

HIGH COURT OF AZAD JAMMU & KASHMIR

Writ petition No.902/2020.
Date of institution 15.07.2020.
Date of decision 22.04.2024.

Malik Fahad Riaz s/o Malik Riaz Ahmed (Late) Commissioner Rehabilitation an employee of the Management Group, C/o Professor Malik Arshad Poultry Farm Road behind CMH Tehsil & District Muzaffarabad, Azad Jammu & Kashmir.

Petitioner

VERSUS

1. Azad Government of the State of Jammu & Kashmir through its Chief Secretary, Azad Jammu & Kashmir, having his office at New Secretariat Complex, Lower Chatter, Muzaffarabad;
2. Chief Secretary, Azad Jammu & Kashmir, having his office at New Secretariat Complex, Lower Chatter, Muzaffarabad;
3. Board of Revenue, Azad Jammu & Kashmir, through Secretary Board of Revenue, having his office at Block No.7 New Civil Secretariat Muzaffarabad;
4. Senior Member Board of Revenue, having his office at Block No.7 New Civil Secretariat Muzaffarabad;
5. Commissioner Muzaffarabad Division, having his office at New District Complex Muzaffarabad;
6. Commissioner Rehabilitation, Azad Jammu & Kashmir.

Respondents

WRIT PETITION

Before:- Justice Syed Shahid Bahar, J.
Justice Sardar Mohammad Ejaz Khan, J.
Division Bench

IN PRESENCE OF:

Syed Zulqarnain Raza Naqvi, Advocate for the Petitioner.
Salma Tariq Sadozai, Advocate for Respondents.

JUDGMENT:

Lex prospicit non respicit (law looks forward not back). There is presumption that legislature intended its enactments to have this effect to be effective only in future. So, many candidates took fruit of the policy under which children of deceased employees could be accommodated, thus, petitioner should not be deprived from benefits of the same as it is sheer discrimination and mala-fide as well as infringement of the Constitutionally Guaranteed Fundamental Right No.1 and

concept of better government enshrined in the preamble clause of the Constitution, besides in apposition with the moral science. Matter calls for equitable relief.

(Justice Syed Shahid Bahar, J.) Through this petition filed under Article 44 of the Azad Jammu & Kashmir Interim Constitution, 1974, the petitioner is seeking direction against the respondents to appoint him as Naib Tehsildar BPS-14 in light of notifications dated 15.01.2011 and 31.03.2020.

2. The main stance of the petitioner is that his father was holding the post of Additional Commissioner in the Management Group of Azad Jammu & Kashmir who died while in service on 3.08.2012 and thereafter, the petitioner submitted application to the relevant forum for his appointment. The Worthy Prime Minister also directed the respondents to appoint the petitioner as per departmental policy but the Board of Revenue processed the cases of many other applicants i.e. the sons of the (late employees), however, the application of the petitioner was not processed and the petitioner was badly discriminated. It has further been alleged that the names of all the appointees against the death package have been inserted in the final seniority list of Naib Tehsildar and they have also been confirmed. As per contents of the writ petition, the Government of Azad Jammu & Kashmir issued a notification on March 31, 2020 regarding employment of the Family members of deceased employees who die in service and according to this notification, the post in BPS-1 to BPS-15, shall be filled in

without advertisement under death package and the petitioner in view of supra notification again applied but all in vain. Lastly, the petitioner prayed for his appointment under the death package in light of notification supra.

3. In the written statement filed on behalf of respondents no satisfaction reply has been made as it has been stated that due to appointments of other Naib Tehsildar no rights of petitioner are being infringed, however, in ground C, it has been averred that in light of letter bearing No.2064 dated 02.11.2020, the rights of the petitioner have been admitted. It has been averred that petitioner is seeking remedy under rules of 2014 whereas, through notification dated 16.10.2017, the son's quota for appointment of Naib Tehsildar has been abolished and the said notification has not been challenged by the petitioner at any fora, meaning thereby that the said notification has attained finality.

