

HIGH COURT OF AZAD JAMMU & KASHMIR

Writ Petition No. 1092 of 2018,

Date of Institution. 04.06.2018,

Date of Decision. 17.09.2019.

1. Barrister Adnan Nawaz Khan, Advocate, Supreme Court of AJ&K.
2. Shamshad Hussain Khan, Advocate Supreme Court of AJ&K.
3. Sardar Javaid Sharif, Advocate High Court of AJ&K.
4. Raja Izzat Baig, Advocate High Court of AJ&K.

...Petitioners.

VERSUS

1. Govt. of the State of Azad Jammu & Kashmir through its Chief Secretary, having office at Lower Chatter, Muzaffarabad.
2. Chairman AJ&K Council through Secretary AJ&K Council Secretariat, having office at Azad Jammu & Kashmir Council Secretariat, Sector F-5/2, Islamabad.
3. AJ&K Council through its Secretary having office at AJ&K Council Secretariat Sector F-5/2, Islamabad.
4. Secretary AJ&K Council Secretariat, having office at AJ&K Kashmir Council Secretariat, Sector F-5/2, Islamabad.
5. Joint Secretary AJ&K Council Secretariat, having office at AJ&K 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, having office at Lower Chatter Muzaffarabad.
9. Secretary Law, Justice, Parliamentary Affairs and Human Rights, having office at Lower Chatter, Muzaffarabad.
10. Mr. Raza Ali Khan, presently holding the post of Judge High Court (under the Impugned Notification), High Court Muzaffarabad.
11. Mr. Muhammad Ejaz Khan, presently holding the post of Judge High Court (under the impugned Notification), High Court, Muzaffarabad.
12. Mr. Chaudhry Khalid Yousaf, presently holding the post of Judge High Court (under the impugned notification), High Court, Muzaffarabad.
13. Mr. Raja Sajjad Ahmed Khan, presently holding the post of Judge High Court (under the Impugned Notification), High Court, Muzaffarabad.
14. Mr. Chaudhry Muhammad Munir, presently holding the post of Judge High Court (under the Impugned Notification), High Court, Muzaffarabad.

... Non-petitioners.

*Writ Petition No.1130 of 2018,
Date of Institution. 09.06.2018,*

Aamir Ali Awan Advocate Supreme Court of AJ&K, Muzaffarabad.

...Petitioner.

VERSUS

1. Azad Govt. of the State of Jammu & Kashmir through its Chief Secretary, having office at New Secretariat Muzaffarabad.
2. Chairman AJ&K Council/Prime Minister of Pakistan at Council Secretariat Islamabad.
3. President of the State of AJ&K having his office at Presidential Secretariat Muzaffarabad.
4. Minister for Kashmir Affairs and Northern Areas Islamabad.
5. AJ&K Council through its Secretary having office at Council Secretariat Islamabad.
6. Secretary AJ&K Council having office at Council Secretariat Islamabad.
7. Joint Secretary AJ&K Council Secretariat, having office at Council Secretariat, Islamabad.
8. Department of Law, Justice, Human Rights and Parliamentary Affairs through Secretary Law Azad Govt. of the State of Jammu & Kashmir having his office at New Secretariat Muzaffarabad.
9. Secretary to President of the State of AJ&K having his office at Presidential Secretariat Muzaffarabad.
10. Mr. Raza Ali Khan, Advocate Supreme Court of AJ&K, presently holding the post of Judge High Court of AJ&K (under the Impugned Notification).
11. Mr. Muhammad Ejaz Khan, Advocate Supreme Court of AJ&K, presently holding the post of Judge High Court AJ&K (under the impugned Notification).
12. Mr. Chaudhry Khalid Yousaf, Advocate Supreme Court of AJ&K presently holding the post of Judge High Court AJ&K (under the impugned notification).
13. Mr. Raja Sajjad Ahmed Khan, Advocate Supreme Court of AJ&K presently holding the post of Judge High Court AJ&K (under the Impugned Notification).
14. Mr. Chaudhry Muhammad Munir, presently holding the post of Judge High Court (under the Impugned Notification).

... Non-petitioners.

*Writ Petition No.1194 of 2018,
Date of Institution. 26.06.2018,*

1. Sardar Saif Ullah Hajazi Advocate High Court District Bar Association Rawalakot.
2. Sardar Khalid Mahmood Advocate High Court District Bar Association Rawalakot.
3. Malik Muhammad Asghar Advocate High Court District Bar Kotli.
4. Raja Tariq Mehmood Advocate High Court District Bar Kotli.
5. Ashfaq Anjum Advocate High Court District Bar Kotli.
6. Mehmood-ul-Hussan Advocate High Court District Bar Kotli.
7. Sardar Muhammad Ibrahim Khan Advocate High Court District Bar Kotli.
8. Raja Sakandar Iqbal Advocate High Court Tehsil Bar Hajira.
9. Wajid Ali Advocate High Court Tehsil Bar Hajira.
10. Khalid Qaiser Advocate High Court Tehsil Bar Hajira.
11. Muhammad Amin Advocate High Court Tehsil Bar Hajira.
12. Javaid Ayub Advocate High Court Tehsil Bar Hajira.
13. Sardar Raees Inqlabi Advocate High Court Tehsil Bar Hajira.
14. Arslan Nisar Advocate High Court District Bar Sudhnooti.
15. Sajjad Zia Advocate High Court District Bar Sudhnooti.
16. Ahmed Fraz Advocate High Court, President Tehsil Bar Association Thorar, District Poonch.

...Petitioners.

VERSUS

1. Govt. of Azad Jammu & Kashmir through its Chief Secretary, having office at Lower Chatter, Muzaffarabad.
2. Chairman AJ&K Council through Secretary AJ&K Council, having office at Azad Jammu & Kashmir Council Secretariat, Sector F-5/2, Islamabad.
3. AJ&K Council through its Secretary having office at AJ&K Council Secretariat Sector F-5/2, Islamabad.
4. Secretary AJ&K Council Secretariat, having office at AJ&K Council Secretariat, Sector F-5/2, Islamabad.
5. Joint Secretary AJ&K Council Secretariat, having office at AJ&K 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. Mr. Raza Ali Khan, presently holding the post of Judge High Court (under the Impugned Notification), High Court Muzaffarabad.
11. Mr. Muhammad Ejaz Khan, presently holding the post of Judge High Court (under the impugned Notification), High Court, Muzaffarabad.
12. Mr. Chaudhry Khalid Yousaf, presently holding the post of Judge High Court (under the impugned notification), High Court, Muzaffarabad.
13. Mr. Raja Sajjad Ahmed Khan, presently holding the post of Judge High Court (under the Impugned Notification), High Court, Muzaffarabad.
14. Mr. Chaudhry Muhammad Munir, presently holding the post of Judge High Court (under the Impugned Notification), High Court, Muzaffarabad.

Non-Petitioners.

*Writ Petition No.1235 of 2018,
Date of Institution. 04.07.2018,*

1. Ch. Muhammad Riaz Alam Advocate Supreme Court Mirpur AJ&K (Former President District Bar Association & Member AJ&K Bar Council).
2. Ch. Shakeel Zaman Advocate Supreme Court Mirpur AJ&K (Member AJ&K Bar Council).
3. Mirza Muhammad Amin Baig, Advocate High Court, AJ&K Mirpur (Former Senior Vice President, District Bar Association Mirpur).
4. Ch. Tehseen Ahmed Advocate Supreme Court of AJ&K Mirpur (Former General Secretary, District Bar Association Mirpur).
5. Kabeer Ahmed Hashim Advocate Supreme Court (Joint Secretary AJ&K Supreme Court Bar Association).
6. Muhammad Muddasar Iqbal Advocate Mirpur (Former General Secretary, District Bar Association Mirpur).
7. Khawaja Muhammad Ilyas Advocate High Court AJ&K Mirpur.
8. Shamraiz Asif Advocate High Court Mirpur.

...Petitioners.

VERSUS

1. Govt. of AJ&K through its Chief Secretary, having office at Muzaffarabad.
2. Chairman AJ&K Council through its Secretary AJ&K Council Secretariat Islamabad Pakistan.
3. AJ&K Council through its Secretary having its office at AJ&K Council Secretariat Sector F-5/2 Islamabad.
4. Secretary AJ&K Council Secretariat having office at AJ&K Council Secretariat Sector F-5/2 Islamabad Pakistan.

5. Joint Secretary AJ&K Council, having office at AJ&K Council Secretariat, Sector F-5/2, Islamabad, Pakistan.
6. Minister for Kashmir Affairs & Gilgit-Baltistan, Red Zone Islamabad, Pakistan.
7. President of the State of AJ&K through its Secretary having office at Muzaffarabad.
8. Principal Secretary to President of AJ&K Muzaffarabad.
9. Department of Law, Justice, Parliamentary Affairs & Human Rights through its Secretary having his office at Lower Chatter Muzaffarabad.
10. Secretary Law, Justice, Parliamentary Affairs & Human Rights having its office at Lower Chatter, Muzaffarabad.
11. Registrar Supreme Court of AJ&K Muzaffarabad.
12. Registrar High Court of AJ&K Muzaffarabad.
13. Mr. Raza Ali Khan, presently holding the post of Judge High Court (under the Impugned Notification) High Court Muzaffarabad.
14. Mr. Muhammad Ejaz Khan, presently holding the post of Judge High Court (under the impugned Notification) High Court, Muzaffarabad.
15. Mr. Chaudhry Khalid Yousaf, presently holding the post of Judge High Court (under the impugned notification), High Court, Muzaffarabad.
16. Mr. Raja Sajjad Ahmed Khan, presently holding the post of Judge High Court (under the Impugned Notification), High Court, Muzaffarabad.
17. Mr. Chaudhry Muhammad Munir, presently holding the post of Judge High Court (under the Impugned Notification), High Court, Muzaffarabad.

... Non-petitioners.

*Writ Petition No.1255 of 2018,
Date of Institution. 10.07.2018,*

Fayyaz Ahmed Janjua Advocate Supreme Court of AJ&K Member
Central Bar Association Old Secretariat Muzaffarabad.

...Petitioner.

VERSUS

1. Azad Govt. of the State of Jammu & Kashmir through its Chief Secretary, having office at New Secretariat Muzaffarabad AJ&K.
2. Chairman AJ&K Council, Council Secretariat F-5/2, Islamabad, Pakistan.
3. AJ&K Council through its Secretary Council Secretariat F-5/2 Islamabad, Pakistan.
4. Secretary AJ&K Council, Council Secretariat F-5/2 Islamabad, Pakistan.

5. Joint Secretary AJ&K Council, Council Secretariat F-5/2, Islamabad, Pakistan.
6. Minister for Kashmir Affairs & Gilgit-Baltistan Red Zone Islamabad.
7. President of AJ&K through Secretary to President having his office at President Secretariat, Muzaffarabad.
8. Department of Law, Justice, Parliamentary Affairs and Human Rights through its Secretary having his office at Lower Chatter Muzaffarabad.
9. Secretary Law, Justice & Parliamentary Affairs of AJ&K having his office at New Secretariat Complex Muzaffarabad.
10. Registrar High Court/Shariat Appellate Bench of AJ&K High Court having his office at High Court Building Muzaffarabad AJ&K.
11. Registrar Supreme Court/Shariat Appellate Bench of the AJ&K Supreme Court having his office at Supreme Court Building Muzaffarabad AJ&K.
12. Mr. Raza Ali Khan, Judge High Court but illegally appointed under Notification No.LD/AD/711-30/2018 dated 21.05.2018.
13. Mr. Muhammad Ejaz Khan, Judge High Court but illegally appointed under Notification No.LD/AD/711-30/2018 dated 21.05.2018.
14. Mr. Chaudhry Khalid Yousaf, Judge High Court but illegally appointed under Notification No.LD/AD/711-30/2018 dated 21.05.2018.
15. Mr. Raja Sajjad Ahmed Khan, Judge High Court but illegally appointed under Notification No.LD/AD/711-30/2018 dated 21.05.2018.
16. Mr. Chaudhry Muhammad Munir, Judge High Court but illegally appointed under Notification No.LD/AD/711-30/2018 dated 21.05.2018.
17. Accountant General of AJ&K Sathra Hills Muzaffarabad.

... Non-petitioners.

*Writ Petition No.1296 of 2018,
Date of Institution. 23.07.2018,*

Shahid Ajmal Advocate Supreme Court, Member Sehnsa Bar Association Kotli Azad Kashmir.

...Petitioner.

VERSUS

1. Govt. of the State of Azad Jammu & Kashmir through Chief Secretary, having office at New Secretariat Muzaffarabad.
2. Chairman AJ&K Council/Prime Minister of Pakistan at Council Secretariat Islamabad.

