

HIGH COURT OF AZAD JAMMU AND KASHMIR

Writ Petition No 44/2022.

Date of institution 04.01.2022.

Date of decision 07.06.2022.

Zaid Asif Awan, Assistant Director Horticulture (Additional Charge) Development Authority Muzaffarabad Azad Jammu & Kashmir.

...Petitioner

Versus

1. Azad Govt. through its Chief Secretary, Azad Govt. of the State of Jammu and Kashmir having his office at New Secretariat Muzaffarabad.
2. Rules Making Committee through its Chairman (Additional Chief Secretary General) New Secretariat Chatter Muzaffarabad, Azad Jammu and Kashmir.
3. Secretary Services and General Administration Department Muzaffarabad, having his office at New Secretariat Muzaffarabad, Azad Jammu & Kashmir.
4. Development Authority Muzaffarabad through its Chairman having his office at Upper Tariqabad Muzaffarabad.
5. Chairman DAM having his office at Upper Tariqabad, Muzaffarabad.
6. Secretary Physical Planning and Housing, having his office at New Secretariat Chatter Muzaffarabad, Azad Jammu and Kashmir.
7. Selection Board through its Chairman (Secretary Physical Planning and Housing, having his office at New Secretariat Chatter, Muzaffarabad, Azad Jammu & Kashmir).

.....Respondents

WRIT PETITION

Before:- Justice Syed Shahid Bahar, J.

PRESENT:

Shahid Ali Awan, Advocate for the petitioner.

Muhammad Yaqoob Khan Mughal, Legal Advisor on behalf of DAM and PP&H departments.

Raja Aqib Safeer Khan, Legal Advisor for Services and General Administration Department.

Judgment:

Through the titled writ petition filed under Article 44 of Azad Jammu and Kashmir Interim Constitution, 1974, following relief has been solicited by the petitioner:-

“It is, therefore, very humbly prayed on behalf of the petitioner that by accepting the instant writ petition, the impugned notification/ Amended Rules dated 15.12.2021 (Annexure “PF”) to extent of serial No.12 regarding the post of Assistant Director (Horticulture) B-17 may kindly be set aside and the respondents be directed to modify the same in accordance with the proposal (Annexure “PD/1”). It is further prayed that the respondents may kindly be directed to forward case of the petitioner’s promotion against the post of Assistant Director (Horticulture) B-17 to the concerned selection board as per the requirement proposed Rules after got approval.”

I. FACTUAL MATRIX OF THE LIS

1. Facts precisely stated are that petitioner is 1st Class State Subject of Azad Jammu & Kashmir and permanent employee of Development Authority Muzaffarabad. It is averred that petitioner was handed over the charge of Assistant Director Horticulture vide order dated 08.06.2020. It is further averred that as per service rules, 2008, against the post of Assistant Director Horticulture B-17, method of recruitment was prescribed as 50% by promotion on the basis of seniority cum-fitness from amongst Field Superintendents with at least five years service as such. It is contended that promotion can be made from the incumbents having cadre of Field

superintendents whereas, said post does not exist in the DAM as evident from the summary of gazetted and non-gazetted posts existing in the DAM attached herewith and marked as Annexure "PC". It is further contended that respondent No.5 forwarded a proposal of amendment in the service rules to respondent No.6 vide letter dated 29.03.2021 and respondent No.6 forwarded the said proposal to the rules making committee on 06.05.2021 for approval as per requirement of law. It is maintained that as the proposed rules, criteria for promotion against the post of Assistant Director Horticulture (B-17) was prescribed as 50% by promotion on the basis of seniority-cum-fitness from amongst the employees having qualification of M.Sc with agriculture economics as a subject in degree program accompany five years experience in the Department. It is vehemently contended that the petitioner is holding the post in question from the last one and half year and in the DAM there is no other incumbent having prescribed educational qualification i.e. M.Sc.(Economics) other than the petitioner. The petitioner therefore, has a valuable right accrued on basis of proposed rules. It is averred that respondents issued the Azad Jammu & Kashmir Development Authority Muzaffarabad (employees) Service Amended Rules and promulgated the same through notification dated 15.12.2021. It is prayed that the amended

rules/notification dated 15.12.2021 mentioned above to the extent of serial No.12 are liable to be set aside/modified.

