

HIGH COURT OF AZAD JAMMU AND KASHMIR

Writ Petition No. 1309/2020.
Date of institution 10.10.2020.
Date of decision 11.06.2024.

Hameed Masih S/o Khushi Masih R/o Pasroor Sialkot,
Sweeper/Sanitary Worker BPS-1 City Campus University of Azad
Jammu and Kashmir Muzaffarabad.

...Petitioner

Versus

1. University of Azad Jammu and Kashmir through Vice Chancellor University of Azad Jammu and Kashmir.
2. Registrar University of Azad Jammu and Kashmir.
3. Directorate of Finance/Planning through Director of Finance University of Azad Jammu and Kashmir.
4. Selection Committee through Chairman Selection Committee AJK University.
5. Deputy Registrar (Administration) Azad Jammu and Kashmir University.
6. Muhammad Faheem, Sanitary Supervisor BPS-5 AJK University Muzaffarabad.

.....Respondents

WRIT PETITION

Before:- Justice Syed Shahid Bahar, J.

PRESENT:

Gohar Altaf Khan, Advocate for the petitioner.

Raja Gull Majeed Khan, Legal Advisor for University of AJ&K,
Muzaffarabad.

Judgment:-

1. “Our lives begin to end the day we become silent about the things that matter”¹. In the instant case, petitioner; a sanitary worker opted to staunchly contest the discrimination meted out against him on the notion of religion. This reminds of our celebrated revolutionary poet, Faiz, who said: “Speak, for your lips are free; Speak, your tongue is still yours, your upright body is yours --- Speak, your life is still

¹. Martin Luther King Jr.

yours.”² Power, like a desolating pestilence, pollutes whatever it touches³. A discretionary power, when, is bereft of any prefixed evaluation structure, results in an unguided and unfettered exercise of power which is ex-facie discriminatory by jeopardizing the fundamental rights of the petitioner.

2. Through this writ petition filed under Article 44 of the Azad Jammu and Kashmir Interim Constitution, 1974, the petitioner is seeking infra relief:-

“It is, very humbly prayed that by accepting the instant writ petition, the impugned order dated 11.09.2020 may very kindly and graciously be set aside by declaring the same as unlawful, illegal, against the rules and criteria of promotion and the respondent may very kindly be directed to appoint/promote the petitioner as Sanitary Supervisor BPS-5 accordingly. It is also very humbly prayed that any other relief to which the petitioner is entitled in the eye of law may very kindly be granted.”

3. Brief facts of the case as per petitioner are that he was appointed as Sweeper/Sanitary Worker BPS-1 in University of Azad Jammu and Kashmir City Campus on temporary basis vide order dated 03.03.2007 and then on contract basis vide order dated 03.09.2015 alongwith one Mr. Naeem and after that he was appointed on permanent basis vide order dated 16.10.2016. Petitioner contended that two posts of Sanitary Supervisors were created through Notification dated 06.04.2017 and the criteria of recruitment was prescribed in the

² . بول، کہ لب آزاد ہیں تیرے
بول، زمان اب تک تیری ہے
تیرا ستواں جسم ہے تیرا
بول، کہ جان اب تک تیری ہے

³ . Percy Bysshe Shelley.

notification dated 26.04.2012 through promotion/ selection in the matter that in case of educated person, the qualification must be “Matric with 05 years’ experience as Sanitary Worker/Sweeper and in case of non-educated 15 years’ service as Sweeper. Petitioner further contended that initially the criteria of promotion was followed and one Jaffar Bostan was promoted having qualification of Matric with requisite experience and Mr. Muhammad Siddique in the line of un-educated/illiterate person through order dated 12.09.2018 and after that one Muhammad Saeed, Sweeper was promoted in the line of non-matric criteria vide order dated 08.05.2020. The petitioner alleged that on the retirement of one Mr. Muhammad Siddique, the petitioner was appointed on temporary basis as Sanitary Supervisor vide order dated 03.07.2019 who is till now performing his duties. The petitioner contended that for the purpose of permanent selection of Sanitary Supervisor, the Selection Committee was framed and the selection committee in its meeting held on 26.08.2020 recommended the promotion/recruitment of respondent No.6, which was confirmed by respondent No.1 vide order dated 11.09.2020. The petitioner claimed that the order of respondent No.1 is liable to be set aside as the same has been issued against the law.