3. President of the State of Azad Jammu & Kashmir having office at Presidential Secretariat Muzaffarabad.
4. Minister for Kashmir Affairs and Northern Areas Islamabad.
5. Azad Jammu & Kashmir Council through its Secretary having office at Council Secretariat Islamabad, Pakistan.
6. Secretary AJ&K Council having office at Council Secretariat Islamabad.
7. Joint Secretary AJ&K Council, having office at Council Secretariat Islamabad.
8. Department of Law, Justice, Human Rights and Parliamentary Affairs through Secretary Law Azad Govt. of the State of Jammu & Kashmir having his office at New Secretariat Muzaffarabad.
9. Secretary to President of the State of AJ&K having office at Presidential Secretariat Muzaffarabad.
10. Mr. Raza Ali Khan, Advocate Supreme Court of AJ&K, presently holding the post of Judge High Court of AJ&K (under the Impugned Notification).
11. Mr. Muhammad Ejaz Khan, Advocate Supreme Court of AJ&K, presently holding the post of Judge High Court of AJ&K (under the Impugned Notification).
12. Mr. Chaudhry Khalid Yousaf, Advocate Supreme Court of AJ&K, presently holding the post of Judge High Court of AJ&K (under the Impugned Notification).
13. Mr. Raja Sajjad Ahmed Khan, Advocate Supreme Court of AJ&K, presently holding the post of Judge High Court of AJ&K (under the Impugned Notification).
14. Mr. Chaudhry Muhammad Munir, Advocate Supreme Court of AJ&K, presently holding the post of Judge High Court of AJ&K (under the Impugned Notification).
15. Registrar Supreme Court of AJ&K Muzaffarabad.
16. Registrar High Court of AJ&K Muzaffarabad.

... Non-petitioners.

WRIT PETITIONS

Before:- *Justice Azhar Saleem Babar, A.C.J.*
Justice Muhammad Sheraz Kiani, J.

PRESENT:

M/s Barrister Adnan Nawaz Khan, Barrister Humayun Nawaz Khan, Syed Shahid Bahar, Sardar Shamshad Hussain and Fayyaz Ahmed Janjua, Advocates, for the petitioners.

Mr. Abdul Rasheed Abbasi, Advocate, for respondents No.1 to 6, 8 and 9.

Raja Muhammad Hanif Khan, Advocate, for the private respondents.

Mr. Bashir Ahmed Mughal, Advocate, for AJ&K Council.

Ms/ Sardar Tahir Anwar Khan and Raja Ibrar Hussain, Advocates, for respondent No.7 (President of AJ&K).

ORDER:

(Justice Azhar Saleem Babar, J) Mr. Raza Ali Khan, Mr. Muhammad Ejaz Khan, Mr. Khalid Yousuf Chaudhry, Raja Sajjad Ahmed Khan and Ch. Muhammad Munir, respondents, have been appointed as Judges High Court of Azad Jammu & Kashmir vide notification dated 21.05.2018. The notification of appointment of aforementioned incumbent Judges has been challenged through the above titled writ petitions on almost common grounds.

2. Facts envisaged by the writ petitions may briefly be summarized as under:-

- (i) Petitioners are practicing lawyers and are office bearers of different Lawyers Associations and believe in supremacy of Constitution and Law. It is claimed that the writ petitions have been filed to uphold independence of Judiciary and to uphold the Constitution.
- (ii) That some posts of Judges High Court fell vacant and number of vacancies beefed up to 5 after shifting/transfer of 2 vacancies of Judges Shariat Court to the High Court and at the eve of elevation of Justice Ghulam Mustafa Mughal, Chief Justice High Court AJ&K, as Judge of the Supreme Court of AJ&K.
- (iii) After mentioning qualification of Judge of the High Court envisaged by Article 43 (2-A) of the Azad Jammu & Kashmir Interim Constitution, 1974, the petitioners

have contended that process of filling-in the vacant positions was initiated. It is stated that as per the aforementioned provision of Constitution, the President of the State of Azad Jammu & Kashmir (herein after may be referred as "The President" is supposed to appoint a Judge in the High Court after consultation with Chief Justice of the AJ&K and Chief Justice High Court of AJ&K and after seeking advice from Chairman AJ&K Council (herein after may be referred (The Chairman). It is contended that consultation with the constitutional consultees has not been conducted in accordance with the constitutional provisions. The petitioners contended that the President sent a panel of 5 persons in exclusion of other nominees to the Chairman and, thus, an advice was sought from the Chairman on an illegal and unconstitutional correspondence.

- (iv) The petitioners have challenged the eligibility of Ch. Muhammad Munir, J, on the ground that he was promoted as District & Sessions Judge on 09.01.2016, so, he was not eligible to be appointed as Judge High Court because he lacked requisite eligibility of 3 years service as District & Sessions Judge as per the provisions of Article 43(3)(b) of the Interim Constitution.

(v) It is claimed that mandatory requirement of “Consultation” ordained by Article 43 of the Constitution has not been complied with because it has been time and again held that consultation should be effective, meaningful, purposive and consensus oriented leaving no room for complaint of arbitrariness or unfair play. It has also been contended that incumbent Judges lack the capacity, ability, sound knowledge of law and required experience for the job of Judge High Court.

(vi) Another important point raised in the writ petitions is that there is no consensus between the Chief Justice of AJ&K and Chief Justice High Court of AJ&K in appointment of incumbent Judges. It has been explained that both the Judicial Consultees have been given equal weightage by the Constitution and opinion of none of them can be brushed aside. So, the impugned notification is liable to be set at naught while accepting the writ petitions.

3. The respondents have filed separate written statements and besides raising some technical objections, have insisted that whole the process of appointment of incumbent Judges has been conducted in accordance with the Constitutional provisions and in accordance with the judgments of the superior Courts. It has been explained that process of consultation was duly held by the Hon’ble President and after

seeking advice of the Chairman, the impugned notification has correctly been issued.

4. M/s Abdul Rasheed Abbasi and Raja Muhammad Hanif Khan Advocates addressed the Court on behalf of the respondents at some length, whereas Barrister Adnan Nawaz Khan opened the arguments on behalf of the petitioners. It looks appropriate to deal with the technical objections towards maintainability of the writ petitions, first.

- (i) It has been contended that all the facts have not been brought to the notice of the Court in the writ petitions which is essential to constitute a ground for indulgence of the High Court to exercise powers under Article 44 of the Interim Constitution. It has been explained in this regard that petitioners do not have substantive knowledge of the facts and the facts mentioned have been brought-forth on the basis of credible sources and according to the petitioners' information. Learned counsel for the respondents has referred to and relied upon PLD 1993 SC AJ&K 12 and 2014 SCR 1412 in support of his contention.

The petitioners are practicing Advocates in the territory of Azad Kashmir and hail from different Districts. It is logical to assume that the petitioners are neither a witness to the process of consultation nor the record of consultation is within their reach.

The petitioners have attached certified copy of notification dated 21.05.2018, whereby the respondents have been appointed as Judges in the High Court of AJ&K. There is no legal infirmity in the claim that the facts taken in the writ petitions are based on their information or on some plausible sources. The objection is, therefore, overruled.

(ii) It is claimed that the supra titled writ petitions have been filed just to disturb the smooth functioning of the AJ&K High Court. It has been claimed that object of filing of the writ petitions is just to humiliate the respondent Judges. PLD 1965 SC 236 referred. It may be stated in this regard that petitioners carry equal respect and unless some mala-fide is apparent from record, the petitioners cannot be blamed for filing the writ petitions with a bad intent. Smooth functioning of an institution, by itself, is not a ground for throwing the petitioners out of the Court. In the referred case, it has been laid down that the Court is empowered to refuse discretionary relief in a constitutional petition if it obstructs smooth nature of working. The objection, being weightless, is not tenable.

(iii) It has been objected that the petitioners are not entitled to challenge the process of consultation held between the constitutional consultees. It has also been contended that the petitioners claim that process of consultation has not

been conducted in accordance with the Constitution, whereas contention of the respondents is that whole process of consultation has been conducted in accordance with law. As per his view, a factual controversy has arisen which cannot be resolved in a constitutional writ petition. Learned counsel has referred to 2001 SCMR 1493, 2004 SCMR 1299, 2005 SCMR 37, 2006 SCMR 219, 2013 CLC 868 and 2008 SCMR 916.

A perusal of case law regarding appointment of Judges in the superior Courts transpires that wisdom of constitutional consultation cannot be challenged in a writ petition but the procedural defects in the process of consultation are open to challenge via a constitutional writ petition. It may be refreshed that a writ of certiorari is generally filed on the ground that the impugned order/notification of an authority is not in accordance with law. From Gupta's case reported as AIR 1982 SC 149, upto Muhammad Younas Tahir's case reported as 2012 SCR 213, the process of consultation amongst the Constitutional Consultees was under challenge and Supreme Courts of India, Pakistan and Azad Kashmir have resolved the controversy without feeling any legal hitch. The objection, being unnecessary, is overruled.

- (iv) It has also been contended on behalf of the respondents that acts done by the President in his official capacity are

immuned by virtue of Article 52 (3)(4) of the Interim Constitution. This ground is also not available to the respondents because the procedural defects in the process of appointment of Judges in the superior Courts has frequently been challenged in the High Courts and the Supreme Court of Pakistan, so, the law referred to on behalf of the respondents is not attracted. It may be stated here that wisdom behind the immunity has been explained in 2014 CLC 817, which states that since the Governor is acting upon advice of the Cabinet, therefore, immunity has been provided to the Governor under Article 248(1) of the Constitution of Islamic Republic of Pakistan, 1973. The respondents forgot for a while that they are governed by the Interim Constitution, 1974, and the President has sole prerogative to consult with the Chief Justice of AJ&K and Chief Justice of the High Court and Article 7 of the Constitution does not obstruct his prerogative in so doing. An analogous provision under Article 48 of the Constitution of Pakistan 1973, (CoP 1973) is a bit different from the provision contained in Article 7 of the Interim Constitution, 1974. It has been clarified in Muhammad Younas Tahir's case (2012 SCR 213) that the words "subject to an express provision to the contrary in this Act" are missing in the CoP 1973.

The Hon'ble Supreme Court of AJ&K has differentiated that Governor or President under CoP 1973, is bound by the advice of the Cabinet under Article 48 but the President is not bound by any such advice under Article 7 of the Interim Constitution, 1974. Para 20 at page 235 of Muhammad Younas Tahir's case can be referred, which is as under:-

“A comparative study of both the provisions would show that the provisions of Article 48 of the Constitution of 1973 and Section 7 of the Act, 1974 are different to some extent. The words “subject to an express provision to the contrary in this Act” appearing in Section 7 of the Act, 1974 are missing in Article 48 of the Constitution of 1973, which shows that in the Act, 1974, there is some provision contrary to Section 7 but in Constitution of 1973 there is no provision contrary to Article 48. In the Constitution of 1973, the word “advice” appears in Article 48 only, while in the Act, 1974, the word “advice”, apart from Section 7, appears in Section 42(4) and Section 43(2-A) of Act, 1974 for different purposes. A Judge in Supreme Court of Pakistan is appointed under Article 177 by the President after consultation with the Chief Justice of Pakistan and a Judge in the High Court is appointed by the President after consultation with the Chief Justice of Pakistan, Governor concerned and the Chief Justice of the High Court concerned under Article 193, while under Sections 42(4) and 43(2-A) of the Act, 1974, a Judge in the Supreme Court is appointed by the President on the advice of the Council and after consultation with the Chief Justice of Azad Jammu & Kashmir and

a Judge in the High Court is appointed on the advice of the Council after consultation with the Chief Justice of Azad Jammu & Kashmir and the Chief Justice of High Court. The advice of the Prime Minister under Section 7 of the Act, 1974 is not relevant for the purpose of the appointment of Judges.”

Therefore, the objection towards immunity of act done by the President is not tenable.

- (v) Another point has been raised that High Court cannot sit over the process of consultation conducted by the President, the Chief Justice of AJ&K and Chief Justice of the High Court of AJ&K. This objection is repelled on the same grounds, which have been mentioned in two preceding paragraphs.
- (vi) It has been claimed that appointment of incumbent Judges in the High Court of AJ&K is deemed to have been made validly on the “Principle of Primacy”. The objection needs detailed deliberation which shall be dealt with while discussing merits of the case. It has also been contended that Ch. Muhammad Munir, J, is fully eligible as per the requirement of the Interim Constitution. It has been stated that post of District & Sessions Judge has been upgraded from BS-19 to BS-20 and then to BS-21 at different times, so, it is not pay scale that matters; rather it is the experience as District & Sessions Judge which matters. Learned counsel has relied on Section

3(15) of General Clauses Act in support of his contention as well. He has further referred to AIR 1954 Aasam 161, AIR 1951 Calcutta 1, AIR 1990 Patna 49, PLD 1996 SC 324 as well.

