

HIGH COURT OF AZAD JAMMU & KASHMIR

Writ petition No. 185/2021
Date of Institution 19.01.2021
Date of Decision 28.04.2021

1. Abdul Majid Khan S/o Abdul Waheed Khan R/o Peshawar CNIC No. 17301-2909363-3, Candidate of LA-45 Valley 6;
2. Ghulam Mohi-Ud-Din Dewan S/o Ghulam Muhammad Dewan R/o Lahore CNIC No. 35202-3014721-5, Candidate of (LA-37 Valley 2);
3. Muhammad Saleem Butt S/o Gul Muhammad R/o Karachi CNIC No. 42101-2889558-1, candidate of LA-26 Valley 1;
4. Muhammad Asim Shareef S/o Muhammad Shareef S/o Multan CNIC No. 36302-4344543-5, candidate of LA-38 Valley 3;
5. Syed Ishtiaq S/o Syed Abdullah R/o Rawalpindi CNIC No. 27637-4100053-1, candidate of LA-43 Valley 4;
6. Mirza Muhammad Sadiq Jarral S/o Haji Khuda Bukhush R/o Lahore CNIC No. 35202-6153321-3, candidate of LA-30 Jammu 1;
7. Muhammad Asif S/o Muhammad Sarwar R/o Sailkot CNIC No. 34601-2661118-7, candidate of LA-31 Jammu 2;
8. Muhammad Akmal Sargalla S/o Ch. Muhammad Hussain R/o Narwal CNIC No. 34502-1627091-1, candidate of LA-33 Jammu 4;
9. Amjad Khursheed S/o Muhammad Iqbal R/o Rawalpindi CNIC No. 37401-5682779-1, candidate of LA-36 Jammu 6;
10. Sardar Muhammad Gias S/o Sardar Sofi Mirza Khan R/o Gujranwala CNIC No. 34101-6761435-3, candidate of LA-31 Jammu 2;
11. Ejaz Ahmed Butt S/o Ghulam Rasool Butt R/o Islamabad CNIC No. 82203-2122669-7, candidate of LA-44 Valley 5;
12. Muhammad Usman Hayat Khan Abbasi S/o Sardar Iftikhar Hussain Khan Abbasi R/o Rawalpindi CNIC No. 82203-4224154-3, candidate of LA-44 Valley 5;
13. Mahar-un-Nisa, Secretary General all Jammu & Kashmir MC Ex-MLA/Deputy Speaker AJ&K Assembly R/o Sadat House Lala Rukh Kashmir Colony adjacent to Garden Villas Adyala Road, Rawalpindi.

Petitioners

VERSUS

1. Election Commission of Azad Jammu & Kashmir through its Secretary, Civil Secretariat Lower Chatter Muzaffarabad;
2. Chief Election Commissioner, Election Commission of Azad Jammu & Kashmir Civil Secretariat Lower Chatter Muzaffarabad;
3. Member Election Commission of Azad Jammu & Kashmir Civil Secretariat Lower Chatter Muzaffarabad;
4. Secretary Election Commission of Azad Jammu & Kashmir Civil Secretariat Lower Chatter Muzaffarabad;
5. Muhammad Ishaq S/o Ch. Abdul Ghani R/o Post Office Kanpur Tehsil & District Sialkot, candidate for Legislative Assembly LA-32 Jammu 3;
6. Waseem Advocate S/o Muhammad Bashir;
7. Riaz Ahmed Advocate S/o Sardar Ali;
8. Tariq Mehmood Chaudhry Advocate S/o Mir Baz;
9. Nisar Zameer S/o Muhammad Malik Muhammad Zameer Awan;
10. Salman Ali S/o Ch. Dewan Ali;
11. Mir Abdul Qayyum S/o Mir Abdul Aziz;
12. Muhammad Aftab S/o Faiz Hussain;
13. Ahsan Qayyum S/o Abdul Qayyum;
14. Muhammad Iqbal S/o Haji Faqar Din R/o AJ&K Constituency Jammu 1 to 3;
15. Abdul Nasir Khan S/o Abdul Moeed Khan R/o Plate Tehsil & District Muzaffarabad, candidate of Legislative Assembly LA-45 Valley 6.

Respondents

WRIT PETITION

Before;- Justice Sadaqat Hussain Raja, ACJ.

PRESENT:

M/s Farrukh Shahzad Dall, Raja Yasir Ali, Kh. Muhammad Maqbool War, Raja Gul Majeed Khan and Miss Farkhanda Ibrar, Advocates for the petitioners;

M/s Mr. Tahir Aziz Khan, Mushtaq Ahmed Janjua, Syed Kafayat Hussain Gillani, Sh. Muhammad Saleem and Taufeeq Ahmed Chaudhry, Advocates for the respondents.

ORDER:

Through the above titled writ petition filed under Article 44 of the Azad Jammu and Kashmir Interim

Constitution, 1974, following relief is solicited by the petitioners:-

“In view of the above facts and legal position, it is respectfully prayed that on acceptance of this writ petition, this Hon’ble Court may graciously be pleased to pass the following directions and declarations:-

- i. Declaration that the impugned Notification No. 5772-99/2020 dated 01.01.2021, Notification No. 5723-71/2020 dated 01.01.2021 and Notification No. 5543-5722/2021 dated 01.01.2021 along with TORs issued by respondent No.4 are illegal, unconstitutional, arbitrary, unlawful, void ab-initio having no legal effect, are of colorful exercise of the powers and based on mala-fide are coram non judice and have no sanctity in the eyes of law and the same may very kindly be set-aside;
- ii. Directions against the respondents to frame rules describing the procedure for verification of the refugees for the purposes of verification of the electoral roll of the state subject/refugees living in Pakistan;
- iii. Pass such other and further orders as this Hon’ble Court may deem proper and expedient in the interest of justice and to salvage and restore the delicately poised constitutional balance in accord with the norms of constitutional democracy.”

