SUPREME COURT OF AZAD JAMMU & KASHMIR

[Appellate Jurisdiction]

PRESENT:

Raja Saeed Akram Khan, C.J.
Kh. Muhammad Naseem, J.
Raza Ali Khan, J.

CIVIL APPEALS NO. 155, 156, 197, 198, 199, 200, 201, 202, 203 OF 2024

(Against the judgments/orders of the Subordinate Judiciary Service Tribunal dated 03.04.2024, 03.04.2024, 07.06.2024, 01.04.2024, 07.06.2024, 07.06.2024, 03.04.2024, 03.04.2024 & 07.06.2024)

Arbab Azam & others
(In C. A. No.155)

Idrees Bhatti & others
(In C.A. No.156)

Syed Zulfiqar Hussain Shah
(In C.A. No.197)

Jahangir Ahmed & others
(In C.A. No.198)

Nighat Sultana & others
(In C.A. No.199)

Jahangir Ahmed & others
(In C.A. No.200)

Syed Waseem Ahmed Gillani & others
(In C.A. No.201, 202, 203)

…. Appellant(s)

VERSUS

Kh. Habib-ur-Rehman & others
(In C.A. No.155)

Muhammad Yousaf Haroon & others
(In C.A. No.156)

Competent Authority & others
(In C.A. No.197)

Khalid Hussain Saqib & others
(In C. A. No.198, 199, 200)

Kh. Habib-ur-Rehman & others
(In C.A. No.201)

M. Yousaf Haroon & others & others
(In C.A. No.202)

Raja Khalid Asghar & others & others
(In C.A. No.203)

…. Respondent(s)

-:-:-:-:-:-:-:-:-:-:-

For the appellants: Raja Amjad Ali Khan & Raja Ishtiaq Ahmed Khan, ASC.
(In C.A. No.155)

Manzoor Hussain Raja, ASC.
(In C.A. No.156)

Mr. Abdul Rasheed Abbasi, ASC.
(In C.A. No.197)

Syed Atif Mushtaq Gillani, ASC along with Saqib Javed, ASC (in C.A. No.201)
(In C.A. No.198, 200, 202, 203)

Sardar M. R. Khan, ASC.
(In C.A. No.199)

For the respondents: Barrister Humayun Nawaz Khan & Sardar M. R. Khan, ASC.
(In C. A. No.155 and 203)

Raja Sajjad Ahmed Khan, ASC.
(In C.A. No.156)

Mr. Shehzad Shafi Awan, ASC.
(In C.A. No.197)

Mr. M. Sagheer Javed, ASC.
(In C.A. No.198)

On Court's call: Sheikh Masood Iqbal, Advocate General.

Date of hearing: 26.06.2024

JUDGMENT

Raja Saeed Akram Khan, C.J.- Although the facts of the titled cases differ, however, all the appeals involve the same legal proposition, which has already

been resolved by us through a short order dated 26.06.2024 in the following manner:-

> *"In all the titled petitions an important legal proposition regarding the establishment of the Azad Jammu and Kashmir Subordinate Judiciary Service Tribunal* ***(Tribunal)*** *is involved, therefore, all the petitions are converted into appeals.*
>
> *Section 3 of Azad Jammu and Kashmir Subordinate Judiciary Service Tribunal Act, 2016 speaks that:*
>
> *"3. Tribunal. (1) The President may, subject to sub-section (3), by notification in the official gazette, establish a service Tribunal for the Members of Subordinate Judiciary of the Azad Jammu and Kashmir.*
>
> *(2) The Tribunal shall have exclusive jurisdiction in respect of matters relating to the terms and conditions of service of the Members of Subordinate Judiciary, including disciplinary matters.*
>
> *(3) The Tribunal shall consist of two judges of the High Court or Shariat Court as the case may be, nominated by the Chief Justice of the High Court, the senior most of whom shall be the Chairman."*
>
> *A notification dated 09.03.2024 shows that the Hon'ble Chief Justice in terms of section 3, supra, has constituted/established the Tribunal, however, we are of the unanimous opinion that the Hon'ble Chief Justice was only empowered to nominate two judges of the High Court or Shariat Court, as the case may be, and the said nomination was required to be notified in terms of sub-section (1), read with sub-section (3) as both the sub-sections are interlinked and cannot be read in isolation.*
>
> *Therefore, for the reasons to be recorded later on, all the titled appeals are accepted while setting aside the impugned judgments passed by the Tribunal. The appeals filed before the Tribunal shall be deemed pending till the valid constitution of the Tribunal.*
>
> *In view of the above, entire structure based on the impugned judgments has fallen, therefore, in exercise of the powers vested in this Court under Article 42-A of the Azad Jammu and Kashmir Interim Constitution, 1974 read with Order XLIII, Rule 5 of the Azad Jammu and Kashmir Supreme Court Rules, 1978 all the promotion/demotion notifications issued in pursuance of impugned judgments of the Tribunal are also set aside with immediate effect."*

