

HIGH COURT OF AZAD JAMMU & KASHMIR

1. Writ petition No. 670-A/2021
Date of institution 22.02.2021
Date of decision 19.03.2021

Kh. Aamir Ahmed Advocate High 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 his office at New Secretariat Muzaffarabad Azad Jammu & Kashmir;
2. President of Azad Jammu & Kashmir through Secretary to President having his office at President Secretariat Muzaffarabad;
3. Justice Azhar Saleem Babar, Acting Chief Justice of High Court of Azad Jammu & Kashmir Muzaffarabad;
4. Department of Law, Justice, Parliamentary Affairs and Human Rights through its Secretary having his office at Lower Chatter Muzaffarabad;
5. Secretary Law, Justice, Parliamentary Affairs of Azad Jammu & Kashmir having his office at New Secretariat Complex Muzaffarabad;
6. Registrar High Court/Shariat Appellate Bench of Azad Jammu & Kashmir High Court having his office at High Court Building Muzaffarabad Azad Jammu & Kashmir;
7. Accountant General of Azad Jammu & Kashmir Sathra Hills Muzaffarabad.

Respondents

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2. Writ petition No. 691/2021
Date of institution 24.02.2021

Kh. Aamir Ahmed Advocate High 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 his office at New Secretariat Muzaffarabad Azad Jammu & Kashmir;
2. President of Azad Jammu & Kashmir through Secretary to President having his office at President Secretariat Muzaffarabad;
3. Justice Azhar Saleem Babar, Acting Chief Justice of High Court of Azad Jammu & Kashmir Muzaffarabad;
4. Department of Law, Justice, Parliamentary Affairs and Human Rights through its Secretary having his office at Lower Chatter Muzaffarabad;
5. Secretary Law, Justice, Parliamentary Affairs of Azad Jammu & Kashmir having his office at New Secretariat Complex Muzaffarabad;
6. Registrar High Court/Shariat Appellate Bench of Azad Jammu & Kashmir High Court having his office at High Court Building Muzaffarabad Azad Jammu & Kashmir;
7. Accountant General of Azad Jammu & Kashmir Sathra Hills Muzaffarabad.

Respondents

WRIT PETITIONS

BEFORE:_____ Justice Sadaqat Hussain Raja, J.

PRESENT:

Mr. Fayyaz Ahmed Janjua, Advocate for the petitioner in both the writ petitions.

M/s Raja Ayaz Farid and Mr. Khursheed Anwar Mughal, Assistant Advocate Generals for the official respondents.

Sardar M.R Khan, Advocate for private respondent.

JUDGMENT:

The instant writ petitions have been filed under Article 44 of the Azad Jammu and Kashmir Interim Constitution, 1974, whereby following relief is solicited by the petitioner in Writ Petition No. 670-A/2021:-

“(I) It is, therefore, most respectfully prayed on behalf of the petitioner that this Hon’ble Court may very graciously be pleased to issue direction to the official respondents to retire the private respondent from position of Judge/Acting Chief Justice of High Court of Azad Jammu & Kashmir with effect from 23.02.2021 as per his service record coupled with passport and CNIC forthwith;

(II) It is further prayed that this Hon’ble Court may kindly be issued writ in the nature of Quo-Warranto and asked from private respondent under what authority of law he is holding the post of Acting Chief Justice High Court;

(III) The official respondents be directed to fill the post of Chief Justice High Court as per law forthwith;

(IV) Any other relief which is deemed fit and proper may kindly be granted.”

While in Writ Petition No. 691/2021 following relief is implored by the petitioner:-

“(I) It is, therefore, most respectfully prayed on behalf of the petitioner that this Hon’ble Court may very graciously be pleased to issue direction to the official respondents to amend the Notification dated 23.02.2021 in the manner that the private respondent be retired with effect from 23.02.2021 from position of Judge/Acting Chief Justice of High Court of Azad Jammu & Kashmir as per his service pay record coupled with passport and CNIC forthwith;

(II) It is further prayed that this Hon’ble Court may kindly be issued writ in the nature of Quo-Warranto and asked from private respondent under what authority of

law he is holding the post of Acting Chief Justice High Court;

(III) The official respondents be directed to fill the post of Chief Justice High Court as per law forthwith;

(IV) Any other relief which is deemed fit and proper may kindly be granted.”

As common questions of fact and law are involved in both the above titled writ petitions, hence, were heard together and decided as such through this single judgment.

While drafting the supra titled writ petitions, in Writ Petition No. 691/2021, the name of respondents have not been inserted serial wise, wherein the same have been started from serial No.2 instead of serial No.1, therefore, the name of respondents shall be read and written according to the serial wise.

2. Snappish summary of the facts culminating into filing of instant writ petitions is that the petitioner is a 1st Class State Subject, Member of Central Bar Association Muzaffarabad and is a practicing Lawyer. It is stated that the petitioner being a Lawyer found an irregularity that according to the National Identity Card of private respondent and salary slip reveals that the date of birth of private respondent is 23.02.1959 but the Government issued the notification of retirement of private respondent with effect from 22.03.2021

and private respondent is holding the office illegally as Acting Chief Justice of the High Court of Azad Jammu & Kashmir. In support of his claim, the learned counsel placed a facsimile of I.D Card and salary slip of private respondent. It is submitted that private respondent is holding the post as Judge/Acting Chief Justice of the High Court of Azad Jammu & Kashmir and the Government was legally bound to issue retirement notification one month prior to attaining the age of retirement according to service record as has already been held by the Apex Court of Azad Jammu & Kashmir but the competent authority failed to do so. It is further submitted that the correction period in the date of birth is two years as is mentioned in Article 67(2) of Civil Financial Code. It is stated that private respondent has completed his constitutional age for retirement as Judge/Acting Chief Justice of the High Court on 23.02.2021 in the light of service record annexed with the writ petitions but the competent authority/Law Department wrongly issued the retirement notification of private respondent as 23.03.2021. It is prayed for acceptance of the writ petitions.

3. Pre-admission notices were issued to the respondents for filing para-wise comments, which were filed accordingly on behalf of respondents No. 5 to 7, wherein the

claim of the petitioner has been negated in toto and prayed for dismissal of the instant writ petitions in limine.

4. On 15.03.2021, it was brought into notice of the Court by the learned counsel for the parties that the petitioner filed petition for leave to appeal before the Apex Court which was disposed of and the Apex Court admitted the writ petition for regular hearing and remanded the case for decision. In the light of direction of the Apex Court on 15.03.2021, the parties were directed to file written statement and other relevant documents, if any. In compliance of the aforesaid order of this Court, written statements have been filed on behalf of all the respondents, separately, wherein, it is stated on behalf of respondents No. 2, 4 to 6 that the petitioner has no locus standi to invoke the extraordinary Constitutional Jurisdiction of this Court as he does not fall within the definition of an aggrieved person, hence, the instant writ petition entails dismissal. It is further stated that the petitioner has failed to point out any violation of law, rules or regulations on the subject, therefore, the instant writ petition is not competent. It is submitted that initial service record of private respondent should be in the custody of respondents No. 5 & 6, however, available record in the custody of respondent No.7 was provided to respondent No.6 for process of retirement of private respondent. It is further submitted that the Law

Department moves all cases of retirement of Judges of the Superior Courts on the proposal of respective Registrar of the Court, since service record of the Hon'ble Judges is maintained in the Hon'ble Supreme Court and High Court. The Law Department inquired about the personal service record of private respondent from respondent No.7 (Registrar High Court) verbally, who replied that no such record is available. It is contended that since no specific date was mentioned by respondent No.7 regarding retirement of private respondent, hence, the Law Department analyzed the entire case and submitted proposal to the worthy President through proper channel and the worthy President accorded approval for retirement of private respondent w.e.f 22.03.2021 on the basis of date of birth mentioned in the Matriculation Certificate.

