

**SUPREME COURT OF AZAD JAMMU & KASHMIR**

[Appellate Jurisdiction]

**PRESENT:**

Mohammad Azam Khan, C.J.  
Ch. Muhammad Ibrahim Zia, J.  
Raja Saeed Akram Khan, J.

1. Civil Appeal No.166 of 2014  
(P.L.A. filed on 29.11.2013)

Shah Ghulam Qadir s.o Shah Ghulam Nabi r.o village Khawaja  
Seri.Malik Seri, Tehsil Sharda, District Neelum.

.... APPELLANT

*v e r s u s*

1. Sardar Gul-e-Khandan s.o Sardar Habibullah Khan r.o Kel,  
Tehsil Sharda, District Neelum.

..... RESPONDENT

2. Chief Election Commissioner, Azad Jammu & Kashmir,  
House NO.11, Street No.120, sector G-11.4, Islamabad.
3. Returning Officer LA-XXIII, Neelum-1.Senior Civil Judge  
Athmuqam, District Neelum.
4. Azad Government of the State of Jammu & Kashmir  
through its Chief Secretary, Muzaffarabad.
5. Mian Abdul Waheed r.o Kundal Shahi candidate of LA-  
XXIII, Neelum-I, District Neelum.
6. Pakistan People's Party.
7. Pakistan Muslim League (N).
8. All Jammu & Kashmir Muslim Conference.
9. Mutahidda Qaumi Movement.

..... PROFORMA RESPONDENTS

(On appeals from the judgment of the High Court,  
dated 29.11.2013 in Writ Petition No.1038 of 2011)

FOR THE APPELLANT: Raja Imtiaz Ahmed, advocate.

FOR THE RESPONDENTS: Mr. Mansoor Pervaiz Khan,  
Advocate-General, M.s Sadaqat  
Hussain Raja, Mushtaq Ahmed  
Janjua, Mir Sharafat Hussain,  
Barrister Humayun Nawaz & Syed  
Shafqat Gardezi, advocates.

FRIENDS OF THE COURT: Justice (R) Syed Manzoor Hussain  
Gilani and Raja Muhammad Hanif  
Khan, advocates.

2. Civil Appeal No.167 of 2014  
(P.L.A. filed on 29.11.2013)

Sardar Gul-e-Khandan s.o Sardar Habibullah Khan r.o Kel,  
Tehsil Sharda, District Neelum, candidate LA-XXIII, Neelum-1.

.... APPELLANT

*v e r s u s*

1. Chief Election Commissioner, Azad Jammu & Kashmir,  
New Secretariat, Chattar, Muzaffarabad.
2. Azad Government of the State of Jammu & Kashmir  
through its Chief Secretary, Muzaffarabad.
3. Shah Ghulam Qadir candidate LA-XXIII, Neelum-1, r.o B-  
Block, Ward No.5, Satellite Town, Rawalpindi.

..... RESPONDENTS

4. Mian Abdul Waheed r.o Kundal Shahi, District Neelum,  
candidate of LA-XXIII, Neelum-I, presently Minister  
Education (Schools) New Secretariat, Chattar,  
Muzaffarabad.

5. Azhar Hussain Gilani,
6. Abdus Salam Butt,
7. Abdul Majid Khan,
8. Muhammad Hussain Sargala,
9. Muhammad Akbar Ibrahim,
10. Tahir Khokhar,
11. Saleem Butt, Members Azad Jammu & Kashmir Legislative Assembly.

..... PROFORMA RESPONDENTS

(On appeals from the judgment of the High Court,  
dated 29.11.2013 in Writ Petition No.1038 of 2011)

FOR THE APPELLANT: Mir Sharafat Hussain, advocate.

FOR THE RESPONDENTS: Mr. Mansoor Pervaiz Khan,  
Advocate-General, M.s Sadaqat  
Hussain Raja, Mushtaq Ahmed  
Janjua, Mir Sharafat Hussain,  
Barrister Humayun Nawaz & Syed  
Shafqat Gardezi, advocates.

FRIENDS OF THE COURT: Justice (R) Syed Manzoor Hussain  
Gilani and Raja Muhammad Hanif  
Khan, advocates

*Date of hearing:* 13.10.2014

**JUDGMENT:**

*Mohammad Azam Khan, CJ.*—The above-titled  
appeals by leave of the Court, arise out of the judgment of the  
High Court dated 29.11.2013 in writ petition No.1038 of 2011.

Since both the appeals arise out of the same judgment, therefore, these are being disposed of through this single judgment.

2. Appellant, Shah Ghulam Qadir, filed his nomination papers to contest general elections of the Azad Jammu & Kashmir Legislative Assembly (hereinafter to be referred as Legislative Assembly), scheduled in May, 2011 for constituency No.LA-XXIII, Neelum-1, on the basis of vote registered in village Khawaja Seri of the said constituency. Prior to the registration of his vote in the electoral roll of village Khawaja Seri, his vote was registered in the electoral roll of constituency No.LA XL, Valley-5, reserved for the refugees of Kashmir valley in Ward No.5, Satellite Town, Rawalpindi. Before filing the nomination papers, through an application he got his vote cancelled from the electoral roll prepared for Ward No.5, Satellite Town, Rawalpindi (Constituency LA-XL, Valley-5) on 21.5.2011. The respondent, Sardar Gul-e-Khandan, objected to his nomination papers. The objection was turned down by the Returning Officer on 30.5.2011 and nomination papers were accepted. Sardar Gul-e-Khandan challenged the said order by way of an appeal before the Chief Election Commissioner. The learned Chief Election Commissioner through order dated 8.6.2011 dismissed the appeal. He challenged the order of Returning Officer and the Chief Election Commissioner through

a writ petition in the High Court. The High Court through judgment dated 29.11.2013 partly accepted the writ petition and declared the order of Returning Officer dated 30.5.2011 and that of the Chief Election Commissioner dated 8.6.2011 whereby nomination papers of the appellant were accepted without lawful authority and of no legal effect. It was also challenged in the writ petition that subsections (2) and (3) of Section 2 of the AJ&K Legislative Assembly Ordinance, 1970 (hereinafter to be referred as the Ordinance, 1970) may kindly be quashed. The writ petition to this extent was dismissed. Shah Ghulam Qadir and Sardar Gul-e-Khandan have challenged the said judgment of the High Court through the titled appeals by leave of the Court.