2. Brief facts of the case are that the petitioners are contesting election of the Legislative Assembly of Azad Jammu & Kashmir and have been actively crusading for the democratic rights of the people of state of Azad Jammu & Kashmir and to ensure free and fair elections of Legislative Assembly. It is contended that free and fair elections are a basic obligation of a democratic society. Respondent No.4 has issued the impugned notifications and TORs to form

committees for verification of refugees of Jammu & Kashmir settled in Pakistan for the purposes of enrolling them as a voter in the electoral list. It is alleged that through the impugned notifications, respondent No.4 had violated the fundamental principles of a free and fair election enshrined in Article 50(7) of the Azad Jammu & Kashmir Interim Constitution, 1974, therefore, the same are liable to be set-aside.

3. During pendency of the instant writ petition, petitioner No.13 moved an application for impleading her as party in the line of the petitioners. The aforesaid application was accepted and petitioner No.13 was impleaded as party in the line of petitioners vide order dated 01.02.2021.

4. The instant writ petition has been resisted by the respondents by filing written statement separately, wherein the claim of the petitioners has been negated in toto, stating therein that the principle of estoppels and acquiescence is fully applicable in the case in hand, therefore, the instant writ petition is not maintainable on this sole ground. It is further stated that the petitioners did not implead the necessary parties in the writ petition, hence, the same is also liable to be dismissed. Lastly, it is prayed for dismissal of the instant writ petition.

5. Mr. Farrukh Shahzad Dall Advocate, the learned counsel for the petitioners reiterated the facts and grounds as taken in the petition and contended through written arguments

that the impugned notifications issued by respondent No.4 are illegal and having no sanctity in the eye of law, therefore, the same are liable to be set-aside. The learned counsel further contended that it is the duty of the Election Commission to organize and conduct the election and to make such arrangements as are necessary to ensure that the election is conducted honestly and in accordance with law. The learned counsel submitted that despite the Election Commission is fully empowered to frame rules under Section 138 of the Act. Respondent No.4 has formed committees comprising of the members of political parties. The decision of the Commission would surely be politically manipulated and thus affecting the results of the election, therefore, the decision of such committee cannot be said to be fair, impartial and just. The learned counsel further submitted that the power of preparation, correction and amendment of the electoral rolls rests with the Registration Officer appointed under Section 20 of The Azad Jammu & Kashmir Elections Act, 2020. The learned counsel argued that the voters should be verified under Section 21 of the aforesaid Act on the basis of their CNIC or State Subject Certificate, which can only be done by the concerned departments having the complete data and proper machinery to verify such persons and in the light of this fact, the member of political parties cannot be deemed to have any relevant data. He further argued that all the executive

authorities in the State including NADRA are bound to assist the Election Commission in discharge of its functions including the verification of electoral rolls but instead of engaging NADRA, election staff and other Govt. machinery to verify the electoral rolls, the Commission has appointed the political workers to perform functions which are purely the mandate of the Commission. The learned counsel stated that the impugned act of formation of committee also violates Sections 20 & 21 of the Azad Jammu & Kashmir Election Act, 2020 as the role of preparation, correction and amendment of an electoral roll for an electoral area rest with the registration officer under Section 20 of the Act supra. The learned counsel emphasized that under Article 50(7) of the Constitution, the Election Commission is empowered to organize and oversee the election process and to ensure that it was conducted honestly, justly and fairly. The learned counsel averred that the power of holding elections rests with the Election Commission, which cannot be delegated or given to any other authority. In Imran Khan's case reported as {**2012 SCMR 448**}, the Apex Court of Pakistan suspended the notifications issued by the Chief Election Commissioner in respect of the elections of National Assembly and Provincial Assemblies as the said elections were to be organized by the Election Commission but instead, same were conducted by the Election Commissioner. He further averred that it was also held in Imran Khan's case

reported as {*PLD 2013 SC 120*} that accurate electoral rolls were a sine qua non for holding free, fair and transparent election which was not only the command of the Constitution but also a fundamental right of citizens. Lastly, the learned counsel prayed for setting the impugned Notifications along with TORs and cited the following precedents in support of their contention.

1. PLD 2014 Lahore 221
2. PLD 2012 SC 681
3. 2018 SCMR 1166
4. 2014 SCMR 122
5. PLD 2016 SC 97
6. 2013 SCMR 01
7. PLD 2014 SC 668
8. PLD 2014 SC 531
9. PLD 2013 SC 120

1. In case titled “*Arshad Mehmood Vs. Commissioner/Delimitation Authority, Gujranawala and others*” [*PLD 2014 Lahore 221*], it was observed as under:-

“42. It is commonsensical that “Delimitation” must be neutral exercise, conducted by a neutral body. Any partisan political intervention and drawing up of political constituencies under the dictates of the political party in power is bound to lead to gerrymandering and unjust political windfall, tarnishing the sanctity of elections and crippling the faith of an ordinary man in the system of democracy.”

In para 55 (b) of the supra judgment, it was held as under:-

“b) Election Commission of Pakistan is the apex, independent and neutral constitutional authority to hold, organize and conduct elections and no sub-constitutional law, in particular, electoral law, can

takeaway or abridge this constitutional power vested in the Election Commission of Pakistan.”

2. In a case titled “*Workers’ Party Pakistan through Akhtar Hussain, Advocate, General Secretary and 6 others Vs. Federation of Pakistan and 2 others*” [PLD 2012 Supreme Court 681]. The relevant portion of the aforesaid judgment is reproduced as under:-

“38. The Constitution provides a comprehensive mechanism to ensure minimal deviation from these dictates. It identifies and regulates one of the key aspects of democracy, the election process. In Article 218, the Constitution constitutes the Election Commission and empowers it to organize and oversee the election process and to ensure, inter alia, that it is conducted “honestly, justly, fairly and in accordance with law and that corrupt practices are guarded against.”