This judgment contains the detailed reasons for short order (supra).

2. Since we have decided these appeals based solely on the legal proposition, it would be unnecessary

to narrate the specific facts of each case here as it would merely lengthen the judgment without serving any practical purpose.

3. Syed Atif Mushtaq Gillani, Advocate, argued the case at length. He submitted that there exists no lawfully established Subordinate Judiciary Service Tribunal (Tribunal). To elaborate this argument, he submitted that the Tribunal was constituted through the Azad Jammu and Kashmir Subordinate Judiciary Service Tribunal Ordinance, 1996 on 27.06.1996. By virtue of section 3(1) of the said Ordinance, the President was empowered to establish a Service Tribunal, by a notification in the Official Gazette, however, no such Tribunal was established, and the Ordinance expired. This Ordinance was repromulgated on 17.05.2011 (Ordinance No.XX of 2011). In pursuance of this Ordinance, the Tribunal was established by the President vide notification dated 24.08.2011. The Tribunal so established become non-existent on 16.09.2011 as the aforesaid Ordinance was not laid before the Assembly. He added that though the Worthy President promulgated a fresh Ordinance (No.XLIX of 2011) effective from 17.09.2011, however, by virtue of said Ordinance neither the notification dated 24.08.2011 was saved nor the Tribunal established under Ordinance XX of 2011 was given any sort of protection. He added that the Ordinance was repromulgated again and again but even after the enforcement of Act IX of 2016, the President has not established a Tribunal for the members of subordinate judiciary by adopting the procedure provided in all the Ordinances and Act. Therefore, there exists no Tribunal, hence, all the

impugned orders/judgments are coram-non-judice. He further argued that although the Hon'ble Chief Justice of the High Court vide notification dated 09.03.2024 has constituted the Tribunal but under section 3(3) of the AJ&K Subordinate Judiciary Service Tribunal Act, 2016 *(Act, 2016)*, the Chief Justice is only empowered to nominate the Chairman and Member of the Tribunal established by the President under section 3(1) of the ibid, and has no prerogative to itself constitute a Tribunal.

4. Conversely, learned counsel representing the other side submitted that no new point can be raised before this Court. The point raised by Mr. Gillani for the appellants was never raised before the Tribunal, hence, it cannot be allowed to be taken up for the first time before this Court. They referred to section 9 of Act, 2016 and submitted that all actions taken, decisions made, order passed, proceedings initiated, power exercised, power conferred etc., before the commencement of this Act, shall be deemed to have been validly taken, made, passed, issued, initiated, exercised, conferred, imposed etc., under Act, 2016. In view of this saving clause the Tribunal established by the President stood protected and there was no need to re-establish it. They further argued that the notification dated 09.03.2024 issued by the High Court is mere a nomination of Judges and not establishment of the Tribunal. The word "تشکیل" is mere a typing error. According to them, the Tribunal was validly established/constituted and the Chairman and Member were also nominated in terms of section 3 of Act, 2016, hence, the argument raised by Mr. Gillani is not tenable.