3. At the time of grant of leave to appeal, it was observed that very important legal question relating to the right of franchise/contesting elections by the refugees settled in Pakistan is under challenge, which is the most important issue under the provisions of Azad Jammu & Kashmir Interim Constitution Act, 1974 (hereinafter to be referred as the Act, 1974) and the election laws. The judgment may affect the status of the Government as enshrined in UNCIP Resolutions, therefore, it was ordered that Azad Jammu & Kashmir Legislative Assembly, political parties having representation in Azad Jammu & Kashmir Legislative Assembly and the parties who participated in the general

elections of 2011, be arrayed as parties in the line of respondents and seek their point of view. Notices were issued to the Speaker, AJ&K Legislative Assembly through Secretary Assembly, Leader of the House, Leader of Opposition and other parties, who participated in the general elections. Assistance was also sought from Mr. Justice (R) Syed Manzoor Hussain Gilani, a former learned Judge of this Court and Raja Muhammad Hanif Khan, advocate, Muzaffarabad, as friends of the Court.

4. Mr. Imtiaz Ahmed Raja, advocate, counsel for the appellant in Civil Appeal No.166 of 2014, while dilating upon the facts, submitted that the schedule for elections of the Legislative Assembly was announced on 16.5.2011, in the light of which, nomination papers were to be filed up to 26.5.2011. The vote of the appellant Shah Ghulam Qadir was previously entered in the electoral roll of constituency No.LA-XL, Valley-5, Ward No.5 Block B, Satellite Town, Rawalpindi. He got his vote registered in the electoral rolls of constituency No.LA-XXIII, Neelum-1, village Khawaja Seri. On 19.5.2011, he moved an application to the Chief Election Commissioner for deletion of his name from the electoral rolls of Constituency No.LA-XL, Valley-5. His registration as voter was deleted from the electoral roll of the said constituency on 21.5.2011. At the time of filing of nomination papers, his name was registered only in the electoral roll of

village Khawaja Seri, falling in constituency No.LA-XXIII, Neelum-1. The learned counsel submitted that under Section 13 of the Electoral Rolls Ordinance, 1970, no person can be enrolled as voter in more than one electoral area. Under Section 15 of the Electoral Rolls Ordinance, 1970, the Chief Election Commissioner has power of removing of the name of a person from one electoral area or inclusion of the name of a person to the other electoral area. The name of the appellant was entered in the electoral roll of village Khawaja Seri, constituency No.LA-XXIII, Neelum-1 in the light of the provisions contained in Section 10 of the Electoral Rolls Ordinance, 1970. The learned counsel relied upon the cases reported as *Ch. Akhtar Hussain & another v/s Election Commission of Azad Jammu & Kashmir & 4 others* [PLJ 1990 AJ&K 63 (FB)] and *Sardar Sikandar Hayat Khan v/s Syed Ghulam Mujtaba Bokhari & another* [PLD 1991 Supreme Court (AJ&K) 1].

5. While controverting the arguments of the counsel for the appellant, Mir Sharafat Hussain, advocate, counsel for the respondent, Sardar Gul-e-Khandan in Civil Appeal No.167 of 2014, argued that a person, whose vote has been entered in the electoral rolls maintained for the residents of valley, now settled in Pakistan or entered as voter in the electoral rolls mentioned in subsection (2) of Section 8, para (c) of the Electoral Rolls

Ordinance, 1970, cannot contest elections against the seats falling in the administrative areas of Azad Jammu & Kashmir but at the late stage of arguments, he withdrew from this argument and stated that any State subject entered as voter in categories (b) and (c) mentioned in subsection (2) of Section 8 of the Electoral Rolls Ordinance, 1970, can validly contest the election for the seat of Legislative Assembly from the areas under the control of the Azad Government of the State of Jammu & Kashmir. The learned counsel submitted that the appellant, Shah Ghulam Qadir, had contested the election for the Legislative Assembly from constituency No.LA-XL, Valley-5, more than once. He contested the last election for the Legislative Assembly from constituency No.LA-XL, Valley-5 and stood returned. At the time of filing nomination papers, he was a sitting member of the Legislative Assembly from the said constituency. His vote is entered in the electoral roll of said constituency in Ward No.5 of Satellite Town, Rawalpindi. The votes of his family members i.e. the mother, wife and children are also entered in the electoral roll of said constituency. The learned counsel submitted that the appellant got his vote registered in the electoral roll of village Khawaja Seri illegally. The name of a State Subject can only be entered in the electoral rolls of an electoral area, if he is an ordinary resident of that area and word "resident" has been

defined in Section 12 of the Electoral Rolls Ordinance, 1970, which provides that; “resident” means ‘a person who ordinarily resides in that area or owns or is in possession of dwelling house or other immovable property in an electoral area in the territories administered by the Government’. The learned counsel argued that the word “resident” has been defined by the Azad Jammu & Kashmir High Court in the case reported as *Ch. Akhtar Hussain & another v/s Election Commission of Azad Jammu & Kashmir & 4 others* [PLJ 1990 AJ&K 63 (FB)] and this Court in the case reported as *Sardar Sikandar Hayat Khan v/s Syed Ghulam Mujtaba Bokhari & another* [PLD 1991 Supreme Court (AJ&K) 1]. In the light of these reports, the appellant, Shah Ghulam Qadir, is not an ordinary resident of village Khawaja Seri. He only owns property and a dwelling house. His name was illegally entered in the electoral roll of village Khawaja Seri. On the basis of an illegal entry in the electoral roll, he cannot contest election of the Legislative Assembly from constituency LA-XXIII, Neelum-1.