The matter of eligibility of Ch. Muhammad Munir, J, shall also be discussed while elaborating merits of the case.

5. Barrister Adnan Nawaz Advocate while opening the arguments in his case contended that consultation with the Chief Justice of AJ&K and Chief Justice High Court of AJ&K is a prerequisite to bring it valid. He emphasized that the word “and” has been used in Article 43(2-A), which means that consultation with both the Judicial consultees is a must. For guidance, relevant provision contained in Article 43 (2-A) is reproduced as under:-

“A Judge of the High Court shall be appointed by the President on the advice of the Council and after consultation-

- (a) With the Chief Justice of Azad Jammu & Kashmir; and*
- (b) Except where the appointment is that of Chief Justice, with the Chief Justice of the High Court”.*

Learned counsel is of the view that if consultation with any of the Judicial consultees is missing, it would be rendered invalid. He relied on PLD 1996 SCR 324. Learned counsel explained correspondence of the Worthy President with the Hon’ble Chief Justices in chronological order by referring to documents attached with

the written statement as Annexure “RA/1” to Annexure “RA/18”. It has been stated that Hon’ble Chief Justice of AJ&K forwarded a panel of 9 candidates to the President on 23.12.2017 and expressed his opinion in letter that sending of a panel is not a proper consultation and mutual consultative process should be followed. Learned counsel emphasized that there was no consultation until 23.12.2017 in view of correspondence of the Chief Justice of AJ&K. He further explained that Worthy President forwarded a panel of candidates to the Chairman on 04.01.2018. So, the panel was drawn and forwarded to the Worthy Chairman after 11 days of correspondence by Hon’ble Chief Justice of AJ&K. He asserted that there is no correspondence found on record during these 11 days. Learned counsel argued that Worthy President has assumed and posed himself as consultee in his written statement and perhaps because of such misconception, he finalized 5 candidates for judgeship. The petitioners have attached copies of all the correspondence which are attached with the written statement as Annexures “RA/1” to “RA/18”. Learned counsel explained that Minister Kashmir Affairs sought details of correspondence between the President and the Chief Justices, which was sent to him by the President accordingly. Thereafter AJ&K Council Secretariat objected to the panel by pointing-out that Chief Justice High Court must be consulted because the panel already sent comprises names contained in the list of Hon’ble Chief Justice of the Supreme Court. It was advised by the Secretariat that a fresh panel be sent after fresh consultation.

Learned counsel pointed out that according to details of meetings provided on a document RA/15, 4 meetings were conducted after 23.12.2017, which included telephonic conversation.

6. Barrister Adnan Nawaz Khan Advocate submitted with vehemence that the President was not empowered to prioritize the names of the candidates and it was not within his competence to finalize and to forward only 5 names of the candidates for 5 vacant positions/ posts. It has further been argued that names of the incumbent Judges have not been recommended by both the Judicial consultees, so, the consultation and the impugned notification are bad in the eye of law. He pointed out that Registrar High Court in his written statement has clarified that Chief Justice High Court was never consulted for appointment of the incumbent Judges and that no telephonic conversation was ever held in this regard. In such a situation, learned counsel, while relying on Muhammad Younas Tahir's case, suggested that the positions ought to have been left vacant. Learned counsel lamented on appointment of Mr. Justice Ch. Muhammad Munir by stating that he did not have requisite eligibility of 3 years service as District & Sessions Judge, so, the impugned notification is liable to be set aside.

7. Sardar Shamshad Hussain Advocate while agreeing with the arguments already advanced contended that no consultation with the Hon'ble Chief Justices is found on record after reversal of summary from the Council Secretariat. While adverting to an application for

striking out names of Registrar Supreme Court and Registrar High Court of AJ&K from the face of the writ petitions, he claimed that it is the discretion of the Hon'ble Court to add or delete a party to the proceedings. He relied on PLD 2002 SC 615, PLD 1963 SC 663, 1999 YLR 469 and AIR 1936 Madraas 449 in this regard. He further explained his point of view by stating that the word "Consultation" has not been defined in the Constitution, therefore, its Dictionary meanings are to be adhered to. He emphasized that consultation is always between 2 persons involving participatory discussions. He referred to Black's Law Dictionary, which finds mention in AIR 1982 SC 149. Learned counsel further emphasized that learned counsel for the respondents has mistakenly referred to Section 3(15) of General Clauses Act, which defines "District Judge". He pointed out that this definition is not relevant to the case of Ch. Muhammad Munir, J, because the words "District & Sessions Judge" have been employed in Article 43 (2-B) of the Interim Constitution. Learned counsel submitted that acting charge is not a regular promotion, so, the period of Ch. Muhammad Munir, J, as District & Sessions Judge has to be reckoned from his regular promotion as District & Sessions Judge. He explained that by order of the High Court, Ch. Muhammad Munir was promoted as District & Sessions Judge BS-21 on regular basis on 09.01.2016, so, he had not the requisite length of 3 years service as District & Sessions Judge at the time of his elevation as Judge of the High Court i.e. 21.05.2018. Learned counsel relied on PLD 2016 SC 509 and 1993

SCMR 1589 in support of his contention. While re-adverting to the process of consultation, Mr. Shamshad Hussain Advocate contended that previous consultation was in black and white, whereas the second purported consultation has not been done in written shape. He relied on PLD 1996 SC 324, AIR 1991 SC 621, PLD 2016 SC AJ&K 1, 2014 SCR 1258, 2012 SCR 213, 1993 SCR 331 and PLD 2013 SC 1.

8. In addition to the arguments, Syed Shahid Bahar Advocate stated that political affiliation of a candidate by itself is not an obstruction in the way of appointment of a Judge High Court but a candidate with a political affiliation must have maturity coupled with adequate knowledge of law and integrity. While diverting my attention towards some news-paper clippings, learned counsel contended that Raja Sajjad Ahmed Khan, J, has a strong political affiliation and he has been a candidate for Legislative Assembly of AJ&K as well. Learned counsel referred to the opinion of Mr. S.M. Zafar, a known jurist, who has opined that a consultation is supposed to be meaningful and based on mutual discussion. Learned counsel is of the view that in case of difference of opinion between 2 Chief Justices, an appointment in the office of Judge High Court is not valid. He based his view on Sindh High Court case (PLD 2009 Karachi 408).

9. Barrister Humayun Nawaz Khan Advocate in support of his contention stated that written statement filed by Worthy President is supported by an affidavit of Section Officer, which is not relevant. He further stated that in the same way, Registrar High Court has filed his

personal affidavit in support of such facts which did not occur in his presence. He explained that Registrar High Court and the concerned Section Officer were not present during process of consultation, so, their affidavits are not relevant. He further contended that in case of difference of opinion between the 2 Chief Justices, an appointment in the office of Judge High Court should be avoided. Learned counsel extended his arguments by stating that principle of primacy is not attracted because 3 names from the panel of Hon'ble Chief Justice Supreme Court and 2 names from the panel of Hon'ble Chief of the High Court have been finalized and notified, so, Rule of Primacy attached with the opinion of Hon'ble Chief Justice Supreme Court is not attracted. He explained that such principle could be relevant if all the candidates suggested by Hon'ble Chief Supreme Court had been finalized.

10. Mr. Fayyaz Ahmed Janjua Advocate in support of his petition, argued that in the impugned notification dated 21.05.2018, the word "Consultation" has not been mentioned, so, the notification lacks constitutional requirement of consultation and is, therefore, bad in law. He expressed the same views of ineligibility in connection with the appointment of Ch. Muhammad Munir, J.

11. Raja Muhammad Hanif Khan Advocate appearing for the President and incumbent Judges submitted his point of view by explaining that detail of meetings between the Worthy President and the Hon'ble Chief Justices has been provided by the Presidential

Secretariat attached with the written statement as Annexure “RA/15”. In response to correspondence initiated by the Worthy President, Hon’ble Chief Justices forwarded their panels and in this regard, last meeting of the Hon’ble Chief Justices was held with the President on 23.12.2017. The Hon’ble Chief Justice forwarded his panel of choice to the President on the same date. The President forwarded a panel of 5 candidates to the Chairman AJ&K Council on 04.01.2018, which was objected upon by the Council Secretariat. The Council Secretariat sought a panel of atleast 3 candidates for each post, whereupon the President of AJ&K consulted Chief Justice of the High Court through telephonic calls. He explained that Hon’ble Chief Justice of the High Court did not agree to have a face to face meeting with the President despite request extended by the later. Learned counsel further explained that after due consultation with the Judicial consultees, the President sent a panel of 15 candidates to the Chairman AJ&K Council, who happens to be the Prime Minister of Pakistan. It may be added here that an argument was extended on behalf of the petitioners that Mr. Shahid Khaqan Abbasi, the then Chairman Kashmir Council signed the summary on 17.05.2018, which was his last day in the office. Learned counsel for the respondents explained that Mr. Shahid Khaqan Abbasi remained in the office of Prime Minister of Pakistan till 31.05.2018, so, it has wrongly been claimed that signatures of the Chairman Kashmir Council were politically maneuvered at the last hours of his term in the office. It was further submitted that last meeting with Chief Justice of

AJ&K was held in Islamabad on 22.04.2018. In his view, detailed consultative process was conducted between the constitutional entities and, therefore, no defect in the process of consultation is manifested.

12. It was further argued that Chief Justice High Court of AJ&K is the relevant person to clarify that whether he was consulted for appointment of Judges or not? Learned counsel referred to 1997 SCR 389 in support of his arguments. He further asserted that Registrar is an irrelevant person who was not present during consultations, so, written statement by Registrar is not relevant. He further explained that at the time of consultation between the Worthy President and the Hon'ble Chief Justices, Mr. Liaqat Shaheen was functioning as Registrar of the High Court, whereas Mian Arif Hussain has submitted written statement as Registrar High Court. Learned counsel further explained that Registrar is not competent to file his personal affidavit. He relied on 1999 SCR 5 in support of his version. It was further submitted that Registrar High Court has filed written statement on his own and the written statement does not indicate that it has been drafted and filed on directions of Hon'ble Chief Justice. Learned counsel stated that Registrar is a public servant and the High Court is an attached Department of Law Department as per Rules of Business, 1985. He argued that Registrar is not competent to file a suit independently or defend a case as such; rather, he has to seek approval from the Law Department as per the requirement of Rule 55 of Law Manual. In this regard, 2004 SCR 284 has been referred. In regard to term "Consensus

Oriented” learned counsel stated that a participatory consultation is enough to satisfy the requirement of “consensus oriented consultation”. He relied on PLD 1996 SC 490 relevant pages (491 to 524). Learned counsel further explained that Rule laid down by Sindh High Court in Sindh High Court Bar Association’s case (PLD 2009 Karachi 408) has been overruled by the Supreme Court in case reported as PLD 2009 SC 879 and it has been held that primacy to the opinion of Hon’ble Chief Justice Supreme Court, shall prevail in case of difference of opinion.

13. As regards eligibility of Ch. Muhammad Munir, J, learned counsel pressed into service that he has been elevated as Judge High Court on recommendations of Chief Justice High Court and recommendation of a Chief Justice is not justiciable in the High Court. He referred to the panel alongwith biodata of the candidates forwarded by the Hon’ble Chief Justice High Court in support of his version. Learned counsel pressed that experience of a Judge of the High Court cannot be challenged and this rule has been laid down in PLD 1996 SC 124 (relevant pages 510 and 511).

14. M/s Sardar Tahir Anwar Khan and Raja Ibrar Hussain Advocates while extending the arguments advanced by Raja Muhammad Hanif Khan Advocate stated that in case a constitutional consultee refuses from the process of consultation, he becomes a necessary party and his personal affidavit is necessary to be brought on record. It was further argued that Registrar is an alien to the process of consultation, so, the written statement and the affidavits are irrelevant.

It was further suggested that the President has clearly mentioned in his correspondence that consultation has been conducted with the Hon'ble Chief Justices, so, this assertion is final and cannot be challenged. Raja Ibrar Hussain Advocate was of the view that disputed facts about the consultation cannot be resolved in a writ petition. He further asserted that the President is a constitutional consultee whose opinion cannot be avoided arbitrarily. Raja Muhammad Hanif Khan Advocate, by leave of the Court, appeared at the Rostrum and further elaborated his view by stating that Ch. Muhammad Munir, J, disbursed all his powers as District & Sessions Judge while he was functioning as such on acting charge basis. He emphasized that experience of a candidate for Judgeship has to be evaluated by the Chief Justice and it cannot be challenged. He further stated that it matters not that the incumbent Judge was functioning as District & Sessions Judge on regular, officiating or acting charge basis. AIR 1951 Calcutta 1, AIR 1954 Aasam 161 and AIR 1990 Patna 49 relied. Learned counsel further argued that the President is competent to appoint an officer for filing affidavit as per Rule 28 of Law Manual. He further stated that his written statement is supported by an affidavit which has not been rebutted by the petitioners. So, non-filing of affidavit in rebuttal is fatal to the petitioners. 2013 SCR 1026 relied.

