

HIGH COURT OF AZAD JAMMU AND KASHMIR

Writ Petition No.348/2018.
Date of institution 16.02.2018.
Date of decision 10.02.2023.

Khalida Parveen D/o Muhammad Khursheed Khan R/o Kafal Garh
Tehsil and District Bagh Azad Kashmir.

....Petitioner

Versus

1. Divisional Director Schools Elementary and Secondary Education female Poonch Division Rawalakot.
2. Secretary Education Schools, having his office at new Secretariat Muzaffarabad.
3. Selection Committee through Divisional Director Elementary and Secondary Education Poonch Rawalakot.
4. Kalsoom Bibi OT Teacher Govt. Girls Middle School Thub District Bagh.
5. District Account Officer District Bagh Azad Kashmir.

.....Respondents

Nighat Jabeen W/o Muhammad Altaf Hussain R/o Banni Minhasaan
Tehsil and District Bagh presently serving as Arabic Teacher on
contract basis in Govt. Girls High School Banni Minhasaan.

.....Respondents

Versus

1. Secretary Elementary and Secondary Education having his office at new Secretariat Chatter Muzaffarabad.
2. Director Public Instructions Schools (female) having his office at new District Complex Muzaffarabad.
3. Divisional Director Schools female Poonch Division Rawalakot.
4. Selection Committee through its Chairman Divisional Director (D.D.S) Poonch division Rawalakot.
5. District Education Officer (female) Bagh.
6. District Accounts Officer Bagh.
7. Kalsoom Bibi, Arabic Teacher Girls Middle School Thub Tehsil and District Bagh.
8. Umaira Sadique, Arabic Teacher Girls High School Bhirpani, Bagh, Azad Kashmir.

.....Respondents

WRIT PETITIONS

Before:- Justice Syed Shahid Bahar, J.

PRESENT:

Anees-ul-Arfeen Abbasi, Advocate for the petitioner-Khalida Parveen.

Shahid Ali Awan, Advocate for the petitioner-Nighat Jabeen.

Legal Advisor for Education Department.

M/s Saqib Javed and Asim Gillani, Advocate for private respondent Kalsoom bibi.

Judgment:

As some common points of facts and law are involved in both the titled writ petitions, therefore, these are clubbed up and are decided through this single Judgment.

2. Succinct facts of the case as per petitioner's version taken in writ petition No.348/18 are that she is 1st Class State Subject of AJ&K who hails from constituency No.2 Wasti Bagh Azad Kashmir. Contends that she is M.Phil, OT, B.Ed and is eligible for appointment as an Arabic Teacher. Contends that some posts of Arabic Teacher female were advertised by the Education Department. Further contends that she participated in the test and interview, however, in light of judgment of this Court as well as of Apex Court, the entire process of test/interview and merit list was countermanded and department was directed for conducting test and interview de novo. Contends that after the judgment of this Court dated 09.01.2017, on the basis of test and interview fresh merit list was prepared and petitioner's name was placed at serial No.3 in the merit list. Further avers that candidates who were at serial No.1 and 2 were appointed as an Arabic Teacher vide order dated 10.11.2017. Alleges that the qualification of Misbah Nazir (candidate of serial

No.2) was not in accordance with required criteria and a complaint was submitted to the competent authority, so, the appointment order was terminated to the extent of Misbah Nazir, hence, after the termination order of said candidate, petitioner was eligible for appointment being at serial No.3 of the merit list, but private respondents by cancelling the appointment order of Misbah Nazir illegally appointed the respondent No.4 through impugned order dated 19.01.2018 by depriving the petitioner from her merit position.

3. Written statement has been filed on behalf of respondent No.4, wherein the claim of the petitioner has been negated by contending that the petitioner after participating in selection process, failed to obtain merit position, and now has turned around by claiming a right in light of previous merit list which is not warranted by law, hence, writ petition may be dismissed on this single score. Respondent No.4, in her written statement, further contends that the answering respondent challenged the earlier selection process which was conducted arbitrarily, with a view to accommodate some blue-eyed, while the petitioner kept mum over the same, hence, conduct of petitioner makes her disentitled of getting any relief.

