

**SUPREME COURT OF AZAD JAMMU AND KASHMIR**

[Appellate Jurisdiction]

**PRESENT:**

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

Civil Appeal No. 232 of 2018  
(PLA Filed on 28.9.2018)

Raja Khadim Hussain s/o Abdulla, Senior Clerk  
Municipal Corporation Mirpur.

.... APPELLANT

**VERSUS**

1. Secretary Local Government and Rural  
Development Department, Muzaffarabad.
2. Administrator Municipal Corporation  
Mirpur.
3. District Account Officer, Mirpur.
4. Muhammad Ramzan Inspector, presently  
Head Clerk B-14, Municipal Corporation  
Mirpur.

..... RESPONDENTS

5. Mirza Abdul Basheer s/o Maqbool Husain,  
Senior Clerk, Municipal Corporation  
Mirpur.

.... PROFORMA RESPONDENT

(On appeal from the judgment of the Service Tribunal  
dated 30.7.2018 in Service Appeal No. 900 of 2015)

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FOR THE APPELLANT: Ch. Muhammad AShraf  
Ayaz, Advocate.

FOR RESPONDENT NO.4: Ch. Muhammad Suleman,  
Advocate.

*Date of hearing:* 27.2.2019.

**JUDGMENT:**

***Ghulam Mustafa Mughal, J—*** The captioned appeal by leave of the Court arises out of the judgment dated 30.7.2018 passed by the Azad Jammu & Kashmir Service Tribunal in service appeal No. 900 of 2015.

2. The facts forming the background of the captioned appeal are that appellant, respondents No.4 and 5, herein, were permanent employees of the Local Government. Khadim Hussain, appellant, herein, was inducted as Junior Clerk on 14.1.1979 in the Municipal Corporation Mirpur, whereas, Mirza Abdul Basheer, appellant No.2, before the Service Tribunal was inducted as such on 15.9.1979. Respondent No.4, herein, was appointed as Junior Clerk on 24.4.1982. They were promoted subsequently as Senior Clerk on permanent basis vide order dated 30.3.1988, 24.11.1988 and 5.4.1999 respectively. It is stated that the post of Senior Clerk was upgraded meantime in

B-9 and thereafter in B-14. Respondent No.4, herein, was transferred as Inspector Encroachment on acting charge basis in grade B-11, from where he was appointed as Head Clerk B-14 vide order dated 13<sup>th</sup> October, 2015 on officiating basis. It is stated that under rules the post of Head Clerk had to be filled in on the basis of seniority-cum-fitness and the appellant, herein, being senior most employee was liable to be promoted but while ignoring him the respondent has been promoted on officiating basis through the aforesaid order. It is stated that the appellant has not been considered at the relevant time despite the letters of Chief Administrator Municipal Corporation dated 8.8.2015 and Secretary of the Local Government Board dated 25.8.2015. The appeal was contested by the respondents by filing written statement. At the conclusion of the proceedings the learned Service Tribunal through the impugned judgment dated 30.7.2018 has dismissed the appeal on the ground that the

order under challenge is not final order and the appellant, herein, has been retired from service.

3. Ch. Muhammad Ashraf Ayaz, the learned Advocate appearing for the appellant argued that the appellant, herein, was inducted prior to respondent No.4 in the service and he was promoted as Senior Clerk before him and under rules the post of Head Clerk was liable to be filled in on the basis of seniority-cum-fitness but the official respondents have not filled in the post for a pretty long period and have appointed respondent No.4 on officiating basis vide order dated 13.10.2015. The learned Advocate argued that this power has been exercised by the respondents in violation of the judgments of this Court as well as in violation of AJ&K Civil Servant (Appointment & Condition of Service) Rules, 1977, which authorizes the respondents to make the appointment on officiating/acting charge basis only for a period of six months that too, on the seniority basis. The learned Advocate argued that it was the responsibility of the

respondents to send the case of the appellant and other eligible candidates to the respective selection board in due course of time but they have not performed their statutory duty in order to accommodate the private respondent, herein, illegally. The learned Advocate submitted that the appellant has retired vide order dated 2<sup>nd</sup> February, 2017 but he was entitled to be promoted as Head Clerk from 13<sup>th</sup> October, 2015, the date from which the respondent has been appointed on officiating basis. The learned Advocate argued that the Service Tribunal could not dismiss the appeal mere on the ground that the appellant has retired from service. He submitted that appellant No.2, before the Service Tribunal has also been promoted during the pendency of appeal, hence, the appellant, herein, being senior most has been discriminated.

