

SUPREME COURT OF AZAD JAMMU AND KASHMIR

[Appellate Jurisdiction]

PRESENT:

Raza Ali Khan, J.

Muhammad Younas Tahir, J.

Civil Appeal No. 146 of 2021

(PLA filed on 23.12.2020)

1. Rashid Aftab Bukhari, Section Officer Planning & Development Muzaffarabad AJ&K.
2. Muhammad Zaheer Mukhtar Section Officer Finance Department Muzaffarabad, AJ&K.
3. Syed Abbasi Ali, Assistant Superintendent Police, Mirpur AJ&K.

.....APPELLANTS

v e r s u s

1. AJK Govt. of the State of Jammu & Kashmir through its Secretary Services & General Administration Department having his office at New Secretariat Muzaffarabad.
2. Department of Services and General Administration Department Government of

- AJK, having his office at New Secretariat Muzaffarabad.
3. Secretary Services & General Administration Department Government of AJK, having his office at New Secretariat Muzaffarabad.
 4. Additional Chief Secretary (General) Chairman Departmental Rules Committee, Azad Govt. of the State of Jammu & Kashmir having his office at New Secretariat Muzaffarabad.
 5. Rules Committee through its Chairman, Additional Chief Secretary (General), having his office at New Secretariat Muzaffarabad.
 6. Khuram Iqbal, Assistant Superintendent Police Kotli.
 7. Madeeha Kausar, Section Officer, Health Secretariat, Muzaffarabad.
 8. Shumaila Arshid, Section Officer Finance Department Muzaffarabad.
 9. Hina Altaf, Staff Officer/ Section Officer office of Additional Chief Secretary, Muzaffarabad.
 10. Ambreen Asghar, Section Officer Services & General Administration Department Muzaffarabad.
 11. Shoaib Yaqeen, Section Officer, Interior (Home) Department Muzaffarabad.
 12. Khawar Ali, Assistant Superintendent Police Muzaffarabad.
 13. Munir Iqbal, Section Officer, Health Secretariat Muzaffarabad.

.....RESPONDENTS

14. Umar Farooq, Assistant Commissioner, Tararkhal District Sudhnuti, Azad Kashmir.
15. Usman Sarim, Assistant Commissioner, Hattian Bala, District Jehlum Vally Azad Kashmir.
16. Yasir Riaz, Assistant Commissioner, Mirpur Azad Kashmir.
17. Muneer Qureshi, Assistant Commissioner, Hajira, District Poonch, Azad Kashmir.
18. Raja Umer Tariq, Assistant Commissioner Authmuqam District Neelum, Azad Kashmir.
19. Raja Israr Ahmed, Section Officer, Prime Minister Secretariat Muzaffarabad.
20. Tanveer Gul Section Officer, Prime Minister Secretariat Muzaffarabad.

...PROFORMA-RESPONDENTS

[On appeal from the judgment of the Service Tribunal dated 28.10.2020 in service appeal No. 941 of 2019]

Appearances:

FOR THE APPELLANTS: Syed Asim Masood Gillani,
Advocate.

FOR THE RESPONDENTS: Mr. Asghar Ali Malik & Sardar
M. R. Khan, Advocates

Date of hearing: 08.02.2022

JUDGMENT:

Raza Ali Khan, J.— This appeal, by leave of the Court, has been filed against the judgment of the Service Tribunal of Azad Jammu & Kashmir, dated 28.10.2020, passed in service appeal No. 941 of 2019, whereby, the appeal filed by the appellants and proforma-respondents, herein, has been dismissed.

2. The facts forming the background of the captioned appeal are that the appellants, and proforma-respondents, herein, filed an appeal before the Azad Jammu & Kashmir Service Tribunal, stating therein, that the Azad Jammu & Kashmir Public Service Commission (*hereinafter to be referred as PSC*) advertised the posts of Assistant Commissioners, ASP's and Section Officers in the year 2011, 2012 & 2013, in response whereof, the

appellants and proforma-respondents, herein, applied for their appointments. The written test was conducted in the year 2015 and interview were held in July 2016, resultantly, the appellants and proforma-respondents, herein, were appointed as Assistant Commissioners, Assistant Superintendents Police and Section Officers on the recommendations of PSC, vide notifications dated 27.02.2017 & 31.03.2017. It was stated that they have also passed the final passing out examination held by Federal Public Service Commission. At the time of advertisement and selection process the Azad Jammu & Kashmir Civil Servants Act, 1976 and Azad Jammu & Kashmir Civil Servants (Appointment and Conditions of Service) Rules, 1977 were in vogue wherein, the methodology for determination of seniority is available. The official respondents framed the rules "The Azad Jammu &