4. Comments/written statement has been filed on behalf of respondents wherein the claim of the petitioner has been negated. They contended that the concerned authority has the power to consider any employee for promotion in next scale keeping in view of his/her ability of work, experience etc. and for the purpose, the University Authority has established a high level Selection Board/Committee; who after

taking into consideration the ability/skills and suitability of the employees makes the recommendations, thus, under rules and law, employee himself/herself cannot claim his/her promotion as a paramount and preferential right. They alleged that the charge of Sanitary Supervisor was given to the petitioner on temporary basis, thus, it does not mean that he is entitled to be promoted against the post of Sanitary Supervisor. The respondents averred that permanent appointment of respondent No.6 had been made on 26.06.2004 against the post of Sweeper while his promotion regarding the post of Sanitary Supervisor has been made according to Statute 2015, which is quite in accordance with law and needs no interference by this Court.

5. I have taken stock of the learned counsel for the parties and gone through the available record with due care.

6. A perusal of file reflects that according to the notifications dated 26.04.2012 as well as 24.08.2015; promotion/ recruitment as Sanitary Supervisor is 50% in the line of matric with 05 years' experience and 50% in the line of non-matric/illiterate with 15 years' experience as sweeper and keeping in view the previous promotions of employees i.e. Bostan, Muhammad Siddique and Saeed, the petitioner is the only person who fulfills the requisite qualification as his qualification is Matric and is serving as Sweeper/Sanitary Worker since 2007.

7. According to relevant rules i.e Statute of the department, following criteria has been mentioned for the promotion against the post of Sanitary Worker BPS-5:-

26	Name of Post: Sanitary Supervisor Scale: BPS-5 Method of Recruitment; By promotion/ Selection: By Promotion/ Selection: By promotion/ Selection on the basis of selection on merit from amongst Sanitary Worker/ Sweeper having Matric (preferable)/Middle with at least 05 years' service as sweeper or 15 years' service as sweeper.
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8. As per laid down criteria under the law, the petitioner was eligible to be promoted against the post of Sanitary Supervisor but he was ignored despite the fact that he was Matric and had a vast experience in the relevant field.

9. The record further shows that after the retirement of one Muhammad Saddique, the petitioner was appointed as Sanitary Supervisor on temporary basis and against the said post he was performing his duties. He is a qualified person for the said post/job but the respondents have ignored him by promoting the respondent No.6 on the recommendations of respective Selection Committee. The petitioner has been divested of his lawful right of promotion by the impugned order dated 11.09.2020, thus, the same is not sustainable in the eye of law.

10. No plausible ground or reasoning has been given by the relevant quarters as to why the petitioner was meted out with discriminatory treatment in case if he was required to be superseded or ignored then such could be done only after disclosing some reasons in a specific manner as commanded by the Section 24-A of the General Clauses Act. It is useful to reproduce the verbatim of Section 24 ibid as infra;

24-A. Exercise of power under enactments. – (1) Where, by or under any enactment, a power to make any order or give any direction is conferred on any authority, office or person such power shall be exercised reasonably, fairly, justly and for the advancement of the purposes of the enactment.

(2) The authority, office or person making any order or issuing any direction under the powers conferred by or under any enactment shall, so far as necessary or appropriate, give reasons for making the order or, as the case may be, for issuing the direction and shall provide a copy of the order or, as the case may be, the direction to the person affected prejudicially.”

11. Now coming to the guarantee and assurance of the Constitution qua fundamental rights. It unequivocally reflects from the scheme of the aforesaid guaranteed rights that all State Subjects are equal before law and are entitled to equal protection of law and there shall be no discrimination against any State Subject on the basis of sex, simultaneously security of person is given in a manner that no person shall be deprived of [life or] liberty save in accordance with law.

Fundamental guaranteed right No.1 and 15 described in Article 4 of the Constitution, 1974 are reproduced as infra:-

(4)The Rights.-

1. **Security of person.-** No person shall be deprived of [life or] liberty saves in accordance with law.

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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.]”

