

HIGH COURT OF AZAD JAMMU AND KASHMIR

Writ petition No. 665/2009;
Date of institution. 14.05.2009;
Date of decision. 21.05.2013.

1. Sardar Arif Khan, Conservator Forests Poonch Rawalakot;
2. Hafiz Walayat Hussain Divisional Forests Officer, Working Plan Division Athmuqam District Neelum;
3. Chaudhary Muhammad Farooq Divisional Forests Officer Demarcation Division Rawalakot.

Petitioners.

VERSUS

1. Azad Govt. of the State of Jammu & Kashmir through Chief Secretary New Secretariat Complex Lower Chatter Muzaffarabad;
2. Secretary Services & General Administration Department Azad Govt. of the State of Jammu & Kashmir Muzaffarabad;
3. Secretary Forests Azad Govt. of the State of Jammu & Kashmir Muzaffarabad;
4. Chief Conservator Forests Azad Govt. of the State of Jammu & Kashmir Muzaffarabad;
5. Raja Khizar Hayat Khan, Project Director P.R.P Muzaffarabad (Inquiry Officer)

Respondents.

(2) Writ petition No. 666/2009;
Date of institution. 14.05.2009;
Date of decision. 21.05.2013.

1. Sardar Arif Khan, Conservator Forests Poonch Rawalakot;
2. Hafiz Walayat Hussain Divisional Forests Officer, Working Plan Division Athmuqam District Neelum;
3. Muhammad Arif Khan Range Officer, P.R.P. Pallandri;
4. Muhammad Khurshid, Forest Guard, Range Pallandri District Sudhenuti.

Petitioners.

VERSUS

1. Azad Govt. of the State of Jammu & Kashmir through Chief Secretary New Secretariat Complex Lower Chatter Muzaffarabad;

2. Secretary Services & General Administration Department Azad Govt. of the State of Jammu & Kashmir Muzaffarabad;
3. Secretary Forests Azad Govt. of the State of Jammu & Kashmir Muzaffarabad;
4. Chief Conservator Forests Azad Govt. of the State of Jammu & Kashmir Muzaffarabad;
5. Raja Khizar Hayat Khan, Project Director P.R.P Muzaffarabad;
6. Inquiry Committee/Inquiry Officer through Malik Muhammad Younas Conservator Forests (Inquiry Officer) Demarcation Circle Forests Department, Muzaffarabad.

Respondents.

WRIT PETITIONS

Before:- Justice M. Tabassum Aftab Alvi, J.

PRESENT:

Syed Nazir Hussain Shah Kazmi, Advocate, for Petitioners.

Raja Amjad Ali Khan, Legal Advisor for Respondents.

JUDGMENT:

The supra titled writ petitions have been addressed under Section 44 of the Azad Jammu & Kashmir Interim Constitution Act, 1974.

2. As common questions of facts and law are involved in the instant writ petitions, therefore, I proposed to decide the same through this single judgment.

3. Precise facts forming background of writ petition No. 665/09 are that petitioners are permanent employees of Forests Department performing their duties as Conservator Forest Poonch Division, DFO working Plan Authmuqam Division and DFO Demarcation Division Rawalakot respectively. It is stated that some

posts of Junior Clerks, Foresters, Forest Guards and Naib Qasids were vacant and working of the Department was badly affected due to shortage of staff, hence, on the basis of direction of the Prime Minister and order of Secretary Forests, certain appointments were made against the posts supra on contract basis which were latter on also advertised. It is claimed that thereafter selection committees were also constituted to evaluate the merit of the individuals vide order dated 17.09.2008 followed by another order dated 22.09.2008. The above orders pertaining to constitution of selection committees were, however, cancelled by Chief Conservator Forests, vide orders dated 25.10.2008 and 04.12.2008 respectively. An inquiry committee was also constituted to check the validity of the said appointments made in the Department, which submitted its report to Chief Conservator on 22.01.2009. It is alleged that although all appointments were made on direction of the Prime Minister and high-ups of the Department, however, without any lawful justification and for mala-fide reasons through Government notification dated 22.04.2009 proceedings under Removal from Service (Special Powers) Act, 2001 were initiated against petitioners, hence, the instant constitution petition.

4. The writ petition has been contested by the respondents through parawise comments, which were

treated as written statement on request of the learned counsel for respondents. It is stated that appointments were made without advertisement of posts, test, interview and adopting any selection process by violating law of the land, therefore, competent authority initiated disciplinary proceedings against petitioners. It is further stated that the impugned notification was issued without any malice and political victimization through which an honest officer was appointed as an inquiry officer where petitioners may put their defence and prayed for dismissal of petition.