6. While arguing the cross appeal, Mir Sharafat Hussain, advocate, submitted that subsections (2) and (3) of Section 2 of the Ordinance, 1970, are *ultra vires* the Act, 1974. The bifurcation of seats is not provided in the Act, 1974. The learned counsel referred to and relied upon the case reported as

*Minerva Mills Ltd. v/s Union of India & others* [AIR 1980 Supreme Court 1789], *R. C. Cooper v/s Union of India* [AIR 1970 Supreme Court 564], *State of Bombay & another v/s United Motors Ltd. & others* [AIR 1953 Supreme Court 252], *State Government M. P. V. Ramkrishna* [AIR 1954 Supreme Court 19], *L. I. C. of India & another v/s Consumer Education & Research Centre & others* [AIR 1995 Supreme Court 1811], *Sh. Riaz-ul-Haq & another v/s Federation of Pakistan through Ministry of Law & others* [PLD 2013 Supreme Court 501], *All Pakistan Newspapers Society & others v/s Federation of Pakistan & others* [PLD 2012 Supreme Court 1], *Watan Party & others v/s Federation of Pakistan & others* [PLD 2012 Supreme Court 292], *Baz Muhammad Kakar & others v/s Federation of Pakistan through Ministry of Law & Justice, Islamabad & others* [PLD 2012 Supreme Court 870] and *Baz Muhammad Kakar & others v/s Federation of Pakistan through Ministry of Law & Justice, Islamabad & others* [PLD 2012 Supreme Court 923].

7. Barrister Human Nawaz Khan, advocate, while appearing as counsel on behalf of Speaker Legislative Assembly, raised the following preliminary objections on maintainability of appeal filed by Sardar Gul-e-Khandan:-

- a) That the Returning Officer was a necessary party. He was party in the writ petition but has not been arrayed as party in this Court. Without impleading necessary party, appeal is not maintainable.
- b) That the annexures B/1 to B/10 are not certified copies. Without filing certified copies, appeal in this Court is not maintainable.

The learned counsel argued that the Azad Jammu & Kashmir High Court in the impugned judgment has declared Section 2(2) and (3) as a valid piece of legislation. The judgment of the High Court on this question is perfectly legal. The learned counsel relied upon the book titled *The Constitution of Azad Jammu & Kashmir* by Mr. Justice (R) Syed Manzoor Hussain Gilani, (second paragraph at page 2), where declaration of 24<sup>th</sup> October, 1947 has been reproduced, according to which the Government of Azad Jammu & Kashmir is the representative of Kashmiri people.

- c) The learned counsel referred to the Azad Jammu & Kashmir Refugees Act, 1960 and while relying upon the permeable of the same, argued that the persons

who have migrated due to the atrocities of occupation forces of India, have equal fundamental rights. The learned counsel argued that the wisdom of the legislature cannot be challenged. The learned counsel pressed into service the argument that the refugee remains always refugee till there remains the fear of persecution.

8. Mr. Mushtaq Ahmed Janjua, advocate, counsel for the respondents, Syed Azhar Gilani, Abdus Salam Butt, Abdul Majid Khan, Muhammad Hussain Sargala, Muhammad Akbar Ibrahim, Tahir Khokhar and Saleem Butt, the sitting members of the Legislative Assembly, elected against the seats reserved for refugees settled in Pakistan, argued that subsections (2) and (3) of Section 2 of the Ordinance, 1970, is a valid piece of legislation. It has got the constitutional backing. The refugees who have migrated from occupied Kashmir due to atrocities of Indian forces, are State Subjects, whether they are settled in Azad Jammu & Kashmir or Pakistan. The learned counsel submitted that Section 3 of the Azad Jammu & Kashmir Interim Constitution Act, 1974, provides that Islam shall be the State religion and rights of refugees are recognized in Islam. The learned counsel in this respect referred to Surah Al-Noor, verse 24, Sura Al-Baqarah, verse No.2 and Sura Al-Tauba, verse No.9.

He requested for dismissal of appeal filed by Sardar Gul-e-Khandan.

9. Mr. Justice (R) Syed Manzoor Hussain Gilani, a former Judge of this Court, who was requested to assist the Court, argued that the name of Shah Ghulam Qadir is validly entered in the electoral roll of village Khawaja Seri, constituency No.LA-XXIII, Neelum-1. He was duly qualified to be a candidate from the said constituency under Section 24 of the Act, 1974 and the provisions contained in the Ordinance, 1970. All the refugees settled in Pakistan whose votes are entered in any of the electoral roll, can competently be the candidates for a seat of Legislative Assembly falling in the administrative control of the Azad Government of the State of Jammu & Kashmir. He, in this respect, relied upon the definition of word “Azad Jammu & Kashmir” appearing in the Act, 1974. The learned counsel referred to Sections 22 and 31 of the Act, 1974. He also referred to the provisions of State Subject Notification No.I-L.84 of 1927 and 3<sup>rd</sup> Maghar, 1992 and argued that in the light of said notifications, the persons who voluntarily migrated from the State, after two generations, are not entitled to the internal rights in the State. He referred to the case reported as *Al-Jehad Trust through Habib Wahab Al-Khairi v/s Federation of Pakistan through Secretary, Ministry of Kashmir Affairs, Islamabad & 3*

*others* [1999 SCMR 1379] for the purpose of defining citizenship, nationality and the State Subject. It was argued by Mr. Justice (R) Syed Manzoor Hussain Gilani that the provisions of the Act, 1974, were not enacted in accordance with the declaration of 24<sup>th</sup> October, 1947, therefore, for the purpose of interpretation of the Act, 1974, it is not relevant. The learned counsel pressed into service that the Legislative Assembly is defined in Section 22 of the Act, 1974. Under subsection (2) of Section 22, the manner of election shall be determined. The seats reserved for the refugees have not been mentioned in Section 22 of the Act, 1974. It is not the intention of the Act, 1974 that under subordinate law, the seats be bifurcated into different categories. Had there been the intention of the legislature to provide the seats for the refugees separately, then the Act, 1974 should have provided as such. Separate seats can only be provided by amending the Act, 1974. The provisions of subsection (2) and (3) of Section 2 of the Ordinance, 1970, are alien and contrary to the Act, 1974. He also argued that Azad Jammu & Kashmir is not a local authority, as defined in UNCIP resolutions.

