

HIGH COURT OF AZAD JAMMU & KASHMIR

Writ Petition No.1612/2022;
Date of Institution 18.04.2022;
Date of Decision 26.08.2022.

Arooj Sikandar Malik D/o Sikandar
Hayyat malik R/o Roli Kotli Tehsil &
District, Kotli.

Petitioner

V E R S U S

1. Azad Govt. of the State of Jammu & Kashmir through its Secretary Health, having its office at New Secretariat, Muzaffarabad;
2. Azad Jammu and Kashmir Public Service Commission through its Chairman having office at Narul Muzaffarabad;
3. Director General Health Azad Jammu and Kashmir having its office at Old Secretariat, Muzaffarabad;
4. Secretary Public Service Commission having its office at Narul, Muzaffarabad;
5. Deputy Director Public Service Commission, having its office at Narul, Muzaffarabad;
6. Shanza Zaffar D/o Zaffar Iqbal R/o Jamalpur Kotli City, Tehsil & District Kotli;
7. Sajid Ali Gorski S/o Muhammad Bashir Gorski R/o Near Mosque Aqsa Tehsil & District, Kotli.

Respondents

WRIT PETITION UNDER ARTICLE 44 OF
THE AJ&K INTERIM CONSTITUTION, 1974

Before:- Justice Sardar Muhammad Ejaz Khan , J.

PRESENT:

Mr. Sajid Hussain Abbasi, Advocate for petitioner.

Mr. Waheed Bashir Awan Legal Advisor Health Department.

Syed Atif Mushtaq Gillani, Advocate for respondent No.6.

Mrs. Aliya Abdul Rehman, Advocate for respondent No.7.

O R D E R:

The captioned writ petition has been addressed under Article 44 of the Azad Jammu & Kashmir Interim Constitution, 1974 whereby the following relief has been implored by the petitioner:-

“It, is, therefore, most humbly prayed that by accepting the instant writ petition, the following directions may kindly be issued:-

- i. That hand-out issued by the Public Service Commission dated 13.04.2022 to the extent of serial No.6 & 7 post of civil Medical Officer B-17 district Kotli may kindly be declared illegal against the merit, may kindly be set-aside;*
- ii. Direct the respondent-Public Service Commission to recommend the petitioner*

- against the post of district Kotli of Civil Medical Officer B-17 and further be prayed that respondent No.1 may kindly be directed to issue appointment notification of the petitioner against the post of Civil Medical Officer B-17;*
- iii. Directed the respondents to recommend the petitioner against the withheld post of Civil Medical Officer B-17 district Kotli, available post and the advertisement No.02 of 2022 may kindly be set-aside to the extent of one post of Civil Medical Officer District, Kotli;*
 - iv. Declare the notification dated 20.11.2018 against the law, rule and against the fundamental rights of petitioner, may kindly be set-aside;*
 - v. Any other relief which this Court deems fit may also be granted in favour of the petitioner in the interest of justice.”*

2. Synthesized grievance of petitioner is that, inter-alia, 12 posts of Civil Medical Officer BPS-17 were advertised vide advertisement No.01/2022 dated 04.02.2022 by Public Service Commission out of which two posts

were allocated for District, Kotli, and in response thereof, the petitioner along-with the other candidates applied and participated in test. It has been claimed that the petitioner secured 82 marks in written test while private respondents No.6 & 7, Shanza Zaffar, and Sajid Ali Gorski, secured 72 & 70 marks respectively. It has been stated that the petitioner is Gold medallist and has secured higher marks vis-à-vis to the private respondents but on political pressure, she was ignored to be recommended rather hand-out was issued by Public Service Commission on 13.04.2022 while recommending private respondents against two advertised posts. It has further been stated that the petitioner applied for obtaining documents but the same were not supplied to her while the Department with mala-fide intention just to protect the ad-hoc employees withheld 15 posts of Civil Medical Officer BPS-17 but only two posts were advertised against

the quota of District, Kotli, and the same were advertised through subsequent advertisement No.02/2022 on 14.04.2022, which establishes sheer violation of law rather the respondents are in legal obligation to recommend the petitioner against the post of Civil medical Officer BPS-17 reserved for District, Kotli and in furtherance, it has been claimed that she may be recommended against one of available withheld posts of Medical Officer BPS-17, which was available at the time of earlier advertisement in the Department while setting-aside the impugned subsequent advertisement No.02 of 2022 to the extent of one post of said discipline and notification dated 20.11.2018.

3. Pre-admission notices were issued to the respondents for filing parawise comments vide order dated 19.04.2022, however, respondent No.2-Public Service Commission and private respondents filed the same wherein averments made in writ petition by the

petitioner was repudiated in toto and it has been claimed that the petitioner failed to make room in overall merit being principal candidates rather she is falling at serial No.3 of the waiting merit list as such handout dated 13.04.2022 has been issued in accordance with law, hence, the writ petition may be dismissed.

