

15/2-1

IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:

MR. JUSTICE GULZAR AHMED, HCJ
MR. JUSTICE IJAZ UL AHSAN

(AFR)
CIVIL APPEAL NO.597 OF 2020

(Against the judgment dated 06.11.2019 passed
by the Peshawar High Court, Peshawar in Writ
Petition No.1806-P of 2017).

Controller General of Accounts

...Appellant(s)

Versus

Fazli Ahmad, DAO EC (C&W Division Hangu)
and others.

...Respondent(s)

For the Appellant(s):

Moulvi Ejaz ul Haq, DAG.
M. Mushtaq Khan, Account Officer.
Maqbool Ali, ACGA.

For the Respondent(s):

Mr. Sabit Ullah Khan, ASC
Syed Rafaqat H. Shah, AOR
(Nos.1-3, 8-11, 17, 18, 22, 25, 27, 28, 30)

Mr. Abdul Lateef Afridi, ASC.
(Nos.4-7, 12-16, 19-21, 24, 26, 29, 31-32)

Date of Hearing:

10.02.2021.

JUDGMENT

IJAZ UL AHSAN, J.- This appeal by leave of the Court arises out of a judgment of the Peshawar High Court, Peshawar dated 06.11.2019. Through the impugned judgment, a constitutional petition (W.P.No.1806-P of 2017) filed by the Respondents was allowed to the extent of prayers "A" and "C" while prayer "B" made by them was not granted.

2. Briefly stated the facts necessary for decision of this Appeal are that the Respondents were working as

Divisional Accounts Officers in the Office of the Appellant in Khyber Pakhtunkhwa. In order to become entitled to promotion they participated and qualified the departmental examination Part-I in December, 2012 in accordance with the Rules and Regulations prevalent at that time. They had also completed their practical training for six months. As such, they had an expectation of being promoted subject to passing Part-II of the examination which was scheduled to be conducted in the year 2013. Such examination did not take place. While the Respondents were awaiting holding of the examination, vide notification dated 09.03.2017 the method of examination was changed. Previously, the examinations were conducted by the department itself but through the aforesaid notification the Federal Public Service Commission ("FPSC") was assigned the job of conducting promotion examination for appointment of Divisional Accounts Officers (BS-17).

3. Pursuant to the notification in question which was issued by the Office of Controller General of Accounts, Resolution No.881 was circulated by the said Office intimating that promotion examination will henceforth be conducted by the FPSC. The Respondents were aggrieved of the said notification as well as the Resolution and challenged the same before the High

Court by way of a constitutional petition which was allowed vide impugned judgment dated 06.11.2019 in the above noted terms.

4. The Appellant was aggrieved of the impugned judgment and approached this Court through a Civil Petition bearing No.29 of 2020 in which leave to appeal was granted vide order dated 25.06.2020 in the following terms:

"The learned Additional Attorney General for Pakistan has placed before us a photocopy of notification No.S.R.O.162(I)/2017 dated 15.03.2017 duly published in the Gazette of Pakistan and contended that this very notification was validly issued under sub-rule 20 of Rule 3 of the Civil Servants (Appointment, Promotion and Transfer) Rules, 1972 read with Section 7(1)(c) of the Federal Public Service Commission Ordinance, 1977. He contends that the learned High Court has altogether misled itself in deciding the question by relying upon the provisions of Section 12 of Controller General of Accounts (Appointment, Functions and Powers) Ordinance, 2001. He submits that although the earlier Regulation dated 08.10.2012 did provide for departmental examination but by the notification impugned before the learned High Court the said examination was required to be conducted by the FPSC and the Respondents had no valid reason to approach the High Court nor was it justified to interfere with the decision of the Federal Government regarding conducting of examination more so when it is the sole prerogative of the Federal Government to take examination of its employees in the manner as it deems fit and in accordance with law. In support of his contentions, the learned Law Officer has relied upon a judgment of this Court reported as

Government of Khyber Pakhtunkhwa v. Muhammad Javed (2015 SCMR 269).

2. The submissions made by the learned Additional Attorney General need consideration. Leave to appeal is therefore granted to consider inter alia the same. Appeal stage paper books be prepared on the available record. However, the parties are at liberty to file additional documents, if any within a period of one month. As the matter relates to service, the Office is directed to fix the same for hearing in Court expeditiously, preferably after three months.

5. The learned Deputy Attorney General appearing for the Appellant has argued that determination of the method of recruitment is the sole prerogative of the appointing authority in terms of Rule 3(2) of the Civil Servants (Appointment, Promotion and Transfer) Rules, 1973 ("Rules, 1973"). The previous Rules were validly amended by the competent authority and the Respondents had no valid reason or grievance to challenge the same. He further maintains that decision of the Office of Controller General of Accounts to conduct promotion examination through FPSC was based on lawful authority exercised by the said Office under Section 5(j) of the CGA Ordinance read with Section 7(I)(c) of Federal Public Service Commission Ordinance, 1977. He further maintains that decision to change the examination policy was taken in consultation with the Establishment Division as required by the Rules of Business, 1973. He finally submits that the syllabus and

other terms of the examination were not changed and it was only for administrative reasons and to ensure transparency and efficiency that FPSC was assigned the job of conducting the final examination.