Kashmir Section Officers, Assistant Commissioners, Assistant Superintendents of Police/ Probation, Training, Examination and Seniority) Rules, 2019, vide notification dated 21.08.2019, whereby, in Rule 7 & 11 of the impugned rules, it was mentioned that the inter-se-seniority of the probationers in their service/cadre/group shall be determined by the appointing authority after their successful completion of training programme and passing of final passing out examination in the manner as prescribed under rule 6 to be conducted by the Federal Public Service Commission. It was further stated that seniority of the appellants should be determined according to the order of merit compiled by the Public Service Commission because the selection of the appellants was made prior to the compilation of the impugned rules. The learned Service Tribunal after necessary proceedings, has

dismissed the appeal through the impugned judgment dated 28.10.2020.

3. Syed Asim Masood Gillani, the learned Advocate for the appellants forcefully argued that the impugned judgment of the learned Service Tribunal is against law and the record. He argued that the learned Service Tribunal has not taken into consideration the important points while handing down the impugned judgment. He further argued that the initial appointments of the appellants were made under the Rule of inter-se-seniority as enforced in AJ&K Civil Servants Act, 1976 and AJ&K Civil Servants (Appointment & Conditions of Service) Rules, 1977. The same were to be observed as per order of merit of PSC and the appellants, herein, cannot be deprived of inter-se-seniority as was in field at the time of advertisement, selection process

and the appointment. He further argued that the impugned rules to the extent of criteria for determination of the seniority is against the basic scheme of law and the respondents with clear mala-fide intention have formulated/amended the impugned rules just to accommodate their favourites especially the private-respondents, therefore, the impugned judgment of the Service Tribunal is not maintainable which is liable to be set-aside.

4. Conversely, Mr. Asghar Ali Malik, the learned Advocate appearing for respondents No. 1 to 5, forcefully defended the impugned judgment on the ground that the learned Service Tribunal has not committed any illegality while handing down the impugned judgment. He argued that all the conditions were mentioned in the appointment notification of the Public Service Commission and in

the light of those conditions, the test and interview was conducted and the seniority would also be determined on the basis of said conditions. He further argued that the Azad Jammu & Kashmir Civil Servants (Appointment and Conditions of Service) Rules, 1977, have been amended vide notification dated 07.09.2016, which has not been challenged nor the condition No. VIII mentioned in their appointment, thus, they have accepted the same. He submitted that the law of estoppel fully attracts in the case in hand as the appellants along-with seven others filed appeal before the Service Tribunal, whereby, they only challenged the notification dated 21.08.2019 and initial notification dated 07.09.2016, and the conditions mentioned therein was not challenged hence, the Service Tribunal has rightly dismissed the appeal on this point. He contended that the appellants while filing

an application has placed some documents on record which were not filed before the Service Tribunal, thus, they cannot be relied upon. In support of his contentions, the learned Advocate placed reliance on the cases reported as *AJK Government and others vs. M/s Spintex Limited [1998 SCR 167]*, *Syed Rasheed Hussain Shah vs. Azad Govt. & others [2014 SCR 883]*, and *Muhammad Saleem Khan vs. Qassim Khan & others [2018 SCR 623]*.

5. Sardar M. R. Khan, the learned Advocate appearing for respondents No. 6 to 13, while supporting the arguments advanced on behalf of Mr. Asghar Ali Malik, submitted that the rules had already been amended vide notification, dated 09.07.2016, prior to the appointment of the appellants and the Government has sole prerogative

to make or amend the rules under section 23 of Azad Jammu & Kashmir Civil Servants Act, 1976, which cannot be called in question. He contended that the appellants are trying to mislead the Court as the seniority of the appellants shall be determined as per enforced rules. He submitted that the appellants already acquiesced the notification dated 07.09.2016, as well as appointment notification while participating in FPOE exam/course and failed to adhere desired results, while on the other hand the private-respondents got succeeded in the course/training, final passing out examination, therefore, this appeal is not maintainable. The learned Advocate in support of his submission placed reliance on the cases reported as *Rizwan Muzaffar vs. Azad Govt. & others* [2010 SCR 156], *Azad Govt. & others vs. M. Naseer Chaudhary & others* [2010 SCR 186], *Fatima Bibi vs.*

Najma Parveen & others [2016 SCR 15] and Tabasam Arif vs. Azad Govt. & others [2013 SCR 134].

