SUPREME COURT OF AZAD JAMMU AND KASHMIR

(APPELLATE JURISDICTION)

PRESENT:

Ch.Muhammad Ibrahim Zia, J.
Raja Saeed Akram Khan, J.
Masood Ahmed Sheikh, J.

Civil appeal No.247 of 2015
(PLA filed on 31.08.2015)

1. Azad Government of the State of Jammu and Kashmir through Chief Secretary to Azad Government of the State of Jammu and Kashmir, Civil Secretariat, Chatter Domel, Muzaffarabad.
2. Law, Justice, Parliamentary Affairs & Human Rights Department, Azad Government of the State of Jammu and Kashmir, through Secretary Law, Civil Secretariat, Chatter Domel, Muzaffarabad.
3. Legislative Assembly Azad Jammu and Kashmir through Secretary Legislative Assembly, Assembly Secretariat, Chatter Domel, Muzaffarabad.
4. Sardar Muhammad Shahzad Khan, Judge Shariat Court Azad Jammu and Kashmir, Muzaffarabad.

5. Mushtaq Ahmed Janjua, Judge Shariat Court Azad Jammu and Kashmir, Muzaffarabad.

….APPELLANTS

VERSUS

1. Sardar Javed Naz, Advocate Supreme Court, Member Azad Jammu and Kashmir Bar Council, r/o Rawalakot.
2. Sardar Tahir Anwar Khan, Advocate Supreme Court, Ex-President, District Bar Association Poonch, Rawalakot.

……RESPONDENTS

3. Azad Jammu and Kashmir Council through Secretary AJ&K Council, Council Secretariat, Sector F-5/2, Islamabad.

……PROFORMA RESPONDENT

(On appeal from the judgment of the High Court dated 06.08.2015 in writ petition No.803 of 2015)

FOR THE APPELLANTS: Mr.Abdul Rashid Abbasi, Advocate.

FOR THE RESPONDENTS: Raja Sajjad Ahmed Khan, Advocate.

Date of hearing: 07.10.2015

JUDGMENT:

***Raja Saeed Akram Khan, J.*—** Through the instant appeal, by leave of the Court, the appellants have challenged the judgment of the High Court dated 06.08.2015, whereby the writ petition filed by respondents No.1 and 2, herein, has been accepted.

2. Succinctly, the facts leading to this appeal are that this Court while delivering the judgment in a case reported as *Bashir Ahmed Mughal v. Azad Govt. & 6 others* [2014 SCR 1258], declared partially the provisions of section 3 of the Azad Jammu and Kashmir Shariat Court, Act 1993, as ultra vires the Interim Constitution Act, 1974 (hereinafter shall be referred as Act, 1974), set aside the appointments of the Judges made on the strength of the provisions of said section and also issued some directions therein, to the Government. Thereafter, an Ordinance (No.XVIII of 2014) for amendment in the Azad

Jammu and Kashmir Shariat Court Act, 1993, was promulgated by the worthy President of Azad Jammu and Kashmir on 12.12.2014, which inter alia, contained the provisions regarding appointment of Judges of the Shariat Court after consultation with the Hon'ble Chief Justice of Azad Jammu and Kashmir and the learned Chief Justice of the Shariat Court. The appointment Notification of appellants No.4 and 5 was issued on 27.03.2015, which was amended through another Notification issued on 28.03.2015. Respondents No.1 and 2, herein, filed a writ petition before the High Court challenging the vires of the Azad Jammu and Kashmir Shariat Court (Amendment) Ordinance, (No.XVIII of 2014) and appointment Notification of the Judges of the Shariat Court (appellants No. 4 and 5, herein). The version of the respondents-petitioners, therein, was that the aforementioned (Amendment) Ordinance and

the appointment Notification have been issued against the spirit of the judgment of this Court delivered in the supra case, ultra-vires the Act, 1974 and also against the spirit of independence of judiciary. The learned High Court vide impugned judgment dated 06.08.2015 while accepting the writ petition, set aside the Shariat Court (amendment) Ordinance (No.XVIII of 2014) as well as the appointment Notification of appellants No.4 and 5, herein. Hence, this appeal by leave of the Court.

3. Mr.Abdul Rashid Abbasi, Advocate, appearing for the appellants submitted that the impugned judgment of the High Court is against law, rules and the principles of natural justice which is not sustainable in the eye of law. He contended that the impugned judgment is based on misinterpretation of the provisions of the Act, 1974 as well as Azad Jammu and Kashmir Rules of Business, 1985.

He added that Ordinance (No.XVIII of 2014) and the appointment Notification of appellants No.4 and 5 have been struck down by the learned High Court mainly on the ground that Ordinance (No.XVIII of 2014) has been issued in violation of Azad Jammu & Kashmir Rules of Business, 1985, whereas, neither such ground was agitated in the memo of writ petition nor the same was argued at the time of hearing, the arguments in the writ petition. He added that the aforesaid point has been taken-up by the High Court *Suo Motu,* but on this point no opportunity of hearing was provided to the appellants which otherwise is against the principle of natural justice. Furthermore, the point which has not taken in the pleadings, cannot be resolved as it is settled principle of law that no relief can be granted beyond the pleadings. He further submitted that the learned High Court also summoned the record relating to the promulgation of Ordinance and

examined the same without any information to the appellants. In continuation of the arguments, he contended that although placing the Ordinance before the Cabinet could be deemed to be necessary before introducing the same in the Legislative Assembly, however, failure to place the same before the Cabinet did not affect the promulgation of the Ordinance, but the learned High Court failed to understand this legal proposition in its true perspective. He added that no illegality has been committed while promulgating the Ordinance as the President is fully empowered under Act, 1974 to legislate through Ordinance and the only condition is that when the Assembly is not in session. Admittedly, at the time of making and promulgation of Ordinance, the Assembly was not in session which reflects the bona-fide on the part of the issuing authority. He forcefully contended that the impugned judgment regarding making of

and promulgation of the Ordinance is self-contradictory as in the majority judgment, it has been declared that "making" and "promulgation" of the Ordinance are two different steps, but while declaring the Ordinance as ultra vires the Act, 1974 treated the same as one step and held that there should be no session of the Assembly from the date of making the Ordinance till its promulgation. He added that the Ordinance has been struck down by the High Court on account of violation of the provisions of Act, 1974, but no such violation has been pointed out in the impugned judgment. The learned High Court has failed to take into account that the process of consultation and appointment of appellants No.4 and 5 being in accordance with the provisions of the Shariat Court Act, 1993 (as amended through the impugned Ordinance) and in accordance with the spirit of the judgment of the Apex Court in *Bashir*

Ahmed Mughal's case (supra), could not be struck down. He added that the learned High Court has not read the record as a whole, rather the High Court read the same in parts as the learned High Court only reproduced the descending note made by one of the member of Legislative Assembly and has not discussed the opinion of the other members. Even otherwise, it was not the job of the High Court to discuss the Legislative Assembly's proceedings. The learned counsel for the appellants left the other points regarding authenticity of the affidavit appended with the writ petition in support of the contents of the writ petition; whether the same was attested by a competent person or not, and the consultation process. He lastly argued that the direction issued by the High Court for introducing the draft bill for amendment of Act, 1974 within 30 days, is beyond the jurisdictional competence of the High Court as

legislation including the amendment in the Constitution, falls in the competence of the legislature only. In this way, the impugned judgment is without jurisdiction and also against the spirit of the judgment of the Apex Court in *Bashir Ahmed Mughal's* case (supra). He has relied upon the cases reported as *Dr.Muhammad Akram v. Allotment Committee Mirpur Development Authority* [PLD 1985 S.C (AJ&K) 113], *Muhammad Ameen v. Muhammad Younas* [1993 SCR 340], *Azad Govt. & 3 others v. Genuine Rights Commission AJ&K and 7 others* [1999 SCR 1], *Zahida Mehmood v. Muhammad Sabir Khan and 5 others* [2000 SCR 78], *Board of Trustees and another v. Muhammad Azam Durani* [2004 SCR 401], *Azad Govt. & 3 others v. Aysha Shoukat & another* [2011 SCR 119], *Ehtezaz Asghar and another v. Ch. Muhammad Sajawal & 2 others* [PLJ 2012 S.C (AJ&K) 132], *Inayatullah v. Capt. (Ret) Inayatullah Khan*

and another [PLD 1985 S.C (AJ&K) 85], *Azad Govt. v. Haji Abdul Rashid & others* [1999 SCR 345], *Syed Mumtaz Hussain Naqvi and 9 others v. Raja Muhammad Farooq Haider Khan and 4 others* [2014 SCR 43], *Muhammad Tariq Khan v. The State* [1997 SCR 318], *Meer Haider Shah v. Azad Government and others* [1992 SCR 320], *The State of Orissa and others v. Bhupendra Kumar Bose and others* [AIR 1962 S.C 945], *R.K. Garg, v. Union of India and others* [AIR 1981 S.C 2138] and *S.P. Gupta v. M. Trkunde* [AIR 1982 S.C 149].

