

HIGH COURT OF AZAD JAMMU & KASHMIR

Writ Petition No. 248/2009;
Date of Institution. 05.03.2009;
Date of Decision. 30.01.2013.

1. Syed Sibtul Hassan Sabzwari son of Zahoor Hussain, Sub Engineer;
2. Dilpazeer Ahmed son of Kaloo Khan, Sub Engineer, employees of Multi Sector Rehabilitation and Improvement Project (MSRI&P) Works and Communication Department of Azad Jammu and Kashmir, Muzaffarabad.

Petitioners.

VERSUS

1. Azad Government of the State of Jammu & Kashmir through its Chief Secretary having his office at new Secretariat Lower Chatter, Muzaffarabad;
2. Secretary Works and Communication, Azad Government of the State of Jammu & Kashmir having his office at Lower Chatter Muzaffarabad;
3. Project Coordinator (MSRI&P), Muzaffarabad;
4. Section Officer Works and Communication Department of AJK Muzaffarabad.

Respondents.

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Writ Petition No. 68/2013;
Date of Institution. 17.01.2012;
Date of Decision. 30.01.2013.

1. Syed Sibtul Hassan Sabzwari son of Zahoor Hussain;
2. Dilpazeer Ahmed son of Kaloo Khan, presently Sub Engineers/ Employees of Multi Sector Rehabilitation & Improvement Project (MSR & IP), Department of Communication & Works, Azad Government of the State of Jammu & Kashmir, Muzaffarabad.

Petitioners.

VERSUS

1. Azad Government of the State of Jammu & Kashmir through Chief Secretary to Azad Government, Civil Secretariat, Muzaffarabad;
2. Secretary Communication & Works, Azad Government of the State of Jammu & Kashmir, Muzaffarabad;

3. Secretary Physical Planning & Housing, Azad Government of the State of Jammu & Kashmir, Civil Secretariat, Muzaffarabad;
4. Secretary Services & General Administration Department, Azad Government of the State of Jammu & Kashmir, Civil Secretariat, Muzaffarabad;
5. Secretary Finance, Azad Government of the State of Jammu & Kashmir, Civil Secretariat Muzaffarabad;
6. Chief Engineer Buildings & Public Health (North), Azad Government of the State of Jammu & Kashmir, Muzaffarabad;
7. Chief Engineer Highways (North), Azad Government of the State of Jammu & Kashmir, Muzaffarabad;
8. Project Co-ordinator Multi Sector Rehabilitation & Improvement Project, Upper Chatter, Muzaffarabad;
9. Executive Engineer, MSR & IP (Roads and Bridges), Communication & Works Department, Civil Secretariat, Muzaffarabad;
10. Executive Engineer (MSR & IP) Roads and Bridges Communication & Works Department, Division Kotli, (AJK).

Respondents.

WRIT PETITIONS

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

PRESENT:

Mr. Tahir Aziz Khan, Advocate for Petitioners.

Ch. Muhammad Manzoor, Advocate for Respondents in Writ Petition No. 248/2009.

Nemo for Respondents in Writ Petition No. 68/2013.

ORDER:

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

2. As common questions of facts and law are involved in both the captioned writ petitions, therefore, I propose to decide the same through this single order.

3. Precise facts giving rise to writ petition No. 248/2009 are that petitioners are first class State Subjects being qualified as Sub

Engineers and diploma holders in Civil Engineering. It is claimed that petitioner No.1 is highly qualified as Bachelor of Technology. The petitioners were appointed after selection on merit as Sub Engineers/ Overseers in Multi Sector Rehabilitation & Improvement Project under Works & Communication Department of Azad Jammu and Kashmir, Muzaffarabad, vide order dated 11.05.2006. It is averred that petitioners were appointed initially for 4 years period after adopting due process of law. It is alleged that respondents with mala-fide intentions for appointment of their kith and kin advertised 7 posts of regular Civil Sub Engineers B-11 through "Daily Jang" dated 24.01.2009. The petitioners through the instant writ petition challenged the vires of abovementioned advertisement dated 24.01.2009 and solicited a direction for their appointment/ adjustment on regular basis like other employees of development projects.

