IN THE SUPREME COURT OF AZAD JAMMU AND KASHMIR

(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE RAJA SAEED AKRAM KHAN, C.J.
MR. JUSTICE RAZA ALI KHAN

CIVIL APPEAL NO. 232 OF 2023

[Against the judgment dated 02.06.2023, passed by the High Court in writ petition No. 1946 of 2018]

Kanwal Shahzadi, wife of Raja Khalid Inayat, r/o Hallan Janoobi, Tehsil Haveli, District Haveli Kahutta.

…Appellant

VERSUS

Muhammad Naeem s/o Muhammad Bashir resident of Jokan Post Office Kahutta City, Tehsil Haveli District Haveli Kahutta and others.

…Respondents

Appearances:

For the Appellant:	Syed Atif Mushtaq Gillani, Advocate.
For the Respondents:	Sh. M. Saleem and Ch. Aqif-ud-Din, Advocates.

Date of hearing: 07.05.2024

JUDGMENT:

***Raza Ali Khan, J*: -** The captioned appeal, by leave of the Court, has arisen out of the judgment of the High Court dated 02.06.2023, wherein, the writ petitions filed by the respondents, herein, have been disposed of.

2. Briefly, the case revolves around the advertisement of a vacancy for the position of 'Male-Attendant B-1, by the proforma-respondents which also included other positions. Both the appellant and the respondents participated in the selection process. Eventually, Kanwal Shahzadi, the appellant herein, was appointed on the position of Attendant B-1. However, the respondents challenged the appointment through separate writ petitions filed before the High Court, alleging therein, that the appointment of the appellant, a female, to a position designated for males, was made with malicious intent. The learned High Court consolidated these writ petitions and, following due proceedings, issued the impugned judgment on 2nd June 2023, wherein, the following decision was rendered.

> "The sum and substance of the above discussion is that writ petitions stand disposed of in the terms that the appointment of private-respondent Kanwal Shahzadi dated 10.09.2018, is hereby set-aside and Chairman Ehtesab Bureau is directed to make inquiry in the matter with regard to legality, fairness and transparency of the selection process conducted by the respondents for the posts advertised through advertisement annexure 'B' and submit report to this Court through Registrar within a period of one month."

3. Syed Atif Mushtaq Gillani, the learned Advocate representing the appellant, contended that the impugned judgment of the High Court contravenes established legal principles, factual evidence, and the case record. He maintained that, as per the Azad Jammu and Kashmir Health Department Service Rules, 1984, the positions of Attendant B-1 do not specify any cadre, and including of term "male" in the advertisement contradicts these rules, indicating an error of authority rather than any fault of the appellant, who should not be penalized for the authority's mistake. He further contended that the appellant was initially allowed to participate in the selection process by the official respondents, and that was never contested by the respondents. Additionally, he argued that while the appellant applied for a position based on general merit, the private respondents applied for a position reserved for special person, making them non-aggrieved parties to challenge the appellant's appointment order. He concluded that the verdict of the High Court lacks legal foundation and is not aligned with the factual context.

4. On the opposing side, Sh. M. Saleem and Ch. Aqif-ud-Din, the learned Advocates representing respondents No. 1 & 2, asserted that the learned High Court judiciously issued the impugned judgment, warranting no intervention from this Court. They contended that out of the seven advertised positions for Male Attendants, one was allocated for disabled individuals. However, the appellant, being female, was appointed to a Male Attendant position, thereby blatantly violating regulations. Consequently, the High Court's decision to nullify her appointment order was justified. They further argued that the appellant's appointment was secured

through political influence, contravening the fundamental rights of the respondents. Therefore, they concluded that the High Court's decision stands sound and should not be disturbed by this Court, thereby recommending the dismissal of the appeal.

5. After considering the arguments presented by the learned counsel for both the parties and thoroughly examining the case record it is apparent that seven vacancies for the position of Male Attendant, B-1, were advertised by the proforma-respondents, including one specifically reserved for disabled persons and one for Refugees. The appellant, along with the respondents herein applied against one of the posts, participated in the test and interview. Eventually, Kanwal Shahzadi, the appellant, herein, was appointed to one of the positions, however, the respondents contested the appellant's appointment by filing separate writ petitions before the High Court, alleging that the appointment was made with malicious intent, as the appellant, being female, was appointed to a position designated for male cadre. It appears prima facie that there is validity to the contention that, based on the advertisement, vacancies for Male-Attendant were advertised, and yet the appellant, who is female, has been appointed, however, it is imperative to ascertain whether the advertisement was issued in accordance with the rules governing the said position. In the pursuit of justice, we have conducted a thorough examination of the entire record alongside the relevant rules. The rules dealing with the post in question are The Azad Jammu and Kashmir Health Department Service Rules, 1984, the criterion for the said post is outlined under serial No. 112. For clarity, the relevant portion is reproduced herein:

