

HIGH COURT OF AZAD JAMMU & KASHMIR

Writ petition No. 1954/2022

Date of Insti. 14.05.2022

Date of decision 16.05.2022

Barrister Adnan Nawaz Khan, Advocate Supreme Court of
Azad Jammu & Kashmir.

Petitioner

VERSUS

1. Govt. of Azad Jammu & Kashmir through its Chief Secretary having office at Lower Chatter Muzaffarabad;
2. Chairman Azad Jammu & Kashmir Council through Secretary Azad Jammu & Kashmir Council, having office at Azad Jammu & Kashmir Council Secretariat Sector F-5/2, Islamabad;
3. Azad Jammu & Kashmir Council through its Secretary having office at Azad Jammu & Kashmir Council Secretariat, Sector F-5/2, Islamabad;
4. Secretary Azad Jammu & Kashmir Council Secretariat, having office at Azad Jammu & Kashmir Council Secretariat Sector F-5/2, Islamabad;
5. Joint Secretary Azad Jammu & Kashmir Council Secretariat, having office at Azad Jammu & Kashmir Council Secretariat, Sector F-5/2, Islamabad;
6. Minister for Kashmir Affairs & Gilgit-Baltistan, Red Zone, Islamabad;
7. President of Azad Jammu & Kashmir through Secretary to President, having office at President Secretariat, Muzaffarabad;
8. Department of Law, Justice, Parliamentary Affairs and Human Rights through its Secretary, having office at Lower Chatter Muzaffarabad;
9. Secretary Law, Justice, Parliamentary Affairs and Human Rights, having office at Lower Chatter, Muzaffarabad;
10. Registrar Azad Jammu & Kashmir Supreme Court, having office at Supreme Court building, Muzaffarabad;
11. Mr. Kh. Muhammad Nasim, presently holding the post of Judge Supreme Court (under the impugned notification), Supreme Court, Muzaffarabad;
12. Mr. Raza Ali Khan, presently holding the post of Judge Supreme Court (under the impugned notification), Supreme Court, Muzaffarabad.

Respondents

WRIT PETITION

BEFORE: Justice Sadaqat Hussain Raja, C.J.

PRESENT:

Barrister Adnan Nawaz Khan, Advocate/petitioner in person.

JUDGMENT

Through the above captioned writ petition filed under Article 44 of the AJ&K interim Constitution, 1974, following relief has been claimed:-

“Therefore, it is most respectfully prayed that this writ petition may graciously be accepted and;

- i. the advice by the respondent No.2 and Notification No.LD/AD/958-74/2021 dated 26.05.2021 issued on the basis of illegal advice kindly be declared being issued in violation of the mandatory provisions of the Constitution, hence, the same is void, ineffective and of no legal effect. Consequently, the posts be declared vacant and;
- ii. the respondents No. 11 & 12 may kindly be asked under what authority of law they are holding the offices of Judges Supreme Court and;
- iii. the respondent No.2 kindly be directed to take necessary steps and issue advice according to the mandatory Constitutional consultation after due process of law;
- iv. Any other relief which this Hon’ble Court deems appropriate may also be awarded.”

Precise facts, necessary for disposal of the instant writ petition, as per the contents of the petition are that the petitioner is a 1st class subject of the State of Azad Jammu & Kashmir is a qualified Barrister of England and Wales and

Advocate of Supreme Court of Azad Jammu & Kashmir as well as the Lahore High Court. It is stated that the Azad Jammu & Kashmir Interim Constitution, 1974 provides for the creation of the Supreme Court and the High Court of Azad Jammu & Kashmir as the Superior Constitutional Courts being custodian of the Constitution, law and the rights of all the state subjects. It is further stated that in the recent past, two posts of permanent Judges of the Supreme Court of Azad Jammu & Kashmir fell vacant as a result of the retirement of Mr. Justice Muhammad Ibrahim Zia, Chief Justice AJ&K Supreme Court, who retired on 31.03.2020 and Mr. Justice Ghulam Mustafa Mughal, Judge Supreme Court who retired on 27.12.2020. It is submitted that the process for appointment against the aforesaid vacant posts was to be commenced by the President by seeking panel of suitable nominees (three nominees against each vacant post) from the Hon'ble Chief Justice of Azad Jammu & Kashmir. It is further submitted that the President of Azad Jammu & Kashmir after due consultation with the Hon'ble Chief Justice of Azad Jammu & Kashmir in accordance with the procedure laid down by the Superior Courts, had to send a summary of six names (against two vacant posts) to the Azad Jammu & Kashmir Council for advice of two suitable persons. It is averred that on 26.05.2021, respondent No.9 issued Notification No. LD/AD/