5. It is stated in the written statement filed on behalf of private respondent that the petitioner being pro bono publico litigant has no locus standi to file the supra titled writ petitions as he does not fall within the definition of an aggrieved person, hence, both the writ petitions entails dismissal. It is further stated that private respondent was initially inducted in judicial service of Azad Jammu & Kashmir as Sub Judge B-17 on the recommendation of Public Service Commission on 03.08.1988 on the basis of date of

birth entered in Matriculation Certificate as 23.03.1959. Later on, he remained on various positions by promotion and lastly, he was elevated as Judge of High Court in the year, 2013, whereas, the petitioner by filing writ petitions, called in question the entries of date of birth of private respondent after pretty long time without explaining such an inordinate delay, therefore, the supra titled writ petitions are hit by the doctrine of laches, hence, liable to be dismissed on the sole ground. It is averred that the actual date of birth of private respondent is 23.03.1959 which was entered in Matriculation Certificate and on passing the examination of LL.B in the year, 1981, the similar date of birth was entered as 23.03.1959 in the provisional certificate issued by University Law College Lahore. It is further averred that the Pleader-ship License was issued by the High Court on 18.07.1982, wherein the date of birth is entered as 23.03.1959. Subsequently, the License of Advocacy was issued by the High Court on 14.01.1988, which bears the similar date of birth as 23.03.1959. It is stated that private respondent was inducted in Judicial Service as Sub Judge B-17 on the recommendations of Public Service Commission on the basis of date of birth as 23.03.1959 mentioned in Matriculation Certificate. The ACRs of private respondent throughout in service carrier in subordinate Judiciary have been recorded, wherein, the date of birth has

been entered as 23.03.1959. It is further stated that during service, private respondent applied for leave, which was sanctioned and the date of birth was entered as 23.03.1959, which was attested/confirmed by the Audit and Accounts Department, therefore, no ambiguity or contradiction is found regarding date of birth in service record of private respondent. It is contended that the writ petitions are not maintainable even on the ground of mis-joinder and non-joinder of necessary parties. The petitioner throughout in his writ petition disputed the date of birth of respondent No.3, whereas, respondent No.3 is the worthy President of Azad Jammu & Kashmir who could not be impleaded as party in writ petition, therefore, the writ petition is not maintainable on this score too. It is prayed for dismissal of the writ petitions with costs.

6. The writ petition has also been resisted by respondent No. 8 (Accountant General) by filing written statement, wherein, it is stated that as per personal record maintained and kept by this office, the date of birth of private respondent according to National Identity Card is 23.02.1959 and the Salary Slip prepared on system contains the date of birth as 23.02.1959 and the particulars of ID Card are taken on SAP System for computerization of Pay Roll, the date of birth is shown as 23.02.1959 on pay slip. Now, it has been

noted as 23.03.1959 on SAP System as per Matriculation Certificate.

7. Mr. Fayyaz Ahmed Janjua Advocate, the learned counsel for the petitioner reiterated the facts and grounds as taken in the petitions and argued that private respondent during his service, never approached before any competent forum for correction of date of birth in the Matriculation Certificate, therefore, the declaration of age at the time of entry in service should be deemed absolutely conclusive which cannot be revived at later stage for any purpose. The learned counsel further argued that private respondent despite rendering the service more than 03 decades has not disputed the entries of Service Record regarding his age, hence, at this belated stage, in the light of Statutory Provisions, the claim of private respondent is ex-facie and is liable to be discouraged. The learned counsel prayed for acceptance of the instant writ petitions and relied upon the following case law, which are as follows:-

1. 2004 SCR 435
2. 1999 SCR 119
3. PLJ 2014 (AJ&K) 344
4. PLJ 2012 (AJ&K) 58
5. 2015 SCR 1083
6. 2012 SCR 23
7. 1991 PLC (CS) 1202
8. 2007 SCMR 66
9. PLJ 2012 AJ&K 58
10. PLJ 2014 AJ&K 344

An unreported case titled “Raja Munsaf Khan Vs. Board of Intermediate and Secondary Education Mirpur and 3 others” decided by this Court on 04.02.2020.

1. In case titled “*Javed Iqbal and 5 others Vs. Social Welfare Department and 5 others*” [2004 SCR 435], it was held by the Apex Court of Azad Jammu & Kashmir that the Advocates are officers of the Courts---Courts expect help from them to do justice---The role of Advocates upholds the dignity and purity of the Courts.
2. In case titled “Sardar Aftab Ahmed and 5 others Vs. Maj. (R) Muhammad Aftab Ahmed and 3 others” [1999 SCR 119], following points have been formulated by the Apex Court of Azad Jammu & Kashmir:
 - (a) *Aggrieved Party*---
 ----It is not necessary that an aggrieved person should have a strict juristic right to enforce it by filing a writ petition but on the other hand if he can show prima facie some interest which has been adversely affected by an executive or judicial order he becomes fully competent to file appeal.
 - (b) *Law Point*---
 ----Contention being purely legal can be raised at any time before this Court.
 - (c) *Appointment of Army Officers as S.P*----
 ----if a serving or retired Army Officers wants to be appointed as S.P, the appointment shall be made on the basis of examination and test conducted by P.S.C.
 - (d) *Writ Jurisdiction*----
 ----An illegal and unlawful order could not have been enforced in exercise of writ jurisdiction.
3. In case titled “*Zafar Iqbal Khan Vs. Azad Jammu & Kashmir Government through Chief Secretary, Muzaffarabad and 3 others*” [PLJ 2014 AJ&K 344], the Apex Court of Azad Jammu & Kashmir declared that ----R. 67(2)---AJ&K Interim Constitution Act, 1974---S. 44---Correction of date of birth---Correction cannot be allowed---Subordinate Judiciary as civil judge---Suit against board of education and obtained

ex-parte decree for correction of date of birth---Dispute regarding correction of date of birth was brought just a few months ago before his retirement---Validity---Provision of law declaration of age made at time of entry into Government service is conclusive which cannot be revived at latter stage for any purpose----Petitioner despite rendering judicial service extended over two and half decades had failed to apprise his competent authority for such correction hence, at such belated stage his claim cannot be accepted in light of statutory provision...Writ petition, therefore, was also attracted by principle of laches extended over decades-- --According to judicial consensus, a civil servant, should solicit correction of his date of birth within two years of joining service----It is a settled principle of law that writ jurisdiction cannot be exercised to direct a person give effect to an unlawful order of any authority, therefore, same cannot be enforced through writ jurisdiction---Petition was dismissed.