1	2	3	4	5	6	7	8	9	10	11
112	-do-	Ministerial	Lab Attendant/ Blood Slide Carrier/ Attendant B-1	Officer in B-16/17, in respective jurisdiction	(i) Literate (ii) On the basis of suitability and fitness	(i)As per col. 8 (ii) Literate	By initial recruitment as per col. 6	18	28	--

Per the aforementioned regulations, it is evident that the term 'male' is absent from the rules, indicating no explicit gender-based restriction on candidates applying for the post instead the regulations designate the same as 'Attendant B-1'. This prompts the question as to why the term 'male' was included alongside the post in the advertisement if the rules are quite clear. This question was raised to the learned counsel for the respondents by the Court during arguments, but their response merely suggested that the advertisement was not issued in accordance with rules. It is settled principle of law that if a particular act is required to be performed according to a prescribed manner that act should be performed according to that manner or not at all. All the organs of the State and executive authorities are either creation of the AJ&K Interim Constitution, 1974 or any the relevant Act. Each organ of the State and executive and departmental authorities are required to perform their respective functions as prescribed under Constitution or relevant Act and rules. In performance of any act by the State Organs, executive or departments deviation from Constitutional command, any provision of Act or rules is interfered with and set aside by the Courts.

6. The manner and structure of civil service and terms and conditions of civil servants are provided and regulated under Article 49 of AJ&K interim Constitution, 1974, AJK Civil Servants Act, 1976, various Rules and

departmental rules framed under section 23 of the AJ&K Civil Servants. Article 49 of the AJ&K, which lays down principal mandate for provision of legal regime to regulate civil service in AJ&K. It will advantageous for us to reproduce Article 49 of the AJ&K Interim Constitution,1974, which is as under:-

> "49. The Services.- (1) Subject to the Constitution, the appointment of persons to and the terms and conditions of service of persons in, the service of Azad Jammu and Kashmir may be regulated by law.
>
> (2)……'…."

The above Constitutional will and command require that appointments into service of AJ&K and terms and conditions of civil servants may be regulated by law, meaning thereby that all matters relating to civil servants shall be conducted under prescribed Act, rules or regulations or any other law. AJ&K Civil Servants Act, 1976, has been enacted to provide for law and regulate the terms and conditions of civil servants. Section 4 of the Act, 1976, supra, deals with the appointments in civil service of AJ&K. For our convenience same is reproduced here as under:-

> " 4. Appointments:- Appointments to civil service of Azad Jammu & Kashmir or civil post in connection with the affairs of the Government, shall be made in the prescribed manner by the Government, or by a person authorized by it in that behalf."

The essence of section 4, supra is that appointment to civil service or a civil post has to be made in prescribed manner. The Government of AJ&K, having powers under section 23 of the AJ&K Civil Servants Act, 1976, has framed AJ&K Civil Servants (Appointment and

Conditions of Service) Rules, 1977. Rule 3 of the said Rules, deals with appointments, which is reproduced as under:-

> "3. Appointment:- Appointment to posts shall be made by promotion, transfer or initial recruitment, as may be prescribed by the Government in relation to the posts in a grade from time to time.
>
> (2)…..
>
> (3)….
>
> (4)….
>
> (5)…. "

Rule 17 of AJ&K Civil Servants (Appointment and Conditions of Service) Rules, 1977, initial appointments to all posts shall be made after advertisement of the vacancy in the newspapers. For regulating the service of civil servants in the AJ&K Health Department, and making the appointments and setting terms and conditions, AJ&K Health Department Service Rules, 1984, supra, have been framed. A juxtaposed examination of Article 49 of AJ&K Interim Constitution, 1974, Section 4 and 23 of AJ&K Civil Servants Act, 1976, Rule 3 and 17 of AJ&K Civil Servants (Appointment and Conditions of Service) Rules, 1977 and the criterion for the post of Attendant, B-1, outlined under serial No. 112, provides adherence to prescribed eligibility and manner for appointment against the said post. No gender based distinction has been made against the post and post was required to be advertised and filled as required under the relevant supra departmental service rules. Our view is fortified by judgment of this Court delivered in case titled *Ajaz Hussain v. Azad Govt. & others*[1], as under:-

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[1] [2015 SCR 367]

> " According to law the appointment against the civil post can only be made in the prescribed manner. In this regard reference…….. from time to time. "

In the instant case the concerned authority advertised the post and made only "males" eligible for the post of Attendant whereas in the Rules, 1983, supra, no bar is provided for females for the post. The inclusion of said condition reflects the mala fide of the authority. No Government or the public authority may deviate from the prescribed qualification or eligibility as provided under service rules except if law permits as such.