10. Raja Muhammad Hanif Khan, advocate, who was also requested to assist the Court, argued that the Legislative Assembly is creation of Section 22 of the Act, 1974. The provisions of subsection (2) and (3) of Section 2 of the

Ordinance, 1970, are against fundamental right No.15. These are *ultra vires* the Act, 1974 and not maintainable. The learned counsel argued that the purpose of the Act, 1974 has been mentioned as better government and administration of Azad Jammu & Kashmir. A person, who is not the resident of Azad Jammu & Kashmir, cannot sit as the member of Legislative Assembly and legislate for the residents of Azad Jammu & Kashmir. Only such persons have a right of legislation for the residents of Azad Jammu & Kashmir, who are residents of the locality and persons living outside the territory of Azad Jammu & Kashmir have no right to legislate for the residents of Azad Jammu & Kashmir. The learned counsel also pressed into service another argument that under the Act, 1974, the funds of the State can only be utilized for the residents of the territory. These cannot be utilized for any other project in Pakistan on the ground that the refugees are settled there. By looking from this aspect, 12 seats reserved for the refugees and other persons, State subjects settled in Pakistan, affect the fundamental rights of the State Subjects, who are the residents of Azad Jammu & Kashmir territory. The learned counsel lastly argued that under the Act, 1974, there is no classification of general seats. Section 2(2) and (3) of the Ordinance, 1970 divides the refugees into two categories, which is *ultra vires* the Act, 1974. He relied upon a

recent judgment of this Court recorded in the case titled *Bashir Ahmed Mughal v/s Azad Government & others* (Civil Appeal No.11 of 2014, decided on 25.8.2014.

11. In response to the notice the political parties having representation in the Legislative Assembly appeared and submitted their version in written form. Following written version was submitted by different political parties:-

- a) PML(N), Azad Jammu & Kashmir, has filed the concise statement and took the position that Legislative Assembly is defined by Section 22 of the Act, 1974. Ordinance, 1970, provides distribution of seats. Section 51 of the Act, 1974, saves all the laws which were enforced before the commencement of said Act. Ordinance, 1970 has got constitutional protection. No provision of the said ordinance is *ultra vires* the Constitution. A request was made for dismissal of appeal filed by Sardar Gul-e-Khandan. Mr. Sadaqat Hussain Raja, advocate, counsel for PML(N) argued subsections (2) and (3) of Section 2 of the ordinance, 1970, are valid piece of legislation which is protected by the Constitution. The learned counsel referred to and relied upon Sardar Sikandar

Hayat khan's case [PLD 1991 Supreme Court (AJ&K) 1].

- (b) In the concise statement filed on behalf of Pakistan People's Party, Azad Jammu & Kashmir, it is stated that subsections (2) and (3) of Section 2 of the Ordinance, 1970, are valid piece of legislation. A request was made for dismissal of appeal filed by Sardar Gul-e-Khandan.
- (c) Malik Muhammad Nawaz Khan, Acting President of the All Jammu & Kashmir Muslim Conference filed concise statement stating therein that Muslim Conference has unanimous view that 12 seats reserved for refugees settled in Pakistan through the Ordinance, 1970, at present form are contrary to Section 4 of the Act, 1974. Twelve seats may be reserved for refugees but the mode of election should be changed and provided through indirect election by the elected member of the Legislative Assembly like other special seats provided in law i.e. women, technocrats, overseas etc.
- (d) Concise statement was also filed on behalf of Jammu & Kashmir People's Party stating therein that the

seats reserved for refugees from occupied Jammu & Kashmir may be kept intact till the decision of final fate of the Kashmiri people, but the election schedule and the election process of the candidates may be like the proportional representation and the members of Legislative Assembly elected through adult franchise from Azad Jammu & Kashmir may be given power to elect the member from Pakistan like Section 51 of the Pakistan Constitution, 1973.

- (e) The General Secretary, Jafria Supreme Council Azad Jammu & Kashmir, filed concise statement wherein he supported the impugned judgment of the High Court and requested for dismissal of appeal filed by Shah Ghulam Qadir.
- (f) Similarly concise statement has been filed on behalf of Chairman Human Welfare Party, Azad Jammu & Kashmir wherein the version is taken that the party supports the judgment of the High Court. The name or particulars of the Chairman are not entered in the concise statement.
- (g) A concise statement was filed on behalf of the All Jammu & Kashmir Muslim Conference at the time of

hearing of arguments through Sardar Muhammad Raziq Khan, advocate, wherein the party taken the position that provisions of subsections (2) and (3) of Section 2 of the Ordinance, 1970, are not *ultra vires* the Constitution. These are protected under Section 51 of the Act, 1974 and the provisions of the Constitution cannot be called in question by the Court under Section 57 of the Act, 1974.

12. On the conclusion of arguments, Mir Sharafat Hussain, advocate, counsel for Sardar Gul-e-Khandan, took the position that he accepts the right of refugees to contest elections from any constituency and is also not interested in the decision of his appeal to the extent of subsections (2) and (3) of Section 2 of the Ordinance, 1970.

13. We have heard the learned counsel for the parties and perused the record carefully.

14. It is an admitted position that Shah Ghulam Qadir is a State Subject. He contested the elections more than once and remained elected member of the Legislative Assembly from constituency No.LA XL, Valley 5, and his name was registered in the electoral roll of said constituency, ward No.5 of Satellite Town, Rawalpindi. He got registered his vote in the electoral roll

of constituency No.LA-XXIII, Neelum-1, in village Khawaja Seri before filing of nomination papers. It is also admitted fact that before filing of nomination papers for contesting election, he filed an application and got deleted his name from the electoral roll of constituency No.LA-XL, Valley-5, Ward No.5, Satellite Town Rawalpindi and at the time of filing of nomination papers, his name was registered only in the electoral roll of village Khawaja Seri, Neelum (constituency No.LA-XXIII, Neelum-5).

