SUPREME COURT OF AZAD JAMMU AND KASHMIR

[Appellate Jurisdiction]

PRESENT:

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

Civil Appeal No. 52 of 2019
(PLA filed on 10.11.2018)

Sadaqat Ali, Chowkidar Government Girls High School Sathi Bagh, Tehsil & District Muzaffarabad, Azad Kashmir.

…. APPELLANT

VERSUS

1. Headmistress Government Girls High School Sathi Bagh, Tehsil & District Muzaffarabad, Azad Kashmir.

2. Director Public Instruction Schools (Female), Elementary and Secondary Education Azad Jammu and Kashmir having his office at New District Complex Muzaffarabad.

3. District Education Officer (Female), Elementary and Secondary Education, District Muzaffarabad having his office at New District Complex Muzaffarabad.

4. Assistant Director, Elementary and Secondary Education Schools (Female) Muzaffarabad, Azad Kashmir.

5. Divisional Director Education (Female) Muzaffarabad Division Muzaffarabad, having his office at New District Complex Muzaffarabad.

6. Accountant General Azad Jammu & Kashmir having his office at Sathra Muzaffarabad.

7. Sajjad Ahmed s/o Abdul Aziz r/o Komikot, Tehsil & District Muzaffarabad, Azad Kashmir.

…. RESPONDENTS

[On appeal from the judgment of the Service Tribunal dated 20.10.2018 in Service Appeal No.253/2018]

FOR THE APPELLANT: Ch. Shoukat Aziz, Advocate.

FOR RESPONDENT No.7: Raja Shujaat Ali Khan, Advocate.

FOR RESPONDENTS No.2-3: Mr. Muhammad Zubair Raja, Addl. Advocate-General.

Date of hearing: 09.01.2020.

JUDGMENT:

Ch. Muhammad Ibrahim Zia, C.J.— The titled appeal with the leave of the Court has been directed against the judgment of the Service Tribunal dated 20.10.2018, whereby the appeal filed by the appellant, herein has been dismissed.

2. The brief facts of the case are that respondent No.7, herein, was serving as a Chowkidar in the Government Girls High School,

Sethi Bagh. Vide order dated 28.09.2013, he was dismissed from service under the provisions of AJ&K Removal from Service (Special Powers) Act, 2001 *(hereafter to be referred as Act, 2001)*. The vacancy occurred so was advertised on 29.08.2013. According to the appellant, he applied against the said post and after conducting test and interview was appointed as such on the recommendations of the selection committee vide order dated 01.02.2014. After issuance of the appointment order, the appellant submitted his joining report on 02.02.2014, however, on 14.03.2014 respondent No.3 wrote a letter to respondent No.1 for reinstatement of respondent No.7 on the basis of order of the Minister Education. On this, the appellant herein, filed a writ petition before the High Court for protection of his appointment order which stood dismissed. After dismissal of the writ petition, the authority vide order dated 29.03.2018, while reinstating respondent No.7 in service cancelled the appointment order of the appellant, herein. Feeling aggrieved, the appellant filed an

appeal before the learned Service Tribunal. After necessary proceedings, the learned Service Tribunal has dismissed the appeal vide impugned judgment dated 20.10.2018, hence, this appeal by leave of the Court.

3. Ch. Shoukat Aziz, Advocate, the learned counsel for the appellant argued the case at some length. He submitted that the appellant was appointed after advertisement of the post and determination of the merit. In this regard, he referred to the copies of the advertisement dated 29.08.2013 and appointment order of the appellant dated 01.02.2014, issued on the recommendations of the selection Committee. He submitted that subsequently the illegal order of termination of his service was issued which was challenged before the learned Service Tribunal but the learned Service Tribunal while treating respondent No.7 as employee of the department dismissed the appeal. The learned Service Tribunal fell in error of law as respondent No.7, was removed from service under the provisions of Act, 2001 and he has not

challenged the removal order before any legal forum, therefore, he is not legally appointed, hence, the impugned judgment is not sustainable. He further argued that respondent No.7 claims that on the strength of some order passed by the Minister Education, he has been reinstated in service, whereas, neither the Minister Education is authority nor under law he can pass any such order.

