

SUPREME COURT OF AZAD JAMMU AND KASHMIR

[Appellate Jurisdiction]

PRESENT:

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

Civil Appeal No. of 202 of 208

(PLA Filed on 28.6.2018)

Syed Shafqat Hussain Shah s/o Syed Sadiq
Hussain Shah, r/o village Subri, Tehsil and
District, Muzaffarabad.

.... APPELLANT

VERSUS

1. Chief Administrator, Zakat and Usher, Azad Govt. of the State of Jammu & Kashmir, Muzaffarabad.
2. Administrator, Zakat and Usher, Azad Govt. of the State of Jammu & Kashmir, Muzaffarabad.
3. Director, Zakat and Usher, Azad Govt. of the State of Jammu & Kashmir, Muzaffarabad.
4. Chairman, Zakat and Usher Committee, Muzaffarabad.
5. Accountant General, Azad Jammu & Kashmir, Muzaffarabad.
6. Muhammad Sarwar, Driver B-6, Department of Zakat and Usher, Azad Jammu & Kashmir, Muzaffarabad.

..... RESPONDENTS

(On appeal from the judgment of the High Court dated
25.5.2008 in Writ Petition No. 598 of 2016)

FOR THE APPELLANT: Ch. Muhammad Manzoor,
Advocate.

FOR THE RESPONDENTS: Raja Akhlaq Hussain Kiani,
Additional Advocate General
and Syed Asim Masood
Gillani, Advocate.

Date of hearing: 12.11.2018.

JUDGMENT:

Ghulam Mustafa Mughal, J— The captioned appeal by leave of the Court arises out of the judgment dated 25.5.2008 passed by the learned High Court in writ petition No. 598 of 2016.

2. The precise facts forming the background of the captioned appeal are that the competent authority vide order dated 24.5.2016 appointed Muhammad Sarwar, driver, proforma respondent No.6, herein, against a vacant post of Driver B-5 in the office of District Zakat and Usher Committee Muzaffarabad. Feeling dissatisfied from the said order, the appellant, herein, challenged the legality and correctness of the said order through a writ petition before the Azad Jammu & Kashmir High

Court. It was alleged that the father of the petitioner was a permanent employee of Zakat and Usher Department and was serving as driver B-4, who retired from service vide order dated 2.11.2015. It was further alleged that for appointment against the post fell vacant due to retirement of his father, in light of notification dated 26.5.2003, whereby 20% quota has been reserved for children of government servants serving in B-1 to B-5, the petitioner moved an application for appointment and succeeded in getting favourable order from the Prime Minister, but the official respondents in violation of the order of the Prime Minister as well as notification dated 26.5.2003 appointed the petitioner on temporary basis for the period of three months vide order dated 2.11.2015. It was further alleged that for protection of said temporary appointment order, the petitioner filed a writ petition before the High Court, which was disposed of with the observation that if the petitioner claims appointment against 20%

quota, he may file writ petition. It was averred that respondent No.2 adjusted/appointed respondent No. 6 vide order dated 24.5.2016 without lawful authority because respondent No.6 was already working as Driver B-6 in the department against Zakat Profit Fund. The learned High Court vide judgment dated 22.12.2016 dismissed the writ petition. The appellant, herein, filed an appeal before this Court against the said judgment of the High Court, which was accepted and the case was remanded to the High Court for its disposal on merits vide judgment dated 17.5.2016. The writ petition was contested by the respondents by filing written statement, whereby it was stated that the petitioner was not appointed against 20% quota rather was appointed on temporary basis for the period of three months and on expiry of the said period he was relieved. It was further stated that in the department of Zakat and Usher there are 6 posts out of which one post falls in 20% quota, which has already been

filled in by appointing one Syed Aqeel Husain Shah, hence, no post is available against the said quota. It was further stated that respondent No.6, who is serving in the department since 1992, has been adjusted in light of resolution passed by the Azad Jammu & Kashmir Zakat Council dated 1.9.2017. The learned High Court after necessary proceedings vide impugned judgment dated 25.5.2018 has consigned to record the writ petition.

3. Ch. Muhammad Manzoor, the learned Advocate appearing for the appellant argued that a writ petition was filed by the appellant, herein, before the Azad Jammu & Kashmir High Court for implementation of notification dated 26.5.2003 and for appointment against the quota reserved for children of government servants serving in grade B-1 to B-5, but the learned High Court has not considered the case, hence, the impugned judgment is arbitrary, erroneous and against the record. The learned High Court argued that it is also factually