3. heard, record perused. As per record, the father of petitioner was holding the post of Additional Commissioner who died during his service on 3rd August, 2012 and after the death of his father, the petitioner approached the relevant forum for his appointment under the death package but despite making appointments of others candidates under the death package, the case of the petitioner was kept aside and he was dragged into endless litigation. The petitioner's claim is that he may be appointed in light of notifications dated 15.01.2011 and

31.03.2020 as the Government issued additional packages to accommodate the families of the deceased. We have gone through the orders dated 12.02.2011 and 13.08.2014, whereby, Raja Bilal Hussain s/o Abdul Rasheed and Syed Yasir Ali s/o Syed Zulfiqar Ali Shah were appointed under the death package but only the petitioner, herein, is being dragging into the litigation since the death of his father. Similarly, through notification dated 31.10.2014 and 30.04.2015, Asif Munir and Hamam Shafique were also been appointed as Naib Tehsildar B-14 under the death package. As per notification dated 13.09.2006, assistance package for the families of Government employees who die during service has been given in the manner that the children of the employees shall be appointed for the posts in BS-1 to BS-15 on two years' contract basis without advertisement. In the written statement filed on behalf of respondents, the claim of the petitioner has been denied evasively and no plausible explanation has been given for not appointing the petitioner against the post of son quota/death package.

4. We have also gone through the notification dated 31.03.2020 by repeating the subject matter pertaining to the death assistance packages mentioned in the notification dated 13.09.2006. A plain reading of both the notifications reveals that the subject matter is same, however, in the notification dated 31.03.2020, '*LUMP SUM GRANT*' has been increased two times and some additional assistance packages have also been

given to the families of the deceased employees. Regarding employment of the child/widow of the deceased employee, in the notification dated 31.03.2020, further conditions have been chalked out in the manner that the appointment under the death assistance package from BPS-1 to BPS-15 shall be made initially for a period of two years without advertisement and the same shall be confirmed/regularized on satisfactory completion of two years' terms as probationary period. It has further been mentioned that the candidate must be having the requisite qualification for the post concerned already prescribed under rules. So, as per supra notification, the petitioner being qualified is also entitled for the claimed relief.

5. So far as the amendment in Azad Jammu & Kashmir Revenue Department, Patwari, Qanoongo, Naib Tehsildar and Service Rules, 2014, dated 16th of October, 2017 is concerned, it is not out of place to mention here that the father of the petitioner, herein, Malik Riaz Ahmed died during service on 3rd August, 2012 and the petitioner soon after the death of his father moved application for his appointment against death package as per prevailing rules, meaning thereby, that the right of petitioner's appointment against the post of Naib Tehsildar BPS-14 was accrued in year 2012 while the supra amendment has been made in the rules in year 2017, so, this amendment does not affect the petitioner's right. Beside the petitioner, many other candidates have been appointed against the death

package but the respondents have meted out discriminatory treatment with the petitioner which speaks for mala-fide and discriminatory treatment.

6. In the 1st round the writ petition at hand was accepted by this Court vide the judgment dated 26.02.2021 but later on, the case was remanded by the Hon'ble Apex Court vide decision dated 22.12.2021 with the advice to adjudicate the point that whether prayed relief could be given to the petitioner on the yardstick of previous rules and whether without challenging the amended rules prayed relief could be given. Now in light of direction of the Hon'ble Supreme Court, the question that called for determination before this Court is whether in presence of the fresh rules any relief in guise of the previous rules can be granted in favour of the petitioner or not and whether accrued rights acquired by someone can be taken back or frustrated by virtue of fresh law?

The Hon'ble Supreme Court vide decision dated 22.12.2021 in para No.6 observed as under:-

“It can safely be said that the valuable rights were accrued to the answering respondent against the post of Naib Tehsildar in view of assistance package for the employees notified as hereinabove, hence, the appellants, hereinabove, were very much duty bound and under legal obligation to appoint the respondent under 3% quota reserved for

children of the employees who died during service”.

So far as the cumulative effect of the amended rules of 2017 is concerned, the petitioner was not required to challenge the said rules. His case was to be dealt with under previous rules and policy notification in the same manner as grievance of some many similarly situated candidates had been redressed in past.

7. It is trite law that subsequent legislation or for that matter change of policy cannot frustrate and evaporate the accrued rights by any way, as such rights ripe-up under previous law are to be dealt with in light of the abolished law. It is well settled principle of interpretation of statutes that where a statute affects a substantive right, it operates prospectively unless, by express enactment or necessary amendment, retrospective operation has been given. The insertion or deletion of any provision in the rule or the law, if merely procedural in nature would apply retrospectively but not if it affects substantial rights which already stood created/acrued at the time when the un-amended rule or provision was in vague¹. When a right is

¹. Controller of Central Accounts Govt. of Punjab Vs. Abdul Waheed 2023 SCMR 111.

2. Zakria H.A Sattar Bilwani Vs. Inspecting Additional Commission of Wealth 2023 SCMR 271.

3. Govt. of KPK Vs. Khalid Mehmood 2012 SCMR 864.

accrued to a person that cannot be taken away through a repealing law ².