4. After admission of writ petition, respondents were directed to file written statement, however, on request of the learned counsel for respondents, comments were treated as written statement vide order dated 02.06.2009. It is claimed that petitioners were appointed in MSR & IP on contract basis while the disputed posts pertained to the Public Works and Communication Department, therefore, petitioners have no concern with the said posts. It is further claimed that petitioners may also apply for the posts and participate in competition for induction in regular service and prayed for dismissal of writ petition.

5. Precise facts giving rise to writ petition No. 68/2013 are the same as enlisted in writ petition No. 268/2009. However, in this writ petition, petitioners further relied upon a notification dated 25.03.2010, whereby Education Department regularised services of various contract employees. The petitioners also placed orders of certain other departments on record for the purpose of regularisation of their services initially made on contract basis. They relied upon orders of the Prime Minister Azad Government of the State of Jammu & Kashmir dated 30.05.2012, 01.06.2012 and 19.12.2012, respectively for their confirmation/ regularisation against the disputed posts. The petitioners also challenged impugned notice of termination dated 30.11.2012 and solicited their confirmation through the instant petition.

6. The writ petition No. 248/2009 was fixed for arguments on 04.03.2013 which was antedated and fixed for the purpose on 31.01.2013. However, on application and request of the learned counsel for petitioners, the same was again antedated and placed before the Court on 22.01.2013. The petitioners also moved an application for withdrawal of the above writ petition with permission to file fresh one. The other side has opposed the application.

7. The learned counsel for petitioners, Mr. Tahir Aziz Khan, Advocate, submitted that during pendency of earlier writ petition No. 248/2009, certain orders were passed in favour of petitioners for their confirmation against the disputed posts and notice for their termination was also issued, therefore, while withdrawing the earlier

writ petition, fresh may be allowed to be filed. The learned counsel while addressing arguments on merit submitted that as various employees of certain departments were regularised by the Government and its departments, therefore, necessary direction for regularisation of petitioners will serve the ends of justice. The learned counsel further emphasised that for regularization of petitioners the Prime Minister of Azad Government of the State of Jammu & Kashmir passed orders dated 30.05.2012, 01.06.2012 and 19.12.2012 which are liable to be implemented and acted upon by the respondents. The learned counsel pressed into service that impugned notice dated 30.11.2012 is bad in law, therefore, the same may be set aside and necessary direction for regularization/confirmation of petitioners be issued.

8. The learned counsel for respondents, Ch. Muhammad Manzoor, Advocate while controverting the arguments of the learned counsel for petitioners submitted that petitioners were appointed on contract basis for 4 years' period vide order dated 11.05.2006 and on the basis of the above order they cannot claim their regularization under law. The learned counsel emphasized that project in question was completed on 31.12.2012, hence, services of petitioners are no more required. The learned counsel further submitted that on the basis of ad-interim injunction they are in service since 2009 and to prolong case for mala-fide reasons, now they have filed fresh writ petition for ill gotten gains and prayed for dismissal of writ petitions.

9. After hearing the learned counsel for the parties I have perused the contents of writ petitions and examined the appended documents minutely. It will be useful to reproduce contract appointment order of petitioners dated 11.05.2006 which speaks as under:-

A reading of the abovementioned order of petitioners makes it crystal clear that they were appointed as Overseers purely on contract basis, along-with others for 4 years period or till completion of project. On the basis of the supra order no commitment was given by the respondents to regularise petitioners in civil service. According to spirit of the Azad Jammu and Kashmir Interim Constitution Act, 1974, Civil Servants Act, 1976 and Azad Jammu and Kashmir Civil Servants (Appointment and Conditions of Service) Rules, 1977, all the posts in civil service shall be filled in on merit determined by the open, transparent and competitive method. The same point came under consideration before the Full Bench of Hon'ble Supreme Court of Azad Jammu and Kashmir, in an unreported precedent in civil appeal No. 67/2012 titled *Waqas Latif and 3 others Vs. Azad Government and 6 others* dated 28.08.2012. The relevant paragraph No. 6 is reproduced as under:-