4. In case titled “*Khurshid Hussain Vs. Azad Govt. through its Chief Secretary New Secretariat, Muzaffarabad and 3 others*” [PLJ 2012 AJ&K 58], it was held by the Apex Court of Azad Jammu & Kashmir that ----S. 4---Correction of date of birth in service book---Order of ombudsman of Punjab---Not controverted---Complaint was filed against BISE qua date of birth---Direction to issue duplicate certificate---After withdrawal of complaint from ombudsman of Punjab pertaining to correction of date of birth in matriculation certificate, could not file instant writ petition due to bar of estoppels---Revised notification was not challenged by petitioner before any forum----Validity----Matter was probed afresh through inquiry committee and after thrashing out the same found that date of birth of petitioner was 15.1.1952 which was not challenged before any forum---Petitioner was inducted in service on 20.4.1971 who had promoted up to rank---Petitioner never solicited relief for correction of date of birth which was written in his service book as 15.1.1952---Petition was attracted by laches----Civil servant would solicit correction of date of birth within two years---Petition was dismissed.
5. In case titled “*Muhammad Abdul Rehman Abbasi Vs. Azad Govt. & 7 others*” [2015 SCR 1083], it was opined by the Apex Court of Azad Jammu & Kashmir

that the appellant/civil servant during his service never approached any competent forum for correction of entry of his date of birth in the matriculation certificate. He approached the Civil Court only ten months prior to the age of superannuation for correction of his date of birth in the matriculation certificate, which shows mala fide of the appellant. Further held that under section 12 of the AJ&K Civil Servants Act, 1976, no right of hearing is provided to a civil servant in such like matters. Under the proviso to sub-section (iii) of section 12 of Act, 1976, the right of hearing shall be provided to such civil servants, who are being retired after completion of ten years qualifying service for pensionary or other benefits as envisaged in sub-section 12(i) of section 12 of the Act, 1976. It was also held that as no such eventuality prevails in the case in hand, therefore, the question of personal hearing is not available to the appellant as he has been retired under section 12(ii) of Act, 1976 after attaining the age of superannuation, i.e sixtieth years of his age.

6. In case titled "*Sardar Khurshid Hussain, Deputy Inspector General Vs. Azad Government of the State of Jammu & Kashmir through Chief Secretary and 4 others*" [2012 SCR 23], the Apex Court of Azad Jammu & Kashmir observed that ---S. 47---Civil service---Retirement---Dispute regarding date of birth---Petitioner who was retired vide notification after attaining age of superannuation, had challenged said notification of retirement alleging that his date of birth had been wrongly recorded in his Service Book---Date of birth as recorded, on the basis of which the petitioner was retired from service was 15.1.1952, while the petitioner had claimed his date of birth as 15.1.1956---Petitioner had served more than 40 years in the Police Department, but had not timely applied for correction of his date of birth as recorded---Petitioner had himself applied for issuance of duplicate copy of his Matriculation Certificate and upon his application, the Board of Education, verified his date of birth as 15.1.1952---Petitioner raised dispute regarding the correction of his date of birth before competent Authority, just less than a one month's time before his retirement---As per latest verification issued by the Board of Education, petitioner's date of birth was 15.1.1952 and that verification had been issued after holding an inquiry---Unless any contrary conclusion

drawn by the Board of Education, was brought on record, said verification could not be ignored as the most relevant and competent authority/Institution was the Board----If the date of birth 15.1.1956, as contended by the petitioner, was considered correct, then his retirement/induction in the department would be in 15 years age, while according to statutory provision, no person should be inducted into service, who was found less than 18 years of age----No illegality was in the impugned judgment of Service Tribunal----No substantial question of law of public importance was involved in the petition for leave to appeal, which was dismissed, in circumstances.

7. In case titled “*Sh. Mumtaz Ali alias Mumtaz Alam Vs. Government of Punjab*” [1991 PLC (C.S) 1202], the Apex Court of Pakistan laid down the verdict that----Date of birth----Correction----Government servant can seek correction of service record as to date of birth within two years of his service----Government servant not making such a move within two years and filed civil suit and did not explain as to how and in what manner alleged actual date of birth came to his knowledge----Prayer for correction of service record, was not accepted in circumstances. It was also held that----Ex-parte decree----Trend of Government Officers to obtain ex-parte decrees for correction of date of birth towards fag-end of their service career was deprecated.
8. In case titled “*Qamaruddin Vs. Pakistan through Secretary, Establishment Division, Islamabad and another*” [2007 SCMR 66], the apex Court of Pakistan declared that according to Rule 12-A of the Civil Servants (Appointment, Promotion and Transfer) Rules, 1973, the date of birth once recorded at the time of joining Government service shall be final and thereafter no alteration in the date of birth of a civil servant shall be permissible;
9. In case titled “*Khursheed Hussain Vs. Azad Government through its Chief Secretary New Secretariat, Muzaffarabad and 3 others*” [PLJ 2012 AJ&K 58], held that the facsimile of matriculation certificate produced along with writ petition was doubtful and could be relied upon due to its inconsistency with an attested photo stat copy produced by petitioner at time of induction in service of police

department---Petitioner on one hand stated that his date of birth was 15.1.1956 and on other hand produced service book showing date of birth as 15.1.1954 which was contradictory stand and against rendered version of the petitioner as doubtful. Further held that the revised notification was not challenged by petitioner before any forum. Petitioner was inducted in service on 20.4.1971 who had promoted up to rank---Petitioner never solicited relief for correction of date of birth which was written in his service book as 15.1.1952---Petition was attracted by laches---Civil servant would solicit correction of date of birth within two years---Petition was dismissed.

10. In case titled “*Zafar Iqbal Khan Vs. Azad Jammu & Kashmir Government through Chief Secretary, Muzaffarabad and 3 others*” [PLJ 2014 AJ&K 344], it was held that writ petition, therefore, was also attracted by principle of laches extended over decades---According to judicial consensus, a civil servant should solicit correction of his date of birth within two years of joining service.

11. In unreported case titled “*Raja Munsaf Khan Vs. Board of Intermediate and Secondary Education Mirpur and 3 others*” decided by the Acting Chief Justice of High Court on 04.02.2020, wherein, it is stated that it is settled now that date of birth mentioned in Secondary School Certificate is treated as Birth Certificate. It is commonly observed that some of the official employees, in order to extend their length of service, file civil suit before the Court to rectify their date of birth. The Higher Courts however discouraged such practices. Leading case in this regard can be referred as PLD 2014 AJ&K 344 and PLJ 2015 AJ&K 225.

8. While controverting the arguments advanced by the learned counsel for the petitioner, the learned AAG appeared on behalf of the official respondents and contended that according to Article 35-A of Kashmir Service Regulations (KSR), the age to be entered in service record of an official

should be that entered in his University Certificate but if, he has no University qualification, it should be one that is entered in his School Leaving Certificate duly attested by a Gazetted Officer. It is averred that in the Punjab University/Law College Provisional Certificate and Matriculation Certificate, the date of birth of private respondent is 23.03.1959, hence, in the light of Article 35-A of KSR, the date of birth mentioned in Metric Certificate was taken into consideration for the purpose of retirement vis-à-vis the date mentioned in CNIC or Salary Slip by the competent authority. The learned AAG prayed for dismissal of the instant writ petitions with cost and cited the following precedents in support of his version.

1991 CLC 870

1998 PLC 270

1988 PLC 135

9. Sardar M.R Khan Advocate, the learned counsel for the private respondent owned the arguments advanced by the learned AAG and also relied upon the following case law.

2017 SCR 507

1998 SCMR 1494

2002 SCR 236

2016 SCR 960

2006 PLJ 1706 Lahore

10. I have heard the learned counsel for the parties and perused the record with utmost care.

11. The learned counsel for the petitioner laid great stress in his arguments that the respondents may be directed to amend the Notification dated 23.02.2021 in the manner that the private respondent be retired w.e.f 23.02.2021 from position of Judge/Acting Chief Justice of High Court of Azad Jammu & Kashmir as per his service pay record coupled with Passport and CNIC.