In para 40 of the aforesaid judgment, it was held in the following manner:-

“40. A bare reading of Article 218(3) makes it clear that the Election Commission is charged with the duty to “organize” and “conduct the election”. The language of the Article implies that the Election Commission is responsible not only for conducting the election itself, but also for making all necessary arrangements for the said purpose, prior to the Election Day. By conferring such responsibility on the Election Commission, the Constitution ensures that all activities both prior, on an subsequent to Election Day, that are carried out in anticipation thereof, adhere to standards of justness and fairness, are honest, in accordance with law and free from corrupt practices.”

“41. The Election Commission may also exercise its powers in anticipation of an ill that may have the effect of rendering the election unfair. In the case titled as In Re: Petition filed by Syed Qasim Ali Shah Jellani (PLD 1991 Jour. 41) the Elections Commission exercised its powers under Article

218(3) pre-emptively, by making all necessary arrangements to ensure that a certain class of people would be allowed to vote. This case implies that where a violation of the standards mentioned in Article 218(3) has not as yet taken place, the Election Commission is legally empowered under Article 218(3) to exercise its powers pre-emptively in order to avoid a violation of these standards. Furthermore, *Mst. Qamar Sultana Vs. Public at Large* (1989 MLD 360) and *In Re: Complaint of Malpractices in Constituency No. NA-57, Sargodha-V* (supra) both reinforce the argument that the Election Commission is fully empowered by Article 218(3) to make “such orders as may in its opinion be necessary for ensuring that the election is fair, honest etc.” These decisions recognize that the Election Commission enjoys broad powers not only to take pre-emptive action but also to pass any and all orders necessary to ensure that the standards of “honesty” justness and fairness’ mentioned in Article 218(3) are met.”

“52. It is also suggested that NADRA may be deputed to furnish details of the voters at their residences. This exercise is required to be completed at least 7 days before the polling day, and this would facilitate a voter to exercise his right of franchise independently with full application of mind and without influence from the candidate or his supporters. A fair and transparent election rates at the heart of a democratic system. Therefore, any effort which cultivates a complimentary political culture should be encouraged. If need be, instead of involving the employees of the Provincial Governments, the employees of Federal Government/autonomous organizations/agencies, including the armed and para-armed forces may be instructed to carry out stipulated functions at the polling stations.”

“67. Fair, free, honest and just elections are sine qua non for strengthening of democracy. To achieve this goal, accurate preparation/revision of electoral roll is immediately required to be undertaken by the Election Commission through credible and independent agencies. In so doing, the conventional ways and means of merely depending upon NADRA alone or other similar bodies must be discontinued forthwith. Accordingly, we direct the Election Commission to undertake door-to-

door checking of voters' lists and complete the process of updating/revision of the electoral rolls by engaging Army and the Frontier Corps, if need be. This exercise should be undertaken as early as possible and in accordance with the time limit fixed in **Imran Khans'** case (supra).”

3. In a case titled “*Malik Ameer Haider Sangha and another Vs. Mrs. Sumaira Malik and others*” [2018 SCMR 1166], the Apex Court of Pakistan observed as under:-

“15. The Election Commission is constitutionally mandated to ensure that elections are held “honestly, justly, fairly and in accordance with law, and that corrupt practices are guarded against.” However, there’s a growing perception that elections to certain positions/offices, like those of mayor, deputy mayor, chairman, vice chairman, are not held honestly, justly, or fairly and the corrupt practice of vote buying has made inroads into the democratic order. There’s similar perception in respect of other elections where there aren’t many voters. For instance, the election of senators, who are elected by the members of provincial assemblies, and the election of Chairman and Deputy Chairman of the Senate, who are elected by the senators. It is critical that those who represent the people, whether at local Government or in the Senate, must be elected honestly, justly, and fairly through a process free from corrupt practices. A person who manipulates the electoral process by buying votes cannot be categorized as a legitimate representative and does not serve the people. The commodification of high positions and offices through voter manipulation and electoral tampering must be stopped.”

4. In a case titled “*Dr. Imran Khattak and another Vs. Ms. Sofia Waqar Khattak, PSO to Chief Justice and others*” [2014 SCMR 122], the Apex Court of Pakistan held as under:-

“218(3).---It shall be the duty of the Election Commission to organize and conduct the election

and to make such arrangements as are necessary to ensure that the election is conducted honestly, justly, fairly and in accordance with law, and that corrupt practices are guarded against.”

The above quoted provision shows that it is duty of the Election Commission to organize and conduct the election and to make such arrangements as are necessary to ensure that the election is conducted honestly, justly, fairly and in accordance with law. Not only that it is also one of its duties to guard against corrupt practices affecting the fairness of the elections.”

5. In a case titled “*Muhammad Siddique Baloch Vs. Jehangir Khan Tareen and others*” [PLD 2016 Supreme Court 97], it was held as under:-

“26....The scheme of the law appears to be that the primary and perhaps this most effective defence against bogus voting is to ensure that a ballot paper is only issued to a person whose name appears on the Voters List/Electoral Roll of the Polling Station in question, that too, after proper identification. To achieve the object of fair election the availability and proper utilization of the Voters List is therefore crucial. The failure of an effective filter for the issuance of ballot paper to a bona fide Elector would tantamount to leaving the barn door open and the Cow will run away. Any subsequent attempt to track down the proverbial Cow (the illegally issued ballot paper) is by no means easy if not impossible.”

6. In a case titled “*Syed Mehmood Akhtar Naqvi and others Vs. Federation of Pakistan and others* ” [2013 SCMR 01], it was held by the Apex Court as under:-

“4.----It is to be noted that for fair elections, Election Commission of Pakistan also requires such Government officers/officials whose service is fully protected so they may also not succumb to administrative or political pressure by the high-ups.”