15. Mr. Abdul Rasheed Abbasi Advocate assisted by Mr. Bashir Ahmed Mughal Advocate addressed his arguments on behalf of AJ&K Govt. and AJ&K Council. He explained that world

“Consultation” has not been defined in the Constitution, so, its ordinary dictionary meanings have to be adhered to. He referred to Oxford Dictionary wherein the term “Consultation” has sufficiently been explained. Learned counsel argued that Worthy President held as many as 13 consultations with the Hon’ble Chief Justices and conducted 6 joint meetings with the Hon’ble Chief Justices. In his view, sufficient consultations have been conducted as per the Constitutional requirement. He explained that AJ&K Council did not reject the previous summary forwarded by the President, rather sought additional names because of number of vacancies, so, fresh consultation by the President was not any more required. He further explained the meanings of the term “Consensus oriented” by adverting to Oxford Dictionary and suggested that consensus of opinion between the 2 Chief Justices is not the requirement of the Constitution. PLD 1985 SC 28 was relied upon by learned counsel while explaining that law does not expect anything impossible from a person. Learned counsel insisted that the President was left with no option except to forward a list of candidates suggested by both the Chief Justices, particularly when he extended his best efforts in obtaining a consensus opinion of the Judicial consultees. He further explained that a consultee is a necessary party who has not been impleaded in the instant case. He referred to 2016 SCR 887, wherein Finance Department was required to be consulted in financial matters.

16. Barrister Adnan Nawaz Khan, Barrister Humayun Nawaz Khan, Syed Shahid Bahar and Fayyaz Ahmed Janjua, Advocates addressed the Court in rebuttal of arguments extended on behalf of the respondents and tried to clarify that a necessary party has been defined in the Code of Civil Procedure as one, in the absence of whom, an effective decree cannot be passed. It was argued that Registrar is a proper party who has been impleaded because he is custodian of record of the High Court. It was further argued that petitioners have not sought any relief against Chief Justice High Court and no direction against him is required. Learned counsel further explained that the respondents have contradictory claims and they are blowing hot and cold in the same breath. The following case law has been relied upon by the petitioners:-

- 1- PLD 2002 SC 165,
- 2- 2000 SCMR 16,
- 3- 1999 YLR 469, and
- 4- AIR 1994 SC 268.

In support of version that consultation should be in writing, Al-Jehad case has been relied upon. Mr. Shahid Bahar Advocate explained his view point and expressed that Primacy is not a rule but is a theory, which is not necessary to be followed. He relied on PLD 2015 SC 401. Mr. Fayyaz Ahmed Janjua in support of his arguments in relation to consultation relied on 1993 SCR 131, PLD 1989 404 Karachi and 1989 CLC 1369.

17. Before proceedings further, some more technical objections need to be resolved. It has been claimed that Mr. Khalid Rasheed Chaudhry Advocate, petitioner, is included in the panel of Hon'ble Chief Justice High Court but was not appointed as such. It is stated that because of such grudge, the writ petition has been filed by Mr. Khalid Rasheed Chaudhry Advocate and his colleagues/friends. This objection cannot be concurred with for the simple reason that the impugned notification has been challenged in not less than 6 writ petitions, wherein number of petitioners and number of Advocates appearing on their behalf is in dozens. No specific allegation against other petitioners and the Advocates appearing on their behalf has been leveled in the written statement, so, the objection is not worth consideration.

18. It has already been concluded that the petitioners have attached certified copies of the impugned notification dated 21.05.2018, which is the requirement of law as has been laid down by the Apex Court of the State of AJ&K. So, objection towards dismissal of the writ petitions on the ground that relevant certified copies have not been attached, is not tenable. 2013 PLJ AJ&K 148 relied.

19. In order to evaluate that whether process of consultation in connection with appointment of incumbent judges has been followed in accordance with Constitutional requirement, a dilated discussion is required. It is worth adding that prior to 18th amendment in CoP, 1973, process of appointment of Judges in superior Courts was almost the same as in the Interim Constitution, 1974. Method of recruitment of

Judges in superior Courts of AJ&K has not been disturbed in 13th amendment, which came into effect on 06.02.2018. So, the process of consultation and procedure adopted for appointment of a Judge in the High Court prior to 18th amendment in CoP 1973 is to be considered for guidance. In this regard, judgments delivered by the Supreme Court of Pakistan are a source of guidance as well. For proper appreciation relevant Article of both the Constitutions are reproduced hereunder:-

“The Interim Constitution, 1974, under Article 43(2-A) provides that:-

“43(2-A) A Judge of High Court shall be appointed by the President on the advice of the Council and after consultation---

- (a) With the Chief Justice of Azad Jammu & Kashmir, and*
- (b) Except where the appointment is that of Chief Justice, with the Chief Justice of the High Court.*

(3)

(4)

(5)

(6)

(7)

(8).....

(9)”

20. Mode of appointment of a Judge High Court has been provided in Article 193 of the CoP, 1973, which reads as under:-

“193. Appointment of High Court Judges--- (1) A Judge of a High Court shall be appointed by the President after consultation-

(a) With the Chief Justice of Pakistan;

(b) With the Governor concerned; and

(c) Except where the appointment is that of Chief Justice, with the Chief Justice of the High Court.

(2)
 (3)

21. Hon'ble Supreme Court of AJ&K in Muhammad Younas Tahir's case (2012 SCR 213) has differentiated between 2 Articles and elaborated that there are 3 constitutional consultees for appointment of a Judge of the High Court in CoP, 1973 and these include the Governor, Chief Justice of Pakistan and Chief Justice of the High Court concerned. As compared to that a concept of 2 Judicial consultees is found in Article 43(2-A) who are Chief Justice of AJ&K and Chief Justice High Court of AJ&K. It may be clarified that the President of the State of AJ&K is not a consultee as per Article 43(2-A) of the Interim Constitution. It has been argued with vehemence that consultation of Chief Justice of AJ&K and Chief Justice of the High Court is a must for appointment of a Judge High Court. The word "and" used in Article 43(2-A) state that consultation of both the Judicial consultees is required for appointment of a Judge. The word "Consultation" has been discussed and elaborated in different judgments of Indian jurisdiction and Supreme Court of Pakistan. The appointment of a Judge in the High Court after consultation with Chief Justice of AJ&K and Chief Justice of the High Court is sine-qua-non for appointment of a Judge and the legal position is the same in CoP, 1973. Hon'ble Supreme Court of AJ&K in Muhammad Younas Tahir's case has categorically dictated that findings of Al-Jehad case (PLD

1996 SC 324) are applicable to the process of appointment of a Judge in Azad Kashmir and these findings have to be followed *stricto-senso*. The Supreme Court of AJ&K, in Muhammad Younas Tahir's case has reproduced a paragraph of Al-Jehad case in para 21, which is reproduced as under:-

“The words ‘after consultation’ mentioned in Articles 177 and 193 of the Constitution envisage participatory consultative process between consultees and the appointing authority. The Chief Justice of Pakistan, as also the Chief Justice of High Court concerned have the best expert knowledge about the suitability of a person to be appointed as Judge of the High Court. The other consultee, namely, the Governor of the Province may provide adequate information about character of the candidate. All the consultees contemplated in the abovementioned provisions of the constitution have vital role to play in the matter. The opinion of the Chief Justice of Pakistan, however, would deserve significant importance to select best persons for securing the independence of Judiciary. The opinion of the Chief Justice of the High Court and the Chief Justice of Pakistan having direct knowledge about the suitability of the candidate can therefore be not ignored for any extraneous reason, and in case of disagreement, the appointing authority is required to record sound reasons which will be justiciable. It, therefore, follows that if a person is declared unfit by the Chief Justice of the High Court, as also the Chief Justice of Pakistan, for appointment as Judge, he cannot be validly appointed, and if appointed, it will not be a proper exercise of the jurisdiction vested in the appointing authority.”

The perusal of Article 193 of the Constitution shows that the appointment of a Judge of the High Court is made by the President after consultation with the Chief Justice of Pakistan, the Governor concerned and the Chief Justice of the High Court (except where the appointment is that of a Chief Justice). The President has to consult three persons when making appointment of a Judge. The appointment of a Judge is a Constitutional appointment and a mode thereof is provided in the Constitution itself. The consultation required by the President from the consultees cannot be deemed to be a formality. Learned counsel for the parties, as also the learned counsel who assisted the Court as amicus curiae were unanimous in submitting that the consultory process envisaged in the above-noted provision is mandatory and valid appointment of a Judge or his confirmation cannot be made without resorting to consultory process. The Chief Justice of the High Court and the Chief Justice of the Pakistan if give a positive opinion about the suitability of a candidate, but the Governor on the basis of information received about his antecedents give negative opinion, the President is empowered to decline the appointment of the candidate. On the other hand, if the Chief Justice of the High Court and the Chief Justice of Pakistan give a negative opinion about a candidate on the basis of their expert opinion that candidate cannot be appointed and in this way the opinion of the Chief Justice cannot be ignored and due weight is to be given to his opinion. The extended meaning given to the word 'consultation' is mainly for the reason that it secures the independence of Judiciary. The due deference is to be attached to the opinion of the Chief Justice of Pakistan and the Chief Justice of the High Court due to their exalted

position as envisaged in Islam, so, that the appointment of the Judges are made in a transparent manner on the basis of the merits alone.”

22. In order to further associate the meanings of word “consultation” M.D. Tahir’s case (1989 CLC 1369) has been referred to by the Supreme Court of AJ&K in Muhammad Younas Tahir’s case, which is further reproduced as under:-

“....As regards the mode of consultation, as long as, there is reasonable passing of information, on the matter in issue, between the authorities concerned, the requirement of law is satisfied. In Desai’s Law Lexicon placed before us by the petitioner, it is clearly stated that the form of consultation is not material but the substance is important.”

23. In a case titled “Al-Jehad Trust through Raees-ul-Mujahidin Habib Al-Wahabul Khairi, Advocate Supreme Court and another v. Federation of Pakistan & others (PLD 1997 SC 84), it was observed as under:-

“(i) The words ‘after consultation’ employed inter alia in Articles 177 and 193 of the Constitution connote that the consultation should be effective, meaningful, purposive, consensus-oriented, leaving no room for complaint or arbitrariness or unfair play. The opinion of the Chief Justice of Pakistan and Chief Justice of a 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/ Executive.”

24. In order to bring the consultation within the ambit of validity, it has been reiterated in almost all the judgments of the superior Courts that consultation shall be effective, meaningful, purposive, consensus-oriented, leaving no room for complaint or arbitrariness or unfair play. It is true that the word ‘consultation’ has not been defined in the Interim Constitution, 1974, or in the CoP, 1973, or for that matter, in the Indian Constitution. Mr. Abdul Rasheed Abbasi Advocate rightly observed that in such a situation ordinary dictionary meanings of phrase has to be adhered to. Oxford Dictionary assigns the following meanings of word ‘consultation’:-

“To take counsel together, deliberate, confer; also said of a person deliberating with himself.”

25. The word ‘consultation’ has been defined in Oxford Dictionary as to take counsel with, to seek advice from, to confer about, deliberate upon, debate, discuss, consider (a matter). Further meanings assigned to the phrase are to ask advice of, seek counsel from; to have recourse to for instruction, guidance, or professional advice. In the same way, the words ‘consultations’ have been assigned the following meanings:-

“The action of consulting or taking counsel together; deliberation, conference.”

It has been defined as a ‘conference’ in which the parties concerned deliberate, a meeting for deliberation or discussion etc.

26. The matter at hand has to be examined in view of judgments of the superior Courts and the ordinary dictionary meanings of the words 'consultations'.