6. The learned counsel for the Respondents on the other hand has defended the impugned judgment.

7. We have heard the learned DAG as well as the learned ASC for the Respondents and have gone through the record. Rule 3(2) of the Rules, 1973 being relevant in the case in hand provides as follows:

"3(2) (2) The method of appointment and the qualifications and other conditions applicable to a post shall be as laid down by the Ministry or Division concerned in consultation with the Establishment Division."

8. A perusal of notification dated 09.03.2017 *ex facie* reveals that it has not been issued by the Government of Pakistan and only the concurrence of the Establishment and Finance Divisions has been solicited. While it is true that Rule 3(2) of the Rules, 1973 empowers the concerned Ministry/Division subject to consultation with the Establishment Division to lay down methods of appointment, the notification in question as well as the Resolution under challenge were neither issued by any Ministry or Division nor published in the official Gazette. Further, according to the principle of law

laid down by this Court in the case of Mustafa Impex v. Government of Pakistan (2016 PTD 2269) wherever a power is conferred on the Federal Government, it is construed as a power given to the Prime Minister and the Federal Ministers/Cabinet to be exercised in the name of the Federal Government. Nothing has been placed on the record that may indicate that the Federal Government had notified the impugned notification after following the legal and procedural requirements and in accordance with the provisions of Rule 3(2) of the Rules, 1973.

9. We also note that the Office of Auditor General of Pakistan/Controller General of Accounts has been established by the Federal Government through Ordinance No.XXIV of 2001. Section 12 of the Ordinance in question empowers the Controller General of Accounts to make regulations. For ease of reference, Section 12 of the Ordinance is reproduced below:

"12. Power to make regulations: - The Controller General may with the previous approval of the Federal Government by the notification in the official Gazette, make such regulations not inconsistent with the provisions of this Ordinance and the rules made hereunder as he may consider necessary or expedient for carrying out the purpose of this Ordinance."

In exercise of the aforementioned powers, the Controller General of Accounts promulgated Regulations in respect of departmental examinations which provided

that one examination will be conducted in the 1st week of October, 2012. Thereafter, two examinations will be conducted in each successive year in the months of March and October, respectively.

10. We have asked the learned DAG if the Controller General of Accounts had obtained any previous approval of the Federal Government as required under paragraph 14 of the Regulations to amend the mode of examination and whether such notification had been published in the official gazette. He has not been able to show us from the record that previous approval of the Federal Government had indeed been obtained in accordance with law and the notification in question was published in the official gazette.

11. It is a settled principle of law that a notification which is duly published in the official gazette takes effect from the date on which it is published except otherwise provided in the notification itself. In view of the fact that neither the notification had validly been issued on the basis of powers available to the Controller General of Accounts and previous approval of the Federal Government nor does it appear to have been published in the official gazette. As such, the validity of the notification and its impact on the rights of the

Respondents was correctly assessed and determined by the learned High Court through the impugned judgment.

12. It is also apparent from the record and not denied by the Appellant that the Respondents had already successfully completed Part-I of the departmental examination and received the prescribed training in accordance with the Rules and Regulations prevailing at the relevant time. We are therefore not impressed by the argument of the learned DAG that the Appellant could have changed the mode of examination in 2017 keeping in view the fact that Part-II of the examination was due to be held in 2013 and was not held for the next four years without any fault on the part of the Respondents. Further, a right had already accrued in favour of the Respondents by reason of passing Part-I of the departmental examination which could not have been taken away merely on the basis of a notification issued by the Office of Controller General of Accounts without following due process of law.

13. Further, modification of the Regulations notwithstanding the fact that it did not fulfil the legal and procedural requirements could not have affected any right or privilege acquired under the previous Regulations in favour of the Respondents. We are therefore convinced that the learned High Court had valid reasons and lawful

justification which was duly recorded in the impugned judgment in coming to the conclusion that the Respondents were entitled to undergo Divisional Accounts Officers' Examination Part-II to be conducted by the department itself as per the previous Regulations. The impugned judgment of the learned High Court records valid reasons for its conclusion and after hearing the learned Law Officer and going through the record, we are not persuaded to reach a conclusion different from the one arrived at by the learned High Court.

14. For reasons recorded above, we do not find any merit in this appeal. It is accordingly dismissed.

Sd/- H C J

Sd/- J

ISLAMABAD.

10.02.2021.

ZR/

'Not Approved For Reporting'