4. Conversely, Ch. Muhammad Suleman, the learned Advocate appearing for respondent No.4 contended that as the appellant has retired

from service, therefore, he has no right to claim promotion after retirement. The learned Advocate argued that the appeal before the Service Tribunal was not competent because the order was not final. The learned Advocate argued that even otherwise the promotion of the respondent could not be set aside.

5. We have heard the learned Advocates representing the parties and have gone through the record of the case. A perusal of the file of the Service Tribunal reveals that the appellant, herein, was appointed as Junior Clerk on 14.1.1979 in the Municipal Corporation Mirpur. Appellant No. 2 before the Service Tribunal was appointed as such on 15.9.1979. Muhammad Ramzan, respondent No.4, herein, was appointed as Junior Clerk on 24.4.1982. The aforesaid employees were promoted as Senior Clerk on 30.3.1988, 24.11.1988 and 5.4.1991 respectively. According to the seniority list, the appellant, herein, is the senior most employee and as per rules he was liable to be considered

for promotion. It is noticed that the private respondent has been appointed on officiating basis on 13<sup>th</sup> October, 2015 and is holding the post as such. This is serious violation of the relevant rules as well as the various pronouncements of this Court. Though, the appellant has been retired from service but he had a right to be considered for promotion from the date when the post became available and from the date when the respondent No.4, herein, has been promoted on officiating basis i.e. 13<sup>th</sup> October, 2015. Though, the promotion cannot be claimed as a matter of right but a civil servant has vested right to be considered for promotion by the competent authority if he is, otherwise, in possession of the relevant qualification. In the present case, the seniority of the appellant is not denied, however, he has been treated arbitrarily by the respondents because his case has not been sent to the concerned selection board, therefore, we hold that the appellant deserves to be considered as such from 13.10.2015, the date

when the post of Head Clerk in the department became available. Under law, a person who has earned the right for promotion in the higher grade and stood retired and has not been promoted in due course of time due to lapse committed by the authority by not sending his case to the appropriate selection board/committee, he can be considered for promotion and would be entitled to pecuniary and monetary benefits. We are fortified in our view by the dictum laid down in the case reported as *Dr. Syed Sabir Ali vs. Government of the Punjab through Secretary, Health Punjab and others* (2008 SCMR 1535) as well as the case reported as *Kh. Faqir Muhammad vs. Azad Government & 5 others* (2008 SCR 115). In paragraph 4 of *Kh. Faqir Muhammad's* case, it was observed as under:-

“4. The appellant claims promotion on the basis of his right which is upheld by the Service Tribunal. He was, therefore, entitled to the promotion irrespective of the fact whether he had retired or not. His



promotion would take effect from the date the right accrued to him and would last till his retirement, which in the other words means that he would be entitled to the benefits for his promoted post or posts, even if he had retired. A right which accrues to the civil servant cannot be denied to him even if he is retired. We are fortified in holding this view by a case reported as *Syed Altaf Hussain Bukhari (Retd.) Deputy Director Food Mirpur v. Accountant General and 2 others* [PLJ 1999 AJK 66], wherein it is held that a civil servant even though retired is entitled to the benefit of right of promotion accrued during service and that right cannot be denied to him after service. Although only monetary benefits accrue out of his promotion but that does not mean that he shall not be formally promoted...”

The upshot of the above discussion is that the appeal is accepted, the impugned judgment dated 30.7.2018 passed by the learned Service Tribunal is set aside and the official respondents are directed to consider the case of the appellant for promotion from the date

of officiating appontiemnt of the private  
respondent i.e. 13.10.2015. The promotion of  
the appellant now shall be only for monetary  
benefits in the higher grade.

JUDGE

CHIEF JUSTICE.

Mirpur.  
....2.2019.