7. Election Commission of Pakistan through Secretary Vs. Province of Punjab through Chief Secretary and others” [*PLD 2014 Supreme Court 668*], it was held as under:-

“64. In terms of section 3 of the Sindh Local Government Act, the Provincial Government has been empowered to delimit the constituencies of the Local Government in Sindh. Being one of the fundamental steps to hold fair elections, it has to be carried out by a body which is neutral and credible. That is why the task of delimitation of constituencies for National and provincial Assemblies has been entrusted to the Election Commission of Pakistan (Delimitation of Constituencies Act 1974). Now that the task of holding elections to local governments has been entrusted to Election Commission of Pakistan by a constitutional amendment (Article 140A), the constitutional provision relating to delimitation of constituencies has to be accorded purposive, construction. In these circumstances we are persuaded to hold that the power of Majlis-e-Shoora to provide by law for “the delimitation of constituencies by the Election Commission would include the delimitation of constituencies of local government.”

8. In a case titled “*Province of Punjab through Chief Secretary and others Vs. M.Q.M through Deputy Convener and others*” [*PLD 2014 Supreme Court 531*], the relevant portion of the aforesaid judgment is hereby reproduced as under:-

“38. The discretion conferred on the Delimitation Officer in the proviso under challenge is unlimited and rather subjective. Such discretionary powers have been subject of critical comment. As justice Wiliam Douglas of United States Supreme Court aptly remarked:---

“Law has reached its finest moments when it has freed men from the unlimited discretion of some ruler, some civil or military official, some

bureaucrat. Where discretion is absolute, man has always suffered.”

9. In a case titled “*Imran Khan and others Vs. Election Commission of Pakistan and others*” [PLD 2013 Supreme Court 120], it was held as under:-

“24. An accurate Electoral Roll is a sine qua non for the holding of a free, fair and transparent election, which is not only the command of the Constitution but also a Fundamental Right of the citizens, which appears to have been compromised qua the residents of Karachi.”

6. M/s Kh. Muhammad Maqbool War, Raja Yasir Ali, Raja Gul Majeed Khan and Miss Farkhanda Ibrar, Advocates, the learned counsel for the petitioners owned the written arguments submitted by the learned counsel for the petitioners Mr. Farrukh Shahzad Dall Advocate and contended that the official respondents while exercising powers under Section 21(1)(a) have issued impugned notifications dated 01.01.2021, whereby, certain committees have been constituted on the behest of sitting MLA/Minister of present Government of PML(N) but the Election Commission has not attended objections raised by the petitioner (Maher-Un-Nisa) regarding illegal and arbitrary constitution of committees for the purpose of registration of voters. Lastly, they prayed for acceptance of the instant writ petition.

7. While controverting the arguments advanced by the learned counsel for the petitioners, Mr. Tahir Aziz Khan, Advocate assisted by Mr. Mushtaq Ahmed Janjua, Syed

Kafayat Hussain Gillani, Sh. Muhammad Saleem and Taufeeq Ahmed Chaudhry, Advocates, appearing on behalf of the respondents contended that the Azad Jammu & Kashmir Election Commission Act, 2020 empowered the Election Commission under Section 21 clause 1(a) to constitute a committee for certification of voter, who is not holding the State Subject Certificate may be enrolled as a voter, so the Election Commission after the consultation with all the concerned political parties issued the impugned notifications, hence, the instant writ petition is liable to be dismissed. The learned counsel further contended that petitioner No.1 wrote a letter to Chief Election Commission on 11.12.2020 and nominated the focal person to assist the Election Commission but later on, petitioner No.1 through letter dated 28.12.2020 withdrawn the aforesaid letter on 11.12.2020. Petitioner No.1 wrote a subsequent letter to Chief Election Commissioner of the Azad Jammu & Kashmir for submission of Members of Pakistan Tehrik-e-Insaf in the Committees for constituencies of refugees of Jammu and Valley settled in Pakistan on 01.01.2021. The Chief Election Commissioner after the consultation of all concerned political parties as well as with the petitioners issued the impugned Notifications dated 01.01.2020, hence, the principle of estoppels and acquiescence is fully applicable in the case in hand, therefore, the instant writ petition is not maintainable on this sole ground. The

learned counsel further stated that the petitioners did not implead the necessary parties i.e The Govt. of Azad Jammu & Kashmir as well as the political parties in the writ petition, hence, the instant writ petition is also liable to be dismissed. The learned counsel submitted that the impugned Notifications have been issued in accordance with law, therefore, no indulgence is required by this Court. Lastly, they prayed for dismissal of the instant writ petition.

8. I have heard the learned counsel for the parties, perused the written arguments submitted by the learned counsel for the petitioners and gone through the record with utmost care.

9. Leaving aside the other aspects of the case, first of all, I would like to resolve the moot point which goes to the roots of the case that whether the instant writ petition is maintainable or not in its present shape?

10. The learned counsel for the respondents raised the following objections on the non-maintainability of the instant writ petition, which are as follows:-

- i. As the principle of estoppels and acquiescence is fully attracted;
- ii. Mis-joinder and non-joinder of necessary parties;
- iii. Impugned Notifications have been issued in accordance with law.

11. The record appended with the writ petition reveals that the office of Chief Election Commissioner of Azad Jammu & Kashmir wrote a letter to petitioner No.1 (Abdul Majid Khan) to ensure his presence in the meeting, which is going to be held on 15 November, 2020 at Kashmir House, Islamabad with respect to preparation of voter lists for Constituencies of Jammu and Valley vide letter dated 05 November, 2020. The record (*Annexure "A"*) also postulates that in compliance of the aforesaid letter, twenty one (21) political representatives of political parties along with petitioner No.1 (who was at serial No. 17 of Agenda Meeting) and officers of Election Commission participated in the meeting held on 15.11.2020. The petitioner Abdul Majid Khan stated in the meeting as under:-