incorrect that one Syed Aqeel Hussain Shah was appointed against 20% quota reserved vide notification dated 26.5.2003, the fact of the matter is that the said person was appointed on open merit as is evident from his appointment order dated 5.7.2012. The learned Advocate argued that the resolution of the Zakat Council was not required to be challenged because that does not affect the case of the petitioner. The learned Advocate argued that on the basis of the resolution dated 1.9.2017 the department has firstly to amend the relevant rules for providing a room for appointment through transfer and only thereafter the appointment of the private respondent can be made, who was serving in the office of the Chairman of District Zakat Council. The learned Advocate argued that the learned High Court has also failed to consider that the appointment of the private respondent, herein, was illegal and the same has been made in violation of the judgment of this Court, therefore, the appellant was aggrieved and can

successfully bring the writ petition under section 44 of the Azad Jammu & Kashmir Interim Constitution, 1974. The learned Advocate argued that if the requisite relief is not granted to the appellant even then the appointment of the private respondent cannot be protected rather a direction was required to be issued for appointment of an eligible candidate in accordance with law and the appellant in that case can compete also.

4. Conversely, Syed Asim Masood Gillani, the learned Advocate appearing for private respondent argued that the private respondent, herein, was serving in the department as a driver since more than 22 years and he has been adjusted as such in light of the resolution of Zakat Council dated 1.9.2017, which is an autonomous body and has the powers to make and amend the rules. The learned Advocate argued that the appellant was not aggrieved as he was not in possession of the required qualification. While referring to the relevant

rules, he argued that only the holder of P.S.V. licence can be appointed as a driver whereas the appellant was not in possession of the same. The learned Advocate argued that as 20% quota has already exhausted and no post left against the quota claimed by the appellant, herein, therefore, his writ petition before the High Court was baseless and has rightly been dismissed by the learned High Court. He argued that even otherwise the appellant has no case on merits.

5. Raja Akhlaq Hussain Kiani, the learned Additional Advocate General has owned 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. A perusal of the record reveals that the father of the appellant, herein, was serving as a driver in the Zakat and Usher Department, who stood retired from service vide order dated 2.11.2015. The appellant, herein, moved an application for his appointment as

driver B-4 against 20% quota reserved for the children of employees serving in grade B-1 to B-5 vide notification dated 26.5.2003. The appellant was not appointed in light of the said notification, however, he was appointed as a driver on temporary basis for a period of three months vide order dated 2.11.2015. He filed a writ of prohibition against the respondents praying therein not to cancel the order dated 2.11.2015, however, the learned High Court disposed of the writ petition vide its judgment dated 1.3.2016 observing therein that the order cannot be protected because the same is temporary one, however, if the claim of the petitioner is that he should have been appointed against 20% quota reserved for the children of the employees serving in grade B-1 to B-5, he may file fresh writ petition. During this period, respondent No.6, herein, who was already serving as a driver on temporary basis, was adjusted by the official respondents on the claimed post vide order dated 24.5.2016.

7. The case of the appellant, herein, before the High Court was that it was enjoined upon the respondents to appoint the petitioner against 20% quota. A perusal of the record reveals that the learned High Court has dismissed the writ petition mostly on the ground that the appellant, herein, has not challenged the resolution of the Zakat Council dated 1.9.2017, whereby the private respondent has been adjusted. Moreover, it is also observed by the learned High Court that 20% quota has already been fulfilled. After perusing the record, it may be stated that the service of the Zakat and Usher Department is regulated by the rules known as "The Azad Jammu & Kashmir Zakat and Usher Department Service Rules, 1998", whereby the post of driver B-4 can be filled in only by initial recruitment. There is no scope for making appointment through transfer or any other mode. Another requirement is that a candidate should be in possession of P.S.V. licence having three years experience in the

relevant field, therefore, the private respondent could not be adjusted/appointed against a permanent post in absence of the rules. The writ petition has been dismissed on another ground that Syed Aqeel Hussain Shah has been appointed against the quota claimed by the petitioner. His order is available at page 61 of the Paper Book as annexure "P/1". From the order, it does not reveal that his appointment was made against 20% quota, however, in the comments, it has been categorically stated by the official respondents that the appointment of Syed Aqeel Hussain Shah has been made against 20% quota reserved for the children of the employees serving in grade B-1 to B-4. The quota is a question of fact, unless it is proved through cogent evidence, the stand of the department cannot be nullified mere on the basis of surmises and conjectures. We have perused the resolution passed by the Zakat Council. From the perusal of the resolution, it reveals that a room is provided in the resolution

for adjustment of temporary staff, however, that is subject to modification, amendment and framing of the rules, therefore, the writ petition could not be dismissed on the ground that rules have not been challenged. The question as to whether the appellant is not in possession of the required qualification has to be seen by the competent authority while making appointment after amendment in the rules.

In the light of the aforesaid discussion, we accept the appeal and direct the respondents to amend the rules firstly and thereafter make the appointment afresh from amongst the eligible candidates. If the appellant is in possession of the required qualification, he may also compete against the post if the same is advertised for appointment through initial recruitment. The writ petition before the High Court stands accepted in the manner indicated above.

JUDGE
Muzaffarabad
14.11.2018.

CHIEF JUSTICE