II. STANCE OF THE PETITIONER.

2. Mr. Shahid Ali Awan, the learned counsel for the petitioner reiterated the facts and grounds narrated in the petition and vehemently argued that the impugned amended rules dated 15.12.2021 to the extent of serial No.12 pertaining to the post of Assistant Director Horticulture B-17, have been issued against the requirement of law and fundamental rights of the petitioner, hence, the same are liable to be set aside/modified. He further argued that the impugned rules have been issued against the proposal forwarded by DAM which are duly endorsed by the concerned Secretariat, hence act of the respondents is against the requirement of Rules of Business, 1985, revised in 2021 hence, the same is liable to be rectified. The learned counsel further argued that incumbent Field Officer B-17 is considered for promotion against the post of Deputy Director Horticulture, whereas the post of Field Officer was upgraded vide notification dated 18.08.2009 and the post having substantial scale B-17 is totally clerical post in nature that has no concern with the section of Horticulture, on the other hand, while issuing the impugned rules, legal and justified proposal is overlooked and rejected by the official respondents, hence, the

same are liable to be modified as prayed for. The learned counsel staunchly contended that through the impugned notification, number of amendments have been approved for the different posts, the proposal forwarded by the concerned department was approved as was sent whereas only the proposal for the post of Assistant Director Horticulture in the mentioned rules has been changed. He submitted that the Interim Constitution, 1974 guaranteed equality before law and equal treatment of law, while by issuing the impugned notification, the respondents discriminated the petitioner who was sole eligible candidate in accordance with the proposed rules. The learned counsel prayed that by accepting the instant writ petition, the impugned notification/ amended Rules dated 15.12.2021 (**Annex. "PF"**) to the extent of serial No.12 regarding post of Assistant Director (Horticulture) B-17 may be set aside and respondents may be directed to modify the same in accordance with the proposal (**Annex. "PD/1"**). He further prayed that the respondents may also be directed to send the case of the petitioner for promotion against the post of Assistant Director Horticulture B-17 to the concerned selection board.

III. CONTRA VERSION

Conversely, the learned Legal Advisor appearing on behalf of respondents opposed the arguments of the learned

counsel for the petitioner and contended that framing, altering or amending the rules is the prerogative of the government or concerning authority. The learned counsel further contended that the impugned amended rules of DAM have been issued on the recommendations of Rules Making Committee and after the approval of government, hence, the same have been issued in accordance with law and it is settled law that rules cannot be framed at the sweet-will of a party or any person. The learned Legal Advisor for respondents further maintained that the impugned rules have been amended with the collective wisdom of the members of Rules Making Committee and with the consensus of all the members and authority. Finally, the learned counsel prayed for dismissal of the writ petition.

Preliminary arguments pro and contra have been heard. Record perused.

4. The claim of the petitioner is that the respondents may be directed to set-aside the impugned notification/ amended Rules dated 15.12.2021 (**Annex. "PF"**) to the extent of serial No.12 regarding post of Assistant Director (Horticulture) B-17 and respondents may be directed to modify the same in accordance with the proposal (**Annex. "PD/1"**). The petitioner further prayed that the respondents may also be directed to send the case of the petitioner for promotion against the post of

Assistant Director Horticulture B-17 to the concerned selection board after getting approval of proposed rules sent by the DAM. It is maintained that the impugned amended rules dated 15.12.2021 being unlawful, against the verdicts of the Apex Court and against the fundamental rights of the petitioner.

IV. DETERMINATION OF THE COURT.

5. As adumbrated above, the grievance voiced by the petitioner pertains to framing of rules which as per his estimation are detrimental or adverse upon his service rights. The main plank of the arguments of the learned counsel for the petitioner is that rules have not been framed by the competent authority/rules making committee in light of the proposed rules sent by Development Authority Muzaffarabad (DAM) as he is already holding the post with legitimate hope that he will be considered against the aforesaid post, have stood fragile and evaporated by the impugned rules. Be that as the case may be, making of rules is purely within the domain of rules making authority and wisdom of the rules making authority could not be challenged by any individual in a way to ask for framing of rules merely for his benefit and according to his sweet-will. Wisdom of the rules making authority cannot be challenged and questioned at random without alleging any illegality or for that matter any clash between the rules with the parent law or Act

viz a viz infringement of any constitutionally fundamental guaranteed rights having direct nexus with the alleged grievance of the petitioner. It is also in the fitness of things to state that competent authority i.e. Govt. is empowered to fix/assess, alter or enhance qualification for any post according to exigencies of the department. Thus, in my estimation, no infringement of law has been pointed out by the petitioner in the impugned rules.

6. Remedy of writ is an extraordinary constitutional remedy which can only be availed by the aggrieved person keeping in view the parameter of the Article 44 of the Azad Jammu & Kashmir Interim Constitution, 1974.

7. As per celebrated principle, canons of judicial ethics, all the presumptions of legality are to be drawn in favour of the legislative instrument even than same is subordinate legislation. Rules or progeny of a statute which are made by the competent authority in exercise of its delegated legislation power under such act on the application thereof is empowered confined and limited to the law under which those are framed.

8. Be that as it may it is not case of the petitioner that rules framed by the authority are inconsistent with the parent law (DAM, Act). In such like eventuality when rules are excess of provisions of the Statute or was in opposition with parent law,

then definitely it could be declared ultra vires and cannot be given effect. In this regard ready reference is **PLD 2013 FSC 18**.