12. I have examined the whole service record and Matriculation Certificate of private respondent, wherein, his date of birth is entered as 23.03.1959. It is also not denied that private respondent entered into service on the strength of Matriculation Certificate which remained as part of his service record. In all other documents relating to service of private respondent, his date of birth is entered as 23.03.1959, whereas, in National Identity Card and Salary Slip, the date of birth of private respondent is entered as 23.02.1959. It may be mentioned that private respondent inducted into service on the basis of Matriculation Certificate, therefore, it cannot be assumed that it is a fault on behalf of private respondent. It is a settled principle of law that no one can be penalized for any fault/act of the authority. The same view has been fortified by the Apex Court of Azad Jammu & Kashmir in a case titled *“Muhammad Irfan Ali Gorski Vs. Azad Government and 6*

others’ {2014 SCR 710}. The relevant portion of the aforesaid judgment is reproduced as under:-

“8. According to celebrated principle of law, no one can be penalized for the wrong of others. It is divine command in Surah Alqamar, Chapter No.27 Verse No. 38 of the Holly Quran, that:-

أَلَا تَزِرُ وَازِرَةٌ وِزْرَ أُخْرَى

which means کوئی شخص کسی کا گناہ اپنے اوپر نہیں لے سکتا and following this principle of law that no one can be penalized wrongs or illegal action, negligence, mal-practice and mal-administration of the others. In the light of facts discussed hereinabove, mal-administration, carelessness, wrong committed by the officials of Nomination Board is apparent on the face of record. Thus, the appellant cannot be penalized for their wrong or be deprived of his vested legal right. Once the appellant is approved for nomination, vested legal right has been created in his favour. Our this view finds support from the chain of cases reported as Muhammad Ammer and another Vs. Muhammad Shoukat and 3 others, [2003 SCR 450], and Nasreen Akhter & others Vs. Sameena Bilqees & 3 others, [2006 SCR 312], Mst. Shakeela Anjum and another V. Imran and others [2009 SCR 180].”

The same principle has been laid down by the Apex Court of Azad Jammu & Kashmir in a case titled “*University of AJ&K and 08 others Vs. Mir Muhammad Hanif & 20 others*” [2019 SCR 533].

13. The record also postulates that private respondent was initially appointed as Sub Judge on 03.08.1988 on the recommendations of Public Service Commission. Before entering into service as Sub Judge, private respondent was enrolled as Pleader and Advocate by the High Court of Azad Jammu & Kashmir. During pendency of the writ petitions, the

learned counsel for the petitioner moved an application under Rule 38 of the High Court Procedure Rules, 1984 for summoning of the record. The record was summoned. According to Pleader-ship License, Provisional Certificate issued by Punjab University Law College Lahore and Secondary School Certificate, the date of birth of private respondent is 23.03.1959. Later on, private respondent was appointed as Sub-Judge and the service record of private respondent was also summoned from the Law Department as well as Accountant General Office of Azad Jammu & Kashmir Muzaffarabad. It is pertinent to mention here that at the time of appointment of private respondent as Sub Judge, the appointing authority was Government and the appointment notification was issued from the Law Department. It is very astonishing and unfortunate that Law Department having no record relating to private respondent. Later on, the service record of private respondent since the year, 1991 up to his elevation as a Judge of High Court was also produced by Audit and Accounts Department. The said record consists of Matriculation Certificate and ACRs etc. In the aforesaid documents, the date of birth of private respondent is also the same i.e 23.03.1959. The available service record i.e Matriculation Certificate, ACRs, Advocacy License, Pleader-ship License except the National Identity

Card and Salary Slip support the Notification dated 23.03.2021 for retirement of private respondent.

14. To dig up the truth, it is more advantageous to reproduce Article 35-A of Kashmir Service Regulations, which is as under:-

“35-A. *The certificate should be in the Treasury Form No.49 with suitable modifications where necessary.*

Note 1.---When an officer, in whom a defect has been noticed by the examining officers is transferred from one office to another, the duties of which are different in character, a Medical Officer, should report whether the defect will materially interfere with the discharge of the new duties of the officer transferred.

Note 2.---The age to be entered in the service records of an official should be that entered in his University certificate but if he has no University qualification it should be one that is entered in his school certificate duly attested by a Gazetted officer of the Education Department. In other cases the Head of the office concerned should satisfy himself of the correctness of the age declared by requiring the production of horoscope of the concerned person or in any other manner considered suitable. The method adopted should be recorded in writing.”

(Underscoring is mine)

15. According to supra Article, the age to be entered in service record of an official should be that entered in his University Certificate, but if, he has no University qualification, it should be one that is entered in his School Leaving Certificate duly attested by a Gazetted Officer. According to the aforesaid Article, the date of birth

mentioned in Metric Certificate was taken into consideration for the purpose of retirement vis-à-vis the date mentioned in the CNIC or Salary Slip.

16. Moreover, the Accountant General Department is the custodian of service record of Gazetted Officers in the light of Article 264 of the Kashmir Service Regulations (KSR) rather private respondent has no responsibility to maintain his service record. The aforesaid Article is hereby reproduced as under:-

“**264.** A record of the service of Gazetted Officers is maintained by the Accountant-General who audits the salaries. When a British Lent Officer is reverted to his appointment in the British Government, a copy of his Service Register will be sent by the Audit Officer to the Accountant or Controller-General accounting for the contribution.”

17. The learned counsel also raised a supplementary objection that according to the National Identity Card of private respondent and salary slip, the date of birth of private respondent is entered as 23.02.1959 but the Government issued the notification of retirement of private respondent with effect from 22.03.2021, which is against the law. To resolve the controversy in hand, an identical proposition came before the Apex Court of Pakistan in a case titled “***Akbar Khan Vs. Karachi Transport Corporation***” [1988 PLC 135], the relevant portion is reproduced as under:-

“His reliance on the National Identity Card is no proof conclusive of the age, which simply the dates of birth are shown by the holders of the cards for the purpose of identification and nothing beyond. Normally the best evidence of the age is the parent certificate where he was born or the school certificate where he received the education or if there is no such entry, normally the date of entry in the job which he initially joined in the Government service or autonomous bodies. The medical certificate is also simply the opinion with always high fluctuation of the margin, of which the Court has taken judicial notice in number of cases.”

(Underscoring is mine)

18. The contention of the learned counsel for the petitioner that in the light of National Identity Card and Salary Slip, there is a conflict of one month in the date of birth of private respondent vis-à-vis to the whole service record. Moreover, during the whole service, the private respondent never approached any competent forum. The same point has been resolved by the Apex Court of Azad Jammu & Kashmir in a case titled **“Director General Anticorruption & others Vs. Abdul Qayam & another”** [2017 SCR 507]. The relevant segment is reproduced as under:-

“Moreover, respondent No.1 failed to substantiate that he ever challenged the entry made in the service record. During the whole service, the respondent never approached any competent forum but after attaining the age of superannuation, he has taken the stance that his actual date of birth is 13.06.1956. The respondent has heavily relied upon the matriculation certificate which he has obtained in the year, 1983, whereas, he joined his service on 04.08.1973, i.e after about 10 years’ of his

service. It is also not denied that at the time of joining the service, the qualification of the respondent was not matriculation, therefore, the date of birth mentioned in the matriculation certificate cannot be given preference over the service record.

7. The argument of the learned counsel for respondent No.1 that he was not aware of the date of birth entered in the service record, has no force and is ill-founded, which cannot be taken into consideration. If for the sake of arguments, it is presumed that his date of birth was not correctly entered in the service record then the proper course was to agitate the matter at the proper forum for correction of entry of his date of birth in the service record. The same cannot be allowed to be raised at the time of retirement.”