5. Precise facts of writ petition No. 666/2009 are that petitioners are Conservator Forests, Divisional Forest Officer, Range Officer and Forest Guard of Forests Department. It is claimed that for land comprising survey Nos. 253 and 570, situated in village Azad Pattan, a suit was filed for adverse possession against the Forests and Revenue Departments by Khaliq Nawaz and others who also succeeded to obtain decree from Sub-Judge, Palandri, on 21.02.1993. It is further stated that Khaliq Nawaz & others illegally constructed a Cottage in the said land, however, petitioner No. 1, who was Conservator Forests at the then time, passed an order of ejectment of the above persons on 28.11.1998. It is averred that Khaliq Nawaz and others again filed a declaratory suit in the Court of Civil Judge, Pallandri, on 14.01.1999 and

obtained stay order against Forests and Revenue Departments. It is further alleged that during pendency of the above suit, land comprising survey No. 253 measuring 3 Kanals was illegally transferred by them in favour of one Sardar Altaf Hussain, vide sale deed dated 06.01.2005, and consequently a mutation No. 187 was also attested in favour of latter on 15.03.2005. The suit was contested by the Forests Department, however, a declaratory decree was also issued by the concerned Court on 27.12.2005. It is averred that later on Forests and Revenue Departments filed a suit before Civil Judge, Palandri, on 26.01.2006 which after due process was decreed on 15.09.2006. Against the above mentioned decree, an appeal was filed before District Judge, Palandri, on 20.09.2006 which was dismissed, against which an appeal is yet pending before Circuit Bench Rawalakot of this Court. It is alleged that without considering the record supra, an ex-parte preliminary inquiry was conducted by respondent No.6 without associating the petitioners and a report was submitted to the Prime Minister for initiating disciplinary proceedings against them. On the basis of the report mentioned herein above, through the impugned notification dated 22.04.2009, proceedings under Removal from Service (Special Powers) Act, 2001 were initiated. The petitioners

have challenged vires of the above notification through the instant constitution petition.

6. The writ petition has been contested by the respondents through written statement, wherein, it is stated that matter pertains to terms and conditions of service, therefore, this Court has got no jurisdiction to adjudicate upon the same. It is further stated that writ petition has been filed by petitioners for mala-fide reasons, therefore, the same is not maintainable. The contents regarding malice etcetra have also been repudiated.

7. The learned counsel for parties argued the cases, according to their respective pleadings.

8. All the petitioners are civil servants performing their duties as Conservator Forests, Divisional Forest Officer, Range Officer and Forest Guard, respectively. The learned counsel for petitioners also very generously admitted that petitioners are civil servants as enshrined in Azad Jammu & Kashmir Service Tribunals Act, 1975 and Azad Jammu & Kashmir Civil Servants Act, 1996. The petitioners considered themselves aggrieved from Government notification dated 22.04.2009, whereby disciplinary proceedings under the Azad Jammu & Kashmir Civil Servants Removal from Service (Special Powers) Act, 2001 were initiated. No any law was cited at bar that proceedings initiated under disciplinary law can

be assailed by a Civil Servant through writ jurisdiction. Admittedly, no any adverse order was yet passed by the competent authority against the petitioners and only notifications for initiating disciplinary proceedings were issued. There were allegations against the petitioners that they had appointed numberless persons in different cadres and grades without advertisement of posts, merit and recommendations of respective selection committees in the first writ petition. The defence of petitioners may be genuine that all such appointments were made by them on direction of the Prime Minister and high-ups of the Forests Department including Secretary and Chief Conservator of Forests, as various orders appended with the writ petition supra speak itself, which defence can be placed by them before the inquiry officer. The petitioners were charged in the latter writ petition that they failed to protect forest land where some influential persons namely Abdul Khaliq & others constructed Petrol Pump with their connivance, hence, they seemed guilty of misconduct and inefficiency. The petitioners were in fact given an opportunity to repudiate the allegations before the inquiry officer, however, they felt advised to challenge the said disciplinary proceedings through the instant constitution petitions. After giving deep thought, I am of the view that, the disciplinary proceedings cannot be assailed through writ jurisdiction. An identical point was

considered by the Karachi High Court in case titled Karachi Transport Workers Union V. Karachi Transport Corporation Ltd and others (PLC 1987 (Lab) 456). At page 457 of the report, it was held as under:-

“The petitioner has also felt aggrieved against certain charge-sheets which have been issued to certain employees of the respondents where an action under Sind Essential Services (Maintenance) Act of 1958 is threatened. The issue of mere charge-sheet is hardly a matter which should be brought to this Court for the purpose of relief. The employees who have been issued charge-sheets are required to submit their replies and they should do so. We are sure that the respondent will give due regard to the answers submitted by the employees and due inquiry will be held into the charges. At the moment there is hardly any justification for the petitioner to challenge the issue of these charge sheets. If eventually action is finally taken by the respondent against the employees and they have no other adequate remedy available, then alone they can invoke the extraordinary jurisdiction of this Court. Consequently, this petition is not found to be sustainable and is hereby dismissed in limine”.