4. I have heard the learned counsel for petitioner and gone through the record of the case.

5. So far as the contention of the learned counsel for petitioner that the petitioner participated in test and interview against one of the posts of Civil Medical Officer BPS-17 allocated for District, Kotli, and thereafter, she was called for interview including other candidates. On 13.04.2022 a hand-out was issued by Public Service Commission through which principal candidates private respondents No6 & 7 were illegally recommended for appointment against the said posts because the

petitioner is Gold medallist and secured 82 marks in MCQs test while private respondents secured 72 and 70 marks respectively, hence, she is entitled to be appointed vis-à-vis to the private respondents carries no weight. It reflects from record that the petitioner has not brought the result of written test on record whereby it can be assumed that she secured higher marks as compare to private respondents but record shows that private respondents Shanza Zaffar and Sajid Ali Gorski secured 80 marks each in written test, which were appended along-with their comments, hence, the arguments to that extent do not have any substance and are hereby repelled. Thus, the petitioner is in legal obligation to substantiate her claim specifically while placing reliance on confidence inspiring record because in writ jurisdiction, the cases are decided on the strength of available convincing documents but nothing has been brought on record in this

regard. As this Court already handed down its views in a case reported as *Faisal Saghir Saduzai vs. Azad Government of the State of Jammu & Kashmir through Chief Secretary, AJ&K, Muzaffarabad and 04 others* [PLJ 2022 AJ&K 42] wherein it has been observed that:-

“It is relevant to mention here that the petitioner stated to have applied for the post in question against the advertisement dated 04.04.2019 rather after perusal of annexure “PB”, it appears that last date for invitation of application was fixed as 04.04.2019. The petitioner claimed to have appeared in test/interview and secured second position in waiting merit list but it is very surprising to visualize the record that the petitioner neither any iota of proof pertaining to appearance in test/interview conducted by Public Service Commission has been brought on record nor merit list/waiting merit list has been annexed to which it can be ascertained that indeed the petitioner got obtained second position in overall merit or waiting merit list for which the record has completely closed its eyes, however, only single document at page 24 of the paper book has been appended, which is unattested photostat copy and

same seems to be a self-made list, which is not admissible under law.”

6. Turning to the proposition with regard to withheld posts occupied the ad-hoc appointees as claimed by the petitioner, from bare reading record, it transpires that the petitioner has not appended any proof that at the time of sending requisition, certain posts of Medical Officers BPS-17 against the quota of District, Kotli, were available and that posts with *mala-fide* intention were withheld by the Department concerned. In this regard no iota of confidence inspiring document has been brought on record to which it can be assumed that at the time of earlier advertisement No.01/2022 certain posts of said discipline were available in the Department, which with *mala-fide* intension were not requisitioned and withheld by the concerned Department and it has to be established by the petitioner that these posts were vacant in such and such

Health Units at the time of earlier advertisement No.01/2022, which thereafter were published in subsequent advertisement No.02/2022. Even otherwise, the ad-hoc appointees who are stated to have occupied the said posts have neither been arrayed as party in the in line of respondents nor their ad-hoc appointment orders have been challenged in the case in hand rather the notification dated 20.11.2018 sought to be annulled by the petitioner cannot be declared illegal without any legal justification, hence, the claim of the petitioner to that extent cannot be acceptable by any stretch of imagination. Thus, the rule of law laid down by the apex Court in a case titled *Sarfraz Ahmed Khan Vs. Azad Government and others* [2012 PLC (C.S.) 755] is fully applicable in the instant case. For proper appreciation of the matter here I would like to reproduce the relevant portion of *Sarfraz Ahmed's* case, supra, which reads as under:-

“The petitioners have specifically alleged that the posts have been withheld by the department. They failed to bring on the record any proof to substantiate their claim. If the party discharges the burden, then it shifts on the other party. The petitioners failed to substantiate their claim from the record that the posts have been withheld by the department and from the perusal of the record produced by the Education Department, we are satisfied that at the time of relevant advertisements no posts were withheld by the department.”

“We want to make it clear that any post which was not available at the time of advertisement or was subsequently created in new budget or is available due to retirement of any person or any other reason becomes in existence before the test and interview is conducted by the Public Service Commission, it cannot be said that the post was available at the time of advertisement and the department has withheld the same.”

7. Under the relevant provisions of law, she cannot be allowed to be appointed against one of the posts in question, which has subsequently been advertised through advertisement No.02/2022. For proper

appreciation of the matter Rule 13 of The AJ&K Public Service Commission (Procedure) Rules, 1994 is reproduced as under:-

“13 (1) A person appointed on the recommendation of Commission fails to join the service or is declared medically unfit, a candidate next in the merit from the waiting list shall be recommended, on the request of the department concerned, and for this purpose the Commission shall prepare a waiting list.

(2) The waiting list prepared under sub-rule (1) shall remain valid for 180 days from the date of selection of candidate.

(3) The waiting list shall not be valid in case of fresh vacancies referred to Commission just after test and interview of the previous vacancy.”