4. Conversely, Raja Sajjad Ahmed Khan, Advocate, the learned counsel for the respondents strongly opposed the arguments addressed by the learned counsel for the appellants. He submitted that the appellants failed to point out any legal defect in the impugned judgment. He contended that in the writ petition, the respondents, herein, specifically challenged the vires of the

impugned Ordinance on the ground that the same is in conflict with Act, 1974, Azad Jammu and Kashmir Rules of Business, 1985 and is also against the spirit of the judgment of the Apex Court delivered in *Bashir Ahmed Mughal's* case. He added that no step has been taken in pursuance of the judgment of this Court for appointment of *Aalim* Judge and also failed to furnish any reason for the establishment of Shariat Court as this Court has already observed in the judgment supra that present structure of the Shariat Court failed to achieve the object of Shariat Court Act, 1993. After such findings, the said Act has impliedly been declared ultra vires Act, 1974. Moreover, the respondents, herein, also taken the ground that the official appellants, herein, have made and promulgated the Ordinance in violation of the judgment of the Apex Court to induct the persons of their own choice and also proved before the High Court that the

Ordinance has been issued in violation of Azad Jammu and Kashmir Rules of Business, 1985. Thus, the argument of the learned counsel for the appellants that no such point was agitated before the High Court is contrary to the pleadings of the parties and against the record. While relying upon a case reported as *Industrial Development Bank of Pakistan v. Arshad Mehmood and 9 others* [2013 SCR 929], he submitted that even without challenging the vires of any law, if it comes to the notice of the Court that any piece of legislation is lacking the Constitutional backing or is promulgated without Constitutional competence, the same may be declared ultra-vires the Constitution or ignored. He added that it is an admitted fact that the impugned Ordinance has not been placed before the Cabinet prior to its promulgation, which is a mandatory requirement of rule 23 of the Azad Jammu and Kashmir Rules of Business, 1985.

In this way, the learned High Court has rightly held that the official respondents, appellants, herein, have failed to follow the due course of law. He added that the argument of the learned counsel for the appellants that prior to record the findings upon rule 23 of the Azad Jammu and Kashmir Rules of Business, 1985, no opportunity of hearing was provided to them, is not supported by law as the learned High Court has ample power to call for the record of any case and if some law points are involved the same can be resolved by the High Court without affording an opportunity of hearing. While drawing the attention of this Court towards different paragraphs of the judgment delivered in *Bashir Ahmed Mughal's* case, he submitted that the official appellants, herein, were bound to take necessary steps in the light of the directions/guidelines given by this Court in that judgment but they failed to do so and issued the impugned Ordinance in a

hasty manner. The impugned Ordinance was issued against the spirit of the judgment of the Apex Court, therefore, the learned High Court was fully justified to hold that the Ordinance was promulgated in disregard of the judgment of the Apex Court. He added that after placing the matter before the Legislative Assembly there was no occasion to make legislation on the subject which was already pending at the competent forum which itself shows the mala-fide on the part of the appellants, because no such task was given by this Court in *Bashir Ahmed Mughal's* case. This Court while directing the authority to appoint/empower the Judges of the High Court as Judges of the Shariat Court, was conscious of all aspects involved in the matter. He has relied upon the cases reported as *Syed Mumtaz Hussain Naqvi & 9 others v. Raja Muhammad Farooq Haider Khan and 4 others* [2014 SCR 43], *The Collector of Customs, Karachi and others v.*

Messers New Electronics (PVT.), Limited and 59 others [PLD 1994 S.C 363], *Mst. Sushila Devi v. Madan Mohan and another* [AIR 1960 Alabad 546] and *Syed Fayyaz Hussain Qadri v. The Administrator Lahore Municipal Corporation Lahore and 4 others* [PLD 1972 Lahore 316].

5. We have heard the arguments of the learned counsel for the parties and gone through the record along with the impugned judgment. In the light of the arguments, the moot point as emerged in this appeal, is the vires of the Ordinance under the provision of which appellants No.4 and 5, herein, claim their appointments. To appreciate this proposition, the stand of the appellants taken in the written statement and written arguments is of vital importance. Appellants No.1 to 3, herein, in their written statement before the High Court have categorically taken the stand in para 2 that Ordinance (No.XVIII

of 2014) has been made and promulgated quite in accordance with the dictum laid down by the apex Court. The relevant portion of the said paragraph reads as under:-

> "to remove the vacuum and establish Shariat Court according to direction of the apex Court on urgent basis, Ordinance (No.XVIII of 2014) has been promulgated which is quite in accordance with the dictum of the apex court as contained in the aforesaid judgment."

They have also categorically mentioned in para 5 of the written statement that:

> "The Ordinance has since been presented in the Legislative Assembly in shape of a bill. It is totally incorrect that appointments of the learned Judges of the Shariat Court were made hurriedly. The appointments have been made after due process in accordance with the

> direction of the Hon'ble Supreme Court."

Whereas, appellants No.4 and 5, herein, in ground "G" of their written statement before the High Court have stated the background of the case in the following manners:

> "It is respectfully submitted that session of the Assembly was convened on 09.12.2014 and the Ordinance No.XVIII was laid before the Assembly on 10.12.2014 and on the same date the Ordinance was sent to the Select Committee. The session of the Assembly was adjourned sinadie on 11.12.2014. The letter of Secretary Law dated 08.12.2014 (Annexure "RC/1") is appended herewith whereby, the Ordinance No.XVIII was sent to the Secretary Assembly and the Notification dated 11.12.2014 (Annexure "RC/2") is placed on record showing that the session of the Assembly was adjourned sinadie. It is respectfully submitted

> that the promulgation of the Ordinance was affected from 12.12.2014 while publication of the same into the gazette of Azad Jammu and Kashmir on 12.12.2014. The Azad Jammu and Kashmir Assembly was not in session on 12.12.2014."

In ground "J", of the written statement they have taken the stand that through Ordinance No.XVIII, the Ordinance No.XVII, promulgated on 12.12.2014, was repealed. The relevant ground of the written statement reads as under:-

> "(J) It is worthwhile to submit that through the Ordinance No.XVIII, which was promulgated on 12.12.2014, the Ordinance No.XVII which was also promulgated on 12.12.2014 (kindly see Gazette No.105, Annexure "RD") was repealed. The juxtaposition perusal of Ordinances No.XVII and No.XVIII would show that the amendment in Section 3(2) of Shariat Court Act

> 1993 was of similar nature in both the Ordinances. It therefore follows that provision of Section 3(2) of Shariat Court Ordinance amended through Ordinance XVII was also effective till 12.12.2014, the date of promulgation of the Ordinance XVIII. Keeping in view the whole state of affairs, it is quite clear that the Ordinance No.XVIII of 2014 was never promulgated on a date to which the Assembly was in session."