19. When a Government employee enters in service on ad-hoc or permanent basis, the basic requirement for getting Govt. job is Matriculation Certificate or Municipal Birth Certificate. An identical proposition came before the Apex Court of Azad Jammu & Kashmir in a case titled *“Muhammad Abdul Rehman Abbasi Vs. Azad Govt. & 7 others”* [2015 SCR 1083]. The relevant paragraph is reproduced as under:-

“6. We have examined the whole service record and matriculation certificate of the appellant issued in the year 1973, wherein his date of birth is entered as 7.10.1954. It is also not denied that the appellant entered into service on the strength of matriculation certificate which remained as part of his service record. All the other documents relating to the service of the appellant, his date of birth is entered as 7.10.1956, whereas, in the matriculation certificate, the date of birth is entered as 7.10.54. The appellant filed as civil

suit on 14.12.2013 for correction of the entry of date of birth in the matriculation certificate on the ground that the same has wrongly been entered, whereas, his actual date of birth is 7.10.1956. The appellant also placed reliance on “فارم ب” issued on 27.07.1976. It may be mentioned that the appellant inducted into service on the basis of matriculation certificate on 29.12.1974 and all other documents relied upon by the appellant have been issued after his induction into service, therefore, the possibility cannot be ruled out that the appellant intentionally mentioned the date of birth in those documents as 7.10.1956. The entry in the service book must have been entered according to the entries of date of birth incorporated in the matriculation certificate.’

(Highlighting is mine)

20. To strengthen the aforesaid view, it is more appropriate to reproduce Section 116 of General Financial Rules, which is as under:-

“Date of birth:

116. Every person newly appointed to a service or a post under Government should at the time of the appointment declare the date of his birth by the Christian era with as far as possible confirmatory documentary evidence such as matriculation certificate, municipal birth certificate and so on. If the exact date is not known, an approximate date may be given. The actual date or the assumed date determined under para. 17 should be recorded in the history of service, service book, or any other record that may be kept in respect of the Government servant’s service under Government and once recorded, it cannot be altered, except in the case of a clerical error, without the previous orders of the Local Administration.”

(Emphasizing is mine)

To fortify Rule 116 and 117, para 5.28, which is at page No. 91 of Financial Rules and Instructions, reproduced as under:-

Date of Birth (Rules 116 and 117):

5.28. On appointment every Government servant is required to declare his date of birth according to the Christian era and the declaration should be duly supported by a Matriculation Certificate or Municipal Birth Certificate, etc.

The date of birth should be duly recorded in the Service Book, Service Roll and History of Service, etc.”

21. It is so well known that on one's recruitment in Government service, one is required to obtain a Medical Fitness Certificate by paying visit to the Medical Superintendent, who may examine him personally or through a subordinate. The main object of the medical certificate is the verification about physical fitness of the new recruited employee and the date of birth or age is stated in the said certificate. To say that the age described on medical examination of a civil servant or an employee of a corporate body by the doctor is something final and conclusive would be an absurd thing, close to fiction and divorced from reality. The same view has been laid down in a case titled ***“Chairman, area Electricity Board, Gujranwala and another Vs. Qazi Muhammad Ilyas”*** [1998 PLC 270], the relevant portion of the aforesaid precedent is reproduced as under:-

“Authentic entry about age or date of birth emanates from the “*Janam Patri*”, or school leaving certificate. Entry about age, for the first time, is generally made in matriculation certificate and it is relied upon by everybody. One may not have his education up to matriculation, and may leave school earlier. The school leaving certificate, in that event, will carry the date of birth, that may, however, have been entered in the school record at random. But at the same time, such an entry may also be authentic, as the elder who accompanies a lad and gets him, admitted in school is supposed to know the age or date of birth of the new entrant in school, or he may state the same by guess work; but such entry is generally given credence and considered to be authentic.”

An identical objective came before the Apex Court of Pakistan in a case titled “*Iqbal Hussain Vs. Deputy Director Revenue Officer Nankana Sahib, District Sheikhpura and another*” [PLJ 2003 Lahore 1706], which reads as under:-

“2. I am afraid, this contention has no force, because the matriculation certificate had been submitted by the petitioner himself and until and unless, the entry of the age is corrected by the Board of Intermediate and Secondary Education in accordance with law, 5.4.1968 was the date of birth of the petitioner, which rightly has been taken into consideration by respondent No.1.”

22. In the supra reported cases, two basic principles have been laid down by the Apex Court. Firstly, the matter of alteration of age cannot be resolved by any Court except of Service Tribunal and secondly, the issue of alteration of age cannot be raised at the verge of retirement. In the instant case,

neither the case of private respondent is relating to alteration of age nor he has approached before any competent Court for alteration of date of birth. Admittedly, private respondent has never processed to change, amend or alter his date of birth as entered at the time of appointment in the service by following the dictum laid down by the Apex Court in the plethora of judgments.

The incumbent Acting Chief Justice private respondent was inducted in service through Public Service Commission and it is an admitted fact that according to the rules that Public Service Commission determined eligibility regarding age according to the matriculation certificate.

23. According to the service record (Annexure “RA to RA/3”) private respondent was appointed as Sub Judge on 03.08.1988 on the recommendations of Public Service Commission on the basis of date of birth entered in Matriculation Certificate and after promotion, he served in the subordinate judiciary on various positions and lastly, he was elevated as Judge of the High Court in the year, 2013. According to the available service record i.e Matriculation Certificate, Provisional Certificate of LL.B in the year, 1981, ACRs, Advocacy License and Pleader-ship License issued by the High Court on 14.01.1988 and 18.07.1982 respectively, the date of birth of private respondent is entered as

23.03.1959, which was not changed. The judgments referred to and relied upon by the learned counsel for the petitioner, the Apex Court categorically held that the date of birth cannot be corrected after a period of two years and after that period it will attain finality. The private respondent was appointed as Sub Judge on 03.08.1988 and record available i.e ACRs and leave application form which shows that the date of birth of private respondent is 23.03.1959 and no subsequent document can change the date of birth of an official after two years of his induction in the service, hence, the authority has rightly considered on the Matriculation Certificate which was submitted at the time of induction of private respondent as Sub Judge B-17. The learned counsel for the petitioner emphasized that age of an official cannot be changed after two years which has been held by the Apex Court in numerous judgments but in the case in hand, in fact he denied the aforesaid principle by relying upon the subsequent documents.

24. The petitioner has relied upon the Salary Slip of private respondent for December, 2021. It is pointed out by the learned counsel for the private respondent that according to the said Salary Slip the qualifying service of the private respondent is mentioned as 30 years, 09 months and 18 days, which is also against the facts. The private respondent was

appointed as Sub Judge on 03.08.1988 and in December, 2020, the service of private respondent becomes 32 years, 07 months and 18 days, which was not rightly calculated in the Salary Slip. The submission of the learned counsel for the private respondent is correct in light of the record, hence, entries in the Salary Slip should not be considered for conclusive proof of date of birth, if it is not supported by other document. It is pertinent to mention here that entries in the Salary Slip regarding date of birth of private respondent has been changed by the Accountant General office. According to the preliminary service record of February, 2021 and this change was not called in question by the petitioner, therefore, the aforesaid argument of the learned counsel for the petitioner lost it weight.

25. According to the essential service record, the date of birth of private respondent is 23.03.1959, which cannot be subsequently changed by other documents i.e National Identity Card and pay slip. , therefore, the whole claim of the petitioner is vogue, which is hereby repelled. In my considered view, the impugned Notification was rightly issued up to the extent of date of birth of private respondent. It is also worthwhile to mention there that admittedly, there is a slight difference of one month pertaining to age of private respondent, apparently numerical disorder, which cannot be

said to be done by the private respondent for getting undue benefits, hence, both the writ petitions are not maintainable, which are hereby dismissed.