5. We have heard the learned counsel for the parties and gone through the record.

6. The sole proposition involved in all the titled appeals is whether the Tribunal was lawfully constituted. To resolve the proposition, let's first discuss the history of law relating to establishment of Tribunal. On 27.06.1996, an Ordinance No.XXXIII was promulgated to constitute a Tribunal for the members of Subordinate Judiciary. This Ordinance was not laid before the Assembly; hence, it expired by operation of law. Subsequently, an Ordinance No.XX of 2011 was promulgated on 17.05.2011 for the same purpose. By virtue of section 3(1) of the Ordinance, ibid, the President of Azad Jammu and Kashmir established a Service Tribunal vide notification dated 24.08.2011 which reads as under:-

> **"AZAD GOVERNMENT OF THE STATE OF JAMMU AND KASHMIR**
> Law, Justice, Parliamentary Affairs and Human Rights Department
>
> Muzaffarabad
> 24th August, 2011
>
> **NOTIFICATION:**
>
> No. LD/AD/1449-70/11. In exercise of powers conferred under Section 3(1) of Azad Jammu and Kashmir Sub-Ordinate Judiciary Service Tribunal Ordinance, 2011, the President has been pleased to establish a Service Tribunal for members of subordinate judiciary of Azad Jammu and Kashmir.
>
> 2. The Tribunal shall consist of two Judges of High Court or Shariat Court, as the case may be, nominated by Chief Justice High Court in term of sub-section (3) of Section 3 of the said Ordinance.
>
> Section officer (AD)"

Ordinance No.XX of 2011 stood repealed by lapse of time on 16.09.2011 and a new Ordinance No.XLIX was promulgated on 26.09.2011 with effect from 17.09.2011. Thereafter, repeated re-promulgations were

made through Ordinances No.IV of 2012, XXVII of 2012, LVI of 2012, XIV of 2013, XLIX of 2013 and LXXXVI of 2013. It is the assertion of Syed Atif Mushtaq Gillani, Advocate, that these Ordinances were promulgated with a span of few days, hence, it was the requirement of law to again establish the Tribunal in terms of section 3 of Act, 2016, however, we are of the view that all these Ordinances merged into an Act of Assembly (i.e., Act No.IX of 2016), section 9 of which speaks that:-

> *"9. Savings.- all actions taken, decisions made, order passed, proceedings initiated, power exercised, power conferred etc., before the commencement of this Act, shall be deemed to have been validly taken, made, passed, issued, initiated, exercised, conferred, imposed etc., under this Act."*

Therefore, in view of this saving clause all the prior actions taken have been given protection of law, meaning thereby that the notification dated 24.08.2011 relating to establishment of Tribunal was also saved. However, we are of the view that after issuance of notification dated 24.08.2011 the next step was the constitution of Tribunal by nominating Chairman and Member of Tribunal. In this regard, it is appropriate to refer here section 3 of Act, 2016 which reads as under:-

> *"3. Tribunal. (1) The President may, **subject to sub-section (3)**, by notification in the official gazette, establish a Service Tribunal for the Members of Subordinate Judiciary of the Azad Jammu and Kashmir.*
>
> *(2) The Tribunal shall have exclusive jurisdiction in respect of matters relating to the terms and conditions of service of the Members of Subordinate Judiciary, including disciplinary matters.*
>
> *(3) The Tribunal shall consist of two judges of the High Court or Shariat Court as the case may be, nominated by the Chief Justice of the High Court, the senior most of whom shall be the Chairman."*
>
> *(underlining is ours)*

A plain reading of above provisions shows that the President may, subject to sub-section (3), by notification in the official gazette establish a Tribunal. In Blak's Law Dictionary, 5th Edn. at page 1278, the expression 'subject to' has been defined as under:

> *"Liable, subordinate, subservient, inferior, obedient to; governed or affected by; provided that; provided; answerable for. Human v. Employers Reinsurance Corp."*

Upon proper interpretation of the provision, the use of the words "subject to" refers to effectuating the intention of the law, and the correct meaning, in our opinion, is "conditional upon." Therefore, sub-section (1) is conditional upon sub-section (3) of section 3 which requires the nomination of Judges by the Chief Justice of the High Court. In our opinion, both the sub-sections are interlinked and cannot be read in isolation. In this context, for the constitution of the Tribunal the Chief Justice of the High Court was required to nominate the Judges and forward the nominations to be notified under sub-section (1) in the official gazette, but this procedure has not been adopted in this case rather vide notification dated 08.03.2024, the Hon'ble Chief Justice himself constituted the Tribunal. If for the sake of argument, this constitution is deemed to be a nomination even then this nomination was required to be notified under sub-section (1) and not by the High Court. It is established legal principle that where an Act or rules prescribe a specific mode for performance of an act then such act should be performed according to that matter otherwise it should not be performed at all in contravention of that method and any deviation from it is impermissible. This principle

is well exemplified in *Muhammad Younis Tahir's case* [2012 SCR 21], in the following manner:-