It will also be useful to reproduce here the relevant paragraphs, i.e., 2, 3 and 7 of the written arguments filed on behalf of appellants No.4 and 5, herein, before the High Court which read as under:-

> "2. In compliance to the aforesaid provision of law firstly Ordinance XVII of 2014 was made on 21.11.2014, which was repealed through Ordinance No.XVIII of 2014 which was made on 01.12.2014. Both the Ordinances were published

in official gazette No.105, 107 simultaneously on 12th December 2012 (Annexure "PA" with the Writ Petition and Annexure "RD" with the written statement of the Respondents No.5 and 6). Perusal of both the ordinances in juxtaposition would show that amendment in section 3(2) of Shariat Court Act 1993 was of similar nature which provided a consultative process required to be undertaken for the appointment of the Judges of the Shariat Court.

3. Ordinance No.XVII made on 21.11.2014 was not introduced as a bill before the Legislative Assembly, rather before promulgating on 12.12.2014, the provisions of Ordinance XVIII of 2014 which was made on 01.12.2014 was laid before the Legislative Assembly on 09.12.2014 and the Assembly constituted a Select Committee on 10.12.2014 (Annexure "RC/2" appended with the written statement of Respondents 5 and 6).

It is worthwhile to submit that Ordinance made on 01.12.2012 was promulgated on 12.12.2012 and prior thereto the contents of the Ordinance were laid as a Bill before the Legislative Assembly. The introducing of the bill of the Ordinance before it promulgation does not mean that the Ordinance could not be promulgated on 12.12.2014 on a date when the Assembly was not in session……

4…….

5…….

6……

7. Since on introduction of a Bill on 09.12.2014, the Assembly did not passed a resolution disapproving the Ordinance, rather the Assembly constituted a Select Committee, in this view of the matter mare laying the Ordinance at the floor of the Assembly and constituting the Select Committee shall not the floor of the Assembly and constituting the Select

Committee shall not be deemd to passing the resolution disapproving the Ordinance. The provision of Section 41 Interim Constitution Act has not been violated in any manner, therefore, from the date of promulgation of the Ordinance i.e. 12.12.2014 and till the expiration of four months i.e. 12.04.2015, the Ordinance shall have the same force and effect as an Act of the Assembly and in this perspective of the matter the Ordinance was having force of law when the consultative process was completed as well as when the appointment of the Respondent No.5 and 6 was notified vide Notification dated 27.03.2015, the date to which the Ordinance No.XVIII was having the force of law. The Ordinance shall be deemed to have been repealed at expiration of four months and ion this view of the matter Section 56-C(c) readwith Section 5(C)(E) and Section 6-A of General Clauses Act provides, where a law is repealed or is deemed to have been repealed, by under or by

> virtue of this act the repeal shall not affect any right, privileges, obligation or liability acquired, accrued or incurred under the law. Since, during currency of the Ordinance the Respondents 5 and 6 were appointed, a right has accrued to the Respondents 5 & 6 and the privileged has also been extended to the Respondents 5 and 6, therefore, irrespective of the expiry of Ordinance during statutory period, the appointment of the humble Respondents is protected."

Leaving aside the contention of the respondents, herein, according to the pleadings and written arguments of the appellants, herein, the admitted position is that the first Ordinance was made on 21.11.2014 and till 12.12.2014 the same was not promulgated and before its promulgation, through another Ordinance made on 01.12.2014, the same was repealed. Moreover, before promulgation of Ordinance

made on 01.12.2014, the same was introduced in Assembly as a bill. As the learned counsel for the appellants has waived the other points taken in memo of appeal and only focused on proposition of vires of the Ordinance and spirit of *Bashir Ahmed Mughal's* (supra) case, therefore, in our view, to resolve the controversy, following questions require resolution by this Court:-

i) whether Ordinance (No.XVIII of 2014), was made and promulgated according to the spirit of Act, 1974 or not, and;

ii) whether the judgment of this Court delivered in *Bashir Ahmed Mughal's* case [2014 SCR 1258], has been implemented in letter and spirit while enacting the Ordinance (No.XVIII of 2014) or not?

To appreciate the first point, whether sub-constitutional legislation has been made in accordance with the spirit of Act, 1974 or not;

we have gone through the record. In the light of hereinabove, discussed facts, the relevant portions of the pleadings of the parties as well as the written arguments, we have to judge the vires of the Ordinance (No.XVIII of 2014), in the light of section 41 of the Act, 1974. For proper appreciation the relevant provisions of Ordinance (No.XVIII of 2014) are reproduced as follows:

> "2. Amendment of Section 3, Act IX of 1993- In the Azad Jammu and Kashmir Shariat Court Act, 1993 (Act IX of 1993), in Section 3, following amendments shall be made:
>
> (i) Sub-section (2) shall be substituted as under:-
>
> (2) The Court shall consist of the Chief Justice and two or more Muslim Judges to be appointed by President after consultation with the Chief Justice of Azad Jammu and Kashmir and the Chief Justice of Shariat Court:

Provided that a Judge of High Court may be appointed as a Judge of Shariat Court for a period not exceeding three years,”

ii) Sub-Section (4), shall be substituted as under:-

‘(4) A person shall not be appointed as a Judge of Shariat Court unless,

(a) he has for a period, or for period aggregating, not less than ten years been an advocate or pleader of the high Court or High Court in Pakistan, Or

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

(iii) After Sub-Section (4), Substituted as above, a new sub-section (4-A) shall be added as under:-

‘(4-A) One shall be an Aalim judge having at least fifteen years experience in Islamic Law research or instruction.’

(iv) After existing sub-section (5), a new sub-section (5-A) shall be added as under:-

'(5-A) A Judge of Shariat Court shall not be removed from his office except in the like manner and on the same grounds as a Judge of the High Court under the Interim Constitution Act, 1974.

3. **Repeal**.._ The Azad Jammu and Kashmir Shariat Court (Amendment) Ordinance, 2014 (Ordinance XVII of 2014) is hereby repealed."

After going through the measures initiated for sub-constitutional legislation, discussed in the preceding paragraph, the question of the validity of legislation does arise. To appreciate this aspect, it would be appropriate to examine the relevant provision of Act, 1974, i.e., section 41, which reads as under:-

"**Power to make Ordinance**.-(1) The President may, except when the Assembly is in session, if satisfied that circumstances exist which

render it necessary to take immediate action, make and promulgate an Ordinance as the circumstances may require.

(2) An Ordinance promulgated under this section shall have the same force and effect as an Act of the Assembly and shall be subject to like restriction as the power of the Assembly to make law, but every such Ordinance.

(a) shall be laid before the Assembly and shall stand repealed at the expiration of four months from its promulgation or, if before the expiration of that period a resolution disapproving it is passed by the Assembly, upon the passing of that resolution; and

(b) may be withdrawn at any time by the President.

(3) Without prejudice to the provisions of sub-section (2), an Ordinance laid before the Assembly shall be deemed to be a Bill introduced in the Assembly.