26. Before parting with the judgment, I would like to observe that in order to examine the inordinate delay in the appointment of top positions of Judiciary, I summoned the record for appointment of Hon'ble Chief Justices of Apex Court and of this Court from the office of appointing authority i.e President House but the record was not provided. Today, during the course of arguments, the learned AAG provided a seal statement of Secretary to President of Azad Jammu & Kashmir. I have gone through the brief statement submitted by the Secretary to the worthy President and all the relevant record as well as impugned Notification. According to the impugned notification, private respondent was retired as Acting Chief Justice of High Court, which is against the verdict of Apex Court of Pakistan laid down in cases titled *“Al-Jehad Trust through Raeesul Mujahideen Habib-Ul-Wahabb-ul-Khairi and others Vs. Federation of Pakistan and others”* [PLD 1996 Supreme Court 324], *Asad Ali Khan and Muhammad Younas Tahir's* case. In Al-Jehad Trust's case, the Apex Court of Pakistan held as under:-

“That in view of the relevant provisions of the Constitution and established conventions/practice, the most senior Judge of a High Court has a

legitimate expectancy to be considered for appointment as the Chief Justice and in absence of any concrete and valid reasons to be recorded by the President/Executive, he is entitled to be appointed as such in the Court concerned.’

(Highlighting is mine)

27. The same principle has also been laid down by the Apex Court in a case titled “*Malik Asid Ali and others Vs. Federation of Pakistan through Secretary, Law, Justice and Parliamentary Affairs, Islamabad and others [PLD 1996 SC 161]*”, as under:-

“In the light of well established Constitutional Convention that the senior most Judge of the Supreme Court was to be appointed as the Chief Justice of Pakistan in the absence of anything concrete and solid against him.---Two Governments during the period respondent remained a Chief Justice of Pakistan had moved necessary summary for rectifying the Constitutional violation by denotifying the appointment of respondent as the Chief Justice of Pakistan but the efforts did not succeed on account of unyielding attitude of the then President of Pakistan.”

(Emphasizing is mine)

28. An identical phraseology has also been discussed in a case titled “*Syed Manzoor Hussain Gillani, Retired Acting Chief Justice, AJ&K and another Vs. Azad Govt. of the State of J&K through its Chief Secretary, Muzaffarabad and others*” [PLJ 2012 AJ&K 113]. The relevant portion is reproduced mutatis motandis as below:-

“Likewise the appointment of Acting Chief Justice of High Court of the Azad Jammu &

Kashmir is regulated by Section 43(A) of the Azad Jammu & Kashmir Interim Constitution Act, 1974, which is also reproduced as under:-

“Acting Chief Justice:- At any time when---

- (a) the office of Chief Justice of High Court is vacant; or
- (b) the Chief Justice of High Court is absent or is unable to perform the functions of his office due to any other cause, the President shall appoint the Senior most of the other Judges of the High Court to act as Chief Justice.”

A bare reading of the above constitutional provisions makes it clear that at any time when the office of the Chief Justice is vacant or the Chief Justice is absent or is unable to perform functions of his office due to any other cause, the President shall appoint senior most Judge as Acting Chief Justice. The controversial in the instant petitions is that whether an Acting Chief Justice is entitled to the pensionary benefits as Chief Justice. The point in question came under consideration before the Government of Pakistan in case of Mr. Justice (Retd) Saad Saood Jan. It appears that after considering law laid down in Al-Jehad Trust’s case, the following notification was issued on 21.06.1999 which is reproduced as under:-

“Government of Pakistan
Law, Justice and Human Rights Division
Islamabad, the 21st June, 1999.

NOTIFICATION

No. F.1(2)/86-All.—The President is pleased to approve that Mr. Justice (Retd) Saad Saood Jan shall be deemed to have retired as Chief Justice of Pakistan on the 10th June, 1996 for the purpose of pension and retiring benefits.

(Ch. Irshad Ahmed)
Secretary”

On the basis of above-mentioned notification, pensionary benefits were given to Mr. Justice (Retd) Saad Saood Jan as Chief Justice although he served as Acting Chief Justice. Thus, in view of the provisions of Fourth and Fifth schedules of the Azad Jammu & Kashmir Interim Constitution Act, 1974, the petitioners are entitled to solicited relief.

Fourth Schedule

“The Chief Justice and the Judges of the Supreme Court of Azad Jammu & Kashmir shall be entitled to the same Salary, Allowance, Privileges and pension as are admissible to the Chief Justice and the Judges of the Supreme Court of Pakistan.”

Fifth Schedule

“The Chief Justice and the Judges of the High Court of Azad Jammu & Kashmir shall be entitled to the same salary, Allowance, Privileges and pension as are admissible to the Chief Justice and the Judges of the Supreme Court of Pakistan.”

The scrutiny of the aforesaid schedules postulates that Chief Justice and Judges of the Supreme Court of Azad Jammu & Kashmir as well as Chief Justice and Judges of the High Court of Azad Jammu & Kashmir are entitled to the same salary, allowances and privileges and pension as are admissible to the Chief Justice and Judges of the High Court of Pakistan. It is very shocking that after pretty long time, the Executive failed to comply with the principles laid down in *Al-Jehad Trust's* case, *supra* for appointment of permanent Chief Justices of Apex Court as well as of this Court, which has been adopted by the Apex Court of Azad Jammu & Kashmir in *Younas Tahir's* case.

29. The Apex Court of Azad Jammu & Kashmir adopted all the principles laid down in *Aj-Jehad Trust's* case

as guidelines for appointment of Judges and Chief Justice of Azad Jammu & Kashmir. It is more expedient to reproduce the aforesaid principles, which are as under:-

“7. Our conclusions and directions in nutshell are as under:-

- (i) The words “after consultation” implied 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 of arbitrariness or unfair play. The opinion of the Chief Justice of Pakistan and the Chief Justice of High Court as to the fitness and suitability of a candidate for Judgeship is entitled to be accepted in the absence of very sound reasons to be recorded by the President/Executive;
- (ii) That if the President/Executive appoints a candidate found to be unfit and unsuitable for judgeship by the Chief Justice of Pakistan and the Chief Justice of High Court concerned, it will not be a proper exercise of power under the relevant Article of the Constitution;
- (iii) That the permanent vacancies occurring in the offices of Chief Justice and Judges normally should be filled in immediately not later than 30 days but a vacancy occurring before the due date on account of death or for any other reasons, should be filled in within 90 days on permanent basis;
- (iv) That no ad hoc Judge can be appointed in the Supreme Court while permanent vacancies exist;
- (v) That in view of the relevant provisions of the Constitution and established conventions /practice, the senior most Judge of a High Court has a legitimate expectancy to be considered for appointment as the Chief Justice and in the absence of any concrete and valid reasons to be recorded by the

President/Executive, he is entitled to be appointed as such in the Court concerned;