“So far condition No.1 of the referred notification is concerned, the same speaks of filling the posts according to duly prescribed recruitment rules. In the Azad Jammu and Kashmir, under the constitutional provisions, Azad Jammu and Kashmir, Civil Servants Act, 1976 has been enforced and the rules have been made there under, in 1977, which are called as the Azad Jammu and Kashmir Civil Servants (Appointment & Conditions of Service) Rules, 1977. According to spirit of the constitution, Civil Servants Act and the recruitment rules, all the posts in the civil service shall be filled in on merit determined by the open transparent competitive method. This Court, in several cases has interpreted and enunciated the principles governing the induction into civil service. In this regard, we may fortify through the wisdom of landmark judgment titled Azad Jammu and Kashmir & others V. Muhammad Younas Tahir &

others, reported as 1994 SCR 341. According to the facts of this case, a large number of person were inducted into service on the ad-hoc basis. Among them, some were continuing for period of more than 10 years. The Azad Jammu and Kashmir Legislative Assembly, made a law known as "The Azad Jammu and Kashmir Civil Servants (Regularization of Ad-hoc Appointment) Act, 1992, through which ad-hoc appointee's service were regularized but when the vires of this Act, were challenged and the Court tested this legislative Act on the touch stone of the constitutionally guaranteed fundamental rights, the Act, was found contrary to fundamental right No.15 which speaks that all the state subjects are equal before law, thus, the Act was struck down."

The same view is later on adopted by the apex Court in the case titled Mst. Tanveer Ashraf & 25 others Vs. Azad Govt. and 2 others, reported as 2011 SCR 528, wherein some ad-hoc appointees were having service of more than 15 years at their credit but to uphold the supremacy of law and spirit of merit, their permanent induction without open competition was disapproved by the Hon'ble Supreme Court and following dictum was laid down in the above referred report:-

"It is now settled that except the method of appointment on merit determined through a transparent open competition, no other method, tactics, policy can be approved, therefore, it can be safely held that condition No.1 imposed in this notification is quite in accordance with the spirit of law and principle of law enunciated by this Court in several cases.

9. So for the validity of conditions No.2 and 3 of the notification is concerned, these conditions are ex-facie contrary and destructive to condition No.1 imposed in the notification referred hereinabove. It is also a celebrated principle of law that the validly enforced law cannot be defeated by any executive order or notification. If the Government, in the public interest, is of the view that some

change in the law relating to service matter is necessary, it will have to follow the legal method of amending, substituting or making the law but through the executive notification, validly promulgated and enforced law's spirit cannot be allowed to be defeated."

10. The impugned notice was issued to petitioners as per contract clause No. 4(vi) and no illegality was pointed out in the said notice regarding violation of any law which may be persuaded for interference of this Court.

11. The contention of the learned counsel for petitioners that various departments and Government regularised services of contract employees, therefore, petitioners are also entitled for similar relief is baseless which is hereby repelled. The reference of unlawful executive orders cannot be made to obtain equitable relief of writ jurisdiction.

12. The contention of the learned counsel for petitioners that the Prime Minister, Azad Government of the State of Jammu & Kashmir granted relief to petitioners for their regularisation on 30.05.2012, 01.06.2012 and 19.12.2012 is also not tenable. The learned counsel during course of arguments admitted that competent authority of petitioners is Secretary concerned, therefore, orders of the Prime Minister are void ab initio and against the scheme of law which cannot be implemented through writ jurisdiction. The similar point was considered by the apex Court in case of *Major Muhammad Aftab Ahmed (Retired) Vs. Azad Jammu*

and *Kashmir Government* [1992 SCR 307]. At page 312 of the report it was held as under:-