4. Conversely, Raja Shujaat Ali Khan, Advocate, the learned counsel representing respondent No.7 forcefully defended the impugned judgment of the Service Tribunal and submitted that the appellant has got no locus standi because his appointment is not legal one. He being not the resident of constituency, cannot be appointed in violation of the Government notification. He submitted that although respondent No.7 was removed from service, however, he filed an appeal before the next higher authority and ultimately after due process of law, he was reinstated. The order of reinstatement is quite valid and passed under law, however, if there is any omission on the

part of the authority he cannot be penalized. He also suggested that for ends of justice if while keeping intact the appointment order of the appellant, the reinstatement order of the respondent is also protected, it will service the purpose of justice.

5. Mr. Muhammad Zubair Raja, Additional Advocate-General, submitted that although the appellant was appointed after advertisement of the post on the recommendations of the Selection Committee but as he was appointed against the vacancy which occurred due to termination of service of respondent No.7 and on his reinstatement the vacancy stood filled, thus, in this state of affairs the service of the appellant has to be retrenched. The order of retrenchment is legal one. The learned Service Tribunal has rightly passed the impugned judgment.

6. We have heard the learned counsel for the parties and gone through the record. According to the admitted facts, respondent No.7 was proceeded under Act, 2001, and ultimately vide order dated

28.09.2013, he was removed from service. The vacancy occurred due to his removal from service was advertised and on the recommendations of the Selection Committee the appellant was appointed, thus, according to the stated facts his appointment order has been issued while following the due course of law. So far as the objection that the appellant is not resident of the Constituency, is concerned, in our considered view this objection cannot be raised in this appeal in which the order impugned is that of retrenchment and not appointment of the appellant. According to the enforced law, while deciding the appeal the Service Tribunal has to determine the validity of the order impugned before it, thus, the objection stands repelled.

7. The sole moot point, which goes to the roots of the case, is whether in view of the stated facts, respondent No.7 has been validly reinstated in service. As is evident from the record and also admitted by the parties, respondent No.7 was removed from service under the provisions of Act,

2001. He has not brought on record that he has challenged this order by way of an appeal before the Service Tribunal or through representation before the competent forum. The document brought on record in this context is the order of Minister Education. According to the enforced law, the Minister Education figures nowhere in the rules in relation to such like matters. Thus, the order passed by the Minister Education on the face of it is without lawful authority and no detailed reasons are required for declaring the same as void. It is a celebrated principle of law that any action done or order passed without competence or lawful authority has no legal effect and void. Thus, on the basis of such order treating respondent No.7 as reinstated is not justified. The learned Service Tribunal has not properly appreciated the proposition and applied judicial mind. In this state of affairs, we are constrained to accept this appeal and set-aside the impugned order dated 29.03.2018 and declare that respondent No.7, who was removed from service vide order dated

28.09.2013 cannot be treated reinstated in service on the strength of so-called order of Minister Education.

8. The examination of the impugned judgment of the Service Tribunal reveals that the conclusion drawn appears to be result of misconception due to official communication dated 27.03.2018, reproduced in paragraph 10 of the impugned judgment. This official communication on the face of it is faulty, misleading and based upon misstatement of facts. It is shown in this letter that it has been issued in compliance of the judgment of the High Court dated 22.03.2018, whereas, the spirit of the referred judgment is quite contrary. In the referred judgment the learned High Court has clearly held that there is no order of restoration of respondent in service and the appointment order of the appellant has been implemented. It is also clearly mentioned that in absence of order of termination of petitioner's (appellant, herein) order of appointment, respondent No.7 cannot claim that he has been restored to service. Thus, it is clear

that the departmental authority has misstated the facts because the learned High Court has not directed as such. The other contents of this letter also appear to have no legal validity because once respondent No.7 has been removed from service under the provisions of Act, 2001 and punishment order operated, unless such order is set-aside in due process of law while following the remedies provided under law the victim cannot get rid of such order merely on the basis of some inquiry. It is settled principle of law that when an act has to be performed in the specific manner it should be performed in that manner or not at all and non-performance in the prescribed manner is void and of no legal effect.

9. So far as the submission of learned counsel for the respondent that the respondent has served for more than 9 years, thus, on sympathetic grounds both the parties be accommodated, is concerned, keeping in view the overall facts and circumstances of the case we cannot pass any specific direction in this regard, however, the

respondent may approach the concerned authority who may consider his request.

10. In the light of above stated facts and reasons, while setting aside the impugned order of the Service Tribunal the appeal filed by the appellant before the Service Tribunal is accepted and the impugned departmental order dated 29.03.2018 being unlawful is set-aside.

This appeal stands accepted in the above terms with no order as to costs.

CHIEF JUSTICE JUDGE

Muzaffarabad.
13.01.2020