15. The electoral rolls in Azad Jammu & Kashmir are prepared under the Electoral Rolls Ordinance, 1970. Section 8 of the Ordinance postulates that for each electoral area, the electoral rolls for elections to the Legislative Assembly shall be prepared. The Section provides three types of electoral rolls; (a) State Subjects residing in the Azad Jammu & Kashmir territory; (b) State Subjects of Indian Occupied Areas of Anantnag (Islamabad), Baramula and Muzaffarabad, now residing in Pakistan and; (c) State Subjects other than mentioned in clauses (a) and (b) above and now residing in Pakistan. For the purpose of preparation of electoral rolls, the Registration Officers are appointed under Section 9 of the Electoral Rolls Ordinance, 1970, by the Chief Election Commissioner, who are empowered under Section 10 to prepare the electoral roll for an electoral area under the superintendence, direction and control of the

Commissioner. The detailed scheme for preparation of electoral rolls is provided under subsections (1) to (6) of Section 10 and under subsection (7) of the Ordinance, it is provided that an electoral roll shall be revised, amended or corrected in the prescribed manner as and when necessary so as to correct any entry or omission therein or to include the name of any qualified person whose name doesn't appear on such roll or to delete therefrom the name of any person who has died or who is or has become disqualified for enrollment on such roll. This subsection further empowers the Registration Officer that an amended electoral roll be maintained in the prescribed manner. Under subsection (1) of Section 10 of the Ordinance, the Registration Officer has been empowered to prepare the electoral roll for an electoral area containing the name of every State Subject, who on the qualifying date, is not less than eighteen years of age, doesn't stand declared by a competent court to be of unsound mind and is, or is deemed under Section 12, to be resident in the electoral area. The word "resident" has been defined in Section 12 of the Electoral Rolls Ordinance, 1970. Section 13 of the Ordinance provides that no person shall be entitled to be enrolled on the electoral roll for any electoral area more than once or on the electoral roll for more than one electoral area.

16. The question which needs resolution is to determine the validity and legality of the entry of the name of a State Subject under Sections 8, 10 and 12 of the Electoral Rolls Ordinance, 1970. For proper appreciation we deem it necessary to reproduce the provisions of Sections 8, 10 and 12 of the Electoral Rolls Ordinance, 1970, which read as under:-

**“8. Electoral Rolls for Election of Legislative Assembly.—**(1) The electoral rolls for election to the Legislative Assembly shall be prepared for each electoral roll.

(2) Notwithstanding anything contained in sub-section (1) separate electoral lists shall be prepared for.—

- (a) State subjects residing in Azad Jammu & Kashmir territory;
- (b) State Subjects of the Indian occupied areas of the districts of Anantnag (Islamabad), Baramula and Muzaffarabad and now residing in Pakistan; and
- (c) State subjects other than those mentioned in clauses (a) and (b) above and now residing in Pakistan.”

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10. **Preparation of electoral rolls, etc.—**(1) The Registration Officer for an electoral area shall, under the superintendence, direction and control of the Commissioner, prepare for that area in the prescribed manner a draft electoral roll containing the name of every State Subject who, on the qualifying date:--

- (a) is not less than eighteen years of age;

(b) does not stand declared by a competent Court to be of unsound mind; and

(c) is, or is deemed under Section 12, to be resident in the electoral area.

(2) The draft electoral roll prepared under sub-section (1), together with a notice inviting claims and objections within such period as may be specified by the Commissioner with respect thereto, shall be published in such manner as may be prescribed.

(3) The Registration Officer shall make such additions, modifications or corrections in the draft electoral roll as may be required by any decision on any claim, or objection or as may be necessary for correcting any clerical, printing or other error.

(4) After making additions, modifications or corrections, if any, under sub-section (3), the Registration Officer shall publish in the prescribed manner the final electoral roll for each electoral area.

(5) (a) The Electoral Roll published under sub-section (4), upon issuance of its notifications by the Commissioner, be deemed to be the Electoral Roll of the electoral area concerned and shall come into force immediately on such notification.

(b) The existing electoral roll for the time being enforce shall continue to remain enforce and operative until the notification by the Commissioner under clause (a) is issued.

(6) If the Commissioner, on account of any gross error or irregularity in the preparation of an electoral roll for any electoral area published under subsection (4), considers it necessary so to do, he may by order direct that:--

- (i) the electoral roll for that area be amended, revised or corrected in such manner as the Commissioner may deem fit;
- (ii) the electoral roll or draft for that area shall stand cancelled and that an electoral roll for such area be prepared afresh in accordance with the provision of the Ordinance or Rules made thereunder.

(7) An electoral roll shall be revised, amended or corrected in the prescribed manner, as and when necessary, so as:--

- (i) (a) to correct any entry or supply any omission there in; or
  - (b) to include the name of any qualified person whose name does not appear on such roll; or
  - (c) to delete therefrom the name of any person who has died or who is or has become disqualified for enrollment on such roll.
- (ii) An electoral roll, as amended and corrected, from time to time, shall be maintained in the prescribed manner and shall, together with a notice inviting application for further amendment and correction, be kept open to public inspection, and copies of such roll shall be supplied to any person applying therefor, on payment of such fee as may be prescribed.

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12. **Meaning of “resident”.**—(1) Save as hereinafter provided, a person shall be deemed to be resident in an electoral area if he,

- (a) Ordinarily resides in that area; or
- (b) Owns or is in possession of dwelling house or other immovable property in an electoral area in the territories administered by the Government:

Provided that where any such person owns or possesses more than one dwelling house or other immovable property in more than one electoral area in such territories, he, his wife and children ordinarily resident with him, if otherwise eligible for enrollment, may at his option be enrolled in any one of such areas.

(2) A person who for any reason resides in an electoral area amended other than electoral area in which he would have but for such reasons been resident shall, unless he otherwise indicates in writing to the Registration Officer, be deemed to be resident in the former electoral area.

(3) the wife of any such person as is referred to in subsection (2) and such of his children as are entitled to be enrolled shall, if they ordinarily reside with such person be deemed to be resident in the electoral area in which such person is deemed to be resident under that subsection.

(4) A person who is detained in prison or other legal custody shall be deemed to be resident in the electoral area in which he would have been resident if he has not been so detained.

(5) Where the residence of a State Subject is in doubt, he may himself indicate the electoral area or the electoral roll of which he desires to be enrolled.”