“iii) Even if it is assumed for the sake of arguments that the Prime Minister had made the order for the appointment of the appellant to the post of Superintendent of Police still it cannot be given effect to or enforced by way of issuing writ directing the respondents to issue the order of his appointment to the said Post as it is a settled law that the writ jurisdiction cannot be exercised to direct a person to give effect to an unlawful order of any authority even though it is competent authority to pass such an order in a lawful manner. Since, as said earlier, the appointment of the appellant could not be made to the post of Superintendent of Police under the rules the orders of the Prime Minister claimed by the appellant to be the orders of his appointment to the said post being violative of the relevant rules were unlawful and consequently were not enforceable by the High Court in its writ jurisdiction which is discretionary in nature and its exercise is always refused where the ends of justice and facts of the case do not justify and call for to do so.”

13. The application for withdrawal of earlier writ petition with permission to file fresh one is also baseless. No formal defect was pointed out in the earlier writ petition and basic claim of petitioners is to regularise them against the posts of Sub Engineers/ Overseers B-11 without adopting due process of law on the basis of their contract appointment made against a temporary scheme. For the purpose of withdrawal the guiding principles are laid down in order XXIII Rule 1 of the Code of Civil Procedure which are reproduced as under:-

“1. Withdrawal of suit or abandonment of part of claim-(1) At any time after the institution of a suit the plaintiff may, as against all or any of the

defendants withdraw his suit or abandon part of his claim.

(2) Where the Court is satisfied.

(a) that a suit must fail by reason of some formal defect, or

(b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim. It may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim.

(3) Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in sub-rule (2), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(4) Nothing in this rule shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the consent of the others”.

A bare reading of the above mentioned statutory law makes it clear that a suit can be withdrawn on the ground of any formal defect or other sufficient grounds. No any formal defect or grounds were pointed out in the writ petition already filed by petitioners. Before allowing withdrawal application, satisfaction of the Court regarding formal defect or other sufficient grounds is necessary. The same point pertaining to withdrawal of writ petition came under consideration before this Court in case of *Sajida Maqsood Vs. Deputy Commissioner/Collector district Muzaffarabad* and others decided on 30.11.2012, wherein it was held as under:-

“The writ petition was filed by petitioner alongwith all necessary facts with plethora of documents. The learned counsel for the petitioner could not satisfy that how writ of certiorari,

instead of mandamus was liable to be filed, therefore, withdrawal application with permission to file fresh one has got no substance for the following reasons.

(I) A suit bearing No. 232/97 titled Mst. Mustafa Begum V. Azad Govt. & others was filed by mother of petitioner, before Civil Judge Muzaffarabad, on 25.01.1997, whereby, award issued in favour of respondents pertaining to disputed land was challenged which was dismissed on merit vide judgment and decree dated 15.05.2004. Against the above judgment and decree no appeal was filed, therefore, the same got finality under law.

(II) After passing more than three and half years again another suit No. 777/07 titled Mst. Mustafa Begum V. Azad Govt. & others was filed, regarding the same land for the same relief, before Senior Civil Judge, Muzaffarabad, on 28.11.2007. The learned Senior Civil Judge on the ground of principle of resjudicata rejected the plaint, vide order dated 19.05.2009. It appears that meanwhile mother of petitioner died, hence, an appeal titled Sajida Maqsood & 8 others V. Azad Govt. & 4 others was filed before Additional District Judge, Muzaffarabad, which was dismissed, vide judgment and decree dated 29.06.2010. Against the above mentioned judgment and decree civil appeal No.71/09 was filed before this Court, which was dismissed as withdrawn, vide order dated 01.11.2012. After finalizing, dispute regarding suit land in second round up to this Court, the same cannot be re-opened through even fresh writ petition.

(III) As matter after adjudication on merit was already finalized, therefore, permission to file fresh writ petition will be futile exercise, which will frustrate the judgments and decrees already obtained finality under law.

(IV) Withdrawal with permission to file fresh writ petition would deprive the Government and public functionaries to carry on national project pertaining to construction of Prime Minister House Narrul, which would defeat the ends of justice and statutory law of the land.