> *"It is celebrated principle of law that when a particular method for performance of an act is prescribed under an Act or Rules, then such act must be performed according to that particular method or not at all".*

This view was reiterated in the case reported as *M. Munir Raja vs. Chairman AJ&K Council & others* [2018 SCR 48] wherein, it was held that:-

> *"It is now almost settled principle of law that when a particular method of performance of an act is prescribed under an Act or Rule then such act must be performed according to the prescribed method alone or not at all."*

In another case reported as Muhammad Idrees v. Collector of Customs and others [PLD 2002 Karachi 60], it was observed as under:-

> *"A perusal of the provisions contained in section 201 of the Customs Act and in the rules shows that everything has been clearly and meticulously prescribed under the statute law and the rules framed thereunder. There is no indication of any procedure of post-auction private offers or receiving of any higher bid as provided in the two Standing Orders. It is thus abundantly clear that the Collector of Customs has exceeded his jurisdiction in making provision for post auction bids, thereby contravening the provisions contained in section 201 of the Customs Act and in the rules framed by the C.B.R. It is established principle of law that the things should be done as they are required to be done or not at all. Nobody can be allowed to contravene, flout or violate the statutes or the rules framed thereunder in the name of national interest or any other so-called high or sublime idea or ideal. The rule of law requires that every person in execution of law should follow strictly the law as laid down and should not exceed the limit of law for any reasons whatsoever."*

That's why we have accepted the appeals via our short order and set aside the impugned judgments.

7. Now, the question arises what the fate of titled appeals will be. The answer is simply that all the appeals shall be deemed pending because as stated hereinabove

that the notification dated 24.08.2011 was saved by virtue of section 9 of Act, 2016, hence, the appeals were validly instituted but all the subsequent proceedings were coram-non-judice as the Chairman and Member of the Tribunal were not nominated by adopting the procedure provided under law. Therefore, it is held that in all the appeals de novo process shall be initiated.

8. Before parting with, we have noted from the perusal of the record that in the case titled *Arbab Azam vs. Kh. Habib ur Rehman* (C.A. No.155/2024), this Court passed following order on 18.04.2024:-

> *"This application under Order VI, Rules 1 and 2 of the Azad Jammu and Kashmir Supreme Court Rules, 1978 for urgent hearing and ad-interim ex-parte relief has been placed before the Court during pendency of petition for leave to appeal under completion in the registry office.*
>
> *The case has been heard through video link. Barrister Humayun Nawaz Khan, Advocate, also appeared at this preliminary stage on behalf of the respondents. A query was made to the learned counsel for the petitioners whether in pursuance of impugned judgment of High Court any order of reversion has been passed; he replied in negative. Fresh seniority list has also to be compiled yet, hence, it is appropriate to take up this application along with petition for leave to appeal on its completion. Meanwhile, the status quo prevailing at the moment shall be maintained."*

Subsequently, leave was granted on 30.05.2024 and the status quo already granted was ordered to be continued till disposal of appeal and the order was duly communicated to the High Court on 31.05.2024. Literally the 'status quo' means "the situation that currently exists", and the order of status quo means that the situation currently existing i.e. at the time of order should not be changed. Plainly stated, the import of order is that nothing further be done with respect to the subject of the dispute so as to change its

features or character. This term in simple words means "صورت موقع جوں کی توں بحال رہے", as elaborated by this Court in an interim order passed on 01.11.2022 in the case titled *Yasir Safeer Mughal vs. Azad Government & others* [Civil Appeal No.538 /2020 decided on 14.02.2023]. In Black's Law Dictionary, the word "status-quo' has been defined as under-

> *"Status-quo:--- The situation that existed before something else (being discussed) occurred."*