> (4) The President shall likewise, except when the council is in session, if so advised by the Chairman of the council, make, promulgate and withdraw an Ordinance as the circumstances may require; and the provisions of sub-section (2) and sub-section (3) shall apply to the Ordinance so made as if references therein to Act of the Assembly and Assembly were references respectively to Act of the Council and Council”

The careful study of the above reproduced provision postulates that the same vests the power in the President to promulgate an Ordinance if the President is satisfied that existing circumstances render it necessary to bring forth an emergent legislation. The powers conferred on the President to issue Ordinance are exercisable in the nature of an emergency which render it necessary for taking immediate action and such action becomes necessary at a time when the

Legislative Assembly is not in session. However, while invoking this provision, the President cannot overreach the Assembly to do what the Assembly cannot do in exercise of its legislative power. It is settled law that once Ordinance has been validly promulgated, the same has the same force and effect as of an Act of the Assembly, however, if the same is not laid before the Legislative Assembly and approved, it shall lapse on the expiry of four months. Meaning thereby, that an Ordinance validly promulgated bears the life of four months. The power of the President under section 41 of Act, 1974 regarding promulgation of Ordinance came under consideration of this Court in a case reported as *Syed Mumtaz Hussain Naqvi and 9 others v. Raja Muhammad Farooq Haider Khan and 4 others* [2014 SCR 43], wherein it has been observed that:

"The plain reading of section 41 of

the Constitution Act shows that the President is empowered to promulgate the ordinance; (a) when the assembly is not in session; (b) when the President is satisfied that circumstances exist which require immediate action, then he may make and promulgate an ordinance. The powers vested in the President under Section 41(1) are not unfettered. The powers of the President are subject to same restrictions which apply to the Assembly to make the laws. Further restriction is imposed that the ordinance shall be laid before the Assembly and at the expiration of a period of four months from its promulgation it shall automatically stand repealed. Further powers is vested in the President that he may withdraw the ordinance at any time. The conditions for issuing an ordinance, thus, may be summarized that when the Assembly is not in session and the President is satisfied that the circumstances exist which render

> immediate action, he may promulgate an ordinance. The existence of circumstances for satisfaction of the President taking immediate action is necessary."

From the bare reading of section 41 of the Act, 1974 and the case law cited hereinabove, it is crystal clear that although, the President has the powers to promulgate an Ordinance, however, these powers are subject to some conditions and are not unguided. First condition is the satisfaction by the President that the existing circumstances render it necessary to take immediate action and the second condition is that the Legislative Assembly is not in session. The ingredients attached with the first condition are; the emergent situation and immediate action. It is pertinent to mention here that primary law making authority under the Constitution is the Legislature, however, the possibility cannot be ruled out that when the Legislature is not in

session the circumstances may arise which render it necessary to take immediate action and in such a case in order to secure the public interest till the matter is brought before the Assembly (the Legislature) the President can make laws through temporary legislation. As the power to promulgate an Ordinance is essentially a power to be used to meet an extraordinary situation, therefore, to consider the point, whether such extraordinary situation was available which constrained the President to exercise powers under Act, 1974, we have examined the case from this angle. This Court consciously directed the authorities in *Bashir Ahmed Mughal's* case (supra), to appoint the Judges of the High Court as Judges Shariat Court. After appointment of the Judges of the High Court as Judges Shariat Court vide notification dated 13.02.2015 there was no such vacuum existing in absence of the Judges of the Shariat Court as the High Court's Judges

were performing the duties of the Shariat Court Judges efficiently. The appointment notification of the Judges of the High Court as Judges Shariat Court dated 13.02.2015 further speaks that the Judges of the High Court are being appointed as Judges Shariat Court till the making of proper legislation, which itself proves the fact that even appellants No.1 and 2, herein, have also not treated the Ordinance as proper legislation. Thus, no emergent situation was existing. In such state of affairs, after laying of the Ordinance in shape of bill before the Legislative Assembly, the Ordinance cannot be promulgated, thereafter. Here we would also like to discuss another surprising aspect of the case that an Ordinance was made and promulgated to meet the extraordinary situation, however, after promulgation, the Ordinance remained ineffective and the same was near to complete its Constitutional life when the appointment

notification of appellants No.4 and 5 was issued, meaning thereby, that no emergent circumstances were existing which constrained the President to exercise the powers under section 41 of Act, 1974. The second ingredient attached to the said condition is, the immediate action. In the instant case, whether the action taken by the President was immediate or not; to resolve this point, it will be useful to consult the dictionary meaning of the word 'immediate' because this term is not defined in the statute.

In *Chamber's 21st Century Dictionary* (page 674), the word 'immediate' has been defined as follows:

> "/I'mi:diət/ 1. Happening or done at once and without delay □ *my immediate reaction* 2. Nearest or next in space, time, relationship, etc □ *the immediate family* □ *the*

> *immediate vicinity.* 3. Belonging to the current time; urgent □ *deal with the immediate problems first.* 4. Having a direct effect and without anything coming in between □ *the immediate cause of death* ◌ 16c: from Latin *immediatus*, from *mediare* to be in the middle."

In the *Concise Oxford Dictionary the new Edition for the 1990,* (page 589), the word 'immediate' has been defined as under:-

> "/I'mi:diə t/ adj. 1. Occurring or done at once or without delay (an immediate reply). 2. Nearest, next; not separated by others (the immediate vicinity; the immediate future; my immediate neighbor). 3. Most pressing or urgent (our immediate concern

was to get him to hospital). 4. (of a relation or action) having direct effect; without any intervening medium or agency (the immediate cause of death). 5. (of knowledge) intuitive, gained without reasoning. □□ immediacy n. immediateness n. [ME f. F immédiate or LL immediatus (as In-1, MEDIATE)]."

In *Webster's Third New International Dictionary Unabridged and Seven Language Dictionary* (page 1129), the word 'immediate' has been defined as under:-

"1 a. acting or being without the intervention of another object, cause or agency: DIRECT, PROXIMATE (the cause of death) b: of or

relating to psychic immediacy : being or occurring without reference to other states or factors : INTUITIVE (knowledge) 2 of relations between persons a: having no individual intervening : being next in line or relation : not secondary or remote (the parties to the quarrel) (only the family was present) (your are most to our throne Shak). B: standing in or being the relation of vassal and lord when the one holds directly of the other 3 a: occurring, acting, or accomplished without loss of time : made or done at once : INSTANT (an need for help) <expenses> (agreed to an marriage) b of time : near to or related to the

present (sometime in the past) (the future is uncertain) 4: characterized by contiguity : existing without intervening space or substance (bring the chemicals into contact very cautiously); broadly : being near at hand : not far apart or distant (hid the money in the neighborhood).”

In *21st Century Practical Dictionary English to English & Urdu* (page 451), the word ‘immediate’ has been defined as follows:-

“(imediayt) adj. 1. Proximate 2. Instant 3. Close in time or space قریب ترین۔ بلاتوقف، بلا واسطہ. We received an immediate answer to our proposal. Immediate neighbor. اصلی ہمسایہ

In the *Dictionary of law (English – Urdu) with legal and Islamic Maxims Dictionary,*

Compiled and Edited by Shazia Naz, Advocate High Court, (page 432), the word 'immediate' has been defined as (بلا تاخیر، فوری)

In the *Black's Law Dictionary with Pronunciations Sixth Edition* (page 749), the word 'immediate' has been defined as under:-

> "Present; at once; without delay; nor deferred by any interval of time. In this sense, the word, without any very precise signification, denotes that action is or must be taken either instantly or without any considerable loss of time. A reasonable time in view of particular facts and circumstances of case under consideration. Next in line or relation; directly connected; not secondary or remote. Not separated in respect to place' not separated

> by the intervention of any intermediate object, cause, relation, or right. Thus we speak of an action as prosecuted for the "immediate benefit" of A., of a devise as made to the "immediate issue" of B. etc."

In *N.S. Bindra's Interpretation of Statutes Seventh Edition* (page 1070), the word 'immediate' has been defined as follows:-

> "The words 'forthwith' and 'immediately' have the same meaning. They are stronger than the expression 'within a reasonable time' and imply prompt vigorous action without any delay and whether there has been such action in a question of fact having regard to the circumstances of the particular case. In *Thompson v. Gibson,* it was held that the word 'immediate' meant 'with all convenient speed'. In *Page v. Pearce,* Lord Abinger said: 'When the Act says only that the Judge shall

> certify immediately after the trial, and does not more specially define the time, it must mean that it is sufficient if it be done within a reasonable time.' And Alderson, B. said: 'As it is to be assumed to be a reasonable and proper act, *prima facie,* it is for the party who complains of it to show that he took an unreasonable time'. Where a statute provides that a certain thing shall be done immediately, to the position of the parties and the purpose for which the Legislature intends that to the circumstances of the case. When a statute requires that something shall be done 'forthwith' or 'immediately' or even 'instantly' it would probably be that the act may be dome some weeks afterwards."