4. Precise facts of writ petition No.2076/2018, are that petitioner is 1st class State Subject of AJ&K who hails from Bani Minhasaan, Tehsil and District Bagh, and is serving as an Arabic

Teacher on contract basis. The qualification of petitioner is M.A, M.Ed. Avers that official respondents published one post of Arabic Teacher B-9, reserved against the quota of constituency No.2, Wasti Bagh, vide advertisement dated 27.06.2015. After that a corrigendum was issued on 30.06.2015, through which, quota of constituency No.2, Bagh was substituted as two posts instead of one. In response of the aforesaid advertisements, after obtaining test and interview two candidates were adjusted. The aforesaid selection process was called into question by Kalsoom Bibi (private respondent herein) and others through writ petition before this Court. After due process, this Court declared the whole process null and void vide judgment dated 09.01.2017. Against the said Judgment, an appeal was filed before the Apex Court, which was dismissed vide judgment dated 04.05.2017. Contends that after the pronouncement of the aforesaid judgment, test and interview were conducted on 05.11.2017 de novo and final merit list was prepared on 10.11.2017, whereby, Umaira Sadique and Misbah Nazir were appointed against two advertised posts. Meanwhile, appointment order of Misbah Nazir was recalled vide order dated 16.01.2018, as she was not fulfilling prescribed qualification against the post of Arabic Teacher. Petitioner contends that official respondents compiled another merit list on 19.01.2018, on the basis of newly prepared merit list and appointed private respondent No.7, as Arabic Teacher vide order dated 19.01.2018. She claims that both the merit lists dated 10.11.2017 and 19.01.2018 show that in the

first merit list, petitioner's name was inserted on serial No.4 and marks for B.Ed. degree were not given to the petitioner and in the second merit list, the petitioner was enlisted at serial No.3 and column reserved for marks of Graduation was blanked. She further claims that had the petitioner been awarded with marks for the degree of B.A and B.Ed, then the whole merit position would have been changed, hence, the whole selection process is liable to be rectified. She prays that the appointment order of respondents No.7 and 8 may be abrogated and respondents may be directed to appoint the petitioner as an Arabic Teacheress B-9 in light of advertisement dated 27.06.2015 (*Annexure "B"*) after rectification by adding marks of BA and B.Ed. degree in favour of the petitioner-Nighat Jabeen.

5. Written statement has been filed on behalf of respondents wherein claim of the petitioner has been negated in toto by contending that the petitioner has failed to get merit position, after test and interview, hence she had not been appointed against the claimed post. They further submit that if the whole marks of BA. B.Ed. degrees are given to the petitioner, even then, she could not attain the merit position for appointment.

6. Separate written statement has been filed on behalf of private respondent No.7, wherein she contends that merit list dated 19.01.2018 was prepared in light of fresh selection process and in light of judgment of this Court and accordingly, the answering

respondent being successful candidate was appointed. Finally, she prays that the writ petition may be dismissed.

7. Mr. Anees-ul-Arfeen Abbasi, the erudite advocate representing petitioner-Khalida Parveen, submitted written arguments, wherein he reiterated the facts and grounds narrated in the petition and submitted that petitioner was at serial No.3 of the merit list of Arabic Teacheress, constituency No.2, Wasti Bagh, and after cancellation of appointment order of Misbah Nazir, petitioner was eligible for appointment, but official respondents instead of appointing the petitioner, illegally appointed the respondent No.4 due to political involvement, without any legal justification, hence, impugned order and merit list are liable to be set-aside. He vehemently contended that the impugned post has not been filled by the official respondents in light of direction of this Court as well as of Apex Court. The learned counsel staunchly contended that the petitioner did not participate in any so called interview as her name was illegally mentioned in the impugned merit list, whereas, she was already on merit and was eligible for appointment. He forcefully contended that private respondent passed Matric in year 2002 and the certificate of Shahadat-ul-Alima (B.A Arabic) in 2003, hence, she could not be appointed on the said post being not having required qualification and this legal aspect of the case has not been considered by the official respondents by appointing the private respondents. The learned counsel vigorously contended that the after the judgment of the Hon'ble Court the earlier legitimate

merit list was prepared in which private respondent name was present at serial No.8, whereas, petitioner was placed at serial No.3, after the cancellation of appointment order of Misbah Nazir, serial No.2 of the merit list, respondents were legally bound to issue the appointment order of the petitioner in light of the recruitment policy, rules and law.

8. Mr. Shahid Ali Awan, the erudite advocate representing petitioner-Nighat Jabeen also submitted written arguments wherein he reiterated the facts and grounds and further prayed that by accepting the instant writ petition, the appointment orders of respondents No.7 & 8 dated 10.11.2017 and 19.01.2018 may be set-aside and further prayed that the official respondents may be directed to appoint the petitioner on the post of Arabic Teacheress B-9 in light of advertisement dated 27.06.2015.