In New Shorter Oxford Dictionary, the word 'status-quo' has been defined as under-

> *"Status-quo:-- The existing state of affairs."*

In Wharton's Law Lexicon, the word "status-quo' has been defined as under-

> *"Status-quo:- The existing state of things at any given date; e.g. Status quo ante bellum, the state of things before the war"*

While going through the aforesaid definitions, one come to an inescapable conclusion that 'status-quo' means that the existing position at the time of order should not be changed which means that in no way the features or character of the subject matter should be altered or changed. In the case reported as *Mst. Sardar Begum Faruqi and others vs. Rashida Khatoon & others* [1990 CLC 83], it was held that:-

> *"The object of a status quo order is to maintain the subject-matter of the suit as it was at the time of passing of the stats quo order and not to alter it or to create a new situation."*

The Chief Court of Gilgit Baltistan in the case reported as *Mushraf Ahmad vs. Sher Ahmad & another* [2011 CLC 391], has held that:-

"The above discussion compels me to give an elaborative note on the terms "ad interim" and "status quo" as this Court has often bote on misconception and misconceiving rather misuse of both the terms by the subordinate Judiciary in the area as such the terms are required to be interpreted and defined for proper guidance of Subordinate Judiciary to adopt in future as under...

The term ad interim: *The latin word, having meaning as meantime temporary" and the Courts of law use this term to issue temporary injunction ex parte with or without issuance of notice to the opposite party in very rare cases after minutely examining the facts and being satisfied that if the ad interim B injunction is not granted in dispense with the procedure laid down in Order XXXIX, Rule 3, C.P.C. then the very object would be defeated but the order would not exceed fifteen days. Ordinary the Courts while exercising the discretion should be careful of real urgency and special circumstances of each case which extremely demand passing of an ex parte injunction. In the case in hand, the trial Court has not only granted the impugned order without notice, unheard, and without assigning reasons of urgency, but erroneously has confirmed the same pending disposal of the suit, behaving like an arbitrator rather to behave like a Judicial Officer, hence the same order is nullity in the eyes of law.*

Status quo. *This Court has observed in most cases that the subordinate Courts in Gilgit-Baltistan use this legal term as routine practice to direct parties or any party to maintain status quo of the subject matter without defining or determining the situation existing at the day of the issuance of the status-quo or at the day of the institution of the suit, hence I deem it important to define the term status quo and its effects for guidance of lower judiciary. Status quo means to maintain the subject matter as it was at the day the suit was instituted. It does not mean to C alter, the situation or create new situation as such is obligatory on the Judicial Officers to satisfy themselves about the state of affairs on the day the order is passed particularly when parties are at variance in their pleas about the situation of the subject- matter on the day, the Courts must not issue status quo blindly as usual practice but to inquire into the matter to ascertain the real and existing situation of the subject matter on the day."*

A perusal of the record shows that the status quo order passed by this Court was duly communicated to the High Court, however, despite this the Selection Board, on 11.06.2024 passed several promotion/demotion orders in presence of status quo order issued by this Court. Thus, it can be safely concluded that all the promotion/demotion orders have

been issued in violation of status quo order issued by this Court. Under Article 42-B of the Azad Jammu and Kashmir Interim Constitution, 1974 the decisions of the Supreme Court are binding on all other Courts, but it is appalling and unacceptable that the High Court, an institution expected to uphold the supremacy of law, is engaged in such blatant disregard for the orders of this Court. This violation is a direct affront to the authority and dignity of this Court. Such conduct not only undermines the judicial process but also erodes public confidence in the legal system. This Court will not tolerate any action that compromises its integrity. We will go to any extent to uphold the authority and maintain the prestige of this Court.

Before proceeding further in this regard, we deem it appropriate to direct the Registrar, High Court to file explanation that what steps have been taken in pursuance of directions issued by this Court. He shall also explain whether the fact of issuance of status quo order was brought into the notice of the Selection Board before passing of promotion/demotion orders or not. The reply should reach this office within a period of one month. The Registrar shall also appear in person on the date to be notified by the office. The office is directed to maintain a separate file in this regard.

CHIEF JUSTICE JUDGE JUDGE

Muzaffarabad,
04.07.2024