One of the dictionary meanings of the word 'immediate' is 'forthwith'. Both the words have been interpreted in a case reported as *Keshav Nilkanth Joglekar v. The Commissioner of Police, Greater Bombay and others* [A.I.R 1957 SC 28] in the following manners:-

"7. The meaning of the word 'immediately' came up for consideration in Thompson v. Gibson (1841) 8 M & W 282: 151 E R 1045 at p. 1047 (C) Holding that it was not to be construed literally, Lord Abinger C.B. observed: "if they" (acts of Parliament) "could be construed literally, consistently with common sense and justice, undoubtedly they ought; and if I could see, upon this act of Parliament, that it was the intention of the legislature that not a single moment's interval should take place before the granting of the certificate, I should think myself bound to defer to that declared intention. But it is admitted that this cannot be its interpretation; we are therefore to see how, consistently with common sense and the principles of justice, the words 'immediately after wards' are to be construed.

If they do not mean that it is to be done the very instant afterwards,

do they mean within ten minutes, or a quarter of any hour, afterwards? I think we should interpret them to mean, within such reasonable time as will exclude the danger of intervening facts operating upon the mind of the Judge, so as to disturb the impression made upon it by the evidence in the cause". In agreeing with this opinion, Aderson. B. expressly approved of the decision of Lord Hardwicke in Rex v. Francis (A). This construction of the word 'immediately' was adopted in page v. Pearce (1841 8 M. & W.677 at p.678: 151 E R 1211 at p. 1212 (D), Lord Abinger C.B. observing:

'It has already been decided, and necessarily so, that the words immediately afterwards' in the statute, cannot be construed literally; and if you abandon the literal construction of the words, what can you substitute but 'within a reasonable time?,…." In the Queen v. the Justices of Berk Shire (1879) 4 Q.B.D. 469 at p.471 (E),

where the point was as to the meaning of “forthwith” in S.52 of 35 & 36 vict, chapter 94, Cockburn C.J. observed: “The question is substantially one of fact. It is impossible to lay down any hard and fast rules as to what is the meaning of the word ‘immediately’, in all cases. The words ‘forthwith’ and ‘immediately’ have the same meaning. They are stronger than the expression ‘within a reasonable time’, and imply prompt, vigorous action, without any delay, and whether there has been such action is a question of fact, having regard to the circumstances of the particular case. The same construction has been put on the word “forthwith” occurring in contracts. In Hudson v. Hill, (1874) 43 LJCP 273 at p.280 (F) which was a case of charterparty, it was observed at page 280: “Forthwith” means without unreasonable delay. The difference between undertaking to do something ‘forthwith’ and with a specified time is familiar to

> everyone conversant with law. To do a thing 'forthwith' is to do it as soon as is reasonably convenient'."

After taking into account the dictionary meaning of word 'immediate' along with the interpretation made in the referred case and the books cited, it can safely be gathered that the word 'immediate' means to take an action forthwith or without any delay. In the light of this interpretation, we have examined the proposition in hand, whether the action taken by the President to meet the alleged emergent situation was forthwith? Here it would be relevant to examine once again the dates of making of and promulgation of the Ordinance. The first Ordinance was made on 21.11.2014, but no step for its promulgation was taken till 12.12.2014. The same was repealed by another Ordinance (No.XVIII of 2014) before its birth on 01.12.2014. It also appears from the record that the second Ordinance was

tabled in the Legislative Assembly as bill, i.e., on 09.12.2014 and thereafter was promulgated on 12.12.2014. It may be observed here that in the Constitutional provision the word ‘immediate’ is not used without having wisdom, as we have observed hereinabove that the powers for such legislation can only be exercised when the emergent circumstances exist and immediate action is required, but from the dates of making of and promulgation of the Ordinance, it reveals that the word ‘immediate’ has not taken into consideration according to its spirit. Thus, keeping in view the circumstances of the case, it can be concluded that neither the extraordinary situation was available nor the action taken by the President was an immediate action. Therefore, the promulgation of the Ordinance in such manners/ circumstances, is clearly contrary to the Constitutional scheme which cannot be

declared as proper or valid legislation. It may also be observed here that the provisions under section 41 of the Act, 1974 do not give power to the President to act at his own will rather the Constitutional provisions demand that if such situation arises where the immediate legislation is required, the President has to act immediately without any delay, but this course has not been adopted in the case in hand. The result of the careful appreciation of the provisions of section 41 of Act, 1974 leads to the conclusion that once a bill is introduced in the Legislative Assembly, the President's powers of promulgation of the Ordinance are vanished and he cannot promulgate the Ordinance. Any Ordinance which is made but not promulgated validly, is not a law to be enforced rather it is mere a bill, the fate of which depends upon the action and proceedings of the Legislative Assembly.

6. Now another question arises, whether

the President enjoys the powers to re-promulgate an Ordinance? While appreciating this aspect, it may be stated that it is now settled that the President has no such powers to reenact the same. This question has also been answered by this Court in the case reported as *Syed Mumtaz Hussain Naqvi and 9 others v. Raja Muhammad Farooq Haider Khan and 4 others* [2014 SCR 43] in the following manners:

> "The view expressed in Raja Niaz Ahmed Khan's case [PLD 1988 SC (AJ&K) 53] that the President has power to reenact an ordinance in all the circumstances is not correct and the view that the president can prorogue the assembly session for issuing an ordinance is overruled. The judgment has been delivered in the circumstances that the ordinance was promulgated in the year 1982. The assembly was not in existence and the President remained reenacting the ordinance

repeatedly on the same subject. There may be extraordinary circumstances where the assembly is not in existence, the elections to the legislative assembly are not held within time due to unforeseen circumstances. In that case for smooth running of the business of the Government, the President may reenact an ordinance.

15. There is a certification issued by the Secretary AJ&K Legislative Assembly brought on record by the respondents, herein, that after promulgation of the amending ordinance on 09.07.2012 nine sessions of the legislative assembly have been convened. Thus, it is held that under subsection (2) (a) of Section 41 of the Constitution Act, it was mandatory to lay the ordinance before the assembly within the period of four months and the President has no power to reenact the same."

As we have drawn the conclusion that the

Ordinance (No.XVIII of 2014), was not Constitutionally promulgated, hence, it is neither enforceable as law nor has any legal status except mere a bill introduced in the Legislative Assembly. In our opinion, in view of this conclusion, it hardly requires any detailed deliberation on the point of violation of Rules of Business, 1985. Even otherwise, on this legal proposition an authoritative full Court judgment in *Syed Mumtaz Hussain Naqvi's* case (supra), is holding the field and principles of law enunciated in this regard are fully applicable to the case in hand.

7. The argument of the learned counsel for the appellants that appellant No.4 and 5 were performing their duties in pursuance of the legislation, therefore, they had been protected, has no substance. In our opinion, provisions of section 41 of Act, 1974 were invoked, not to make legislation in compliance of the judgment of this Court rather just to

appoint the Judges in the Shariat Court; therefore, in the light of the legal precedents exercise of legislative powers in the manners as cited hereinabove, is a fraud played with the Constitution which cannot be given any legal cover. Reliance can be placed on a case reported *Dr. D.C Wadhwa and others v. State of Bihar and others* [AIR 1987 SC 579] that:

> "It is settled law that a constitutional authority cannot do indirectly what it is not permitted to do directly. If there is a constitutional provision inhibiting the constitutional authority from doing an act, such provision cannot be allowed to be defeated by adoption of any subterfuge. That would be clearly a fraud on the constitutional provision."