9. It is settled principle of law that framing, altering or amending the rules is the prerogative of the government or concerning authority. The Apex Court in number of Judgments held that it is the prerogative of the government/concerned authority to frame or amend the rules. In case titled "**Qazi Ghulam Sarwar & 3 others Vs. Azad Govt. and 6 others**", reported as **2016 SCR 1737**, the Hon'ble Supreme Court of Azad Jammu and Kashmir held as under:-

"The version of the petitioners is that Rules be amended and departmental promotion quota be provided. The Framing of Rules is a sole prerogative of the concerned authorities and no such direction can be issued that the Rules shall be framed according to the wishes of the Government Servants. This proposition has already been resolved by this Court in a case reported as *Syed Rasheed Hussain vs. Azad Govt. and 6 others [2014 SCR 883]*, wherein, it has been observed as under:-

"...Even otherwise, Rules cannot be framed/amended at the sweet-will of a party and it is the sole prerogative of the Authority concerned to frame or amend the same...."

10. This view finds further support from another case reported as "**Rizwan Muzaffar v. Azad Government & 8 others [2010 SCR 156]**", wherein, the Hon'ble Apex Court of Azad Jammu & Kashmir, has observed as under:-

“---Rules cannot be framed for the benefit of a particular person --- It is ordered by the Prime Minister on application that “the request made in the application appears to be genuine, the rules shall be reconsidered by the Committee: --- Held: this practice is not appreciable.”

S. 23 --- Rules making powers vest in the Government --- The Government is competent to enhance, alter or amend the prescribed qualification for a particular post.”

In the aforesaid verdict, the Hon’ble Apex Court further held that:-

“A person cannot claim a vested right for promotion to a particular post with the claim that the rules be framed in such manner so that he may be promoted. In the impugned rules the Govt. has fixed such qualification which is necessary for relevant field. No fundamental rights of the appellant have been infringed.”

It has been further observed by the Hon’ble Apex court in the aforesaid dicta at page 171, which also speaks as under:

“No one can claim a vested right in promotion or in the terms and conditions for the promotion to a higher post. The Government has the right to enhance the qualifications and the standards for recruitment and promotion in order to maintain efficiency in service. Except for the post which the civil servant happens to hold, he cannot claim vested right in other higher tiers in the hierarchy.”

The Hon’ble Supreme Court of Azad Jammu & Kashmir in case titled “Sardar Muhammad Khalil & 101 others

Vs. Azad Govt. and 65 others”, reported as [2019 SCR 571], laid

down that:-

---framing/amendment of rules---change/enhancement of qualification---the AJ&K Elementary and Secondary Education Department Teaching Cadre Service Rules, 2016--- the power of the Govt. cannot shattered if same is not ultra vires the Constitution or based on mala fide---it appears from the record that the appellants’ claim is based on such a right which may accrue to them in future, it is very astonishing, if their claim is accepted then consequently, the way of making amendments in the rules shall be closed which is against the scheme of law. It may be observed here that enhancement in the minimum qualification for promotions/appointments is the need of the hour and when nothing is available on record to show that enhancements introduced through Rules, 2016, are ultra vires the Constitution or based on mala fide then the powers duly conferred to the government by law cannot be shattered.”

The aforesaid view finds further support from the case titled “Zaffar Iqbal Khan & 52 others Vs. Azad Government & 5 others” reported as [2018 SCR 1079], wherein August Supreme Court of AJ&K, has been laid down as under:-

“it is settled principle of law that rules cannot be enacted, altered or amended on the sweet-will of any civil servant and to declare the same as illegal/ultra vires the Constitution, the aggrieved civil servant has to prove that the Rules are inconsistent with the provisions of the parent Act or the Constitution, whereas, no such eventuality is available in the case in hand; thus, keeping in view the circumstances of the case, law does not permit us to interfere

with the powers legally exercised by the Government.”

11. Therefore, it can safely be held that the rules cannot be amended or framed at the sweet-will of any person or on the choice of any party.

12. Before parting with the order/decision all the Rules Making Authorities in the entire hierarchy of the service structure under the umbrella of Azad Jammu & Kashmir Government are expected to mull over the matter fairly with broad mindedness in order to provide equal opportunity of further promotion by way of indicating avenue for the purpose in their respective field at the eve of rule making/amending or revisiting (as it breath from Constitutionally fundamental guaranteed rights No.1 and 15).

13. The petitioner in the case in hand has failed to point out any illegality irregularity or perversity on the part of the respondents, hence, in this eventuality, no direction can be issued.

14. In backdrop of the above discussion the instant writ petition is not maintainable as no illegality has been pointed out in the rules, therefore, the petition in hand is hereby dismissed in limine.

Copy of this decision be sent to Secretary Services and General Administration of Azad Govt. of State of Jammu and Kashmir, Muzaffarabad, in view of para No.12 supra).

Muzaffarabad,
07.06.2022.

-Sd-
JUDGE

Approved for Reporting

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JUDGE