12. In para 6 ground B of the petition, the petitioner alleged that he is being discriminated and deprived from his right simply because he is non-Muslim.

It is useful to reproduce the ground B of the petition;

(B). That it is guaranteed in the constitution of Azad Kashmir that all persons are equal before law and no discrimination should be done in respect of caste, colour, religion or language basis, but it is the sorry state of fact that the petitioner was denied his promotion being a Non-Muslim, hence, the impugned order is not maintainable and liable to be set aside.

13. In reply of the above para the answering respondents have not given any plausible reply in order to justify their act qua ignoring and depriving him from his right, only evasive denial of the material fact has been given. Reply of the ground B is as under:-

’B’ - موقف درست نہ ہے۔ پٹیشنر کا یہ الزام کہ اسے غیر مسلم ہونے کی بنیاد پر ترقیاب نہ کیا گیا خلاف حقائق، خلاف قانون ہونے کی بناء پر عدم تسلیم ہے۔ نیز پٹیشنر کیساتھ کوئی امتیازی سلوک نہ روا رکھا گیا ہے۔“

14. As adumbrated discriminatory treatment is oozing from the record.

15. Action of the respondents qua depriving the petitioner from promotion is discriminatory.

16. 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 of race, religion, caste, residence, sex or place of birth.⁴ No one shall be subject to discrimination by any State, institution, group of persons, or person on the grounds of religion or belief,⁵ as all persons are equal before the law and are entitled without any discrimination to the equal protection of the law.⁶ The word “law” in the former expression is used in a philosophical sense whereas the word “law” in the latter expression denotes specific laws in force. The former implies the absence of any special privilege in favour of any individual and the equal subjection of all classes to the ordinary law while the latter is a more positive concept implying equality of treatment in equal circumstances.⁷

17. Canons of morality abhor discrimination among citizens so as to maintain transparency and fairness and to curb mal-administration, corruption and corrupt practices.⁸

18. Discrimination cannot be attributed without any element of bias, which has to be proved through concrete and solid evidence.⁹

19. Although reasonable classification and intelligible differentia is permissible but in the case at hand, the official quarters themselves violated the rules. Preferential edge has not been given to

⁴. Right number 17 of the Fundamental Rights (Article 4) envisaged in the Interim Constitution.

⁵. Article 2 of the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.

⁶. Article 26 of the International Covenant on Civil and Political Rights (ICCPR) read with Fundamental Right No. 15 of the Interim Constitution.

⁷. Muhammad Ayan Ali Raja v. AJ&K Legislative Assembly PLD 2023 High Court (AJK) 55.

⁸. Ameer Afzal vs. Govt. of Punjab KLR 2014 civ. 393.

⁹. Shahid Rahim vs. Board of Trustees 2015 PLC (CS) 1235.

the Matriculate candidates, but instead of given preferential treatment to the petitioner (matriculate) the respondents preferred, the illiterate one over the literate person. Action taken by the respondents mocks the rules, sense of morality as well as norms of justice. Trite that a thing which is required to be performed in a specific manner, terms and tone, that can only be performed accordingly otherwise performance of the same is nullity in the eyes of law. All the State Subjects (rationally mean citizens of the State of Jammu and Kashmir) are equal and could only be treated equally. It is unhealthy state of affairs to declass a citizen of same class in guise and garb of caste, creed, religion, colour and clan, as this disease is lethal for society. Human rights simply on the touchstone of humanity should be respected and adhered to.

(Underling is ours)

20. Another important aspect of the matter is that the entire proceedings militate against the doctrine of administrative justice which takes breath from Fundamental Rights No.1, 15 and 19 read with Principles of Policy and Preamble Clause of the Constitution, coupled with Section 24-A of the General Clauses Act.

21. In wake of the above the writ petition at hand is accepted. Promotion order of the respondent No.6 M. Faheem dated 11.09.2020 is set aside and the respondents are directed to redress the grievance of the petitioner against the post of Sanitary Supervisor by considering him for appointment accordingly within 15 days. Compliance report be submitted before the Registrar of this Court. File shall be kept in archive.

Muzaffarabad,
11.06.2024.

JUDGE

Approved for reporting

JUDGE