8. Before dilating upon the second point, i.e., whether the judgment of this Court delivered in *Bashir Ahmed Mughal's* (supra)

case has been implemented in letter and spirit or not, it will be appropriate to discuss the background of the supra case with the salient features of the same. The background of the case (supra) was that a writ petition was filed before the High Court through which the appointments of the Judges of the Shariat Court were challenged on numerous grounds; however, the learned High Court dismissed the said writ petition. Most of the parts of the judgment of the High Court delivered in that writ petition have reproduced by the Hon'ble Author Judge while handing down the judgment in *Bashir Ahmed Mughal's* case. The crux of survey of the judgment of the High Court was that all the judges of the High Court were unanimous on the point that the appointments of the Judges of the Shariat Court, without consultation of the Chief Justices are against the concept of independence of judiciary. Only disability,

shown by the learned Judges of the High Court for declaring the provisions of Shariat Court Act, 1993 dealing with the appointment of the Judges, as ultra vires the Constitution was, the barrier of the judgment of this Court delivered in *Genuine Rights Commission's* case [1999 SCR 1]. However, this Court while delivering the judgment in *Bashir Ahmed Mughal's* case (supra) crossed the said barrier while holding that:-

> "47. As we have observed that in the previous pronouncement in the *Genuine Rights Commission's case* [1999 SCR 1], the principle of law regarding the vires of Act, 1993 has not been enunciated on the touchstone of the provision of section 4 of the Constitution Act and the constitutional concept of independence of judiciary, thus, the said judgment is not a hurdle for deciding the writ petitions of the appellants. Even otherwise, in our considered view, no judge-made law

can be applied or interpreted in such a manner which results into making any provision of the constitution as inoperative or redundant. If such like interpretation is allowed it amounts to subversion of the Constitution Act. Therefore, in the light of the hereinabove stated detailed reasons, the principle of law laid down in the referred *Genuine Rights Commission's* case [1999 SCR 1], cannot be applied in the manner to make the provisions of sections 3 and 4 of constitution Act inoperative and redundant. Moreover, according to the celebrated principle of law, the Courts while interpreting the law do not legislate or create any new law or amend the existing law. The Courts only declare true meanings of law which are already existing. Such interpretation of law will be applicable from the date of enactment of the interpreted law. As in this case we have interpreted the constitutional provisions of section 3 and subsections 1 and 2 of section 4 of the Constitution Act, thus, this

interpretation has to be deemed applicable from the date of enforcement of the Constitution Act. Our this view finds support from the principle of law enunciated by the apex Court of Pakistan in the case reported as *Malik Asad Ali and others vs. Federation of Pakistan through Secretary, Law, Justice and Parliament Affairs, Islamabad and others* [PLD 1998 SC 161], the brief verdict of the apex Court reads as follows:-

> '135…..The Courts while interpreting a law do not legislate or create any new law or amend the existing law. By interpreting the law, the Courts only declare the true meaning of the law which already existed. Therefore, to that extent the law declared by this Court is applicable from the date the law is enacted.' "

This Court while laying down the dictum in the judgment (supra), discussed the powers of the High Court and functioning of the Shariat

Court in the present form and observed that if the Judges of the High Court can competently and effectively dilate upon the matters to be dealt with by the Shariat Court's Judges then what is the necessity of the establishment of Shariat Court. This is why, the establishment of new Courts was also discussed on the touchstone of section 46 of Act, 1974. Before reproducing the relevant paragraph, it may be observed here that although, the said section does not debar to establish the other Courts, however, the same does not allow to establish the parallel judicial system. The relevant paragraph of the said judgment reads as under:-

> "40. We would also like to discuss here another aspect of the matter. Since the inception of the Azad Jammu and Kashmir State, the High Court is efficiently and effectively performing the functions of administration of justice according

to the assigned jurisdiction whether it is constitutional writ jurisdiction or any other jurisdiction as original, revisional or appellate, conferred under any other law including the confirmation of the death sentences. The “right of life” is very basic fundamental right whereas in the present scheme of law, the cases of confirmation of the death sentences are referred to the Shariat Court. Which is neither established under the constitutional provisions nor is according to the concept of the independence of judiciary. Thus, conferring upon such Court the powers of confirmation of the death sentence amounts to empowering such Court to deal with the most important constitutionally guaranteed fundamental right of life while taking away the same from the jurisdiction of the constitutionally established High Court. No doubt, according to the constitutional provisions, other Courts can be established but not as parallel Courts for mere accommodation of some

persons on the basis of favouritism or nepotism rather there should be some legal specific purpose for establishment of such Courts which cannot be achieved by the already established Courts. In this context section 46 of the Constitution Act is reproduced as follows:-

> ‘46. **High Court to superintend and control all Courts subordinate to it, etc.**- (1) The High Court shall superintend and control all other Courts that are subordinate to it.
>
> (2) <u>There shall, in addition to the Supreme Court of Azad Jammu and Kashmir and the High Court, be such other Courts as established by law</u>.
>
> (3) A Court so established shall have such jurisdiction as conferred on it by law.
>
> (4) No Court shall have any jurisdiction which is not conferred on it by this Act or by or under any other law.’

(*underlining is ours*)

> The phraseology of subsections 2 & 3 speaks that such other Courts can be established by law in addition to the Supreme Court of Azad Jammu & Kashmir and the High Court. The establishment of such other Court does not mean for conferring the jurisdiction already vested in the Supreme Court and High Court or to establish parallel additional Supreme Court or the High Court. The word "in addition" clearly conveys the intention of legislature that for establishment of such Courts, there must be some additional object which cannot be achieved through the already established Courts. Otherwise the establishment of such other Court without the additional object or jurisdiction will amount to destruct the whole system of administration of justice which cannot be the true spirit of the Constitution or intention of legislature."

The most important feature i.e., the

composition of Shariat Court, has been examined in *Bashir Ahmed Mughal's* case (supra) in the light of Article 203-C of the Constitution of the Islamic Republic of Pakistan, 1973, in the following manners:-

> "42. In our considered view, the present composition of the Shariat Court appears to be superfluous because there is no special features, qualification or distinction in the composition of the Shariat Court except the mode of appointment. The examination of Act, 1993 reveals that it has been basically established to examine the status of law whether or not it is according to the injunctions of the *Holy Qur'an* and *Sunnah*. But regrettably, not a single person as Judge has been included to achieve this purpose. Whereas in this context Article 203-C of the Constitution of the Islamic Republic of Pakistan contains the provision in regard to the special qualification of judges "*not more than three shall be the*

Aalim having atleast fifteen years experience in the Islamic law research or instruction" Thus, if at all there is any necessity of establishment of the Shariat Court for achieving the purpose, then there must be some distinction in its composition as compared to the High Court to justify the establishment of a separate Court. Otherwise, if the qualification and terms & conditions of the Judges of the Shariat Court are same, then why the jurisdiction which has been conferred upon Shariat Court cannot be exercised by the Judges of the High Court having same qualification and privileges.

43. As it has been observed hereinabove that the only difference is of mode of appointment. Such arbitrary mode which practically amounts to adopt a mechanism of bypassing the constitutional provisions providing the consultation with the Chief Justices, is one of the reasons to create doubts in the minds of the public at large regarding such Court's establishment

> for accommodation of some persons on the basis of favouritism and nepotism. Ultimately, such like doubts result into damaging the dignity of the judiciary and shaking the public confidence upon such an important state organ. Therefore, in our opinion, if there is a necessity of establishment of the Shariat Court for achieving the specified purpose, then it must be given constitutional status and protection. In its composition there must be some judges having special qualification relevant to the specified purpose to be achieved, like the constitution of Islamic Republic of Pakistan which provides for induction of Ulema as Judge Shariat Court having atleast fifteen years experience in the Islamic law research or instruction."

While declaring section 3 of the Azad Jammu and Kashmir Shariat Court Act, 1993, partly ultra vires the Act, 1974, this Court has held as under:

"50. In the light of the hereinabove discussed detailed reasons, we conclude that the provisions of section 3 of Act, 1993 are partly *ultra vires* to the constitution Act to the extent of:-

i. empowering the appointing authority to appoint the judges of the Shariat Court without consultation of the Chief Justices;

ii. lacking the necessary provision of induction of Aalim Judge for achieving the specific object of Islamization of law;

iii. lacking the provision and procedure for removal of Judge of Shariat Court.