7. We are concerned of the fact that on one hand, the department published the advertisement, candidates applied accordingly, and when a candidate is appointed based on merit and acquires a vested right, it is apparent that the advertisement was not issued in compliance with the relevant rules. In this case, the departmental authorities permitted the appellant to participate in the test and interview, included her in the merit list, and subsequently appointed her based on merit. Therefore, when she was initially allowed to participate, no objections were raised, nor was the decision to allow her participation challenged. Consequently, a vested right was established in favor of the appellant, which cannot be revoked under the guise of any mistake of the authority. It is a well-established legal principle that an individual cannot be penalized for the actions or oversights of the authority. In this regard reference may be made to the case reported as Muhammad *Irfan Ali Gorsi vs. Azad Govt. and others*[2], wherein, this Court held as under: -

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[2] [2014 SCR 710]

> 8. According to celebrated principle of law, no one can be penalized for the wrong of others. It is divine command in Surah Alqamar, Chapter No. 27 Verse No. 38 of the Holy Quran, that: -
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> **الا تزرو وازرة وزرا اخرای** which means 'کوئی شخص کسی کا گناہ اپنے اوپر نہیں لے سکتا" and following this principle, the Courts have always enunciated the principle of law that no one can be penalized wrongs or illegal action, negligence, mal-practice and maladministration ofthe others. In the light offacts discussed hereinabove, mal-administration, carelessness, wrong committed by the officials of Nomination Board is apparent on the face of record. Thus, the appellant cannot be penalized for their wrong or be deprived of his vested legal right. Once the appellant is approved for nomination, vested legal right has been created in his favour. Our this view finds support from the chain of cases reported as Muhammad Ammer and another vs. Muhammad Shoukat and 3 others, [2003 SCR 450], and Nasreen Akhter & others vs. Sameena Bilqees & 3 others, [2006 SCR 312], Mst. Shakeela Anjum and another v. Imran and others [2009 SCR 180].

8. Furthermore, the unauthorized inclusion of the term ‘male’ alongside the description of the post in the Advertisement dated 23.01.2018, was completely ultra-vires to the Constitutional guaranteed rights of the appellant. In a society built on principles of justice and equality, the fundamental rights of individuals constitute the cornerstone of the legal framework. Among these rights, the principle of equal treatment holds paramount importance, particularly concerning women, given the historical injustices and systemic inequalities they have faced. It's crucial to elucidate how fundamental rights safeguard and promote equal treatment for women within the legal system. The Constitution, as the supreme law of the land, embodies the ideals of equality and justice for all citizens, irrespective of gender. Fundamental Right No. 15 & 17 of the Constitution unequivocally affirms the right to equal treatment, emphasizing that all individuals, including

women, are entitled to equal protection under the law. This Constitutional provision lays the foundation for addressing gender-based discrimination and upholding the principle of gender equality as a fundamental principle.

9. Article 4(4) of the AJ&K Interim Constitution, 1974, explicitly provides 24 fundamental rights, among these right No. 15 deals with equality of State Subjects. Article 4(4) (15) is reproduced here which is as under:

> " 4. Fundamental Rights.- (1) Any law or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred by this Article, shall, to the extent of such inconsistency, be void.
> (2) No law shall be made] which takes away or abridges the rights so conferred and any law made in contravention of this sub Article shall, to the extent of such contravention, be void.

Article 4 postulates that any law or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred by this Article, shall to the extent of such inconsistency, be void. The Scheme and spirit of the Constitution and all laws is to protect, advance and safeguard the constitutionally guaranteed fundamental rights. any law the application of which results into abridging and taking away such rights, is null and void. Right No. 15, which deals with equality of State Subjects is reproduced here, which is as under:

> 15. Equality of State Subjects.- (1) All State Subjects are equal before law and are entitled to equal protection of law.
> (2) There shall be no discrimination against any State Subject on the basis of sex. (
> 3) Nothing in this Article shall prevent the state from making any special provision for the protection of women and children."