9. In reply, learned legal Advisor for Education Department submitted written arguments on behalf of official respondents No.1 to 5, wherein he contended that two posts of Arabic teacher for constituency No.2, Wasti Bagh, were advertised and in consequence of test and interview against aforementioned two posts Mst. Zohra Rani and Misbah Nazir were appointed. He fervently contended that the aforesaid selection process was challenged by one Kalsoom Bibi (private respondent) and others through writ petition before this Court, which was accepted and whole selection process was declared null and void and official

respondents were directed to obtain test and interview de novo from the concerned candidates under the supervision of Secretary Education Elementary and Secondary Schools, within two months, vide judgment dated 09.01.2017, whereas, the said judgment was also upheld by the Hon'ble Apex Court through judgment dated 04.05.2017, hence, all the selection process went into a deep slumber. He submitted that after the judgments of the Apex Court, fresh selection process was conducted on 05.11.2017 and final merit list was prepared accordingly on 10.11.2017 and on the basis of same, Mst. Umaira Saddique and Misbah Nazir were appointed as Arabic Teacheress, but thereafter it was revealed that Misbah Nazir had been appointed in violation of law, her appointment order was rescinded by respondent No.1. He further submitted that department conducted only interview afresh for the said post and appointed Kalsoom bibi from merit position No.8 of previous merit list and from serial No.1 of fresh merit list. The learned Legal Advisor frankly conceded that it is evident from record that certain errors have been occurred during preparation of second merit list among which the marks of B.A have not been allocated in one merit list and in another, marks of B.Ed have not been given and this is an important factor, outwardly an administrative flaw that may be occurred inadvertently. He submitted that the Hon'ble Court has ample powers to issue appropriate directions to rectify this error, as the one post of the Arabic Teacher (female) in govt. Girls High School Bani Minhasan, constituency No.2, Wasti Bagh is still

vacant. Consequently, the petitioner (Nighat Jabeen) can be accommodated against the said vacant post without disturbing the private respondents.

10. Mr. Saqib Javed, the erudite advocate representing private-respondent Kalsoom Bibi, contended that instant writ petition has been filed after a long delay and is hit by the doctrine of laches. The learned counsel staunchly contended that the petitioner has failed to array the inquiry committee as well as the candidates listed in merit list dated 19.01.2018 which are necessary parties, but they have not been impleaded in the line of respondents, hence, instant writ petition is liable to be dismissed on this point too. Reference may be made on 2014 SCR 806 and 2003 SCR 142. He zealously contended that the petitioner after participating in test and interview when failed to achieve desired result, filed this writ petition, which is not allowed under principle of estoppel and acquiescence. Finally, the learned counsel prayed for dismissal of the writ petition.

11. I have considered the written arguments submitted on behalf of the parties and gone through the record.

12. In the writ petition No.348/18 titled “Khalida Parveen Vs. Divisional Director Schools (F) Rawalakot and others” the petitioner specifically prayed for annulment of the order dated 19.01.2018 alongwith merit list dated 19.01.2018 pertaining to selection of Arabic Teacher in constituency No.2, Wasti Bagh and

she also sought a direction quo her appointment. It transpires from the record, particularly, *Annexure "C"* appended with the writ petition that the previous selection process held in year 2017 was rescinded and denovo selection process was ordered in light of the judgment of this Court dated 09.01.2017, as well as an order dated 16.01.2018 by the respondents, but the petitioner has miserably failed to challenge the order dated 16.01.2018, which is very foundation of the selection process.

13. Now coming back to the judgment of this Court rendered in writ petition No.2086/2015 dated 09.01.2017 wherein after clubbing up two writ petitions titled "**Kulsoom Bibi Vs. DDS & others and Naheed Akhtar Vs. D.D.S & others**", the denovo selection process was ordered by this Court in a transparent fashion.

Para No.23 of the aforesaid judgment is reproduced as infra:-

"The upshot of the above discussion is that by accepting the instant writ petition the impugned merit list and even dated appointment orders of private respondents 22nd September, 2015, are hereby quashed as without lawful authority, hence, having no legal effect. The Divisional Director Schools Poonch Division and respective Selection Committee are hereby directed to obtain fresh test and interview from the concerned candidates under the supervision of Secretary Education Elementary and Secondary Schools, within two months from the receipt of the instant judgment. The selection committee shall ensure to make appointments in fair and transparent manner strictly on the basis of merit without any kind of influence from any corner. However, till completion of the aforesaid selection process period, private respondents shall be allowed to perform their duties against the posts in question. An attested copy of the instant judgment shall be

transmitted to Secretary Education Elementary/Secondary and Divisional Director Schools Poonch Division for compliance. The costs shall follow the eventuality.”