958-74/2021 of the appointments of respondents No. 11 and 12 as Judges of the Supreme Court. It is further averred that due to unavailability of the record (i.e panel/summary/advice etc) of the appointments of the respondents No. 11 and 12 as Judges of the Supreme Court, any potential illegality in the said appointments remained a conundrum, however, it has become public through a copy of the summary of the President that respondents No. 11 & 12 have been appointed in violation of the procedure laid down by the Apex Court for appointments in the higher judiciary. It is contended that the President has entirely failed to complete the process of appointments in accordance with law by sending a summary of only two names (for two vacant posts) to the Azad Jammu & Kashmir Council Secretariat without any record of consultation/recommendation with the Hon'ble Chief Justice of Azad Jammu & Kashmir and the Council Secretariat has issued an illegal advice for the appointments of respondents No. 11 & 12 as Judges of the Supreme Court under a misconception. It is alleged that according to the petitioner's information and the contents of the record (which is in possession of respondents No. 2 to 10), neither the President sought a panel of three nominees against each vacant post (as required by law) from the Hon'ble Chief Justice of Azad Jammu & Kashmir nor the said panel was provided by the

Hon'ble Chief Justice of Azad Jammu & Kashmir per se. It is further alleged that the petitioner has tried his best to get copies of the relevant record but has failed to obtain the same (except the copies of appointment Notification of respondents No. 11 & 12 and the summary of the President as available on social media). Lastly, it is prayed for setting aside the impugned notification of appointment of respondents No. 11 & 12 as Judges of the Supreme Court of Azad Jammu & Kashmir, which is unconstitutional and void ab-initio.

I have heard the preliminary arguments advanced by the petitioner, perused the record and considered the controversy with utmost care.

It is pertinent to mention here that today, another writ petition titled as "Sardar Javed Sharif Advocate Vs. Azad Govt. & others" has also been filed, wherein the appointment of six Judges of this Court has been challenged and I have adjourned the same on account of the reason that as being Chief Justice of this Court, I was a judicial consultee in the matter while another writ petition on the same subject matter titled as "Mir Altaf Hussain Advocate Vs. Azad Govt. & others" was accordingly also sent to sleep due to same reason.

The petitioner reiterated the facts and grounds as taken in the writ petition, therefore, there is no need to reproduce the same.

The vital objection raised by the petitioner is that the President has entirely failed to complete the process of appointment in accordance with law by sending a summary of only two names (for two vacant posts) to the Azad Jammu & Kashmir Council Secretariat without any record of consultation/recommendation with the Hon'ble Chief Justice of Azad Jammu & Kashmir and the Council Secretariat has issued an illegal advice for appointment of respondents No. 11 & 12 as Judges of the Supreme Court is concerned, it appears to be inconsistent with the Constitution and established convention/practice as well as rule of law laid down by the Apex Court of India and Pakistan, particularly, in the case of "SP Gupta" (AIR 1982 SC 149), the case of Supreme Court's Advocate on Record Association" (AIR 1994 SC 268), the case of "Al-Jehad Trust's (PLD 1996 SC 324), the case of "Sindh High Court Bar Association" (PLD 2009 SC 879) and the case of "Sardar Javed Sharif" (2020 SCR 443). In the referred cases, relevant Articles of the Constitution of India and Pakistan relating to appointment of the Judges of the superior Courts were interpreted. On similar lines, the Supreme Court AJK in the case of "Muhammad Younas Tahir" (PLD 2012 SC 42) provided a rule of law. The ratio decidendi of the pronouncements of the Apex Court is that in order to arrive at effective, meaningful, purposive, consensus

oriented consultation leaving no room for complaint or arbitrariness or unfair play, the Constitutional consultees i.e Hon'ble Chief Justice of Azad Jammu & Kashmir and Chief Justice of High Court shall consider more than one person for one position of the Judges of the High Court and shall arrive at the conclusive consultation. The rule of law laid down in the aforementioned famous judgments of the Apex Courts of India and Pakistan does not provide that the Constitutional consultees i.e Hon'ble Chief Justice of Azad Jammu & Kashmir and Chief Justice of High Court shall recommend after meaningful consultation at least three candidates for each post. The opinion of the Hon'ble Chief Justice of Azad Jammu & Kashmir and Chief Justice of High Court as to the fitness and suitability of a candidate for judgeship is entitled to be accepted in the absence of very sound reasons to be recorded by the President. Impressed with the ratio decidendi laid down in the aforementioned case law, the legislature in Pakistan had substituted the relevant provisions of Article 177 and 193 of the Constitution and the process of appointment of Judges of the Superior Courts has been provided in Article 175-A of the Constitution of the Islamic Republic of Pakistan which was introduced through Eighteenth Amendment in the Constitution of the Islamic Republic of Pakistan. It is more advantageous to reproduce the aofdsreiad Article which is as under:-

“**175-A (8)**. The Commission by majority of its total membership shall nominate to the Parliamentary Committee one person, for each vacancy of a Judge in the Supreme Court, a High Court or the Federal Shariat Court, as the case may be.”