27. The process of consultation for appointment of Judges in the High Court of AJ&K commenced on 21.12.2016 when the Hon'ble President sought a panel of eligible persons for appointment of 4 Judges of AJ&K High Court from the then Chief Justice, Mr. Justice Ghulam Mustafa Mughal. The respondents have provided all the correspondence between the Worthy President and the Hon'ble Judicial consultees with the written statement. A second letter on record shows that the President sought a panel of eligible persons for 5 vacant positions in AJ&K High Court from Hon'ble Chief Justice Mr. Justice M. Tabassum Aftab Alvi, on 25.05.2017. The Chief Justice High Court sent a panel of 10 persons to the President on 31.08.2017. It appears that after receiving a panel of eligible persons from Chief Justice of the High Court, the Worthy President sought a panel from Hon'ble Chief Justice of AJ&K on Sep 06, 2017. Number of persons forwarded by the Hon'ble Chief Justice High Court was deemed insufficient because of which the President suggested to the Chief Justice High Court that against 5 vacant positions of Judges in the High Court, a list of 3 nominees against each position may be furnished. In reply to this suggestion, the Chief Justice High Court forwarded a panel of 5 more persons to the President on December 08, 2017. Hon'ble President of the State of AJ&K then sought consultation from the Hon'ble Chief

Justice of AJ&K vide his letter dated 12.12.2017. A letter by Hon'ble Chief Justice of AJ&K dated 23.12.2017, addressed to the President of AJ&K shows that he proposed the names of 9 Advocates for consideration against 5 vacant positions. The Hon'ble Chief Justice of AJ&K mentioned in last paragraph of his letter as under:-

“It is further submitted that according to annunciated principle of law, consultation means effective, meaningful, consensus oriented and simultaneous which require joint meeting and deliberation of the concerned. Hence, mere furnishing of list does not amount to consultation.”

28. Worthy President of the State of Azad Jammu & Kashmir then forwarded a panel of 5 persons to the Prime Minister of Pakistan who is the Chairman of AJ&K Council as well. This letter was drawn on 04.01.2018. It has been mentioned in para 4 of the afore-dated letter that the following have been finalized for appointment as Judges of the High Court of AJ&K against the vacant positions. I can find a letter by Federal Minister for Kashmir Affairs dated 10.01.2018, whereby he sought details of correspondence of the President with the Chief Justice of AJ&K and Chief Justice High Court of AJ&K. The details were furnished to the Federal Minister accordingly on 15.01.2018, which consist of 8 annexes comprising 21 leaves. The Council Secretariat observed in its letter dated 16.04.2018 that list of the candidates proposed by the President consisted of the nominees of Hon'ble Chief Justice of AJ&K and did not include any nominee of Chief Justice High

Court of AJ&K. It was, therefore, suggested that consultation with Hon'ble Chief Justice High Court of AJ&K may be conducted as per the dictum laid down by the Supreme Court of AJ&K in Muhammad Younas Tahir's case. It was further advised that Chairman AJ&K Council has sought a fresh panel consisting of atleast 15 candidates for appointment of 5 Judges in the High Court of AJ&K. The Hon'ble President finally submitted a panel of 15 candidates to Chairman AJ&K Council vide his correspondence dated 25.04.2018, whereupon Chairman AJ&K Council/Prime Minister of Pakistan issued advice of 5 persons for appointment. A notification was accordingly issued on 21.05.2018.

29. There is a detail of meetings/verbal consultation by the President of AJ&K with both the Chief Justices on record which shows that as many as 32 consultations were conducted by the President with Chief Justice of AJ&K and the Chief Justice High Court of AJ&K. The detail shows that consultations with the Judicial consultees were held individually and collectively, face to face and on telephone. Question of vital importance in the process of consultation is that AJ&K Council Secretariat observed on 16.04.2018 that panel of candidates furnished by the President does not include the nominees of Chief Justice High Court of AJ&K. It was, therefore, suggested that a fresh panel of atleast 15 eligible candidates be forwarded while ensuring that Chief Justice High Court of AJ&K has been consulted. Details furnished by Section Officer President Secretariat AJ&K (RA/15) shows that the President

held a meeting with Chief Justice Supreme Court of AJ&K in Islamabad on 15.04.2018. It further transpires that Chief Justice High Court of AJ&K was consulted on telephone between 17-24 April, 2018. For satisfaction of the Court, record of the office of Hon'ble Chief Justice High Court of AJ&K was sent for vide order dated 05.09.2019. The concerned record comprising 8 leaves has been furnished, which mainly indicates the correspondence of the President with the Chief Justice High Court of AJ&K. However, an important document dated 22.05.2018 is found on record which shows that Secretary to Chief Justice submitted a note to the Hon'ble Chief Justice that the Law Department, Govt. of AJ&K, has issued a notification on 21.05.2018 whereby 5 persons have been appointed as Judges of the High Court. The Hon'ble Chief Justice High Court of AJ&K noted as follows:-

“I've examined the Notification dated May 21, 2018. The candidates/Advocates falling at SI.Nos.1, 2 & 3 have neither been enlisted in my panel nor have I been consulted for their appointments, as required by Clause (b) Sub-Sec (2-A) of Sec 43 of the AJ&K Interim Constitution Act, 1974.

However, as per Sub Sect (4) of Sec 43 of the Interim Constitution Act, 1974, it is my constitutional obligation to take oath from the appointed judges. It is, therefore, directed to arrange vehicles, drivers and concerned staff for the newly appointed judges. Oath shall be administered to them on 23rd instant at 10:00 a.m. sharp, in Court No.1, High Court building, Principal Seat, Muzaffarabad.

Secretary

CHIEF JUSTICE”

30. It reveals from the above that Mr. Raza Ali Khan, Mr. Muhammad Ejaz Khan and Chaudhry Khalid Yousuf (the incumbent judges) were neither included in the panel suggested by Chief Justice High Court nor was he consulted for these appointments. In his letter dated 25.04.2018, Hon'ble President of AJ&K mentioned that consultations with the Chief Justice of AJ&K and the Chief Justice High Court of AJ&K conducted under Sub Section (2-A) of Section 43 of AJ&K Interim Constitution, 1974, remained valid and it has been confirmed by both the Hon'ble Chief Justices. It, therefore, appears that Worthy President relied on earlier consultation conducted with both the Chief Justices but further stated that these consultations have been reconfirmed by both the Judicial consultees. In such state of controversy, the record has to be followed because it is said that "a person can lie but the documents don't". It has already been mentioned that according to details provided by the President Secretariat, as many as 32 consultations have been conducted between Worthy President and Hon'ble Chief Justices and detail includes telephonic conversation with the Chief Justice High Court of AJ&K from 17 to 24 April, 2018.

31. Raja Muhammad Hanif Khan Advocate submitted an application before the Court on 02.09.2019 whereby he sought deletion of names of Registrar Supreme Court and Registrar High Court of AJ&K from the title of the cases. He attached call details of the Cell Phone of the Hon'ble President. It shows that Muhammad Masood Khan (Hon'ble President) is registered with Cell Phone Company U-

Fone with number 0336-5042686. As many as 5 calls have been made from this number to Cell Phone number 0301-5502672 on 24.04.2018 and this Cell Phone number is undoubtedly under the use of Hon'ble Chief Justice High Court of AJ&K. Although, Chief Justice High Court of AJ&K is not a party in the supra-titled writ petitions and his version in shape of written statement is not on record, however, the question is that what had been both the dignitaries talking about during their conversation on 24.04.2018, particularly, when the matter of appointment of Judges in the High Court was at issue between the two exalted offices. I am convinced with the conclusion displayed in M.D Tahir's case (1989 CLC 1369), wherein it has been held that as long as, there is reasonable passing of information, on the matter in issue, between the authorities concerned, the requirement of law is satisfied. It is not at all necessary that a consensus between the Judicial consultees must be reached; rather, if a consultation as indicated above, is effected, it satisfies the requirement of law. In my humble view, a sufficient process of consultation by the President with the Chief Justice of AJ&K and the Chief Justice of High Court of AJ&K has been conducted and requirement of law has been satisfied.

32. I agree with the argument that President of the State of AJ&K is not empowered to prioritize or finalize a list of nominees against vacant positions in the office of High Court Judge, as has been done vide correspondence dated 04.01.2018. The afore-dated letter by the President was addressed to Prime Minister of Pakistan/Chairman

AJ&K Council, whereby the Hon'ble President forwarded a panel of 5 Advocates with the endorsement that "the following have been finalized for appointment as Judges of the High Court of AJ&K". The method of recruitment laid down in Muhammad Younas Tahir's case requires that the President has to send the panel forwarded by both the Chief Justices to the Chairman AJ&K Council. Initially, Worthy President finalized names of 5 Advocates against 5 vacant positions of Judges in the High Court and thus, left no choice for Chairman AJ&K Council for selection of Judges in the High Court. The record shows that Hon'ble Chief Justice of AJ&K forwarded a panel of 9 persons for further consultation, whereas a list of 15 persons had already been forwarded by Hon'ble Chief Justice High Court of AJ&K. Total number of the candidates in both the lists is, therefore, 24. In the second round, the Worthy President forwarded a list of 15 candidates which included 2 nominees of Chief Justice High Court of AJ&K and 3 persons nominated by Hon'ble Chief Justice of AJ&K. In such a way, 9 persons nominated by both the Chief Justices were dropped in the final list. The act of forwarding a list of 15 candidates to the Chairman AJ&K Council cannot be considered as fatal to the procedure because it was done at the wish of AJ&K Council. It has already been mentioned that AJ&K Council Secretariat suggested to propose 15 names for 5 vacant positions of Judges and the same was done by Worthy President vide his letter dated 15.04.2018. The words used by Worthy President "in order of priority" and has been 'finalized' are absolutely

unnecessary. But Hon'ble Chairman AJ&K Council had an ample choice of selecting 5 suitable persons from a panel of 15 candidates.

33. It has been argued on behalf of the petitioners that in the process of consultation, the President has just to function as a post office and, thus, the President has transgressed his powers while finalizing the list of persons for appointment of Judges in the High Court. Learned counsel for the petitioners has tried to degrade the esteemed office of the President. It should not be forgotten that the President enjoys highest esteem in the hierarchy of Govt. as per the Constitution. He is not only the head of the State but is Commander-in-Chief of the Armed Forces as per the CoP, 1973. In connection with the affairs of Judiciary, Hon'ble President is the ceremonial head of the Department of Judiciary and is appointing authority of Chief Justices and Judges of the Supreme Court and the High Court. Such an exalted position cannot be under-mind by saying that the President has no function to observe in the process of recruitment of Judges in the superior Courts. The Constitution has put an enormous responsibility on the shoulders of the President to first evolve the process of consultations and to facilitate both the consultees for further discussions. In case of difference of opinion between the two Judicial consultees, there are two options that can be followed:-

- 1- *The Hon'ble Chief Justice of AJ&K may invite Hon'ble Chief Justice High Court of AJ&K to discuss and resolve the controversy.*

2- *The second option is that the Hon'ble President may invite both the Judicial Consultees to have a dialogue on the controversial issues.*

34. In the instant case, Worthy President of the State of AJ&K has disburshed his responsibility by conducting consultations with both the concerned quarters by joint and individual meetings and then by verbal consultation on telephone.

35. It has been vehemently argued on behalf of the petitioners that consultation in regard to appointment of incumbent Judges is neither based on the consensus nor is it consensus oriented. It may be reiterated here that Article 43(2-A) of the Interim Constitution, 1974, provides for appointment of a Judge after consultation with the Chief Justice of AJ&K and Chief Justice of the High Court. There is no concept of appointment on the basis of consensus between judicial consultees. However, the jurists have discussed different aspects of the phrase "consultation", which should be consensus oriented besides being meaningful, purposive etc. A consensus of opinion is not present between the Hon'ble Chief Justice of AJ&K and Chief Justice of the High Court, in the instant case. There is no common name of eligible persons in both the panels suggested by the Judicial consultees, therefore, a difference of opinion exists between the two Chief Justices. In the absence of any definition in the Constitution or the Rules of Business, Mr. Abdul Rasheed Abbasi Advocate rightly opined that Dictionary meanings have to be followed while examining the phrase

‘consensus oriented’. Oxford Dictionary has defined the following meanings of word ‘Orient’:

“Orient:- 1. Trans. To place or arrange (anything) so as to face the east; spec. to build (a church) with the longer axis due east and west, and the chancel or chief after at the eastern end; also, to bury with the feet to the east.

b. By extension; To place with the four faces towards the four points of the compass; to place or adjust in any particular way with respect to the cardinal points or other defined date; to place or arrange the parts of a structure in any particular relative position; also to ascertain the position of (anything) relatively to the points of the compass, etc.; to determine the bearings of.

2. To adjust, correct, or bring into defined relations, to known facts or principles; refl. to put oneself in the right position or relation; also, to ascertain one’s ‘bearings’, find out ‘where one is’.”