14. The official respondents in their written statement have categorically alleged that the selection process was cancelled in light of judgment of this Court and denovo selection process was conducted in which the petitioner also participated and came at serial No.2 of merit list while the non-petitioner Kulsoom bibi came up to mark by obtaining 1st position in the merit. It is pertinent to reproduce Paras **C** and **D** of the written statement offered by official respondents:-

”C. ضمن ہذا در ۛ تسلیم نہ ہے دڈرہ انٹرویو پولیا۔ جس میں پیشتر بھی شامل تھی اور میرٹ شمارہ نمبر 02 پا آئی اس طرح میرٹ شمارہ نمبر 01 کی تقرری عمل میں لائی گئی۔

D. در ۛ تسلیم نہ ہے۔ چوہرہ پاپا \$ تعلیمی قابلیت پوری کر رہی تھی اور میرٹ شمارہ نمبر 01 پانے کی بناء پ تقرری عمل میں لائی گئی۔“

15. It is also pertinent to mention here that as per judgment dated 09.01.2017, the previous merit and selection process was found dubious and opaque. Furthermore, as argued by learned counsel for the non-petitioner No.4 that the petitioner has failed to array the inquiry committee as party in line of respondents who probed and dugout the matter and recommended annulment of merit list and order dated 10.11.2017, thus, obviously in this view of the matter, the inquiry committee and candidates listed in merit list dated 19.01.2018 are necessary parties. In support of his stance, the learned counsel referred **2003 SCR 142 & 446**, as well as **2014 SCR 816**. Furthermore, the conduct of the petitioner disentitles her

for any relief in an extra ordinary constitutional jurisdiction as the claim of the petitioner is hit by doctrine of estoppel and acquiescence. She herself came forward and participated in the subsequent selection process actively but after remaining unsuccessful turned around and volta face by saying that selection process is not in accordance with law. Thus, the claim of the petitioner is not entertain-able on this count as well. Ready reference in this regard is **2014 SCR 13, 2006 SCR 88**. Besides, in a case titled Anupal Singh v. State of U.P (2020) 2 SCC 173, it was held that a person having consciously participated in the interview cannot turn around and challenge the selection process. Similarly, in a case titled Madan Lal v. State of J&K (1995) 3 SCC 486, it was held:-

“It is now well settled that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round.”

Likewise, in the case titled Om Prakash Shukla v. Akhilesh Kumar Shukla (1986) Supp. SCC 285, it was held:

“When the petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition in the High Court challenging the said examination, the High Court should not have granted any relief to such a petitioner.”

16. It is beaten track that in absence of necessary party no effective order can be passed on back of such party, that too, unclean handed approach cannot be encouraged in exercise of extra

ordinary writ jurisdiction. Thus, the petition No.348/2018 is not maintainable.

17. Now coming back to the writ petition bearing No.2076/2018, the petition besides other grounds is liable to be dismissed on the basis of doctrine of laches.

Laches: origin, definition and overview:-

Laches is a legal term derived from the old French “Laschesse”, which means “remissness” or “dilatoriness”, and is viewed as the opposite of ‘vigilance’¹. The United States Supreme Court case of Costello v. United States **365 U.S. 265** is often cited for a definition of laches. In the supra judgment, laches was defined as “lack of diligence by the party against whom the defense is asserted combined with prejudice to the party asserting the defense.

Invoking laches is a reference to a lack of diligence and activity in making a legal claim, or moving forward with legal enforcement of a right, in particular with regard to equity, and so is an unreasonable delay pursuing a right or claim, in a way that prejudices the opposing party. When asserted in litigation, it is an equitable defense, that is, a defense to a claim for an equitable remedy². The essential element of laches is an unreasonable delay by the plaintiff in bringing the claim; because laches is an equitable defense. The person invoking laches is asserting that an opposing

¹. Black’s Law Dictionary, 9th edition.

² Bray, Samuel (2014). “A little Bit of laches Goes a Long Way: Notes on Petrella v. Metro-Goldwyn-Mayer, Inc.”

party has “slept on its rights”. Hence, laches is associated with the maxim of equity: **“Vigilantibus non dormientibus acquitas subvenit” i.e. equity aids the vigilant, not the sleeping ones**³.