- (vi) An Acting Chief Justice is not a consultee as envisaged by the relevant Articles of Constitution and, therefore, mandatory Constitutional requirement of consultation is not fulfilled by consulting an Acting Chief Justice except in case the permanent Chief Justice concerned is unable to resume his functions within 90 days from the date of commencement of his sick leave because of his continuous sickness;
- (vii) That Additional Judges appointed in the High Court against permanent vacancies or if permanent vacancies occur while they are acting as Additional Judges, acquire legitimate expectancy and they are entitled to be considered for permanent appointment upon the expiry of their period of appointment as Additional Judges and they are entitled to be appointed as such if they are recommended by the Chief Justice of the High Court concerned and the Chief Justice of Pakistan in the absence of strong valid reason/reasons to be recorded by the President/Executive;
- (viii) That an appointment of a sitting Chief Justice of a High Court or a Judge thereof in the Federal Shariat Court under Article 203-C of the Constitution without his consent is violative of Article 209, which guarantees the tenure of office. Since the former Article was incorporated by the Chief Martial Law Administrator and the latter Article was enacted by the Framers of the Constitution, the same shall prevail and, hence, such an appointment will be void;
- (ix) That transfer of a Judge of one High Court to another High Court only be made in the public interest and not as a punishment;
- (x) That the requirement of 10 years' practice under Article 193(2)(a) of the Constitution relates to the experience/practice at the Bar and not simpliciter the period of enrolment;

- (xi) That the simpliciter political affiliation of a candidate for judgeship of the superior Courts may not be a disqualification provided the candidate is of an unimpeachable integrity, having sound knowledge in law and is recommended by the Chief Justice of the High Court concerned and the Chief Justice of Pakistan;
- (xii) That it is not desirable to send a Supreme Court Judge as an Acting Chief Justice to a High Court in view of clear adverse observation of this Court in the case of Abrar Hassan V. Government of Pakistan and others PLD 1976 SC 315 at 342;
- (xiii) That since consultation for the appointment/confirmation of a Judge of a Superior Court by the President/Executive with consultees mentioned in the relevant Articles of the Constitution is mandatory, any appointment/confirmation made without consulting any of the consultees as interpreted above would be violative of the Constitution and, therefore, would be invalid.”

The record postulates that the positions of Hon’ble Chief Justice of Azad Jammu & Kashmir as well as Hon’ble Chief Justice of High Court remain vacant for indefinite period, which may tend to impair the independence of judiciary. These positions have been filled up temporarily by appointing Acting Chief Justices of the Apex Court and High Court of Azad Jammu & Kashmir.

30. According to principles laid down in *Aj-Jehad Trust’s* case, the senior most Judge of the Supreme Court or High Court should be appointed as Chief Justice of Supreme

Court and High Court in absence of any concrete or valid reason. It is a settled principle of law that any decision of the Apex Court is binding on all the Courts as well as Institutions of the State. The aforesaid principle has been laid down in *Malik Asid Ali's* case, supra, which is as under:-

“---*Art. 189*---Decision of Supreme Court to be binding---Principles---Supreme Court while adopting an interpretation of the provision of the law or the Constitution which is at variance from the existing view, declares the correct law as an Apex Court and by doing so neither legislates any new law nor amends the existing law----While interpreting a provision of law or the Constitution, Supreme Court can also provide the date from which the interpretation given by it is to come into effect, keeping in view the nature of the provision it is interpreting, the likelihood of possible prejudice which may be caused to an individual or a body of individual and the requirement of justice in the case.”

(Underlining is mine)

31. It is a settled principle of law that the decision of the Apex Court is binding on each and every organ of the State. The aforesaid principle has been laid down by the Apex Court of Pakistan in a case titled “*Al-Jehad Trust through Raeesul Mujahideen Habib-Ul-Wahabb-ul-Khairi and others Vs. Federation of Pakistan and others*” [PLD 1996 Supreme Court 324]. The relevant portion of the supra verdict is reproduced as under:-

“**26.** I may refer to the above second category i.e the Articles under which the Prime Minister’s advice is required, but it will be binding on the

President if it is in accordance with the law declared by the Apex Court. In this regard, it is pertinent to point out that Article 177 and 193 of the Constitution specify the consultees to whom the President is supposed to consult. I may mention that at this stage, it is not necessary to examine the question as to whether the President is the consultor or the Prime Minister/Cabinet. This aspect I intend to deal with at a later stage. In the Judges' case (supra) PLD 1996 SC page 324 the majority has held that the interpretation of various Articles relating to the superior judiciary given by this Court in the said case will be binding on the executive which includes the President, and the Prime Minister. I have already quoted hereinabove paras. 66, 68 and 69 of my opinion in which the above issue has been dealt with.”

The history of appointment of Judges in the High Court is that in pre-partition era, the Chief Justice and Judges in the High Court were appointed by the Maharaja of Jammu & Kashmir at his sweet will. Similarly, under the Courts and Laws Code, 1949, the Chief Justice and Judges were appointed by the Azad Jammu & Kashmir Government at its discretion which was clearly against the independence of the judiciary. For the 1st time, a marked change was brought in the Act, 1974, whereby the process of consultation was introduced for the appointment of Judges in the superior judiciary on the pattern of Constitution of India and the Constitution of Islamic Republic of Pakistan, 1956, 1962 and 1973.

32. Admittedly, private respondent is the senior most Judge of the High Court, therefore, he was recommended by the Hon'ble Chief Justice of Azad Jammu & Kashmir as Chief Justice of High Court but after a lapse of considerable time, his advice was not issued by the worthy Chairman Kashmir Council and private respondent remained Acting Chief Justice of High Court for more than one and half year. In the light of dictum laid down by the Apex Court of Pakistan, the worthy President is bound to make confirmation order in favour of private respondent as Chief Justice of High Court on the basis of valid recommendations of Hon'ble Chief Justice of Azad Jammu & Kashmir but unfortunately, the concerned authorities failed to perform its Constitutional duty due to one reason or the other, which is clear cut violation of the judgments of the Apex Court of Pakistan as well as the Apex Court of Azad Jammu & Kashmir.

33. In view of the relevant provisions of the Constitution, the most senior Judge of Apex Court or High Court has a legitimate expectancy to be considered for appointment as the Chief Justice and in the absence of any concrete and valid reasons to be recorded by the worthy President/Executive, he is entitled to be appointed as such in the respective Court.

34. The same principle has also been laid down in a case titled “*Messrs Forbes Forbes & Campbell Co. through Company Secretary Vs. Messrs Ebrahim Trust through Managing Trustee and 2 others*” [PLD 2010 Karachi 170], which reads as under:-

“(b) *Constitution of Pakistan (1973)*---
---*Art. 189*---*Judgment of Supreme Court interpreting any constitutional provision or law or its own previous judgment*---*Binding effect*---
Scope;

When the Supreme Court interprets the effect of any provision of the Constitution or a law or its own judgment, it becomes law of the land. When the Supreme Court interprets the legal effect of its earlier judgment in a certain manner, then it is not open to the High Court to differ from such interpretation. All Courts have to examine a controversy in the light of such interpretation, unless the Supreme Court itself overrules it through its subsequent decision. However, as long as a judgment of the Supreme Court stands, it has to be given effect to by all Courts including the High Court.”