36. Obviously, the word ‘orient’ means the eastern part. In this regard importance of East has to be born in mind. East is a symbol of rising of the sun, which would mean start of the day. So, the phrase ‘consensus oriented’ would mean a process of consultation to reach consensus. As has already been observed, not less than 32 efforts have been made to obtain a consensus opinion of both the Judicial consultees. So, requirement of consultation, being consensus oriented, has been fulfilled. It appears that framers of the Constitution advertently introduced the words “after consultation” and did not require consensus between the constitutional consultees. Perhaps, the

law framers did not visualize any such eventuality and anticipated resolution of any controversy through mutual discussion.

37. The question arises that what is the way out, if the judicial consultees do not reach a consensus in regard to appointment of a Judge? Right from Gupta's case (AIR 1982 SC 149) upto Muhammad Younas Tahir's case (2012 SCR 213), it has been reiterated that Chief Justice of the Supreme Court, being paterfamilias; head of the Judiciary, has to be given due deference. It has also been concluded in Al-Jehad Trust's case that none of the Judicial consultees has a veto power to discard the opinion of the other consultee. In the Judicial history, it happened for the first time that a conflict between Chief Justice of Pakistan and the Chief Justice of Sindh High Court arose. Learned Sindh High Court in case titled "Sindh High Court Bar Association, through Honorary Secretary v. Federation of Pakistan through Ministry of Law & Justice, Islamabad and 4 others" reported as (PLD 2009 Karachi 408) observed that Chief Justice Sindh High Court initiated process of recruitment by addressing a letter to the Governor and recommended for granting of extension of tenure of Additional Judges for a period of one year to respondents No. 3 and 5 and declined to recommend the appointment of respondent No.4 as permanent Judge. The Governor of Sindh forwarded the suggestion to Federal Law Minister recommending the appointment of respondent No.3 as permanent Judge of this Court and in respect of respondents No.4 & 5, he recommended granting of extension of term as Additional Judges for

a period of one year. Mr. Justice Abdul Hameed Dogar, the then Chief Justice of Pakistan in his letter addressed to Federal Law Minister approved appointment of respondent No.3 as permanent Judge of the High Court and recommended extension in tenure of respondents No.4 and 5 for a period of 6 months as Additional Judges. Therefore, on the one hand, Governor Sindh did not agree with the recommendations of Chief Justice of Sindh High Court and on the other hand, the then Chief Justice of Pakistan agreed with the recommendations of the Governor of Sindh. The matter was challenged before the Sindh High Court, wherein Justice Gulzar Ahmed, J, as he then was, authored majority view and confirmed a short order of the High Court with detailed reasons. The short order of the High Court of Sindh dated 06.05.2009 merged into detailed judgment, wherein it has been observed as under:-

“Article 193 of the Constitution of Pakistan for appointment of a Judge in High Court, provides for two judicial consultees, one the Chief Justice of the High Court concerned and the other Chief Justice of Pakistan. Both being equal consultees, their views will prevail with the Executive in the matter of appointment or non-appointment of a Judge in a High Court. The views of the Chief Justice of Pakistan as a Paterfamilias of the Judiciary, will deserve due deference if the same is also supported by views of the Chief Justice of High Court concerned which has to be evolved through participatory consultative process which should be effective, meaningful, purposive and consensus-oriented. In the event where there is no identity of views between the Chief Justice of High Court concerned and Chief Justice of Pakistan, there

would be no bindingness of the recommendations of the Chief Justice of Pakistan on the Executive and if the Executive accepts the views of the Chief Justice of Pakistan without supporting views of Chief Justice of the High Court concerned, the action of the Executive will become justiciable. This is so because in the Judges case it has been consistently held that the views of the Chief Justice of the High Court concerned and the Chief Justice of Pakistan cannot be rejected arbitrarily for extraneous consideration and if the Executive wish to disagree with their views, it has to record strong reasons which will be justiciable and that a person found to be unfit by the Chief Justice of the High Court concerned and the Chief Justice of Pakistan for appointment as a Judge of a High Court cannot be appointed as it will not be a proper exercise of power to appoint under the Articles of the Constitution. Thus, there has to be conjunctive views of the judicial consultees to make it binding on the Executive. I am therefore, of the clear view, that by not adhering to the recommendations of the Chief Justice of the High Court of Sindh and by not giving any reasons for such non adherence and without consulting the Chief Justice of the High Court of Sindh, appointing respondent No.3 as Permanent Judge of this Court and granting 6 months extension as Additional Judge to respondent No.4 through the impugned notification was not based upon mandatory consultation as required by the Constitution read with Judges' case which provides that there should be participatory consultative process between the consultees and also with the Executive and it should be effective, meaningful, purposive, consensus oriented, leaving no room for complaint of arbitrariness or unfair play and that the views of each

of the consultee is binding on the Executive and in case if he wishes to disagree with view of any of the consultee, he is required to give strong reasons for it.”

38. The High Court of Sindh with detailed reasons defined the principle of primacy attached to the opinion of Chief Justice of Pakistan. The Court was of the opinion that the method of recruitment of Judge in a High Court commences with the panel of Chief Justice of the concerned High Court. The Governor of the Province has then to forward this panel to Chief Justice of Pakistan and if unanimous opinion of the Judicial consultees is found, the Governor/Executive is bound to follow that. In their elaborated view, learned Judges in the High Court of Sindh opined that Chief Justice of Pakistan, being paterfamilias, i.e. head of the Judiciary has to be given due deference and his opinion coupled with the opinion of Chief Justice of the concerned High Court has to be given priority, which is binding on the Governor/Executive. It was further observed that primacy is attached to the opinion of Chief Justice of Pakistan in case it is supported by the recommendations of Chief Justice of the High Court concerned. It further concluded that in case of difference in opinion between Chief Justice of Pakistan and Chief Justice of the concerned High Court, further effort should be made for obtaining consensus of both the Judicial consultees. It was suggested that such an effort could be made through correspondence between Chief Justice of Pakistan and Chief Justice of the High Court or Chief Justice of Pakistan may invite Chief

Justice of the High Court concerned to discuss the controversy. It was finally opined that in case of disagreement between two judicial consultees, the best way is to leave the position vacant, instead of filling the vacancy through a controversial person.

39. The view held by Sindh High Court has been overruled by the Supreme Court of Pakistan in a case reported as PLD 2009 SC 879.

It was observed by their lordships in the Supreme Court as under:-

“The Chief Justice of Pakistan is the paterfamilias, i.e. the head of the judiciary, therefore, his views definitely deserve due deference; the recommendations of the Chief Justice of Pakistan is non-justiciable for the reason discussed in the Supreme Court Bar Association’s case; and last, but not the least, non-justiciability of the opinion of the Chief Justice of Pakistan is inextricably linked with the independence of judiciary. Correct, that the consultation envisaged by Article 177 and 193 of the Constitution, as interpreted in Al-Jehad Trust’s case, has to be effective, meaningful, purposive, consensus-oriented, leaving no room for complaint of arbitrariness or unfair play; it was a participatory consultative process between the consultees and also with the executive; and the views of the two judicial consultees would be binding on the executive in absence of strong reasons to be recorded in writing, which would be justiciable; however, to make the opinion of the Chief Justice of Pakistan justiciable on the ground that it is not fully supported by the opinion of the Chief Justice of the concerned High Court is a proposition, which cannot be countenanced on account of its being violative of the principle of

independence of judiciary. At the same time, it is necessary that to achieve the primary objective of mandatory, effective, meaningful, purposive and consensus-oriented, by all means the first priority has to be directed to evolving consensus between the consultees by mutual discussion of the merits and demerits of the concerned candidates. However, if the opinion of the Chief Justice of Pakistan is not fully supported by the Chief Justice of the concerned High Court, it is the final opinion of the Chief Justice of Pakistan, formed after taking into consideration the opinion of the Chief Justice of High Court and the report of the Governor of the Province about the antecedents of the person concerned, which shall be given primacy. The law laid down in Al-Jehad Trust's case that "the Chief Justice of Pakistan, being the paterfamilias, his views definitely deserve due deference" admits of no other interpretation."

(Underlined for emphasis)

40. Therefore, it has been finalized by the Supreme Court of Pakistan that opinion of Chief Justice of the Supreme Court has to be accorded 'primacy' in case of difference of opinion between the Chief Justice of the Supreme Court and Chief Justice of the concerned High Court. The same view has been adopted in Al-Jehad Trust's case reported as 1996 SC 324. The Hon'ble Supreme Court of AJ&K in case of Muhammad Younas Tahir (2012 SCR 213) has concluded that law laid down in Al-Jehad case is fully applicable to AJ&K and appointment of Judges has to be made by following the method advised in the said case. The apex Court of the State has further relied on AIR 1994 SC 268, wherein the following conclusion has been drawn:-

“(iv) The concept of primacy to be accorded, to the views of the Chief Justice of India has three elements, namely, (a) primacy as ‘paterfamilias’ of Indian Judiciary, (b) primacy to be accorded to his views amongst the consultees mentioned in Articles 124(2) and 217 (1) and (c) primacy in the sense that the opinion of the Chief Justice of India would be binding on the President, i.e. the executive.

The position of the Chief Justice of India under the Constitution is unique, in that, on the judicial side he is primus inter pares i.e. first among equals, while on the administrative side he enjoys limited primacy in regard to managing of the Court business. As regards primacy to be accorded to his views vis-à-vis the President, i.e. the executive, although his views may be entitled to great weight he does not enjoy a right of veto, in the sense that the President is not bound to act according to his views. However, his views would be of higher value vis-à-vis the views of his colleagues, more so if he has expressed them after assessing the views of his colleagues but his views will not eclipse the views of his colleagues forbidding the President, i.e. the executive, from relying on them. The weight to be attached to his views would be much greater as compared to the weight to be accorded to the views of the other consultees under Article 217(1) since he has had the advantage of filtering their views and ordinarily his views should prevail except for strong and cogent reasons to the contrary but that does not mean that the views of the other consultees would be rendered irrelevant or non est forbidding the President, i.e. Executive, from noticing or relying on them. The views of the Chief Justice of India would be entitled to even greater weight when he is the sole consultee under the Constitution, e.g. Article 222(1), more

so when it concerns a member of the Judicial family and ordinarily his view should be accepted and acted upon by the President i.e. the executive, unless there are compelling reasons to act otherwise to be recorded in writing so that the apprehension of the executive having acted in a manner tantamounting to interference with judicial independence is dispelled. Thus, greater weight has to be attached to the views of the Chief Justice of India as indicated hereinabove.”

41. The apex Court of the State of AJ&K has concluded that due deference is attached to the opinion formed by Chief Justice of the Supreme Court and it has to be given preference. In such eventuality, I am left with no option but to conclude that Rule of Primacy requires that opinion formed by Hon’ble Chief Justice of Supreme Court has to be given due deference and such opinion shall prevail in case of difference of opinion between the Judicial consultees.

42. Leaving this academic discussion behind, the question arises that whether Rule of Primacy is applicable to the instant cases. It has been argued that Rule of Primacy does not attract in the instant case because three persons from the panel drawn by Hon’ble Chief Justice Supreme Court of AJ&K and two persons from the list forwarded by Hon’ble Chief Justice High Court of AJ&K have been notified as Judges of the High Court. The argument sounds reason because the impugned notification comprises names of persons from both the panels. The question of primacy attached to the opinion of Hon’ble Chief Justice of AJ&K arises when there is a difference of opinion

about a particular candidate between both the Judicial consultees. Had the Chairman issued an advice of five candidates nominated by Chief Justice of AJ&K, it could be said that such advice is based on the Rule of Primacy. But as many as three nominees of Chief Justice of AJ&K and two of Chief Justice High Court have been finalized by the Chairman, so, Principle of Primacy is not attracted. To this extent, the argument advanced on behalf the petitioners is accepted. Crux of the matter is that the impugned notification has been issued after proper consultation. It has already been discussed that Hon'ble Chairman AJ&K Council/Prime Minister of Pakistan had ample choice of selection of 5 persons from the list of 15 candidates for appointment as Judges in the High Court of AJ&K.

43. It was further argued by the petitioners that advice of the Chairman Kashmir Council was maneuvered at the last hours of his tenure in office. In this regard, it was stressed that tenure in office of the Prime Minister ended on night between 17/18 May, 2018 and the advice was politically maneuvered on 17.05.2018. It has been explained on behalf of the respondents that term of office of the Prime Minister of Pakistan ended on 30.05.2018, so, the Chairman AJ&K Council had enough time to dilate upon the matter and to form his opinion. It was in these circumstances that Hon'ble Chairman AJ&K Council issued advice of incumbent Judges, which was thereafter notified. Whole the process does not indicate any legal or constitutional

deficiency in the method of consultation for appointment of incumbent Judges.

44. Before parting with the discussion, two further important points need to be resolved, first being that, names of Registrar Supreme Court and Registrar High Court be struck out from the title of the writ petitions on an application of the incumbent Judges. The second point relates to eligibility of Mr. Justice Chaudhry Muhammad Munir at the time of his appointment.