It is a settled proposition i.e. the delay defects equities or equity aids the vigilant and not the indolent. In a case titled Pakistan through Chairman Railways vs. The Punjab Labour Court No.2 Lahore and 2 others (1982 CLC 711), learned single Judge of the Lahore High Court dismissed a constitutional petition by holding that even a petition against a void order is liable to be dismissed if the petitioner is guilty of laches. Similarly, in S. Sharif Ahmad Hashmi vs. The Chairman, Screening Committee, Lahore and another (1980 SCMR 711) the Hon’ble Supreme Court of Pakistan held that a writ petition against a void order may be dismissed if it suffers from laches. Likewise, in Hari Kishan Dass v. Chairman WAPDA (PLJ 1983 Quetta 61), a constitutional petition was dismissed on the ground of laches as the same was filed after the lapse of three years from the date of passing of the final order. As writ petition was filed on 29.11.2018 while appointment orders of respondents No.7, 8 were issued on 10.11.2017 approximately more than 11 months ago. In this regard, reliance can also be made on **1995 SCR 259 & 355, 1997 SCR 330, 2001 SCR 179.**

18. Another identical dent pointed out by the counsel for respondent No.7 is also appearing in the instant writ petition as the

³ Ibrahim, Ashraf Ray (April 1997). “The Doctrine of Laches in International Law.” Virginia Law Review. 83(3):647-692.

petitioner has failed to array the Inquiry Committee and candidate listed in the subsequent merit list dated 19.01.2018 as a party in line of respondents. Thus, in absence of necessary party no effective order can be passed, that too, an another identical point is also found in the instant writ petition, which has been raised and argued by the other side that order dated 16.01.2018 has not been challenged by the petitioner as the previous selection process/merit was rescinded in light of aforesaid order. Despite acquiring knowledge of the said dent, the petitioner even did not make any effort to seek amendment in order to challenge the order dated 16.01.2018. It is worthwhile to reproduce the order dated 16.01.2018 as under:-

سیکرٹری ایجوکیشن، آزاد حکومت ریہ
جموں و کشمیر

حکم

جناب سیکرٹری ایجوکیشن، آزاد حکومت ریہ جموں و کشمیر نے وسطیٰ بیغ نمبر 2 میں جوئی عربی معلمات کی اسامی پائیسٹ انٹرویو کے انعقاد کے دوران مسماہ مصباح: امیدوارہ، جو ریخ مشہورگی اسامی کو مطلوبہ تعلیمی کوالیفیکیشن کی حامل نہ تھی، کی تعلیمی اسناد غلط طور پر وصول کرتے ہوئے شامل رک رکھنے کیے جانے اور مطابق مذکور یہ کوالیفیکیشن انٹرویو میں شامل کرتے ہوئے مذکور یہ کوالیفیکیشن جوئی عربی معلمات کیے جانے کی نسبت موصولہ شکایات کی چھان بین کیلئے تشکیل دی گئی تحقیقاتی کمیٹی کی سفارشات کو شرف قبولیت بخشے ہوئے انتخابی عمل کو معاملہ زیر نزاع کی حد - کالعدم کیے جانے اور اس کی روشنی میں جاری شدہ حکم تقرر ز نمبر ڈس/پ ڈرن/43-4637 / 2017 مورخہ 10.11.2017 کو * ریخ 19 سے منسوخ کیے جانے کی منظوری صادر فرمائی ہے نیز سلیکشن کمیٹی کو ہدایت فرمائی ہے کہ وہ اسامی متذکرہ کے خلاف بمشلاء فیصلہ عدالت عالیہ مصدرہ 09.01.2017 از سر نو انٹرویو کے انعقاد کی کارروائی عمل میں لائے۔

دستخط
سیکشن آفیسر
ایجوکیشن ایڈمنسٹریٹو ایجنسی

مورخہ 16 جنوری 2018

نمبر سیکرٹری ایجوکیشن / ای ایڈ ایس ڈی / 61-955-2018

نائب لاہجرت:-

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دستخط
سیکشن آفیسر
ایجوکیشن ایڈمنسٹریٹو ایجنسی

19. In the wake of above discussion, this Court holds that both the petitions bearing No.348/2018 and 2076/2018 are not maintainable, thus, both are hereby dismissed. The parties are left to bear their own costs. Any miscellaneous applications part of the writ petitions are hereby dealt with accordingly.

Circuit Mirpur,
10.02.2023.

JUDGE

Note:-Judgment is written and duly signed. Deputy Registrar Circuit Mirpur is directed to transmit this file alongwith judgment to headquarter Muzaffarabad within a sealed envelope, and Deputy Registrar Judicial Muzaffarabad is directed to intimate the parties or their counsel with due notices.

Approved for Reporting

JUDGE