17. The scheme of Electoral Rolls Ordinance, 1970 is that a Registration Officer for an electoral area is appointed under Section 9 of the Ordinance, who is required under Section 10 to prepare for the assigned electoral area a draft electoral roll containing the name of State subject who on the qualifying date, is not less than eighteen years of age, doesn't stand declared by a competent court to be of unsound mind and is, or is deemed under Section 12, to be resident in that particular electoral area. Sub-sections (3), (4) and (5) of Section 10 of the Ordinance, deal with the powers of the Registration Officer for making additions, modifications, corrections in the draft electoral roll and publishing of the final electoral roll and issuance of notification of such published electoral roll. Under sub-section (6) of the Ordinance, if the Chief Election Commissioner on account of any gross error or irregularity in the preparation of electoral roll of any electoral area and published as such under subsection (4), deems it necessary, he may order for amendment, revision or correction of the electoral roll or may cancel the electoral roll or draft for that area. Under subsection (7) of the Ordinance, the electoral roll shall be revised, amended or corrected as and when necessary in a prescribed manner. Under clause (i) of subsection

(7), the revision, amendment and correction includes to correct any entry or supply any omission or to include the name of any qualified person, whose name doesn't appear on such electoral roll and deletion of the name of any person from the electoral roll, who has died or is or has become disqualified for enrollment on such electoral roll. Para (c) of subsection (1) of Section 10 refers to Section 12 for determination of the fact of a State subject being "resident" of a particular electoral area. For entry of the name of any State subject in an electoral roll being prepared for an electoral area, three conditions referred to hereinabove are required to be fulfilled. Under subsection (1) of Section 12, the word "resident" is defined as; a person who ordinarily resides in that area; or owns or is in possession of dwelling house or other immovable property in an electoral area in the territories administered by the Government. The word "resident" came under consideration of this Court in the case reported as *Sardar Sikandar Hayat Khan v/s Syed Ghulam Mujtaba Bokhari & another* [PLD 1991 Supreme Court (AJ&K) 1]. The expression "ordinary resident" was defined at page 14 of the report in the following words:-

“.....The moot point in the case which needs to be resolved is as to whether the appellant can be deemed to be a resident of the constituency in question because he has been residing in the house mentioned above. It may be observed

here that even if it is assumed that the appellant is a refugee, he would have to show that he is a resident of the electoral area in question within the meaning of section 12 of Ordinance I of 1970.

I have given my deep thought to the argument advanced at the bar and I am not impressed by the argument that the appellant, who is a permanent resident of village Krela-Manjhan and has been residing for the last five years at Muzaffarabad as Prime Minister of the State of Azad Jammu & Kashmir, can be regarded as resident of the constituency in question merely because he has been lodging with Hamid Akhtar who is his friend or is merely an acquaintance. The expression “ordinarily resides” signifies more than a casual dwelling at a certain place. It may not be a permanent dwelling either but it is definitely not a temporary dwelling as in the case of the appellant. The expression ‘ordinarily resides’ implies that a person lives at a place with his wife or children, if any, and resides there for reasonable period and follows there the ordinary pursuits of his life occasioned by the nature of his profession. One may reside at a particular place say for a year or more in connection with business or due to some other engagements but he cannot be regarded to be an ordinary resident of that place within the meanings of section 12 of Ordinance I of 1970.”

Again, at page 23 of the report, the term “resident” has been defined from *corpus juris secundem*. The same is reproduced as under:-

“This now takes us to the question what is meant by ‘residence’ or ‘reside’. In order to find out what the connotation of word ‘residence’ or ‘reside’ is, I would do no better than to quote from the Corpus Juris Secundum,

Vol. 29, from page 69:—

‘The term ‘residence’ or ‘reside’, as used in Constitutional and statutory provisions relating to the qualifications of electors, ordinarily is synonymous with home or domicile, denoting a permanent home or dwelling place, to which the party when absent intends to return, a place where a man establishes his abode, makes the seat of his property, and exercises his civil and political rights.’

Then again it has been held:—

‘That a person cannot have his voting residence at one place while actually and habitually dwelling at another place and that an actual or real, and not an imaginary, abode occupied as a home or dwelling is essential to constitute a voting residence. The word residence does not mean domicile but abode at which a man actually lives and works. This considers the fact of residence rather the intention of the person.’

I may again quote from page 76 as follows:-

‘While a residence for the purpose of voting at an election is the settled place of abode, it need not wholly be permanent, although a certain degree of permanency is required. A permanent residence, to entitle one to vote, is where the intended voter means to abide and become a citizen until duty, business, moral obligation, contract, resolution, or convenience may compel him to elect a new home as his place of domicile.’

18. The High Court in the impugned judgment relied upon the case titled *Ch. Akhtar Hussain & another v/s Election Commission of Azad Jammu & Kashmir & 4 others* [PLJ 1990

AJ&K 63 (FB)], and the judgment of this Court reported as *Sardar Sikandar Hayat Khan v/s Syed Ghulam Mujtaba Bokhari & another* [PLD 1991 Supreme Court (AJ&K) 1]. While defining the word “resident” appearing in Section 12 of the Electoral Rolls Ordinance, 1970, the High Court ordered for cancellation of vote of the appellant, Shah Ghulam Qadir, from the electoral roll of constituency LA-XXIII, Neelum-1. The main question for resolution before the Court in the referred case was regarding ordinary residence of Sardar Sikandar Hayat Khan. The judgment in Sikandar Hayat Khan’s case (supra) was delivered in the circumstances that Sardar Sikandar Hayat Khan was elected as a member of the Legislative Assembly from a constituency of district Kotli. His vote was registered in the village Karela Majhan of the said constituency. He was sitting Prime Minister of the Azad Jammu & Kashmir when general elections to the Legislative Assembly were announced. He filed nomination papers to contest election from Nakyal on the basis of his name registered on the electoral roll in village Karela Majhan, constituency No.LA-IX, Kotli-11. He got registered his name in the electoral roll prepared for the electoral area of Satellite Town Rawalpindi and filed his nomination papers to contest elections from constituency No.LA-XXXIV, Jammu & others-6. The nomination papers were accepted and the appeal against the

acceptance of nomination papers was dismissed by the Chief Election Commissioner. Rival candidate filed a writ petition in the High Court whereby he challenged the submission of nomination papers and registration of his name in the electoral roll prepared for category (c) mentioned in subsection (2) of Section 8 of the Electoral Rolls Ordinance, 1970. The High Court and this Court concluded that from the record Sardar Sikandar Hayat Khan is proved to be the ordinary resident of Karela Majhan. He is not ordinary resident of Satellite Town Rawalpindi. He casually resides in the house of his friend Hamid Akhtar. A casual resident cannot be considered as an ordinary resident of such an area.