6. We have considered the arguments advanced on the behalf of the learned counsel for the parties and gone through the record of the case. It transpires from the record that the appellants and proforma-respondents were appointed on the recommendations of Public Service Commission as Assistant Commissioners, Assistant Superintendents Police and Sections Officers vide notifications, dated 27.02.2017 and 31.03.2017. The appellants claim that the seniority of the appellants should be determined under the Azad Jammu & Kashmir Civil Servants Act, 1976 and Azad Jammu & Kashmir Civil Servants (Appointment and conditions of Service) Rules, 1977, which were in vogue at the time of

selection and appointment of the appellants and the rules known as The Azad Jammu & Kashmir Section Officer, Assistant Commissioners, Assistant Superintends of Police (Probation, Training, Examination and Seniority) Rules 2019, have been framed after the appointment of the appellants, thus, they are not applicable to the appellants. This argument of the learned counsel for the appellants appears to have no force. The appellants have challenged the impugned notification dated 21.08.2019, to the extent of rule 7 and 11, whereby, it has been provided that the inter-se seniority of the probationers in their service cadre/group shall be determined by the appointing authority after their successful completion of training programmes and passing of final passing out examination in the manner as prescribed under Rule 6 to be conducted by the Federal Public Service

Commission. In Rule 11, it has been provided that the provisions of these rules in addition to the Azad Jammu & Kashmir Civil Servants (Appointment and conditions of Service) Rules, 1977, shall be having effect notwithstanding anything contained in any other rule or rules for the time being in force with regard to dealing with the matter of training including examination and determination of inter-se seniority of probationary Civil Servants. It is also germane to mention here that before promulgation of these rules, the Azad Jammu & Kashmir Civil Servants (Appointment and conditions of Services) Rules 1977, were amended vide notification dated 07.09.2016, i.e. prior to the issuance of the appointment notifications of the appellants, wherein Rule 8(1) (c) has been added which reads as follows:

-

“The inter-se seniority of the probationers of Management Group, Secretariat Group and Police Service of AJ&K appointed through AJK Public Service Commission shall be determined by the appointing authority after final passing out examination in the following manner: -

- i) Marks obtained in the competitive examination of AJ&K PSC.*
- ii) Marks obtained in the initial training program (CTP)*
- iii) Marks obtained in the specialized training program (STP)*
- iv) Marks obtained by qualifying in final passing out examination in the ‘first attempt’.*
- v) A probationer who does not qualify in the final passing out examination shall: -*
 - i. Lose his/her one increment if he/she fails in the first attempt;*
 - ii. If fails to qualify FPOE in second attempt but does it in the third attempt, will be relegated in the seniority to the bottom of his batch irrespective of aggregate marks obtained.*

vi) If a probationer is not nominated for training on compelling medical or administrative grounds, his/her seniority shall be determined with his/her own batch. In case of probation's own fault, seniority will be determined with the batch he/she goes under training."

The above amendment in the rules clearly postulates that the inter-se-seniority of the probationers of management group, secretariat Group and Police Service of AJ&K appointed through AJK PSC shall be determined by the appointing authority after final passing out examination. The perusal of the appointment notifications of the appellants demonstrates that the above-said rule was incorporated as condition No. (viii) in the appointment notifications which was necessary to be challenged but the same has not been challenged by the appellant and accepted the same by joining

their respective service in pursuance of the said appointment notifications and participating in the final passing out examination, hence, they are now estopped by their own conduct. It is the settled principle of law that if a person participates in the proceedings and fails to achieve the desired results, thereafter he cannot turn around and challenge the same. Reliance can be placed to the case reported as *Fatima Bibi vs. Najma Parveen & others* [2016 SCR 15], wherein, it has been held that: -

“...the appellant applied for the post, participated in the test and interview but could not qualify the same. After failing, he has challenged the process of selection. He has acquiesced and estopped by conduct from challenging the process of selection.”

The same point came under the consideration of this Court in the case reported as

Tabasam Arif vs. Azad Govt. & others [2013 SCR

134], wherein, this Court held that: -

“There is another aspect of the case that the petitioner in response to aforesaid advertisement applied for the aforesaid post. When he was not called for interview on the ground that he does not fulfil the qualification for the said post, he filed writ petition. The petitioner is estopped by his conduct from filing writ petition. If a person participates in the proceedings and fails to achieve the desired results, thereafter he cannot turn round and challenge the process.”