Thus, this law in the indicated terms is made in contravention of subsection 2 of section 4 of the Constitution being violative of constitutional spirit, independence of judiciary, amounts to take away and abridge the constitutionally guaranteed fundamental right of

access to justice and equal protection of law. Resultantly, the appointments of all the judges right from 1993 under this provision of law (except the proviso of subsection 2 of section 3 of Act, 1993), are void and also the impugned appointment notification bearing No. LD/AD/2031-80/2012, dated 15.11.2012 of respondents No.5 and 6 in appeal No. 99/2014 titled *Sadaqat Hussain Raja vs. Azad Govt. & others,* is declared without lawful authority. However, according to the spirit of the constitutional provisions i.e section 56 of the constitution Act and keeping in view the principle of law laid down by this Court in the latest judgment reported as *Muhammad Younas Tahir & another vs. Shaukat Aziz, Advocate, Muzaffarabad and others* [PLD 2012 SC (AJ&K) 42], all the acts done by the judges of the Shariat Court appointed under the provision of section 3 of Act, 1993 are declared valid on the principle of *de-facto* doctrine

including the drawing of the financial benefits etc."

Lastly, this Court held in the supra case that if at all, the authority decides to establish the Shariat Court then the authority has to legislate while taking into consideration the following features:-

"51 We hold that for establishment of the Shariat Court according to the spirit of the constitution for achieving the object mentioned in Act, 1993, the legislation having following features is required:-

(a) There must be a provision for induction of atleast one *Aalim* Judge, possibly having the qualification as near to *Mujtahid* or atleast the qualification provided under Article 203-C of the Constitution of Islamic Republic of Pakistan i.e., having atleast fifteen years experience in the Islamic law, research or instruction;

(b) the mode of appointment of judges with consultation of the Chief Justice of Azad Jammu and Kashmir and the Chief Justice of High Court who is also Chief Justice of Shariat Court; and

(c) providing mode of removal of judge of Shariat Court for misconduct, incapability of properly performing functions of duties by reason of physical or mental incapacity.

After survey of the above reproduced paragraphs of *Bashmir Ahmed Mughal's* case (supra), the directions issued by this Court can be summarized as under:-

i) The consultation of the Chief Justices for the appointment of Judge Shariat Court is mandatory and there is no concept of appointment of judges without consultation of both the Chief Justices;

ii) The present composition/ establishment of the Shariat Court failed to achieve its object; the qualification and terms & conditions

of the Judges of the Shariat Court are same, then why the jurisdiction which has been conferred upon Shariat Court cannot be exercised by the Judges of the High Court having the same qualification and privileges; if there is any necessity of the Shariat Court then reasons shall be assigned to justify the establishment of separate Court;

iii) While making the composition there must be a provision for induction of atleast one *Aalim* Judge, having fifteen years' experience in the Islamic Law, research or instruction;

iv) Immediately under proviso of subsection 2 of section 3 of Act, 1993, the appointment of the judges of the High Court as Judges of the Shariat Court.

After the judgment passed by this Court in *Bashir Ahmed Mughal's* case (supra) first step to be taken immediately according to the spirit of the judgment, was the appointment of the High Court Judges as Judges of the Shariat Court. In the judgment supra, the word

‘immediate’ has been used for the said purpose, but the record shows that the notification of the appointment of the High Court Judges as Judges Shariat Court has been issued after a considerable delay. Meaning thereby, the direction of this Court has not been taken into account seriously. Moreover, it is also pertinent to mention here that the said notification was issued when an application for implementation of the judgment of this Court was filed by the other party which reflects the non-serious attitude of the authority regarding the implementation of the judgment of this Court.

9. As the Shariat Court in the present form appears to be a parallel Court, therefore, the next direction issued by this Court was that as the qualification and terms & conditions of the Judges of the Shariat Court and High Court are same, then why the jurisdiction which has been conferred upon

Shariat Court cannot be exercised by the High Court, therefore, reasons shall be assigned to justify the establishment of the Shariat Court. After the said direction by this Court, it was mandatory for the Government to assign reasons to justify the establishment of the Shariat Court in the light of section 46 of the Act, 1974. However, the record shows that before sub-constitutional legislation, no reason whatsoever has been assigned in this regard. After scrutinizing the whole record, we failed to gather anything from which it could be ascertained that any step was taken in compliance of this direction. It was the basic step; as the matter of appointment of the judges, is the next step. First of all it was enjoined upon the authority to assign justification for establishment of a separate Court. In this scenario, it can safely be held that this direction has also not been complied with in letter and spirit.

10. Before dilating upon the next direction issued by this Court regarding the induction of an *Aalim* Judge, it may be observed here that the Shariat Court is a Court of unique nature and the purpose for establishing the same is to test the statute on the touchstone of *Shariah* with the assistance of *Ulema* and Scholars and to convey its opinion to the authority concerned. The important part of the special jurisdiction of the Shariat Court is to determine, after due examination, whether any law is repugnant to the Injunctions of Islam or not. The scope of the expression "Injunctions of Islam" has not been left with the discretion of the Court or notions of an individual. It has been clearly spelt out as the Injunctions which have been laid down in the Holy *Qur'an* and the *Sunnah* of the Holy Prophet (P.B.U.H). If any law in force is challenged, the Shariat Court would be within its jurisdiction to decide whether that

law is in accordance with *Qur'an* and *Sunnah* or not. Moreover, if the issue involved in a law under challenge is not possible to settle without striking down another provision of the same law, the Court has the jurisdiction to hit that provision too. The apex Court of Pakistan while dealing with the scope of Shariat Court observed in a case reported as *Pakistan v. Public at large* [PLD 1986 SC 240] that:

> "The most important part of the special jurisdiction is, after due examination, whether any law (except those excluded for the time being) under Article 203-B(c), is repugnant to the Injunctions of Islam. The scope of the expression "Injunctions of Islam", it needs to be re-emphasized in particular, has not been left to the discretion of the Court or notions of an individual. It has been clearly spelt out as only those Injunctions which have been "laid down" in the Holy Qur'an and the Sunnah of the Holy Prophet

(s.a.w.s).

We do release that while discovering the “Injunctions” for a particular subject or situation from the Holy Qur’an and the Sunnah the Court has not only the power but also the duty to state them. And while doing so (not without it), the Court may also keeping in view the well-known rules of interpretation in the Islamic Jurisprudence, expound and interpret them. An indirect important support for such a methodical approach for stating expounding and interpreting the Injunction of Islam can be found from Article 203-E (6); which enjoins upon even the legal practitioners and juris-consults to do so when assisting the Court.

When stating the Injunctions of Islam reference to the Holy Quran and the Sunnah would be essential. Without it no statement will be complete.”

After taking into account the dictum laid down

in *Bashir Ahmed Mughal's* case (supra) by this Court and the judgment referred to hereinabove, it may be observed here that there is no concept of Shariat Court without an *Aalim* Judge as the wisdom behind the induction of *Aalim* Judge is to examine and decide the questions of repugnancy of any law or provisions of law to the injunctions of Islam as laid down in Holy *Quran* and *Sunnah* of the Holy Prophet (P.B.U.H). Thus, to achieve such purpose there must be a person, well versed in Islamic law. Keeping in view the object of the Shariat Court, this Court issued a direction that there must be a provision for induction of atleast one *Aalim* Judge, possibly having the qualification as near to *Mujtahid* or atleast the qualification provided under Article 203-C of the Constitution of Islamic Republic of Pakistan, 1973 i.e. having atleast fifteen years' experience in the Islamic law, research or instruction. For appointment of an *Aalim*

Judge, sub section 4-A was added in the Ordinance under challenge, however, thereafter, no step has been initiated in this regard even after the lapse of considerable period no *Aalim* Judge has been appointed. In such state of affairs, it cannot be said that this direction has also been complied with in letter and spirit.