45. Learned counsel for the incumbent Judges has filed an application under Order 1 Rule 10(2) and Order VIII Rule 9 alongwith Section 151 CPC for striking out names of Registrar Supreme Court AJ&K and Registrar High Court AJ&K from the pleadings. It has been argued in this behalf that Registrar Supreme Court or Registrar High Court AJ&K are neither the consultees nor were they present at the time of consultations, so, both of them have no nexus with the instant litigation. Learned counsel has referred to and relied upon a bunches of judgments in support of his version, which are PLD 1993 AJ&K 12, 2006 SCR 103, PLJ 2016 AJ&K 107, 2016 SCR 960, PLD 1965 SC 236 etc.

46. On the other hand, learned counsel' for the petitioners are of the view that right to add or strike out a party to a lis, is vested with the Court only and a party cannot be struck out at the behest or wish of a contesting litigant. It has further been explained that both the

Registrars are custodian of the record of their respective departments, so, the Registrars have been impleaded as proper party.

47. It is true that Registrar of the Supreme Court or Registrar High Court of AJ&K find no place in the process of consultation or appointment of a Judge of the High Court. It is also true that an effective judgment/order can be passed even in the absence of both of them, however, the fact remains that right to add or strike out a party from pleadings is vested with the Court only, Order 10 Rule 2 envisages the same discretion. It cannot be disputed that both the Registrars are custodian of record of their concerned offices and in the eventuality of any anticipatory direction the concerned Registrar can be subjected to such order/direction. Registrar Supreme Court of AJ&K and Registrar High Court of AJ&K are though not necessary party, however, they cannot be excluded from definition of a proper party. The law referred to by learned counsel for the respondents also explains that power to add or strike out a party, is vested with the Court. The application on behalf of the respondents may be an advertent effort to avoid written statement filed by Registrar High Court of AJ&K, which cannot be shielded. Relevancy of written statement filed by Registrar High Court has already been discussed and no further deliberations on the point are required. In the afore-discussed circumstances, application filed by Raja Muhammad Hanif Khan Advocate for the respondents is not tenable and is refused.

48. The next question is that whether Mr. Justice Ch. Muhammad Munir, respondent, was eligible for appointment as Judge High Court at the time of his elevation? It has been emphasized by Raja Muhammad Hanif Khan Advocate that Ch. Muhammad Munir, J, was eligible for elevation as Judge High Court in all respects. He has relied on Section 3(15) of General Clauses Act, wherein the term ‘District Judge’ has been defined. For proper appreciation, relevant Article 43(3) (b) is reproduced, which reads as under:-

“A person shall not be appointed as a Judge of the High Court or Advocate General unless—

(a)-----

(b) He has for a period of not less than ten years held a judicial office out of which not less than three years shall have been as District & Sessions Judge.”

49. It is said that best interpretation of a legal phrase is plain reading of the same. Obviously, a District & Sessions Judge would be a person appointed as such on regular basis. Bare reading of the phrase connotes that any current charge, acting charge or officiating promotion has been excluded from the phrase. Record attached with the writ petitions reveals that initially Hon’ble Chief Justice of the High Court sent a panel of 5 persons for appointment as Judges in the High Court of AJ&K. The panel included the names of 3 Advocates and 2 District & Sessions Judges. Biodata of District & Sessions Judges forwarded by Chief Justice of the High Court shows that Ch. Muhammad Munir,

respondent, was promoted as District & Sessions Judge on 04.07.2012. The entry in relation to promotion of Mr. Ch. Muhammad Munir as District & Sessions Judge is not factually true and is an apparent mistake on behalf of the High Court Administration. Perhaps, the High Court Administration did not provide true biodata of promotion of the incumbent Judge. A certified copy of notification issued by Registrar High Court of AJ&K dated 04.07.2012 has been made part of writ petition No.1235, which reveals that Ch. Muhammad Munir Acting Additional District & Sessions Judge was promoted to the post of Additional District & Sessions Judge BS-20 on regular basis with effect from 02.04.2012. He was promoted as District & Sessions Judge BS-21 on regular basis on 09.01.2016 on recommendations of relevant Judicial Selection Board. Obviously, his service of 3 years as regular District & Sessions Judge was not complete at the time of commencement of process of appointment and even at the time of issuance of notification of his appointment on 21.05.2018. Ch. Muhammad Munir, respondent, was a civil servant before his elevation as Judge High Court and was, therefore, governed by AJ&K Civil Servants (Appointment & Conditions of Service) Rules, 1977. Rule 10-B of the aforementioned Rules is relevant to the situation, which is reproduced as under:-

“10-B Appointment on current charge basis:- (1) Where a post is likely to remain vacant for a period of less than six months and the appointing authority does not consider it expedient to make an appointment

on adhoc basis it may appoint a civil Servant, who is eligible for promotion under Rules, to that post on current charge basis.”

50. In the same way, Rule 13 deals with promotion on officiating basis. Vide notification dated 04.07.2012, Chief Justice High Court of AJ&K promoted Ch. Muhammad Munir as District & Sessions Judge BS-21 on acting charge basis. It would be appropriate to reproduce the same for proper appreciation:-

“13. Appointment by promotion on officiating basis:- (1) Where a post falls vacant as a result of (ex-cadre) transfer, deputation, leave or appointment on acting charge/ officiating basis of the regular incumbent or is reserved under the rule to be filled by transfer or is permanently available as vacant and is reserved for regular promotion on the recommendation of the appropriate selection board/ committee, the appointing authority may make appointment by promotion against such post on officiating basis.”

51. It is abundantly clear that an officiating promotion does not create any right of promotion on regular basis as per Sub-Rule (3) of Rule 13 *ibid*.

52. There is a plethora of judgments of the superior Courts, which explains Rule 10-B of the AJ&K Civil Servants (Appointment & Conditions of Service) Rules, 1977, and outcome of such verdicts, in a single sentence is that a promotion on acting charge, current charge or officiating basis does not confer any right of promotion. Some of them

may be referred as PLJ 2017 SC AJ&K 34, PLJ 2001 TrC (Services) 164 Punjab Services Tribunal, Lahore, PLJ 2000 SC AJ&K 88,1991 SCMR 2330, 2017 SCR 35 and PLJ 2000 SC 943.

53. Learned counsel for the respondents in support of his version has relied upon Section 3 of General Clauses Act, which defines the phrase “District Judge” which reads as under:-

“District Judge:- “District Judge” shall mean the Judge of a principal Civil Court of original jurisdiction, but shall not include a High Court in the exercise of its ordinary or extra-ordinary original civil Jurisdiction.”

54. The definition by itself does not dictate that a District Judge appointed on acting or current charge basis fulfills the definition of a regular District Judge. It may also be added here that definition of the phrase ‘District Judge’ does not fulfill the requirements of the Constitution, which defines a District & Sessions Judge eligible for the job of Judge High Court. It is apparent that the constitutional provisions envisage the words ‘District & Sessions Judge’ whereas definition included in Section 3(15) of General Clauses Act is restricted to ‘District Judge’ only. It has been emphasized that Ch. Muhammad Munir exercised the powers of District & Sessions Judge even when he was functioning as acting charge District & Sessions Judge, therefore, he fulfills the requisite length of 3 years service as required by the Constitution. Learned counsel has relied on AIR 1954 Asaam 161 in support of his version. This judgment relates to appointment of an

Additional District & Sessions Judge as Industrial Disputes Tribunal. Learned Court concluded that for the purpose of appointment of a Judge as Industrial Disputes Tribunal, District Judge includes Additional District Judge. The Court further concluded that General Clauses Act or Civil Procedure Code or Bengal, Agra and Assam Civil Courts Act, restrict the meanings of District Judge and there is no justification to restrict it in Section 7 of the Industrial Disputes Act. Consequently, the word 'District Judge' in Section 7(3)(b) includes Additional District Judge. Obviously, appointment of an Industrial Dispute Tribunal has no nexus to appointment of a District & Sessions Judge in the High Court, which is a constitutional requirement. AIR 1990 Patna 49 is a full bench case, while explaining Section 110 of Motor Vehicles Act, 1939, the Court concluded that all persons who are District Judges and Additional District Judges are qualified for appointment as "Claims Tribunal". The afore-discussed authorities do not help the case of Ch. Muhammad Munir, J, who did not fulfill the constitutional requirement of 3 years service as District & Sessions Judge. It is, therefore, concluded that by no stretch of argument, appointment of Mr. Ch. Muhammad Munir as Judge High Court, is valid. It has already been stated that the High Court Administration fell in error while placing the biodata of the incumbent Judge before the Hon'ble Chief Justice of the High Court and perhaps, the Chairman AJ&K Council was inclined to pick his name because of length of his service as compared to other candidate mentioned in the panel.

Nutshell of the above discussion is that sufficient consultations in relation to appointment of Mr. Raza Ali Khan, Mr. Muhammad Ejaz Khan, Mr. Ch. Khalid Yousuf, Mr. Raja Sajjad Ahmed Khan and Mr. Ch. Muhammad Munir were conducted through individual and joint meetings and via telephonic consultations by Hon'ble President with the Hon'ble Chief Justice of AJ&K and with Hon'ble Chief Justice High Court of AJ&K. It is further observed that verbal consultation on telephone by the President with Chief Justice of AJ&K is not a proper procedure to be followed. Instead of telephonic calls, the President had a better alternate option of consultations with Chief Justice High Court of AJ&K by sending a summary in black and white by elaborating merits and demerits and after obtaining opinion of Hon'ble Chief Justice High Court, the President was supposed to forward the panel to the Chairman AJ&K Council for seeking advice. It is, therefore, directed that a consultation in writing with both the Judicial consultees shall be followed in future as has been prescribed in Al-Jehad Trust's case and Muhammad Younas Tahir's case. It is further concluded that Mr. Ch. Muhammad Munir, J, did not fulfill the constitutional requirement of 3 years service as District & Sessions Judge at the time of his elevation. It may be reiterated here that Constitution has assigned the sacred responsibility of judging suitability of a person for judgeship and the High Court in its constitutional jurisdiction, cannot revisit such suitability. Obviously, the High Court cannot replace prerogative of the Judicial consultees by

a different opinion. So, argument extended on behalf of the petitioners in relation to integrity, capability and suitability of the incumbent Judges does not fall within ambit of jurisdiction of the High Court.

It is, therefore, concluded that impugned notification dated 21.05.2018 was validly issued to the extent of Mr. Raza Ali Khan, Mr. Muhammad Ejaz Khan, Mr. Ch. Khalid Yousuf and Mr. Raja Sajjad Ahmed Khan, however, this notification of appointment to the extent of Ch. Muhammad Munir, J, is set aside. Ch. Muhammad Munir shall cease to hold the office of Judge High Court forthwith. However, acts done in judicial capacity, judgments delivered and financial benefits taken by him as Judge High Court stand protected on the basis of “Defecto Doctrine”. Resultantly, all the writ petitions No. 1092, 1130, 1194, 1235, 1255 and 1296 of 2018 stand dismissed to the extent of respondents/incumbent Judges namely Mr. Raza Ali Khan, Mr. Muhammad Ejaz Khan, Mr. Ch. Khalid Yousuf and Mr. Raja Sajjad Ahmed Khan and are accepted to the extent of Ch. Muhammad Munir, J, respondent in the manner indicated above.

Muzaffarabad,
Sep 17,2019. (RA)

ACTING CHIEF JUSTICE

[Justice Muhammad Sheraz Kiani. J].(1) After having the privilege of going through the main judgment recorded by the Hon’ble Acting Chief Justice, I agree with the conclusion reached at, however, I would like to add my reasons thereto, as well.

2. The main points which have been agitated at bar are:-

- i. that the respondent/Judges; Mr. Justice Raza Ali Khan, Mr. Justice Muhammad Ejaz Khan and Mr. Justice Ch. Khalid Yousaf, have not been recommended for appointment as judges of High Court, by the Hon'ble Chief Justice of High Court.
- ii. That Mr. Justice Raja Sajjad Ali Khan and Mr. Justice Muhammad Muneer Chaudhary are not the nominees of the Hon'ble Chief Justice of Azad Jammu & Kashmir.
- iii. That at the time of recommendation of appointment, the respondent; Mr. Justice was not having requisite qualification/experience of being District and Sessions Judge for a period of (3) years, as prescribed in Art. 43(3) of the Azad Jammu & Kashmir Interim Constitution.