20. A proviso has been attached to subsection (1) of Section 12 of the Electoral Rolls Ordinance, 1970, which is of vital importance. The effect of proviso was not directly involved in Sardar Sikandar Hayat Khan's case and the High Court in this case has not considered the effect of the proviso. A bare reading of the proviso implies that any person referred to in subsection (1) who owns or possesses more than one dwelling house or any other immovable property in more than one electoral areas, where he, his wife and his children ordinarily reside with him, he has an option for enrollment of his name in the electoral roll of any one of such areas, if he otherwise qualifies. A proviso by its very

nature has overriding effect and control over the whole section. It is used to remove special cases from general enactment and provides for special. The effect of proviso is that it takes out a case from general provision to which the proviso is attached. The proviso is defined by Earl T. Crawford in the book titled *The Construction of Statutes* at page 129, defines the proviso as under:-

“...A proviso, on the other hand, is a clause added to an enactment for the purpose of acting as a restraint upon, or as a qualification of the generality of the language which it follows. Sometimes, however, as a precautionary measure, it is used to explain the general words of the act and to exclude some ground of misinterpretation which would extend it to cases not intended to be brought within its operation or purview. Some cases apparently ascribe three functions to the proviso: (1) to exempt something from the enacting clause; (2) to qualify or restraint its generality; (3) And to exclude some possible misinterpretation of it as extending to cases not intended by the legislature. But the first function would seem to be that of the exception. And technically, the proviso should not be used to enlarge the operation of a statute, although it appears to be used for this purpose occasionally.”

M. Farani in the book titled *The Interpretation of Statutes*, at page 602, as under:-

“...The natural and appropriate office of a proviso is to create a condition precedent, to except something from the enacting clause, to limit, restrict, or qualify the statute in whole or in part, or to exclude from the scope of the

Statute that which otherwise would be within its terms. A proviso is not, however, always so used. It does not necessarily constitute a condition precedent. At times, it is implied, out of abundant caution, merely to explain the general words of the enactment and to guard against a possible construction that is not intended.”

This Court in the case reported as *M.s Ashraf & Akbar & another v/s Kh. Abdul Khaliq & others* [1995 SCR 196], observed as under:-

“...A proviso by its very nature has overriding effect if its contents are inconsistent with the main provision to which a proviso is attached. Legislature does not imply words like “notwithstanding contained to the contrary” to demonstrate its overriding nature unless it is designed to override provisions which do not immediately precede a proviso and are contained elsewhere.”

21. Clause (c) of subsection (1) of Section 10 refers to Section 12 of the Electoral Rolls Ordinance, 1970, for defining “resident” in an electoral area which is a precondition for registration of vote in the said electoral area and Section 12(1)(a) and (b) provide that a person be deemed to be resident in an electoral area if he ordinarily resides in that area or owns a dwelling house or other immovable property in such electoral area in the territories administered by the Government. The proviso attached to subsection (1) of Section 12 of the Ordinance enhances the scope of the term “resident” and takes it out from

clauses (a) and (b) of subsection (1) of Section 12 providing therein that where a person owns or possesses more than one dwelling house or other immovable property in more than one constituencies, he is eligible to be enrolled in the electoral area where he ordinarily resides. The proviso provides a right contrary to clause (a) and (b) to such person to get his name registered in the electoral roll of any of the constituencies where he owns a dwelling house and resides with his wife and children. Subsections (2) and (3) of section 12 of the Electoral Rolls Ordinance, 1970 have been substituted by Act XI of 1995 on 25.6.1995. Through the said judgment word “later” has been substituted by the word “former”. It is clear from the bare reading of subsection (2) of Section 12 that if a person resides in an electoral area other than the area where he ordinarily resides, he shall be deemed to be the resident of the former electoral area, meaning thereby that if ordinary residence of a person is different to the one he is residing, he shall be deemed to be the resident of that area and not the resident of area where he ordinarily resides. An option has been provided to the person to make choice for determining his place of residence. The choice given to a person for registration of a vote under subsection (2), is supported from subsection (3), which was substituted in the year 1995 through Act XI, on 25.6.1995. The amended subsection gives a right to

the wife and children of the person referred to in subsection (2) of Section 12 for enrollment of their names in the electoral roll with such person if they reside with him in that electoral area, in which he is deemed to be the resident under subsections (2). The proposition is further supported from subsection (5) of Section 12 of the Ordinance, which provides that where the residence of a State subject is in doubt, he may himself indicate the electoral area where he desires to be enrolled. Again a choice has been provided to a person for selecting the electoral area for registration of his vote.

22. While delivering the impugned judgment, the learned High Court has not considered the proviso to subsection (1), subsections (2), (3) and (5) of section 12 of Electoral Rolls Ordinance, 1970. Probably it was not brought into the notice of the Court and it escaped the attention of the Court. The phraseology implied in proviso to subsection (1), subsection (2), (3) and (5) of Section 12 of the Electoral Rolls Ordinance, 1970, confers a right in a State subject that if he has a dwelling house or other immovable property in more than one electoral areas, he is eligible to be enrolled as voter in any of the electoral areas at his option and if a State subject resides in the area different to the one where he ordinarily resides, he shall be deemed to be the resident in the former electoral area and an option has also been

provided that he may indicate in writing to the Registration Officer that his ordinary residence is different, otherwise the residence different to the ordinary residence be treated as his residence for the purpose of enrollment. Subsection (5) of Section 12 again provides an option to a State Subject for determining the electoral area where he wants his vote to be registered, whenever a dispute arises in respect of his residence. The definition of word “resident” provided in subsection (1) of Section 12 cannot be read in isolation. Harmonious interpretation of whole section is to be made to reconcile the whole provision. Subsection (1) of Section 12 of the Ordinance, when read with its proviso, subsections (2), (3) and (5), leads to the conclusion that a State subject has an option to get his vote registered at his own choice in any electoral area, subject to the eventualities as provided in Section 12 as a whole.