11. So for as, the direction by this Court regarding the consultation of the Chief Justices for the appointment of Judge Shariat Court is concerned, the consultative process, the question of suitability of the judges appointed in the Shariat Court and some other points have not been pressed before this Court, therefore, there is no need to dilate upon the same. However, it may be observed here that the consultation of the Chief Justices is the basic mandatory requirement to judge the fitness of a candidate for Judgeship and it is now settled that there is no concept of Judges

without consultation of two Chief Justices. This point has elaborately been dealt with by this Court in *Bashir Ahmed Mughal's* case (supra) and also came under consideration of this Court in another case reported as *Muhammad Younis Tahir and others v. Shaukat Aziz, Advocate Muzaffarabad and others* [PLJ 2012 SC (AJ&K) 226], wherein, it has been observed that:

> "23. The word 'consultation' used in Section 42(4) and Section 43(2-A) of the Act, 1974 is used in similar sense as used in Articles 177 and 193 the Constitution of Pakistan 1973. The Supreme Court of Pakistan has held that the consultation should be effective, meaningful, purposive, consensus oriented, leaving no room for complaint or arbitrariness or unfair play. The opinion of the Chief Justice of Pakistan and the Chief Justice of a High Court as to the fitness and suitability of a candidate

> for Judgeship is to be accepted in absence of sound reasons to be recorded by the President/ Executive."

12. As after detailed discussion, we have observed in the preceding paragraphs, that the directions issued by this Court in *Bashir Ahmed Mughal's* case (supra), have not been complied with in letter and spirit, therefore, the findings recorded by the High Court that through the impugned legislation it appears that the legislature tried to frustrate the judgment of the apex Court, are not without substance. It may be observed here that under the Constitutional provision, the judgment of this Court is binding upon each and every organ of the State and no deviation can be made from it irrespective of the fact that the Authority is President or the Prime Minister of the State. The pronouncement of the Supreme Court on a point of law is the law declared, and unless it is altered or overruled by the

Supreme Court itself, there is no option left with all the executive and judicial authorities including the President and the Prime Minister except to implement the same. It may also be observed here that it cannot be allowed to erode or nullify the judgment of this Court through executive or administrative instrument. In this regard, the Constitutional provision, i.e., section 42-A, of the Act, 1974 is comprehensive in nature and self-supplementary which need not to be supported by any authority. For convenience the Constitutional provision is reproduced here as under:-

> "42-A. **Issue and execution of processes of Supreme Court.-** (1) The Supreme Court shall have power to issue such directions orders or decrees and as may be necessary for doing complete justice in any case or matter pending before it including an order for the purpose of securing the attendance

of any person or the discovery or production of any document.

(2) Any such direction order or decree shall be enforceable throughout Azad Jammu and Kashmir as if it has been issued by the High Court.

(3) All executive and judicial authorities throughout Azad Jammu and Kashmir shall act in aid of the Supreme Court.

(4)……”

Reliance may be placed on a recent judgment of the apex Court of Pakistan reported as *Peer Mukarram-ul-Haq v. Federation of Pakistan and others* [2014 SCMR 1457], wherein it has been observed that:-

“The Article 190 of the Constitution confers an obligation upon the executive and the judicial authorities throughout Pakistan to act in aid of this Court. The Prime Minister or the President are under Constitutional obligation to ensure

> that the judgments of this Court are implemented in its letter and spirit, whereas in the case in hand the President (competent Authority) had nullified the findings of this Court against the appellant."

As we have declared that basic steps have not been taken in compliance of the judgment of this Court while making the legislation, thus, it can safely be said that the legislation made through Ordinance is an uttered disregard of the Constitutional provision and judgment of this Court which cannot be approved at all.

13. So far as, the argument of the learned counsel for the appellants that impugned judgment regarding making and promulgation of the Ordinance is self-contradictory, as on one hand, it has been declared that 'making' and 'promulgation' of the Ordinance are two different steps, but on the other hand, while declaring the Ordinance as ultra vires, the High Court treated the same

as one step, is concerned, we have gone through the impugned judgment. After perusing the findings recorded by the High Court in para 24 of the impugned judgment, we are of the view that the learned High Court while keeping in view the spirit of the Constitution, recorded the well reasoned findings which are not opened to interference by this Court. We affirm the findings recorded by the High Court in para 24 of the impugned judgment while observing that although the words 'making' and 'promulgation' suggest that both are independent acts, but the same have to come in force simultaneously. That is why, the word 'immediate action' has been used in the Constitutional provision. In our estimation, the argument of the learned counsel that the impugned judgment is self-contradictory on the point, is based on misconception; therefore, the same is hereby repelled. This Court while dealing with the

proposition in hand, in a case reported as *Muhammad Tariq Khan v. The State and another* [1997 SCR 318] has observed as under:-

> "In sub-section (1) it is laid down that President may "make and promulgate an Ordinance". It means that the President, apart from making an Ordinance, has to promulgate it. It is clear that "making" and "promulgation" are two different and independent steps. Sub-section (2) lays down two things. Firstly it lays down that an Ordinance "promulgated" under this section shall have the same force and effect as an Act of the Assembly. It means that an Ordinance "made" by the President does not have the effect of an Act of the Assembly but it has that force and effect when it is "promulgated". Secondly, sub-section (2) lays down that an Ordinance shall have force and effect as an act of the Assembly for four months from its

> "promulgation". Thus the starting point is not the date on which an Ordinance is made. The conclusion is that an Ordinance comes into force not when it is made by the President but when the second step of promulgation is completed. This leads us to the question as to what is promulgation, but it may be pointed out before entering into that discussion that so far as the term "make an Ordinance" is concerned it does not pose any difficulty. In our view the moment when the President affixes his signature on an Ordinance it may be said that he has made that Ordinance."

14. As we have declared that Ordinance (No.XVIII of 2014) has been made and promulgated in sheer violation, disregard of the Constitutional provisions and the judgment of this Court delivered in *Bashir Ahmed Mughal's* case (supra), therefore, the appointments made in the light of such illegal legislation do not earn any right of protection.

In this scenario, the discussion upon the findings recorded by the High Court that the Ordinance before promulgation has not been placed before the Cabinet becomes irrelevant. Moreover, the argument of the learned counsel for the appellants that no right of hearing was provided to the appellants while recording the findings regarding section 23 of the Azad Jammu and Kashmir Rules of Business, 1985 has also become immaterial, therefore, the same is left open to be dealt with in some other case.

15. The argument of the learned counsel for the appellants that the direction issued by the High Court in the impugned judgment for making the legislation, within 30 days, period, is not enforceable, has substance. Keeping in view the overall facts and circumstances of the case, to this extent the appeal is accepted and in the impugned judgment the direction regarding introduction of Constitutional bill and

appointment of the Judges of the Shariat Court is modified and the matter is left open for the concerned without imposing any time restriction.

16. The case law referred to and relied upon by the learned counsel for the appellants having distinguishable facts and circumstances is not applicable to the case in hand; therefore, the detailed discussion upon the same is avoided.

17. The nutshell of the above discussion is that finding no force, this appeal is dismissed, subject to the modification as mentioned in para 15 hereinabove. Consequently, the impugned judgment stands upheld. No order as to the costs.

Before parting with the judgment, it may be observed here that it is apparent from the record that on 27.03.2015, one Ch. Muhammad Mushtaq, Advocate, was also

appointed as Judge Shariat Court along with appellants No.4 and 5, but on the very next day, i.e., on 28.03.2015 his name was de-notified while issuing another notification. It is a mockery with law on the part of the executive and it amounts to damage the image of superior judiciary in the general public which cannot be allowed at any cost.

Muzaffarabad, **JUDGE JUDGE JUDGE**

__.11.2015.