8. At the outset, clumsy stance of the respondents that grievance of the petitioner could not be redressed on account of non-availability of the posts is not tenable. It depicts from record that the petitioner after the death of his father approached the relevant quarters for redressal of his grievance by filing a representation in year 2013 but the respondents did not pay heed to the same and prolonged the matter by one pretext or other, while in juxtaposition, in the same period grievance of some other similarly situated candidates had been redressed in like manner. Be that as it may, the official quarters have almost admitted the stance of the petitioner in their written statement. Reply of the some paras is reproduced as infra:-

”یہ کہ پیشینہ کے والد کمشنر بحالیات کے عہدہ سے حاضر سروس فوت ہوئے تھے پالیسی رولز کے مطابق کمشنر کے وارث کو بھدہ نائب تحصیلدار محکمہ رولز میں تین فیصد کوٹہ مقرر ہے اسی کوٹہ پر پیشینہ کی درخواستیں موصول ہوئی تھیں جو ہنوز مختلف دفاتر میں زیر کار ہیں۔ یہ کہ ضمن نمبر 4 کے جواب میں گزارش ہے کہ جن نائب تحصیلداران کی تقرری کا پیشینہ نے حوالہ دیا ہے انکی تقرری سے پیشینہ کے حقوق متاثر نہیں ہوتے۔ پیشینہ کا استحقاق تحت رولز اپنی جگہ قائم ہے اس باعث ضمن ہذا میں امتیازی سلوک اختیار کرنے کی نسبت پیشینہ کا موقف غلط ہے۔“

Although the official quarters have admitted the stance of the petitioner to the material point qua existence of his right under previous policy and pendency of his applications but seemingly they have taken the case of the petitioner with the grain of the salt. It is scant to mere acknowledge the right of someone by

². Abid Mehmood Vs. Commissioner Revenue Poonch 2020 SCR 232.
Syed Adman Ejaz Gillani Vs. DEO 2018 SCR 245.
Khuram Shehzad Khan Vs. Secretary Agriculture 2018 SCR 14.
Fazal Rubani Vs. Azad Govt. 2013 PLC (CS) 357.

the people who are at the helm of affairs, what they are required to play is to ensure dispensation of administrative justice which is hallmark of the concept of better governance as enshrined in the preamble clause of the Interim Constitution 1974. Doctrine of administrative justice takes breath from the Constitution, which speaks for fairness, transparency, equality and reasoning in all sort of proceedings.

Underlining is ours

SQUEEZED ANALYSIS:

Annexures "PD & PE" listed with the writ petition are facsimiles of the application submitted by the petitioner for redressal of his grievance, are admitted proof of the stance of the petitioner. Procrastination on part of the official quarters in disposal of the application is oozing from the record. Direction of the premier on application of the petitioner dated 27.03.2013 is holding the field neither reviewed nor challenged by anyone, direction speak in clear terms:

”مطابق اہلیت / محکمانہ پالیسی مذکور کی تقرری کی جائے۔“

Lawful direction of the Chief Executive is liable to be implemented in its pros and cons, however in a case where it is found that direction runs counter to law then it is incumbent upon the relevant quarters to resubmit the matter for review and reconsideration under the scheme of Azad Jammu & Kashmir Rules of Business 1985

(constitutionally mandated rules) petitioner deserves to be benefited under the death package policy in the same manner as the other similarly placed candidates have been accommodated.

Ubi Jus ibi remedium; according to this elementary maxim wherever the common law gives a right or prohibits an injury, it also gives a remedy.

Lex semper dabit remedium; If a man has a right he must have means to indicate and maintain it. It is a vain thing to imagine a right without a remedy ³. Official quarters who are at the helm of affairs cannot be allowed to do an illegal act or for that matter procrastinate a genuine matter under colour of the law. This Court is inclined to vindicate the grievance of the petitioner by way of providing extraordinary equitable help. Let fragrance of flowers of the paradise be allowed to illuminate the cosmos (in the shape of issuance of writ of mandamus).

(Emphasis supplied)

In the wake of above multiple reasons, the writ petition is accepted and the respondents are directed to consider the case of petitioner against any available post

³. Jacob, Law dict. Title remey. Per Holt CJ in Ashby Vs. White Broom's legal Maxim 10th Edition.

under death package according to his eligibility and qualification within a short span of three months.

The petition is disposed of in the manner indicated hereinabove.

Muzaffarabad.

22.04.2024 (Saleem)

JUDGE

JUDGE

Note:- Judgment is written and duly signed. The office is directed to intimate the parties or their counsel accordingly.

JUDGE

JUDGE

(Approved for Reporting)

JUDGE

JUDGE