17- عبدالماجد خان صاحب ممبر اسمبلی وختیوٹی 6-

عبدالماجد خان صاحب نے میٹنگ میں مدعو کرنے پر شکر یہ ادا کیا اور اپنے خیالات کا اظہار کرتے ہوئے کہا کہ 2016 کی انتخابی فہرست ہاؤس سٹیٹ بجیکٹ کی بنیاد پر ووٹ کا اندراج کیا گیا۔ میرے حلقہ میں سٹیٹ بجیکٹ کی فوٹوکاپی حاصل کر کے ووٹ کا اندراج کیا گیا ہے ان کی نقول آج بھی رجسٹریشن آفسز کے پاس ہوں گی۔ ہماری کوشش ہے ہمیں تیسری طرح جانچ دینے کی اجازت ملے۔ نئی انتخابی فہرست ہاؤس کے لیے Time Frame بہت کم ہے۔ کشمیر وٹی او رتوں کی فہرست ہاؤس رجسٹریشن آفسز کی فہرست کے مطابق NADRA سے Computerized کر لینی چاہئے۔ نئی فہرست نہیں ہونی چاہیے۔ میری تجویز ہے کہ وٹی کی حد تک پریسکریٹ کے فیصلے کے مطابق انتخابی فہرست ہاؤس Update کیا جائے تاکہ اس میں نیا نام کا نام ہمیں کی انتخابی فہرستوں میں اندراج الاؤنسٹ چٹ کی بنیاد پر کیا جائے۔ سٹیٹ بجیکٹ اصل ہونا چاہیے۔ واؤس کے سٹیٹ بجیکٹ پر ووٹ کے اندراج کا حق حاصل نہیں ہونا چاہیے۔ 2005 کے بعد زیادہ تر سٹیٹ بجیکٹ جعلی ہیں۔ رجسٹریشن آفسز سٹیٹ بجیکٹ کی Verification نہیں کر سکتا۔ Rehabilitation کا ایک آفسز رجسٹریشن آفسز کے ساتھ ہاؤس کیا جائے جیسا کہ 2016 کے الیکشن میں کیا گیا۔ پلےس پارٹی کی will کو Endorse کیا جاتا ہے۔

درج بالا تجویز کے علاوہ عبدالماجد خان صاحب ایم ایل اے، نوابشاہ پاکستان تحریک انصاف، سید شوکت علی شاہ صاحب ایم ایل اے، نوابشاہ پاکستان مسلم لیگ (ن)، عامر غفار لون صاحب ایم ایل اے پاکستان پیپلز پارٹی، مجتبیٰ میسر وانی ایم ایل اے پاکستان مسلم لیگ (ن) اور محمد احمد رضا قادری صاحب ایم ایل اے نوابشاہ پاکستان مسلم لیگ (ن) نے مشورہ کرتے ہوئے طور پر مطالبہ کیا ہے کہ مباحثہ میں تمام پاکستان وائی تحریک کی 2016 میں تیار کردہ فہرست ہاؤس کو اپ ڈیٹ کیا جائے اور محفوظ رکھے جانے کی ضرورت ہے۔

(Underlining is mine)

12. Whereas, Ms. Mehr-Un-Nisa, Petitioner No.13 also participated in the meeting and stated as under:-

”مہرا نسا صاحبہ امیدوار کشمیریوں کی -V-

مہرا نسا صاحبہ نے کہا ہے کہ آپ نے نئی فہرست تیار کرنے کا جو فیصلہ کیا ہے وہ قابلِ تحسین ہے میرے کچھ ساتھیوں نے کہا ہے کہ موجودہ فہرستوں کو نہ چھیڑا جائے درست نہیں ہے کیونکہ پہلے الیکشن میں جو فہرستیں تیار کی گئی ہیں ان میں کئی ایسے اہل افراد درج ہونے سے رہ گئے ہیں میری تجویز ہے کہ فہرستوں کو دوبارہ تیار کیا جائے۔ کیونکہ ان فہرست ہاؤ کو تیار ہونے کا فیصلہ صرف گزرا چکا ہے اور یقین دلایا کہ الیکشن کمیشن رولز کے مطابق جو کام کرے گا تو مسلم کانفرنس اس کی حمایت کرے گی 2016 میں ووٹرز کا تناسب کم ہو گیا تھا جس کی وجہ سے انتخابی فہرست میں کشمیری ایشیائی شہکار ریاست کا اکثریت میں ووٹ درج ہونے سے رہ گیا۔ الیکشن 2021ء کے لیے انتخابی فہرست ہاؤ کی تیاری کے سلسلہ میں وقت کم ہونے کی بنا پر بہت مشکلات ہیں کسی لٹچر و فیرو کی لسٹ ہمیں مہیا نہیں کی گئی۔ انتخابی فہرست ہاؤ کی تیاری کے سلسلہ میں وقت کو بڑھایا جائے۔ 2016ء کی فہرست ہاؤ میں ایسے افراد بھی موجود تھے جن کے پاس کشمیری ہونے کا نیکو کوئی ثبوت تھا اور نہ ہی ان کا مہاجرین سے کوئی تعلق تھا۔ جس کی وجہ سے اصل ووٹرز کا حق مارا گیا۔ 2016ء میں کشمیریوں کی 4 ووٹرز کشمیریوں کی اور کشمیریوں کی 5 ووٹرز کشمیریوں کی 4 میں درج ہوئے۔ کمیٹیوں کے حوالے سے کچھ کمیٹیوں کے فیصلے صحیح نہیں تھے۔ 2016ء میں جیت کو ہار کی صورت میں تبدیل ہونا پڑا۔ اس میں جو کچھ ہوا اس کو بحال کرنا چاہیے ووٹ کا اندراج صحیح طور پر ہونا چاہیے تاکہ کل آنے والے ہمارے بچوں کا مستقبل بہتر ہو سکے اور ووٹ لسٹ مثالی ثابت ہو۔“

13. The record “Annexure B” also shows that the petitioner Abdul Majid Khan wrote a letter dated 11.12.2020 for submission of representative of PTI’s in the committees for constituencies of Jammu and Valley to the Chief Election Commissioner and nominated the focal person to assist the Election Commission personals in preparations of list of refugees Constituencies of Jammu and Valley but the petitioner withdrawn the aforesaid letter on 28.12.2020. The record (Annexure “RA” and “RA/2”) further postulates that petitioner No. 1 wrote a subsequent letter to Chief Election Commissioner of Azad Jammu & Kashmir for submission of Pakistan Tehrik-e-Insaf Committees for Constituencies of Jammu and Valley on 01.01.2021. The Chief Election Commissioner after the consultation of all concerned

candidates of constituencies of Jammu and Valley as well as with the petitioners issued the impugned Notifications dated 01.01.2020. Admittedly, petitioners No. 1 and 13 participated in the whole process and later on, filed the instant writ petition. In my considered view, the principle of estoppel and acquiescence are fully applicable in the case in hand up to the extent of petitioners No. 1 and 13 but there is nothing on record that remaining petitioners participated in the proceedings, hence, the aforesaid argument of the learned counsel for the respondents is hereby repelled to the extent of other petitioners.