35. An identical proposition came before the Apex Court in a case titled “*Muhammad Mansha and others Vs. Sharifan Bibi and others*” [2006 CLC 608], as under:-

(a) *Constitution of Pakistan (1973)*---
---*Art. 189 & 190*---*Judgment of Supreme Court*--
-*Judgment of Supreme Court was binding on each and every organ of the State by virtue of Arts. 189 & 190 of Constitution.*”

36. There is an unfortunate history of appointments of Chief Justices in Azad Jammu & Kashmir, it is in my judicial notice that Acting Chief Justices of the Apex Court of Azad Jammu & Kashmir and High Court of Azad Jammu &

Kashmir were appointed and they were not confirmed for a long time. Ch. Rahim Dad Khan (late), the then Chief Justice of Azad Jammu & Kashmir was appointed as Chairman of Azad Jammu & Kashmir Shariat Court on 08.10.1980. On the same day, Raja Muhammad Khurshid Khan (late), the next senior Judge of the Supreme Court was appointed as Acting Chief Justice who continued as Acting Chief Justice of Azad Jammu & Kashmir till 02.06.1987. He remained the Acting Chief Justice of Azad Jammu & Kashmir for a period of almost seven years. A number of vacancies of Judges in the High Court and the Supreme Court fell vacant. Mr. Justice Sher Zaman Chaudhry and Mr. Justice Qazi Abdul Ghafoor were appointed as permanent Judges of the High Court on the recommendations of Raja Muhammad Khurshid Khan, Acting Chief Justice of Azad Jammu & Kashmir, while a number of Judges was appointed as ad hoc Judges on the recommendations of the Acting Chief Justice of Azad Jammu & Kashmir. Similarly, the Chief Justice of High Court, Mr. Justice Abdul Majeed Mallick was appointed as ad hoc Judge of the Apex Court and Mr. Justice Sardar Muhammad Ashraf Khan was appointed as Acting Chief Justice of the High Court. Permanent Judges were appointed in the High Court on the recommendations of the Acting Chief Justice of Azad Jammu & Kashmir and the Acting Chief Justice of the High

Court. The appointment of one of the Judges was challenged by way of writ petition. The writ petition was dismissed and the High Court observed that such Acting Chief Justice who has expectancy to be appointed as permanent Chief Justice can validly recommend a person for appointment as Judge. Likewise, Mr. Justice Sardar Muhammad Nawaz Khan served as an Acting Chief Justice (from 28.09.2006 to 07.12.2009) who ultimately retired as an Acting Chief Justice of High Court of Azad Jammu & Kashmir. In the same way, the incumbent Acting Chief Justice of Apex Court of Azad Jammu & Kashmir is holding the position as an Acting Chief Justice of Azad Jammu & Kashmir since 1st April, 2020 while private respondent was also elevated as an Acting Chief Justice of High Court of Azad Jammu & Kashmir from 16 November, 2019.

37. The Apex Court of Azad Jammu & Kashmir in Muhammad Younas Tahir's case, supra has already passed clear cut direction to the concerned authorities that in future, the appointments of Judges and Chief Justices in the Supreme Court and the High Court shall be made in the light of the dictum laid down in *Al-Jehad Trust's* case. The concluding portion of the aforesaid judgment is hereby reproduced as under:-

“As we have already observed that under the scheme of the Azad Jammu & Kashmir Interim Constitution Act, 1974, a vacancy for the office of Chief Justice of Azad Jammu & Kashmir and the Chief Justice of High Court has to be filled in immediately when it occurs, but it is sorry state of affairs that in past the Chief Justices of the Azad Jammu & Kashmir and the Chief Justice of the High Court remained as Acting Chief Justices for years and the concerned authorities failed to perform its Constitutional duty. We direct that in future all the appointments of Judges and Chief Justices in the Supreme Court and the High Court shall be made in the light of the dictum laid down in Al-Jehad Trust’s case.

50. The direction issued by the Supreme Court of Pakistan in Al-Jehad Trust’s case [PLD 1996 SC 324] in paragraph 7(iii); that permanent vacancies occurring in the offices of the Chief Justice and Judges normally should be filled in immediately not later than 30 days but a vacancy occurring before the due date on account of death or for any other reasons, should be filled in within 90 days on permanent basis, is also applicable in case of appointment of Chief Justices and Judges in the superior Judiciary of Azad Jammu & Kashmir and we accordingly direct.”

(Accentuating is mine)

38. It is in my judicial notice that in Criminal Appeal Nos. 1 to 4 and 6 to 10 of 2002 titled as “**Ch. Abdul Razzaq and others Vs. The State**”, decided on **03.07.2002**, following order was passed by the then Chief Justice of this Court:-

“In view of above circumstances of the case and law cited at the bar, I deem it proper to keep the matter pending for further 15 days and in case, the Court is not completed within that period, appropriate order in these cases shall be passed in the light of the arguments of the learned counsel for the parties regarding the constitutionality of the Ehtesab Law and competence of the High Court to pass an appropriate order if the executive

fails to complete the forum. The files shall be placed before the Court on 31.01.2002 and if the bench is earlier completed, the cases shall be taken up forthwith.

A notice along with a copy of this order and memorandum of appeal shall be sent to Mr. Umar Mahmood Kasoori, standing Counsel for the Azad Jammu & Kashmir Council to contact the Council in this behalf and inform the Court about the progress in the matter”

39. In compliance of the aforesaid order of this Court, the worthy Chairman AJ&K Council issued the advices and the Judges were appointed before next date of hearing and on the next date i.e 30.01.2002 issued the following order:-

“A notice was issued to the standing counsel for the Azad Jammu & Kashmir Council on 15.01.2002 to contact the counsel for completion of the High Court by appointing the Judges as the bench required under law for hearing of the cases could not be constituted. Mr. Umar Mahmood Kasouri, the standing Counsel for the Azad Jammu & Kashmir, has placed on record a Notification of the Government issued on the basis of the advice of the Council whereby two Judges of the High Court have been appointed and their oath is being solemnized today. Prompt action of the Council after the notice of the Court is appreciable. The cases shall be placed for arguments before the Division Bench tomorrow on 31.01.2002.”

Admittedly, due to non-availability of the Judges of Apex Court as well as the High Court of Azad Jammu & Kashmir, the litigants are suffering badly and the legal community is demanding for induction in the superior judiciary, therefore, prompt Constitutional action is required

on behalf of the appointing authority in respect of appointment of Judges.

40. In cases *Al-Jehad Trust and Muhammad Younas Tahir*, the Apex Court of Pakistan as well as Azad Jammu & Kashmir categorically held that the Senior Most Judge of the Supreme Court as well as High Court shall be appointed as Chief Justice of the concerned Court except any concrete and valid reason, hence, in the light of the aforesaid judgments, the expectancy for appointment as Chief Justice lies to the senior most Judge of the concerned Court and in absence of any concrete or valid reason, the worthy President, Prime Minister or Chairman Kashmir Council have nothing to do for selection of Chief Justices of the Apex Court or High Court, therefore, I left with no option except to issue a direction to the Executive to implement the principle laid down in *Al-Jehad Trust's case (Al-Jehad Trust through Raeesul Mujahideen Habib-Ul-Wahabb-ul-Khairi and others Vs. Federation of Pakistan and others)* [PLD 1996 Supreme Court 324] and *Muhammad Younas Tahir case (Sardar Karam Dad Khan, Advocate, Supreme Court Azad Jammu & Kashmir Muzaffarabad and 5 others Vs. Chairman AJ&K Council/Prime Minister of Pakistan, through Secretary AJ&K Council Secretariat, Islamabad and 09 others [PLJ 2010 AJ&K 40]*, hence, the official

respondents are hereby directed to complete the process for permanent appointment of Hon'ble Chief Justices of Apex Court as well as of this Court within a period of thirty days and all the other vacant positions of Judges in both the Courts should be filled in within next one month after permanent appointment of Chief Justices of Apex Court and High Court. The impugned notification of retirement of private respondent is hereby modified as Chief Justice of High Court according to the principle laid down in Muhammad Younas Tahir's case.

A copy of this judgment shall be sent to Secretary to worthy President, Secretary Law and Secretary AJ&K Council for compliance. Accordingly ordered.

Muzaffarabad.
19.03.2021

(Sd)
JUDGE