8. If for the sake of arguments, the contention of the learned counsel for the petitioner is admitted as true that she is falling at serial No.1 of the waiting merit list even then she is not entitled to be considered for appointment particularly when the official

respondents appear to have admitted in comments that she is falling at serial No.3 of the waiting merit list meaning thereby that under rule, supra, if principal candidates and two candidates falling at serial No.1 & 2 of waiting merit list fail to join service then she may be considered for appointment. Similar proposition has been resolved by the apex Court in case titled *Tanveer Ahmed Vs. Roshan Din and 2 others*, [1999 SCR 402] wherein it has been opined as under:-

“We have gone through the advertisement published on 23rd October 1995. It shows that there were two posts of Junior Clerks for Muzaffarabad district which were advertised. Accepting the merit list to be correct, the first two persons on the merit list, which is claimed to have been prepared on 1st March 1996, were Saroosh Gilani and Zafar Iqbal. It has been held by this Court in Abdul Rashid Tarrabi v. Azad Govt. of the State of Jammu and Kashmir and others [Civil Appeal No.169 of 1998 decided 15.2.1999] that a post can be advertised only after a vacancy has arisen and not otherwise.

8. Therefore, if two posts were advertised only two appointments

could be made against it. The third person included in the merit list could not be validly appointed against that post. The admitted position in the present case is that two vacancies were advertised.”

It has been further opined in para 10 of the above report that:-

“From the foregoing it is clear that the vacancy against which Roshan Din was appointed occurred during the period of ten months which intervened between the publication of advertisement and appointment of the respondent. In practical terms it means that the post was not advertised which is a mandatory requirement as laid down by this Court in the case mentioned above.”

9. It is pertinent to mention here that the petitioner herself remained instrumental, in the entire proceedings of test and interview, and also remained unsuccessful to achieve the desired result and later on, under the law of acquiescence and estoppel, she is not allowed to turn round to challenge the same on the ground that selection process has been made against law, hence, no valid reasons appear to have been assigned to abrogate the hand-out

dated 13.04.2022 in the given circumstances. Similar proposition has been resolved by the apex Court in a case titled *Tabassum Arif Vs. Azad Government and others* [2013 SCR 134] wherein at page 138, it has been held that:-

“If a person participates in the proceedings and fails to achieve the desired results, thereafter he cannot turn round and challenge the process.”

The aforesaid view finds support from a case titled *Azad Govt. and 3 others Vs. Mrs. Jamshed Naqvi and 2 others* [2014 SCR 13] wherein it has been held as under:-

“From the record it is amply proved that the respondent himself moved application for contract appointment. After being unsuccessful in obtaining desired results, she filed writ petition. By her conduct she is estopped from filing the writ petition. The same was liable to be dismissed on the ground of estoppel and acquiescence.”

10. By visualizing the above quoted law and in view of settled position of the case in hand, the petitioner is neither an aggrieved party within the purview of Article 44 of the

Azad Jammu & Kashmir Interim Constitution, 1974 nor has *locus-standi* to invoke the extraordinary jurisdiction of this Court because such jurisdiction can only be invoked and exercised where any violation of rules and departure of law has been made but no eventuality appears to have been found in the case in hand.

11. The nutshell of the foregoing reasons is that the instant writ petition, having no statutory backing, is hereby dismissed in *limine* in the manner as indicated hereinabove and the same shall be consigned to record. Resultantly, while vacating the ad-interim relief issued earlier, the application for its extension stands rejected.

Circuit Rawalakot:
26.08.2022(J.ZEB)

-Sd-
JUDGE

APPROVED FOR REPORTING

-Sd-
JUDGE

HIGH COURT OF AZAD JAMMU & KASHMIR

Arooj Sikandar Malik

vs.

Azad Govt. & others

PRESENT:

M/s Saqib Javaid & Syed Asim Gillani, Advocates.

O R D E R:

An application has been filed on behalf of applicants Saqib Javaid & Syed Asim Gillani, Advocates stating therein that in the captioned case, they were representing respondent No.7 and they also advanced the arguments on his behalf but inadvertently name of Mrs. Aliya Abdur Rehman on behalf of respondent No.7 has been mentioned instead of names of the applicants. A bare reading of order dated 26.08.2022 shows that inadvertently, names of M/s Saqib Javaid & Syed Asim Gillani, Advocates for respondent No.7 could not be incorporated in the said order, which is a clerical mistake and it is hereby corrected in terms that words "Mrs. Aliya Abdul Rehman, Advocate" are deleted and replaced with words "M/s Saqib Javaid & Syed Asim Gillani, Advocates" while name of Legal Advisor PSC has not been incorporated at her right place, hence, words "Mrs. Aliya Abdul Rehman, Legal Advisor PSC" are

incorporated in the said judgment. This order shall be the part of order dated 26.08.2022.

Muzaffarabad.
31.08.2022(ZEB)

-Sd-
JUDGE