(V) The petitioner has moved withdrawal application with permission to file fresh one for mala-fide reasons to retain her unlawful

possession on the land in question and to stop the Court from passing any order.

(VI) The application for withdrawal with permission to file fresh one was not moved with clean hands.

(VII) The contention of the learned counsel for petitioner that writ of certiorari was liable to be filed and not for mandamus is also misconceived. From the bundle of facts enlisted in writ petition, I do not find that writ of certiorari was liable to be filed on the basis of peculiar facts of the case. Even there is no any fresh cause of action as urged on behalf of petitioner.

(VIII) The disputed land was awarded in favour of respondents on 23.12.1978. The possession of petitioner on the said land after award supra is unlawful, therefore, no any relief can be extended to petitioner even in fresh writ petition.

18. As observed earlier, withdrawal with permission to file fresh, cannot be claimed as a matter of right. For this purpose satisfaction of Court regarding formal defect or other sufficient grounds is mandatory. An identical point came under consideration before the Hon'ble Supreme Court of Pakistan in case titled Haji Muhammad Boota & others v. Member (Revenue), Board of Revenue Punjab and others (PLD 2003 SC 979). At page 991 of the report it was held as under:-

“It was further held in the above case that the withdrawal would not be allowed if it results in perpetuating a fraud or injustice. The Court may in such circumstances decline the petitioner to withdraw the suit. The Court may also in appropriate cases where it comes to the conclusion that the purpose of withdrawal of proceeding is only to prevent the Court from passing an order undoing a wrong or an injustice done to party or the withdrawal would deprive the Government or a public functionary to receive or recover the public dues, or the withdrawal would otherwise defeat the ends of justice, decline the prayer for withdrawal”.

An identical view was expressed by the Apex Court of Pakistan in case of Sardar Muhammad Kazim Ziauddin Durrani & others V. Sardar

Muhammad Asim Fakhuruddin Durrani & others (2001 SCMR 148). At page 154 of the precedent case it was held as follows:-

“As for as instant case is concerned if it is looked keeping in view the above discussion, it would abundantly be clear that so for the ground mentioned in the application under order XXIII, Rule 1, sub-Rule (2), C.P.C that the suit property has been gifted by respondent No. 1 to their mother Mst. Hassan Taj (late) etc. is concerned it cannot be treated to be a apparent lackness in formation/arranging the suit in order to invoke the provisions of clause (a), sub-rule (2) of Rule 1 of Order XXIII, C.P.C. As this effect is substantial or latent in its nature and touches the merits of the case, therefore, for such reason permission to withdraw the suit was unwarranted.”

The point also came under consideration before, Lahore High Court, Lahore, in case of Salma Khalil & 3 others V. Rashida Siddiquee and another (2000 CLC 260). At page 262 of the report it was held as under:-

“I have considered the submissions made by the learned counsel for the parties. I have noticed that while granting permission to respondent No. 1 to file a fresh suit the learned first appellate Court did not specify the formal defect and permission was granted to respondent No.1 to file a fresh suit for declaration. The contention of the learned counsel for the respondents that in the first suit a formal declaration as to the easement rights was not claimed which according to him amounted to a formal defect has no merit either. It is the substance rather than the form which should be looked into to determine the nature of relief claimed by a plaintiff in a suit. In para 4 of the plaint the respondents had clearly pleaded easement rights on account of prescription. Further,

the suit was filed in 1992 and was decided on 08.12.1996 after parties had led the entire evidence and the merits of the claims of the parties were duly considered and adjudicated. The respondents could not, therefore, be permitted to take another chance in the form of a declaratory suit”.

14. The crux of above discussion is that finding no force in the withdrawal application moved in writ petition No. 268/2009 the same is hereby turned down consequently writ petition is dismissed. Similarly, writ petition No. 68/2013 for the same cause of action pertaining to regularisation of petitioners on the basis of their contract service as claimed in earlier petition against the disputed posts of Sub Engineers/ Overseers, having no substance is also dismissed in limine.

Muzaffarabad
30.01.2013 (M)

J U D G E