Right No. 15, provided under Article 4(4) of Constitution safeguards equality among State Subjects before law and ensures equal protect of law The Constitution explicitly mandates that no individual shall be subjected to discrimination on the basis of sex. Right No 15(1), ensures that all State subjects are equal before law and are entitled to equal protection of law. Right No. 15(2), further prevents inequality between genders and lays down that there shall be no discrimination on basis of sex. This constitutional safeguard serves as a bulwark against discriminatory practices and policies perpetuating gender disparities. It ensures women enjoy the same rights and opportunities as their male counterparts, free from prejudice or bias. Furthermore, the principle of equal treatment extends beyond non-discrimination to affirmative action and special provisions aimed at rectifying historical injustices and addressing gender-based disparities. Right No. 15(3), supra, empowers the state to do positive discrimination in favour of women and enact special measures for the protection and advancement of women, recognizing the need to mitigate socio-economic inequalities and promote substantive equality. The Supreme Court of Pakistan in its judgment tilted *Shirin Munir v. Govt. of Punjab through Secretary Health Lahore and another*[3], while making reliance on Article 25(3) of the Constitution of Islamic Republic of Pakistan, which is pari materia provision of article 4(4)(15)(3) of Constitution of AJ&K, supra, upheld the positive discrimination in women medical colleges where only women were entitled for enrollment as well as

[3] [PLD 1990 SC 295]

abolished gender-based quota system for admission in medical colleges which were established for both genders.

10. Simultaneously, fundamental Right No. 17, is also very pertinent to the case in hand as it deals with and shuns discrimination in services on basis of gender among others and in the instant case matter is also based on gender discrimination for induction into service contrary to departmental service rules which does not create and gender-based cadre or reserve post of attendant only for males. Right No. 17 is reproduced here, which is as under:

> "**17. Safeguard against discrimination in services.-** No State Subject otherwise qualified for appointment in the service of Azad Jammu and Kashmir shall be discriminated against in respect of any such appointment on the ground only of race, religion, caste, residence, sex or place of birth:
>
> Provided that in the interest of the said service, specified posts or services may be reserved for members of either sex if such posts or services entail the performance of duties and functions which cannot be adequately performed by members of the other sex:
>
> Provided further that under-representation of any class or area in the service of State may be redressed in such manner as may be determined by an Act of Assembly"

It is clear from juxtaposed reading Right No. 15 and 17 that there shall be no gender based discrimination. Right No. 15 ensures equal treatment under the law however Right No 15(3) provides that nothing in this article shall prohibit the State from making special provisions for the protection and welfare of women and children. This means that the Constitution has given the State a remedial power to protect women and children and provide affirmative action notwithstanding the fact that everyone is

to be treated equally under the law. Therefore, the Constitution has itself recognized and created a classification which needs special protection. Right No. 17 provides that no citizen shall be discriminated against in respect of any appointment he is otherwise qualified for only on the ground of race, religion, caste, sex or place of birth. Right No. 17, provides for a safeguard against discrimination in service. The safeguard ensures that the State will not commit gender-based discrimination. In our case, the concerned authority while issuing advertisement of the post as well as the learned High Court while issuing the writ without appreciating the relevant departmental service rules and the spirit of right No.15, set aside the appointment of the appellant.

11. It is important to note that both respondents actively participated in the test and interview process without any objection regarding the participation of the appellant, who is a female. Having completed the selection process without achieving the desired outcome, they cannot now suddenly reverse their stance and challenge the legitimacy of the selection process because they acquiesced and estopped by conduct from challenging the selection process. Reference may be made to the case reported as *Fatima Bibi vs. Najama Parveen and others*[4], wherein, it has been observed as under: -

> "The High Court has dismissed the writ petition on the ground 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. There is no illegality in the judgment of

[4] [2016 SCR 15]

the High Court. The writ petition was liable to be dismissed on the sold ground.

In another identical case reported as *Suleman Ahmed vs. Tanveer Ahmed Mir*[5], wherein, it has been held as under: -

> 8. We also agree with the contention of the learned counsel for the appellant that respondent No. l in pursuance of advertisement, wherein one of the terms and conditions was that if suitable candidates from Muzaffarabad District were not available, the same may be filled up by any suitable candidate from other Districts. The respondent duly participated in the test and interview after going through the terms and conditions of advertisement published by the Public Service Commission and surrendered himself to its jurisdiction. As the respondent could not qualify the test, he was not an aggrieved person to challenge the selection of appellant by filing a writ petition. Our aforesaid view is supported by a case reported as Muhammad Sharif vs. Muhammad Manzoor and others [1993 SCR 92], wherein it was observed that a party is estopped by his conduct in the proceedings by taking a specific position. Thus, the appeal was dismissed on the ground that appellant is estopped from changing his stand.
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> 9. We may also observe here that in the subsequent notification dated Jan. 30, 1997, although the notification dated 5th July, 1972 was repealed, but all the same the Public Service Commission in its advertisement clearly stated that if suitable candidates from Muzaffarabad District were not available, the post in question shall be filled in on the basis of open merit. No contrary advertisement of the Public Service Commission was placed on record. Therefore, when the Public Service Commission itself offered the candidates that if suitable I C candidates from Muzaffarabad District were not available, the vacancy shall be filled in on the basis of open merit, the appellant could not have been penalized for the fault of the Public Service Commission.