There has been no practice of furnishing of more person for one vacancy. Now, under Article 157-A Sub Article (8) in order to eliminate any chance of arbitrariness and for carrying out the spirit of the ration decidendi laid down by the Superior Courts of India and Pakistan referred in supra case law, necessary amendments were introduced in the Constitution and Article 175-A was inserted. More particularly, as explained earlier the provisions of Sub-Article (8) of Article 175-A of the Constitution of the Islamic Republic of Pakistan are specifically inserted in the Constitution, in which it is provided that “***the Judicial Commission shall nominate one person against one vacancy***”. This provision is specifically introduced to follow the principle of law laid down by the Superior Courts of India and Pakistan referred hereinabove that “the process of appointment shall be transparent specifically leaving no room for complaint or any arbitrariness.

On query of the Court, the petitioner was asked regarding one person against one vacancy, he could not satisfy the Court, therefore, the contention of the petitioner is weightless, which is hereby deterred.

At the very outset, it may be stated that no proof has been attached with the file by the petitioner to strengthen his claim. On query of the Court, the petitioner was asked that no reliable documents have been attached with the writ petition, he kept mum on the aforesaid point. It is pertinent to mention here that mere on the apprehension, writ cannot be granted. The law, by now, is well settled that a writ cannot be granted on the basis of apprehension. The record shows that the petitioner himself stated in content No.9 of the writ petition that the petitioner has tried his best to get copies of the relevant record but has failed to obtain the same (except the copies of appointment Notification of respondents No. 11 & 12 and the summary of the President as available on social media). Admittedly, the petitioner has not attached documents in support of his contention but only the summary of the worthy President available on social media has been attached with the file which is not a valid tendering of the documents as per law, hence, such documents are excluded from the consideration. An identical point came under consideration before the Apex Court of Pakistan in a case titled as “*Muhammad Zafar and others Vs. Muhammad Saeed and others*” [PLJ 2021 Lahore 722]. The relevant portion of the aforesaid judgment is reproduced as under:-

“6. It also transpires from the record that the documentary evidence (Exh. P.2 to Exp. P.15) has been produced in trial proceedings by the learned counsel for the petitioners/plaintiffs in his statement which is not a valid tender of the documents whereas law requires that the documents relief upon or on the basis of which the case has been filed, should be produced in the evidence by party itself and a fair opportunity should be given to the opposite party to cross-examine the same, as such, the documents produced by the petitioners’ counsel cannot be relied upon as valid piece of evidence and ordinary such documents are excluded from taking into consideration. Reliance is placed on the cases titled of Mst. Hameeda Begum & others Vs. Mst. Irshad Begum & others (2007 SCMR 996), Federation of Pakistan through Secretary Ministry of Defence & another Vs. Jaffar Khan & others (PLD 2010 SC 604) and Province of the Punjab through Collector, Sheikhpura and others Vs. Syed Ghazanfar Ali Shah and others (2017 SCMR 172)”.

(Underlining is mine)

The 2nd limb which needs resolution is as to whether the consultation has been made properly and procedurally or not? A bare reading of the file also postulates that consultation was made by the Authority, with the consultee and the worthy President declared respondents No.11 & 12 as ‘qualified’, hence, the consultation was properly made, therefore, the point regarding consultation is vogue and based upon hypothesis. Appointments are outcome of requisite consultation and due process as per mandate and roadmap envisaged by the Azad Jammu & Kashmir Interim

Constitution, 1974, thus the argument of the petitioner in this regard is hereby repelled.

Even otherwise, writ jurisdiction can only be exercised, 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)

It is a settled principle of law that an order/letter 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*.

The net consequence of the above detailed discussion is that finding no force in the instant writ petition, therefore, the same stands dismissed in limine.

Muzaffarabad,
16.05.2022

-Sd-
CHIEF JUSTICE

Approved for reporting

-Sd-
CHIEF JUSTICE