It is an admitted fact that Shah Ghulam Qadir was the resident of Satellite Town. His name was registered in the electoral roll pertaining to Ward No.5, Satellite Town Rawalpindi, an electoral area of constituency LA-XL, Valley-5. He, later on, got his house constructed in village Khawaja Seri, Neelum. He claims that he is residing in the said house. He got registered his name with due process in the electoral roll prepared for village Khawaja Seri falling in constituency No.LA-XXIII,

Neelum-1 and got his vote deleted from the electoral roll prepared for constituency LA-XL, Vally-5, Ward No.5, Satellite Town Rawalpindi. He fulfilled other qualifications laid down in subsection (1) of Section 10 of the Electoral Rolls Ordinance, 1970 i.e. he was not less than the age of eighteen years and was not declared of unsound mind by a competent Court. His name was validly registered in the electoral roll of constituency No.LA-XXIII, Neelum-1 and he was otherwise qualified to be a candidate to contest election for the Legislative Assembly. The orders regarding acceptance of nomination papers of Shah Ghulam Qadir by the Returning Officer and the Chief Election Commissioner, are valid orders. The judgment of the High Court on this point is not maintainable. It is hereby set aside. Resultantly the writ petition filed by Sardar Gul-e-Khandan merits dismissal.

23. Civil Appeal No.167 of 2014, titled *Sardar Gul-e-Khandan v/s Chief Election Commissioner & others* has been filed from a part of the judgment of the High Court whereby the prayer in the writ petition for declaring subsections (2) and (3) of Section 2 of the Ordinance, 1970 *ultra vires* the provisions of Act, 1974 has been declined. While granting leave to appeal, keeping in view the nature of important legal and constitutional points involved in the case, notices were issued to the political

parties having representation in the Legislative Assembly, Speaker, Legislative Assembly, Leader of the House and Leader of the Opposition, and they were arrayed as parties in the line of the respondents. Concise statements have been filed on behalf of some of the political parties, Speaker Legislative Assembly, seven members elected from the seats reserved for refugees and others settled in Pakistan. Friends of the Court; Mr. Justice (R) Syed Manzoor Hussain Gilani and Raja Muhammad Hanif Khan, advocate, addressed the arguments on the legal and constitutional questions. Counsel for the political parties were also heard. At the conclusion of arguments of the counsel for the parties and the friends of the Court, Mir Sharafat Hussain, advocate, counsel for Sardar Gul-e-Khandan, stated that he withdraws himself from the point that the refugees settled in Pakistan cannot contest election from any of the constituencies falling in the territory of Azad Jammu & Kashmir and also is not interested in the decision of appeal in respect of subsections (2) and (3) of Section 2 of the Ordinance, 1970. As per statement of the counsel for the appellant, Sardar Gul-e-Khandan, the resolution of point of inconsistency of subsections (2) and (3) of Section 2 of the Ordinance, 1970 to the provisions of the Act, 1974, remains only of an academic nature and the judgment cannot be delivered only for academic discussion, however, we may want to reproduce

two portions of the judgment of this Court delivered in the case reported as *Sardar Sikandar Hayat Khan v/s Syed Ghulam Mujtaba Bokhari & another* [PLD 1991 Supreme Court (AJ&K)

1]. It was observed at page 11 as under:-

“The first question which needs to be resolved is as to whether the provisions contained in section 2 of Ordinance VI of 1970 are violative of the Constitutional provisions contained in section 24 of the Interim Constitution Act; and whether the conditions envisaged in clauses (2) and (3) of section 2 of the aforesaid Ordinance would debar a person from contesting the elections against a reserved seat envisaged under the aforesaid provisions. A plain reading of section 24 of the Interim Constitution Act clearly reveals that general qualifications for contesting election to the Azad Jammu and Kashmir Legislative Assembly envisaged in subsection (1) of section 24 of the Interim Constitution Act are to be read jointly with disqualifications enumerated under subsection (2) of section 24 of the Interim Constitution Act. The general qualifications envisaged under subsection (1) of section 24 do not bestow an absolute right upon a person to contest election irrespective of the disqualifications which are laid down under subsection (2) of section 24. Any of the disqualifications envisaged under the aforesaid provisions or by or under law envisaged under clause (f) of section 24 of the Interim Constitution Act, would disentitle a person to contest' elections to the Legislative Assembly, despite the fact that he possesses all the three qualifications laid down under subsection (1) of section 24 of the Interim Constitution Act. Any disqualification imposed by a subordinate legislation as envisaged under clause (f) of subsection (2) of section 24 of the Interim Constitution Act would equally debar a person from contesting election and the disqualifications so imposed would be as good

as any disqualification enumerated in subsection (2) of section 24 of the Interim Constitution Act, because a disqualification imposed by subordinate legislation would have sanction of Constitutional provisions contained in clause (f) of subsection (2) of section 24 which envisage that a disqualification can be imposed by any other law.”

Again it was observed at page 21 of the report as

under:-

“It is obvious from the recital contained in this Ordinance that it provides the "manner" in which the Legislative Assembly was to be constituted. It is quite obvious that it has always been considered in practice that in the Constitution Act of 1974 and in the earlier Constitution of 1970 when it was laid down that the manner of election shall be such as may be prescribed, it was in pursuance of this provision that the Legislative Assembly Ordinance drew its authority. I would, therefore, hold that the Legislative Assembly Ordinance (Ordinance No.I of 1970) is a law as is visualized by subsection (2) of section 22 of the Azad Jammu and Kashmir Interim Constitution Act. Consequently, it has the same status as that of a Constitutional provision. The only distinction is that this law can be altered or repealed like any other sub-constitutional law but as long as it is in existence this law, or any other law which replaces it, would be a law which would have the force of Constitution. What follows from it is that the categories created by this Ordinance and other provisions thereof shall have the same force as the Constitution itself.”

24. In the light of the statement made by the counsel for the appellant, Sardar Gul-e-Khandan, deliberation on the question of inconsistency of subsection (2) and (3) of Section 2 of the

Ordinance, 1970 with the provisions of Act, 1974, will be an exercise in futility.

The result of above discussion is that Civil Appeal No.166 of 2014 titled *Shah Ghulam Qadir v/s Sardar Gul-e-Khandan & others* is accepted and the judgment of the High Court is set aside. Civil Appeal No.167 of 2014 titled *Sardar Gul-e-Khandan v/s Chief Election Commissioner & others* is dismissed with no order as to the costs. Resultantly the writ petition titled *Sardar Gul-e-Khandan v/s Chief Election Commissioner & others* is also dismissed.

**CHIEF JUSTICE**

**JUDGE**

**JUDGE**

Muzaffarabad  
12/12/2014