12. Article 44 of the AJ&K Interim Constitution, 1974, empowers the High Court of AJ&K to issue appropriate writ or direction to person performing functions in connection with affairs of AJK to act in a way as he is required under law to do such act or abstain from doing any act which he is not authorized under law to do

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[5] [2001 SCR 282]

any such act and writ may be issued only on violation of any law, statutory provision, rules or celebrated principle of law not otherwise. Further, writ cannot be issued to restore any act which is otherwise against law or rules and later on, rectified by authority and High Court set aside such rectifying order while issuing writ. Our this view is supported by a recent judgment of this Court made in case titled *Amjad Hussain vs. Khuram Nawaz Rathore & 3 others*[6], wherein it has been held as under:

> " The High Court has been empowered under Article 44 of AJK Interim Constitution, 1974, to issue appropriate writ to person performing function in connection with the affairs of AJK to act in the way he is required by the law or abstain from doing any act which, he is not required to do under the law. Our this view is fortified by the judgment this Court reported as Basharat Mehmood vs. Raja M. Waleed & others, [2017 SCR 257], wherein , it has been observed that"-
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> "The first point regarding the competency of the writ petition against the order passed by the Civil Court is of vital importance. According to the statutory provisions of section 44 of the Azad Jammu and Kashmir Interim Constitution Act, 1974, while exercising the writ jurisdiction the High Court has to determine whether any person performing the functions in connection with the affairs of the Azad Jammu and Kashmir has acted according to law or not, or has failed to do what the law requires to be done"

In the instant case the learned High Court without going into the qualification and eligibility provided for the post in the relevant service rules, supra, gave preference to the conditions mentioned in the advertisement. Where requirement of law is that advertisement is to follow and yield to the service rules

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[6] [2022 SCR 1153]

and if any condition has been mentioned in advertisement which is in derogation of such rules that must be ignored and not followed.

13. The judiciary as the guardian of fundamental rights, plays a crucial role in upholding the principle of equal treatment for women. Through the legal precedents, the Courts have reaffirmed the constitutional guarantees of gender equality and non-discrimination specially in the cases where there is no gender-based distinction in the rules.

14. Before we conclude, it's imperative to address a concerning trend of mal-practices that have been increasingly prevalent in the cases brought before this Court. In almost every case we handle, we are confronted with instances where improper conduct by authorities has sparked legal disputes. In the present case, the root of issue lies in the release of advertisement for the post in question, which directly contravened the relevant rules. This breach of protocol has led to prolonged and often unjustifiable litigation, as parties become embroiled in legal battles triggered by the unlawful actions of authorities. Regrettably, this is not an isolated incident but rather a recurring theme that permeates the fabric of our judicial system. Despite our repeated directions to competent authorities to address these issues, it is disheartening to note that our concern seems to have been disregarded. This persistence of malpractices not only undermines the integrity of our legal system but also erodes public trust in the fairness and efficacy of government institutions.

15. Hence, it is imperative that we issue a stern warning to all Governmental functionaries to exercise

greater care and diligence in their actions to prevent the recurrence of such cases. They must ensure strict adherence to the rules and regulations governing their respective domains and operate within the bounds of the law. Failure to do so not only risk legal repercussions but also perpetuates a culture of impunity that undermines the principles of justice and accountability. As a further measure to underscore the seriousness of this issue, we have decided to circulate a copy of this judgment to all government departments of the State through Chief Secretary. It is our hope that this will serve as a wake-up call and motivate action towards greater compliance with legal requirements. Ultimately, our good is to foster a culture of transparency, accountability, and adherence to the rule of law within government institutions, thereby upholding the principles of justice and ensuring the efficient and equitable administration of justice for all.

16. In view of the above detailed discussion, we are of the view that the High Court has committed grave illegality in rendering the judgment in vacuum, which is not sustainable in the eye of law, therefore, while accepting this appeal, setting aside the impugned judgment of the High Court, resultantly, the appointment of the appellant, herein, is deemed valid. The writ petitions filed by the respondents stand dismissed. No costs awarded. Copy of this Judge shall be sent to Chief Secretary for compliance and circulation.

JUDGE **CHIEF JUSTICE**

Mirpur,
15.05.2024
Approved for reporting.