public Service

Commission had no authority to hold test and interview for the dispute posts. His operation was that test should be restricted to refugees settled in Pakistan. His appearance in the failure to get it cancelled, was not an inconsistent conduct because being a refugee himself he was entitled to appear in the test." In the light of the above stated position of law, neither the acquiescence nor estoppel can be pleaded against the appellant because it is not proved that the

status of private respondent being
a State Subject as a refugee settled
in Pakistan, was in his knowledge.

The upshot of the above discussion is
that the appeal is accepted. Resultantly, the writ
petition filed by the appellant, herein, before the
High Court is granted. The recommendations
made in favour of the private respondent by the
Public Service Commission are declared null and
void for the reasons stated hereinabove. The
appellant if, falls next in the merit, may be
recommended for appointment against the vacant
seat pertaining to quota of refugees
settled in Pakistan.

	JUDGE	CHIEF JUSTICE
Muzaffarabad		