7. The appellants have also not challenged the notification of amended rules dated 07.09.2016, wherein, determination of inter-se seniority of probationers of Management group, Secretariat group and Police service appointed through PSC, was to be made subject to passing out of examination in the prescribed manner. It was

enjoined upon the appellants to challenge the same which they have failed to do so. Our this view finds support from the case titled *Syed Mushtaq Hussain Shah and others vs. Azad Govt. & others*, Civil PLA No. 627 of 2019, decided on 09.10.2019, wherein, the petitioners by accepting the promotion, joined the posts during pendency of their appeal before the Service Tribunal but did not challenge the same through separate appeal or by amending the pendency appeal, hence, leave was refused by the Supreme Court on the sole ground.

8. Besides this, it is also a settled principle of law that framing of rules is within the competence of Rules framing authority/ Government. Unless there is any violation of provisions of parent act or constitution, the Courts cannot interfere, advise or suggest the authority to make specific type of rules.

It has been held by this Court in a number of cases that framing of rules is the sole prerogative of the authority and the rules cannot be framed, amended or altered on the sweet-will of a party. In this regard, reliance can be placed to the case reported as *Syed Rasheed Hussain Shah vs. Azad Govt. & others* [2014 SCR 883], wherein, it has been observed by this Court that: -

“The vires of the rules have not been challenged at the relevant time. Moreover, the rules making authority is fully competent to amend the same and the act of authority cannot be declared illegal until the same is in conflict with the powers of parent act or the constitution. The learned counsel for the appellant failed to substantiate his claim that the amendment incorporated in the rules is inconsistent with the provisions of the Act or Constitution, therefore, in absence of that the same cannot be declared ultra vires. Even otherwise rules

cannot be framed/amended at the sweet-will of a party and it is the sole prerogative of the authority concerned to frame or amend the same.”

In the other case reported as Rizwan Muzaffar vs. Azad Govt. & 8 others [2010 SCR 156], it has been observed that: -

“Under section 23 of Civil Servants Act, 1976, the Govt. is competent to enhance, alter or amend the prescribed qualification for a particular post.... We have also examined the application moved by the father of respondent No. 4 to the Prime Minister. We agree with the contention of Kh. Muhammad Naseem that rules cannot be framed for the benefit of a particular person.”

Even otherwise, the Government or the competent authority may make or amend the policy or rules for appointment and promotion of the civil servants with the object of enhancing the efficiency and performance of a civil servants which is the

need of the hour. This view is fortified from the judgment of this Court in the case titled Sardar M. Khalil & others vs. Azad Govt. & others [2019 SCR 571], wherein, it has been observed that: -

“... it appears from the record that the appellants’ claim is based on such a righty which may accrue to them in future, it is very astonishing, if their claim is accepted then consequently, the way of making amendments in the rules shall be closed which is against the scheme of law. It may be observed here that enhancement in the minimum qualification for promotions/appointments is the need of the hour and when nothing is available on record to show that enhancements introduced through Rules, 2016, are ultra vires the Constitution or based on mala-fide then the power duly conferred to the Government by law cannot be shattered.”

9. There is another aspect of the case that the appellants have challenged the rule prematurely

as the same have not been interpreted against the appellants or to disadvantage them. The appeal is competent only when an order was passed regarding the terms and conditions of service of a civil servant. There is no provision existed in the Azad Jammu & Kashmir Civil Servants (Appeal Rules, 1991, or Azad Jammu & Kashmir Service Tribunal Act, 1974 to the effect that the departmental rules could be challenged even if the same were not interpreted to disadvantage of a civil servant. In this regard, we are guided by the reported judgment of this Court in the case titled Syed Zahoor Hussani Shah vs. AJK Govt. & others [2020 SCR 131], wherein it has been held that: -

“As in this case, the appellant has challenged the vires of the rules when no adverse order was issued nor the rules were interpreted or applied to the disadvantage of the appellant,

thus, the appeal was premature...”

The learned counsel for the appellant has also taken a stand that the impugned rules have been framed with mala-fide intention just to favour their favourites. The same is devoid of any force. This argument is hereby repelled.

In the light of above, we do not find any illegality in the impugned judgment justifying interference, therefore, this appeal having no backing in it, is hereby dismissed.

JUDGE
J-II

JUDGE
J-III

Muzaffarabad:
14.02.2022.