14. The learned counsel for the respondents raised another vital point that the instant writ petition is also not maintainable that the petitioners have not arrayed the necessary parties in the writ petition i.e political parties as well as Azad Government.

15. It is pertinent to mention here that the instant case is relating to cancellation of the impugned Notification No. 5772-99/2020 dated 01.01.2021, Notification No. 5723-71/2020 dated 01.01.2021 and Notification No. 5543-5722/2021 dated 01.01.2021 along with TORs issued by respondent No.4 but it is very amazing that neither the petitioners have impleaded the Government as a party nor the other political parties who have nominated the members of the committees in the line of respondents. As a matter of rule, all

the beneficiaries were necessary party but the learned counsel for the petitioners failed to implead them as party. I am cognizant of pronouncements of the August Court of Pakistan as well as Azad Jammu & Kashmir that in absence of necessary party, no direction can be issued. Law is well settled that no writ can be issued in absence of a necessary party. A reference can be made to a case titled “*Shahbaz Khan V. Election Commission of Pakistan through Chief Election Commission, Islamabad*” [P.L.D 2003 (Lah.) 125], wherein at 135, it is observed as under:-

“It is better and appropriate to mention that final Notification was issued on 28.06.2002 in para.4 of which it is specifically mentioned that the Election Commission had received a total number of 945 objections/representations against preliminary delimitation of 849 constituencies out of which 307 pertained to the National Assembly and 638 to Provincial Assemblies. The details mentioned in the Notification reveal that the representations received qua District Sheikhupura were decided after providing hearing by the learned Member Election Commission on 15.06.2002. The petitioners did not implead any of the objectors as respondents. The petitioners did not attach order of the learned Member Election Commission along with the writ petitions. It is pertinent to mention here that the impugned Notification was finally issued on the basis of order of the learned Member Election Commission dated 15.06.2002. The petitioners did not challenge the vires of said order through these writ petitions. The writ petitions could, therefore, be dismissed as the petitioners failed to implead the objectors as respondents.”

The same principle has also been laid down in a case titled as “*Zahid Mehmood Shah and 24 others vs. Azad Govt. & 14 others*” [2011 SCR 159], which is as under:-

“5. I have heard the learned counsel for the parties and perused the record with utmost care. It is evident from the record that Member Board of Revenue dismissed the revision petition on 25th April, 2001. The order was challenged by way of writ petition in the High Court and only Member Board of Revenue was arrayed as party. The Board of Revenue was not arrayed as party in the case. For resolving the proposition whether the Board of Revenue is necessary party or not, we have to resort to section 6(3) of the Azad Jammu & Kashmir Board of Revenue Act, 1993. It provides that any order made or decree passed by a Member Board of Revenue would be deemed to be the order or decree of Board of Revenue, therefore, the Board of Revenue is a necessary party.”

Similarly, in the case reported as “*Shafqat Hayyat vs. Muhammad Shahid Ashraf & 18 others*” [2005 SCR 57], the Hon’ble apex Court of Azad Jammu & Kashmir observed as under:-

“*Necessary Party*----

----Writ was not properly constituted---Impugned orders were passed on the recommendations of the Selection Committee----The Selection Committee was not impleaded as party----If a necessary party in whose absence no effective writ could be issued was not impleaded, the writ is liable to be dismissed on this sole ground.”

“*Necessary Party*----

---Minister Incharge was the competent authority--He should have been impleaded in the line of respondents because he had to implement the directions of mandamus issued by the Court---He was not impleaded----On account of this formal defect the writ petition was not properly constituted.”

16. The impugned notifications were issued to the provide the right of votes to the State Subjects not holding the State Subject Certificate from refugees settled in Pakistan.

Relevant portion of the impugned notification is reproduced as under:-

آزاد جموں و کشمیر الیکشن کمیشن سیکرٹریٹ
 بلاک نمبر 06 (گراؤنڈ فلور) سول سیکرٹریٹ ہسٹریڈومیل، مظفر آباد۔
 مظفر آباد
 مورخہ یکم جنوری 2021

نوٹیفکیشن:-
 الیکشن کمیشن آزاد جموں و کشمیر نے آزاد جموں و کشمیر الیکشن ایکٹ 2020 کی دفعہ 21 کی ذیلی دفعہ (1) کی کلاز (a) کی رو سے حاصل اختیارات کو بروئے کار لاتے ہوئے پاکستان کے صوبہ خیبر پختونخوا اور صوبہ سندھ و بلوچستان اور صوبہ پنجاب میں مقیم مہاجرین جموں و کشمیر کی ہر دو گھنٹہ کی مدتوں و کشمیر و بلی کی انتخابی فہرستوں کی تیاری کے سلسلہ میں ایسے افراد جن کی عمر کو الٹیمایٹ تاریخ کو 18 سال ہو چکی ہے اور انہوں نے ابھی تک بھرتی یا شدہ ریاست سرٹیفکیٹ حاصل نہیں کیا ہے کے بطور ووٹرز اندراج کے لیے تصدیق جاری کرنے کی غرض سے درج ذیل سیاسی نمائندگان پر تحصیل مطلع و ایز مشتمل کمپنیاں تشکیل دیے جانے کی منظوری صادر فرماتی ہے۔
 اس سلسلہ میں عمل ازمیں جاری شدہ حکم نمبر الیکشن اس 4707-4573 مورخہ 24 دسمبر 2020 تاریخ اجراء سے منسوخ تصور ہوگا۔

The object of the Notifications is to enroll all the State Subjects not holding the State Subject Certificate but otherwise qualified to be the voter. Such State Subjects are beneficial of these notifications but they are also not impleaded in the writ petition.