9. The petitioners themselves considered aggrieved from the impugned notifications dated 22.04.2009. It is settled principle of law that an order pertains to terms and conditions of a Civil Servant cannot be challenged through writ jurisdiction. The disciplinary proceedings are falling under Section 15 Chapter-II of Civil Servants Act, 1976, hence, included in the terms and conditions of Civil Servants which cannot

be assailed in writ jurisdiction. The point came under consideration before the Apex Court in case of *The Accountant General & others V. Zaman Hussain Khan* (1993 SCR 259). At page 273 of the report, it was held as under:-

*“I fully endorse the view that the explanation of departmental authority, in section 4 of the Service Tribunal Act refers to an authority competent to make an order in respect of any of the terms and conditions and does not have the effect of laying down the condition that the authority must be competent to pass the particular order from which appeal has to be filed. The words “an order in respect of any terms and conditions” are words of liberal import and a restricted construction is not possible. It may be added that it is significant that the main section lays down that an appeal lies against a “final order” but in the explanation the reference is to “order” in contradistinction to “final order”. This further clarifies that the law-maker never intended to lay down in the explanation that “final order” from which an appeal was to be filed should have been competently passed in order to qualify it to be appeal-able. Thus, the liberal interpretation of the term “departmental authority would include any authority which can pass an order in respect of any terms and conditions. In *Azad Jammu & Kashmir Government V. Syed Zaman Ali Shah* [PLD 1991 SC. (AJK) 57] it was held that terms and conditions are scattered but all the matters which form part of Chapter-II of the *Azad Jammu & Kashmir Civil Servants Act* are decidedly terms and conditions of service. The matters which are included in Chapter-II are appointment, probation, confirmation, seniority, promotion, posting, transfer, termination of service, retirement from service, removal from service, reversion to lower grade or service, re-employment, conduct, efficiency and*

discipline, pay leave, pension, gratuity, provident fund and group insurance. The authorities who are competent to pass appropriate orders in respect of terms and conditions have been specified under different rules and delegation orders. Similarly the authorities competent to award penalties are specified in the Civil Servants (Efficiency and Discipline) Rules. The “authorised officers” have been vested with authority to impose minor penalties while major penalties have been reserved for “the authority”. Every authority who can pass an order in respect of any of these terms and conditions is a departmental authority within the meaning of explanation appended to section 4 of the Service Tribunal Act. Therefore, if an order has been passed by any of these authorities appeal would lie to the Service Tribunal. If an authority transgresses its jurisdiction and passes an order without jurisdiction or imposes a major penalty which cannot be imposed by him, it will be a good ground on which an appeal before the Service Tribunal can be based”.

The aforesaid view was reiterated by the apex Court in case titled Qazi Muhammad Suleman & 5 others v. AJK Govt. & 2 others (2001 SCR 372), wherein at page 377 it was held by their lordships as follows:-

“In the light of this judgment of the Supreme Court the Service Tribunal can competently resolve the dispute as to whether the impugned notification is or is not bad in law. The other contention of the learned counsel for the appellants is that his client had filed writ of prohibition which can be allowed only by the High Court. Even this objection is without substance. In respect of matters relating to terms and conditions of service no such writ can be issued to deprive competent authority from amending, canceling or rescinding any order, notification earlier issued by it. In Dr. Muhammad Sarwar V.

Dr. Muhammad Sharif Chatter etc. [1995 SCR 292] the respondent, Dr. Muhammad Sharif Chatter had obtained his promotion order from the Government. He filed a writ petition in the High Court seeking a writ of prohibition against the Government that notification dated 13.05.1993 relating to his promotion should not be amended or cancelled because in view of section 21 of General Clauses Act if an order is acted upon, it cannot be amended, rescinded or cancelled, especially without hearing the party concerned. The High Court allowed the writ petition and issued the writ of prohibition against the Government. The judgment of the High Court was assailed in appeal before this Court. The Supreme Court allowed the appeal and reiterated the view earlier taken by this Court in a case titled Raja Naveed Ahmed, V. Qazi Khalil etc. [1994 SCR 267] that no writ of prohibition can be issued by the High Court in respect of matter falling within the terms and conditions of civil servant”.

10. The contention of the learned counsel for petitioners that Raja Khizar Hayat Khan, Project Director-respondent (Chief Conservator Forests) may be deleted from the impugned notification as due to seniority dispute between the petitioners and Raja Khizar Hayat Khan, he should have not been appointed as inquiry officer, is misconceived. No such like point has been raised in the writ petition, therefore, submission is against principle of pleadings. Even otherwise petitioners are Conservator, Divisional Forests Officer, Range Officer and Forest Guard while Raja Khizar Hayat Khan is Chief Conservator of Forests, therefore, argument is fallacious, hence, repelled.

11. The inquiry officer has yet to probe into the matter and then submit his inquiry report before the competent authority. The petitioners will be at liberty to place their defence before inquiry officer and then before their competent authority. On the basis of report of inquiry officer, the competent authority will have to pass an order. In case of any adverse order contrary to law, the petitioners will be at liberty to challenge vires of the same before the concerned Service Tribunal, therefore, writ petitions are accordingly bad in law.

12. The crux of above discussion is that finding no substance in the instant writ petitions, the same are hereby dismissed with costs.

Muzaffarabad
21.05.2013.(I)

JUDGE