3. A perusal of the record shows that the positions filled through the impugned Notification became vacant $\frac{3}{4}$ years ago and the initial process for filling the same was delayed due to one reason or the other, however, before issuance of the Notification dated 21.05.2018, whereby, the respondent/judges were appointed as judges of High Court, initially, the consultative process started with the letter of the Worthy President dated 21.12.2016, whereby, he sought panel of eligible persons for appointment of 4 judges from the Hon'ble Chief Justice High Court and thereafter, through different correspondence, the Hon'ble Chief Justice High Court, altogether 15 persons

recommended for 5 vacancies. Vide letter dated 23.12.2017, addressed to the worthy President, the Hon'ble Chief Justice of Azad Jammu & Kashmir nominated further 9 persons for the appointment as the Judges of High Court. The attested copies of all the correspondence of consultative process are attached with the files. The controversy arose due to the reasons that the list of nominees sent by the Hon'ble Chief Justice High Court does not contain the names of 3 respondent/judges; Mr. Justice Raza Ali Khan, Mr. Justice Muhammad Ejaz Khan and Mr. Justice Ch. Khalid Yousaf and the names of respondent/judges the names of Mr. Justice Raja Sajjad Ali Khan and Muhammad Muneer Chaudhary were not specifically mentioned in the panel sent by the Hon'ble Chief Justice of Azad Jammu & Kashmir but the letter of Chief Justice of Azad Jammu & Kashmir dated 23.12.2017, whereby, the names of eligible persons were sent to the worthy President shows that it has been clearly mentioned by the Chief Justice Supreme Court that (9) persons, mentioned therein, be included in the list, already finalized by the Hon'ble Chief Justice of High Court, meaning thereby that the names, recommended by the Chief Justice High Court were not specifically objected/ rejected, although in the second para of the letter, it is mentioned that in the list furnished by the Chief Justice High Court, some nominees are suitable and many are lacking the required standard but nowhere, specifically, the names of respondent/judges; Mr. Raja Sajjad Ahmed and Mr. Justice Muhammad Muneer Chaudhary were rejected or objected by the Hon'ble Chief Justice of Azad Jammu

& Kashmir. In simple words, it can be said that (9) persons, enlisted in the letter dated 23.12.2017 were also made part of the list of 15 other persons, already nominated by the Chief Justice High Court. At page 2 of the letter, the wordings;

“Following persons, (whose bio data is also enclosed herewith) deserve to be appointed and their names be included in the list of nominees for the purpose of consultation” makes it clear that the list furnished by the Chief Justice High Court and the list of the consultee; Chief Justice of Azad Jammu & Kashmir had become the one list for the purpose of consultation. In other words; the names of Mr. Justice Raja Sajjad Ahmed and Mr. Justice Muhammad Muneer Chaudhary have not been excluded from the consideration and consultation process nor any specific objection upon their suitability or eligibility has been raised in the letter dated 23.12.2017.

4. Now the next question arises, whether, after letter dated 23.12.2017, the (24) nominees came under consideration and discussion to complete the consultation process, by the Worthy President with the (2) judicial consultees? There is no further correspondence in black and white in this regard after 23.12.2017, however, details of the meetings and telephonic conversations made after the said date is available on the record. As in the letter dated 23.12.2017 it was proposed that ‘to make the consultation process effective, meaningful, consensus oriented and simultaneous, (as laid

down in the various judgments of the Superior Courts), a joint meeting for the deliberation of the concerned may be held’.

5. The consultative process was going on between the President (the appointing authority) and both the Hon’ble Chief Justices. The petitioners in all the (6) petitions have not bothered to implead the judicial consultees; Chief Justice Azad Jammu & Kashmir and Chief Justice High Court as party in the line of respondents and the only relevant authority from these (3), the President of Azad Jammu & Kashmir has been impleaded through Secretary to President as party in the line of respondents, in these petitions. In parawise comments, which later on were treated as written statement, the respondent-worthy President stated that altogether 31 meetings were held on different dates mentioned in ‘RA/15’. It is clearly mentioned in the comments that the meetings with the Chief Justice of Azad Jammu & Kashmir and Chief Justice High Court on the same date; on 23.12.2017, on 30.12.2017 and on 15.04.2018 were held and from 17.04.2018 to 22.04.2018 consultation through telephonic conversation with the Chief Justice of High Court was also made. The list, ‘RA/15’ in file No.1255/2018 is an attested copy showing the details of the meetings and this version is supported by an affidavit given by an authorized officer; Shahbaz Akhtar, Section Officer, President Secretariat. There is no counter affidavit in this regard, by the concerned consultees, therefore, it cannot be said that the consultation regarding the respondent/judges has not been effected, particularly, when, the

Constitution does not prescribe any particular method or mode of consultation, as laid down in 'M.D Tahir's case, (1989 CLC 1369) 'that the mode of consultation is as long as reasonable passing of information on the matter in issue between the authorities concerned is done, the requirement of law is satisfied. In-fact it is the substance which is important not the form, in my view, substantially, the consultation had been made.

6. It is relevant to mention here that the Registrar High Court, in written statement has stated that the consultation regarding respondent/judges namely; Justice Raza Ali Khan, Mr. Justice Muhammad Ejaz Khan and Mr. Justice Ch. Khalid Yousaf, has not been made with the Chief Justice High Court but the written statement does not mention that the same was filed on behalf or on the instruction of the Hon'ble Chief Justice. The Registrar was not the witness of any consultation process, took place between the consultees and the worthy President, as he was not present in any meeting and he has no knowledge of the telephonic conversation between the Hon'ble Chief Justice/consultee and the President, so, his version taken in the written statement has no effective bearing on the proposition.

7. The names of 3 respondent/judges Justice Raza Ali Khan, Mr. Justice Muhammad Ejaz Khan and Mr. Justice Ch. Khalid Yousaf, are not in the list furnished b the Hon'ble Chief Justice High Court but on record there are no adverse remarks against them nor any

disqualification, attributed towards these appointees, by the Chief Justice High Court. For the sake of argument, if it is assumed that during the consultative process, as meetings were held and telephonic conversations took place, the opinion of the Hon'ble Chief Justice of Azad Jammu & Kashmir, who recommended their names, is not supported by the Hon'ble Chief Justice of High Court, at the time of consultation. Even, in such situation, their appointments cannot be declared invalid. The proposition has been resolved by the Supreme Court of Pakistan in caption CCCC of the reported judgment in the Sindh High Court Bar Association's case, reported as PLD 2009 SC 789. In para 39 of the main judgment, the said caption has been reproduced that if the final opinion of the Chief Justice of Pakistan is not fully supported by the opinion of Chief Justice of High Court, the opinion of Chief Justice of Pakistan shall be given preference and the Chief Justice Pakistan being paterfamilias, definitely deserves due preference. In Muhammad Younis Tahir's case, 2012 SCR 213, the Hon'ble Supreme Court of Azad Jammu & Kashmir has also enunciated the principle of primacy attached to the opinion of Chief Justice Supreme Court and observed that the opinion of Chief Justice has to be preferred. (caption Q,S).

8. In the light of the above principle of primacy laid down by the Supreme Court of Pakistan as well as by the apex Court of Azad Jammu & Kashmir. In the present case, when it is admitted fact that the abovementioned (3) respondent/Judges have been recommended by the

Chief Justice Supreme Court and other (2) names of respondent/judges were also not excluded from the list, neither they have been rejected specifically, by attributing any disqualification to them rather their names have been made part of the list. So, in case of even disagreement, the consultation process cannot be declared illegal and unlawful. Particularly, when, the concerned 4 judges have not been found unfit by any consultee.

9. In the famous Al-Jihad Trust's case and in many other judgments, the word, 'consensus oriented' has been used for meaningful consultation and the first effort by all means should be made to reach at a consensus between the consultees. This consultation in the present case has consumed a period of almost 1½ year and 31 meetings took place and in-spite of these hard efforts, when, the consensus could not be reached, then, in such situation, the fact that the names being not common of all the nominees in both the lists, does not vitiate the whole process. No such ruling has been referred which may require the complete consensus and the requirement of law is the only purposive and meaningful consultation. Consensus oriented and consensus have different meanings and connotations, however, it is to be observed here that always there should be consensus oriented and meaningful consultation and the consensus oriented consultation can be described according to the plain dictionary meanings; that during consultation process its direction should be towards consensus; The long and detailed correspondences, meetings and telephonic conversations

suggest that all efforts have been made to achieve the consensus, which unfortunately could not be brought about.

10. Although, after hard labor of sifting the grains from chuff, it has been concluded that the mandatory consultative process was completed before issuance of the impugned Notification but as observed in the main judgment that in future, to avoid such complication and make the consultative process more transparent and effective without leaving any room for any complaint, the opinion of the consultees regarding concerned candidates must be in black and white. In case of meetings, the minutes must be recorded, So that, if there is any disqualification and infirmity attached to any of the person under consideration, in the opinion of any of the consultees, that could be brought on record. It is to be noted here that the primacy does not mean to sideline the other consultee, the consultation in connection with the concerned person's eligibility, suitability, his knowledge of law, competency and integrity must be from both the consultees, however, after that if the opinion of the Chief Justice Supreme Court is not supported by the Chief Justice of High Court, only then, the preference should be given to the opinion of the Chief Justice Supreme Court.

11. Regarding eligibility of respondent/ judge, Mr. Justice Muhammad Muneer Chaudhary, details findings have been given in the main judgment, suffice to say here that qualification for the purpose of appointment as prescribed in Article 43(3) of the Azad Jammu &

Kashmir Interim Constitution, 1974 cannot be condoned and relaxed. The respondent/Judge was promoted as regular District & Sessions Judge vide order dated 09.01.2016, so, he was not qualified to be appointed as judge of the High Court, having less than 3 years experience as District & Sessions Judge. By the earlier order dated 04.07.2012, he was, in-fact, remained an additional District Judge and was just holding charge of District & Sessions Judge on acting charge basis. Rule 10-A(4) of the Azad Jammu & Kashmir Civil Servants (Appointment and Conditions of Service) Rules, 1977 clearly postulates that no appointment on acting charge basis shall be deemed to have been made on regular basis for any purpose nor shall confer any right for regular appointment. Relevant provision of Constitution 43(3) bars the authority to appoint any District & Sessions Judge having less than 3 years experience as a (regular) District & Sessions Judge. The provision starts with the wordings;

‘A persons shall not be appointed as a Judge of the High Court unless;

(a).

(b) he has for a period of not less than ten years held a judicial office out of which not less than three years shall have been as District & Sessions Judge.

So, there is no legal ground to consider the acting charge period of the respondent/judge as District and Sessions Judge for the purpose of appointment as a Judge of High Court.

12. It is pertinent to note here that all the reliefs under Article 44 of the Azad Jammu & Kashmir Interim constitution, 1974 including the

writ of quo warranto, particularly, are of discretionary nature. Quo warranto is not issued as a matter of course, however, discretion must be used while keeping in view all the circumstances of each case. Reference can be made to the cases reported as 2004 SCMR 1299, PLD 1989 SC 166, PLD 1988 SC 1996 and PLD 1986 Lah. 310 (DB).

Furthermore, Where the smooth and peaceful functioning of any institution or organization is disturbed due to such command of the Court, or the person against whom the writ is to be issued, fulfills the qualification and suffering from not any disqualification, such discretionary relief may be refused. Reliance can be placed upon the judgments reported as PLD 1965 SC 236, 1999 PLC (CS) 686, PLD 1986 Lah. 365 and PLJ 2004 SC 399.

In the light of the above legal position, in addition to the merits of the case, as discussed in the preceding paras, as no disqualification or disability is attributed towards the respondent/judges except Mr. Justice Muhammad Muneer Chaudhary and there is also no plausible complaint against them, to issue the writ of quo warranto against them, (4) would, by no means be a proper exercise of discretionary powers as none of them lacks requisite qualification. Due to the unfilled vacancies for many years, there was lot of backlog of the cases in the High Court. Now, it seems that judicial work of the Court is going on smoothly and reasonably. Obviously, the work load of 9 judges cannot be managed by 4 judges in comprehensive and smooth way. Moreover, directions issued in Al Jihad Trust's case have been made part of the judgment

recorded in Younis Tahir's case, (2012 SCR 284), by the Supreme Court of Azad Jammu & Kashmir, which require that permanent vacancies occurring in the office of Chief Justice and Judges normally should be filled in immediately not later than 30 days. But the respondent/judges were appointed after years and public already suffered a lot. So, the issuance of writ of quo warranto against aforesaid (4) judges would also be not in public interest. But appointment of the respondent; Mr. Justice Muhammad Muneer Chaudhary, in-fact is void ab-initio and unlawful, which is liable to be declared as such.

Muzaffarabad,
Sep 17,2019.

JUDGE

Approved for reporting.

ACTING CHIEF JUSTICE

JUDGE