17. Same like principle has also been laid down by the superior Courts in plethora of judgments [**1997 SCR 239, PLJ 1990 SC (AJK) 38, 1994 SCR 19, 1996 SCR 112, 1996 SCR 161, 2003 SCR 142, 2013 SCR 222 and 2001 SCR 84**] that in absence of a necessary party the writ petition itself is incompetent. It is further held that a necessary party is one without whom no order can be made effectively and a proper party is one in whose absence an effective order can be made

but whose presence is necessary for complete and final decision on the question involved in the proceedings. On account of this formal defect, the instant writ petition is not properly constituted.

18. Even otherwise, Section 20 (1)(a) of The Azad Jammu & Kashmir Election Commission Act, 2020, empowered the Election Commission to control and draft electoral roll containing the name of every State Subject. It is further provided that the Refugees settled in Pakistan not holding State Subject certificate may be enrolled as voters, on production of the documentary evidence. It is more advantageous to reproduce the aforesaid Section:-

“21. Preparation of electoral rolls, etc.

(1)The Registration Officer for an electoral area shall, under the superintendence, direction and control of the Commission, prepare for that area in the prescribed manner a draft electoral roll containing the name of every State Subject who, on the Qualifying date;

(a) is not less than eighteen years of age and possesses CNIC or original “Form-B” issued by the NADRA if he is likely to attain eighteenth year of age on qualifying date or photo bearing identity card for refugees of Jammu & Kashmir 1989 and afterward, issued by the Government:

Provided that expired CNIC shall be valid for enrolment:

Provided further that if a State Subject is likely to attain eighteen years of age on qualifying date, he shall be registered as voter on production of original Form-B issued by NADRA and number mentioned against his name for his prospective CNIC shall be entered in Electoral Roll:

[Provided further that the Refugees settled in Pakistan not holding State Subject certificate may be enrolled as voters, on production of the documentary evidence to establish their identity as State Subjects on certification of a Committee to be constituted by the Commission for each Constituency.]

(Emphasizing is mine)

19. To resolve the controversy in hand, it is more appropriate to define the State Subject in the light of The Azad Jammu & Kashmir Interim Constitution, 1974, which reads as under:

“State Subject:-

State Subject means a person for the time being residing in Azad Jammu & Kashmir or Pakistan who is a State Subject, as defined in the late Government of the State of Jammu & Kashmir Notification No. I-L/84 dated the 20th April, 1927, as amended from time to time.”

20. In other words, State Subject Certificate is the defacto citizenship certificate of the people residing in or belonging to the State of Jammu & Kashmir, currently divided into two parts i.e Azad Kashmir and Indian Occupied Kashmir.

21. According to the Notification dated 20th April, 1927, the following definition of the term “State Subject” has been sanctioned by his Highness the Maharaja Bahadur (Vice Private Secretary’s letter No. 2354, dated 31st January, 1927 to the Revenue Member of Council) and is hereby promulgated for general information. The term “*State Subject*” means and includes:-

Class-I. All persons born and residing within the State before the commencement of the reign of His Highness the late Maharaja Gulab Singh Sahib Bahadur and also persons who settled the reign before the commencement of Samvat year, 1942 and have since been permanently residing therein.

Class-II. All persons other than those belonging to Class-I who settled within the State before the close of Samvat year, 1968 and have since permanently resided and acquired immovable property therein.

Class-III. All persons, other than those belonging to classes I and II permanently residing within the State, who have acquired under a rayatnama any immovable property therein or WIZO may hereafter acquire such property under an ijazatnama and may execute a rayatnama after ten years continuous residence therein.

Class-IV. Companies which have been registered as such within the State and which belong companies in which the Government are financially interested or as to the economic benefit to the State or to the financial stability of which the Government are satisfied, have by a special order of His Highness been declared to be State Subjects.

22. The descendants of the persons who have secured the status of any class of the State Subjects will be entitled to become the State Subject of the same class.

23. According to the law and Interim Constitution, the fundamental rights are guaranteed to all the State Subjects and not to the State Subject holder. A person who is State Subject as defined in the Constitution has all rights guaranteed by the Constitution whether he is holding the State Subject Certificate or not and no one can be deprived of from his fundamental or legal right on the ground that he is not holding the State Subject Certificate. The instant writ petition is based upon the election laws of Pakistan where no concept of State Subject is available. The State Subject Certificate is issued by the Rehabilitation Authorities by providing certain documentary evidence such as, State Subject of his ancestors, Allotment Chit, Rashan Card at the time of migration and certification by two refugees officers etc. Surely, the impugned Notifications have been issued in the light of Section 21(1) of The Azad Jammu & Kashmir Election Commission Act, 2020. The aforesaid Section is reproduced as under:-

“21. Preparation of electoral rolls, etc.

(2)The Registration Officer for an electoral area shall, under the superintendence, direction and control of the Commission, prepare for that area in the prescribed manner a draft electoral roll containing the name of every State Subject who, on the Qualifying date;

- (b) is not less than eighteen years of age and possesses CNIC or original “Form-B” issued by the NADRA if he is likely to attain eighteenth year of age on qualifying date or photo bearing identity card for refugees of Jammu & Kashmir 1989 and afterward, issued by the Government:

Provided that expired CNIC shall be valid for enrolment:

Provided further that if a State Subject is likely to attain eighteen years of age on qualifying date, he shall be registered as voter on production of original Form-B issued by NADRA and number mentioned against his name for his prospective CNIC shall be entered in Electoral Roll:

[Provided further that the Refugees settled in Pakistan not holding State Subject certificate may be enrolled as voters, on production of the documentary evidence to establish their identity as State Subjects on certification of a Committee to be constituted by the Commission for each Constituency.]

(Underlining is mine)

24. The aforesaid section empowers the Election Commission to form committees, which has not been challenged by the petitioners and without challenging the supra section, the instant writ petition is also not maintainable.

25. The phraseology of Article 44 of the Azad Jammu & Kashmir Interim Constitution, 1974 clearly indicates that writ jurisdiction is exercisable if a grievance is based on violation of a law. Under Article 44, if an act is without lawful authority, a writ can issue to direct the respondent to do that which he is required by law to do or to forbid him from doing an act which he is not allowed by law to do. The requirement

clearly is that a grievance raised in a writ petition must be based on law. Writ lies if law has been violated or, in case of a writ of prohibition, when it is apprehended that it will be violated by a Government functionary. My this view finds support from the precedent *1997 SCR 336*.

26. It is also pertinent to mention here that writ jurisdiction can be exercised only, where there is violation of law or principle of law. The similar view has been reiterated by the Hon'ble apex Court in case titled '*Perveen Azam & others v. SSP District Mirpur & 4 others*, [2015 SCR 837]. The relevant observation reads as under:-

“7. According to the spirit of the constitution, writ jurisdiction can be exercised where there is violation of law or principle of law. In this case, no such situation exists for interference in the domain of Investigating agency. The extraordinary writ jurisdiction is very limited and can be exercised in extra-ordinary circumstances. This Court while attending the identical proposition with reference to Section 561-A Cr.PC, which vests vast powers in the High Court has enunciated the principle of law in the case reported as '*Muhammad Saleem v. Muhammad Zaman & others*, [2014 SCR 809] that interference in the matters falling the the domain of Investigating agency, is not permissible.”

(Underlining is mine)

27. It is a settled principle of law that an order can only be set-aside in exercise of writ jurisdiction, if it violates any legal provision but no such situation exists in the present case, as no violation of law or of any instrument having the force of

law has been shown. My this view finds support from *PLD 2012 Lahore 52, PLD 2009 SC 28 and 2007 SCMR 1318*.

28. It is pertinent to mention here that the Courts do not normally interfere a policy made by the Government unless it is proved mala fide or made in a colourful exercise of authority. For further guidance, I may refer a case titled as “*Syeda Shazia Irshad Bokhari Vs. Government of Punjab through Secretary Health and another*” [PLD 2005 Lahore 428]. The relevant portion of the aforesaid judgment is reproduced as under:-

“14. It is also a recognized principle of law that Courts do not sit in judgment over a policy of the Government. The impugned scheme was introduced as matter of a public policy. The courts do not normally interfere or strike down a policy made by the Government unless it is proved mala fide or made in a colourful exercise of authority, etc. In this respect for guidance we may refer to Lt. Col. Farzand Ali and others Vs. Province of West Pakistan [PLD 1970 SC 8], Gul Khan v. Government of Balochistan [PLD 1989 Quetta 8].”

(Underling is mine)

29. It is also significant to mention here that the Election Commission of Azad Jammu & Kashmir is empowered under Article 50 of the Interim Constitution, 1974 to conduct elections of the Legislative Assembly of Azad Jammu & Kashmir. Election Commission is a constitutional body which performs its functions independently, freely, fairly and transparently. The acts done by Election Commission

should not be interfered in an ordinary manner. The powers vested to the Election Commission are trust and can be expected to be performed with objectivity, reasonably, independently and in accordance with law. However, the possibility of breach of law, arbitrariness and mala fide cannot be overruled. In any Constitutional Petition, it is necessary for the petitioners to prove that the impugned act of the Commission is against the law arbitrarily or with mala fide, otherwise, the writ petitions are not maintainable for academic discussions and it will amount to interfere in the election process which is not warranted by law. The Courts have vast powers for judicial review of any functionary of the State but such power should not be exercised to interfere within constitutional or legal domain of any other organ of the State. Such exercise of the powers is also against the concept of trichotomy as provided by the Constitution.

30. The learned counsel for the petitioners emphasized that electoral rolls should be prepared by the Election Commission after door-to-door checking of voters. The aforesaid contention of the learned counsel for the petitioners is not helpful regarding physical position of constituencies for refugees settled in Pakistan. For example, a constituency of Jammu consists of three provinces of Pakistan i.e Sindh, Punjab and Balochistan. It is impossible for the Election Commission Registration Officer to prepare voter lists by door-

to-door survey throughout Pakistan. The only possible way is to verify the identity of a person who claims to be refugee of the State of Jammu & Kashmir settled in Pakistan, which was rightly adopted by the Election Commission by constitution of the committees consisting of representative of the rival political parties.

31. In the instant case, the petitioners called in question the vires of notifications issued by the Election Commission regarding formation of committees for verification of Electoral Rolls for the Constituencies of Refugees settled in Pakistan. The impugned Notifications have issued in accordance with law i.e Section 21(1) of the supra Act with clear cut objective to enroll all the State Subjects who are not holding State Subject Certificate. The formation of committees also reveals that the committees do not consist upon the members of a single party rather the member of rival political parties are included in the committees having clash of interest, hence, no question of mala fide or arbitrariness or unreasonableness arises.

32. Section 21(1)(a) of supra Act, empowers the Election Commission to constitute a committee for certification of voters, who have not holding the State Subject may be enrolled as a voter, therefore, in my considered view, the Election Commission after the consultation with all the concerned political parties issued the impugned notifications

dated 01.01.2020 correctly and rightly, which need no indulgence by this Court.

33. The precedents referred to and relied upon by the learned counsel for the petitioners have no conformity with the facts and law of the present case.

In view of the above, finding no force in the instant writ petition, therefore, the same stands dismissed with no order as to the costs.

Muzaffarabad;
28.04.2021

(Sd)
ACTING CHIEF JUSTICE

Note:- Judgment is written and duly signed. Deputy Registrar Headquarter High Court is hereby directed to announce the judgment in presence of the parties or their counsel.

(Sd)
ACTING CHIEF JUSTICE