SUPREME COURT OF AZAD JAMMU AND KASHMIR
(Appellate Jurisdiction)

PRESENT:-
Mohammad Azam Khan, C.J.
Ch. Muhammad Ibrahim Zia, J.
Raja Saeed Akram Khan, J.
Masood A. Sheikh, J.

1. Civil Appeal No. 7 of 2016
(PLA filed on 18.01.2016)

Azad Jammu and Kashmir Council through Secretary, Azad Jammu and Kashmir Council Secretariat, having office at Kashmir Council Secretariat, Sector F-5/2, Islamabad.

…. APPELLANT

VERSUS

1. Azad Jammu and Kashmir Government through its Chief Secretary, New Civil Secretariat, Muzaffarabad.
2. Secretary Law, Justice & Parliamentary Affairs Department, Azad Jammu and Kashmir Government, New Civil Secretariat, Muzaffarabad.
3. Legislative Assembly, Azad Jammu and Kashmir through Secretary Legislative Assembly, Assembly Secretariat, Muzaffarabad.
4. Secretary, Election Commission, Azad Jammu and Kashmir, New Civil Secretariat, Muzaffarabad.

5. President, Azad Jammu and Kashmir through Secretary Presidential Affairs, President Secretariat Jalalabad, Muzaffarabad.
6. Chief Secretary, Azad Government of the State of Jammu and Kashmir, Muzaffarabad.

…… RESPONDENTS

1. Chaudhary Tariq Farooq, Member Legislative Assembly Azad Jammu and Kashmir, Deputy Opposition Leader Azad Jammu and Kashmir Legislative Assembly.
2. Dr. Najeeb Naqi, Member Legislative Assembly, Azad Jammu and Kashmir.
3. Raja Sajjad Ahmed Khan, Advocate Supreme Court, Muzaffarabad.

…… PROFORMA RESPONDENTS

[On appeal from the judgment of the High Court dated 12.01.2016 in Writ Petition No. 2740/2015]

FOR THE APPELLANT: Mr. Sadaqat Hussain Raja and Raja Kahlid Mehmood Khan, Advocates.

FOR THE RESPONDENTS: M/s. Mansoor Pervaiz Khan, Advocate-General, Ch. Shaukat Aziz, Additional Advocate-General, Raja Muhammad Hanif Khan,

Raja Inamullah Khan and Barrister Humayun Nawaz Khan, Advocates.

2. Civil Appeal No. 8 of 2016
(PLA filed on 20.01.2016)

1. Chaudhary Tariq Farooq, Member Legislative Assembly Azad Jammu and Kashmir, Deputy Opposition Leader Azad Jammu and Kashmir Legislative Assembly.
2. Dr. Najeeb Naqi, Member Legislative Assembly, Azad Jammu and Kashmir.
3. Raja Sajjad Ahmed Khan, Advocate Supreme Court, Muzaffarabad.

…… APPELLANTS

VERSUS

1. Azad Jammu and Kashmir Government through its Chief Secretary, New Civil Secretariat, Muzaffarabad.
2. Secretary Law, Justice & Parliamentary Affairs Department, Azad Jammu and Kashmir Government, New Civil Secretariat, Muzaffarabad.
3. Legislative Assembly, Azad Jammu and Kashmir through Secretary Legislative Assembly, Assembly Secretariat, Muzaffarabad.
4. Azad Jammu and Kashmir Council through Secretary AJ&K Council, having office at Kashmir Council Secretariat Sector F-5/2, Islamabad.

5. Secretary, Election Commission, Azad Jammu and Kashmir, New Civil Secretariat, Muzaffarabad.
6. President, Azad Jammu and Kashmir through Secretary Presidential Affairs, President Secretariat Jalabad, Muzaffarabad.
7. Chief Secretary, Azad Government of the State of Jammu and Kashmir, Muzaffarabad.

…… RESPONDENTS

(On appeal from the judgment of the High Court dated 12.01.2016 in Writ Petition No. 2740/2015)

FOR THE APPELLANTS: Raja Muhammad Hanif Khan and Raja Inamullah Khan, Advocates.

FOR THE RESPONDENTS: Mr. Mansoor Pervaiz Khan, Advocate-General, Ch. Shoukat Aziz, Additional Advocate-General, Mr. Sadaqat Hussain Raja and Raja Khalid Mehmood Khan, Advocates.

3. Civil Appeal No. 11 of 2016
(PLA filed on 21.01.2016)

1. Azad Government of the State of Jammu & Kashmir through Prime Minister of Azad Jammu & Kashmir, Muzaffarabad.
2. Secretary Law, Justice & Parliamentary Affairs, Government of Azad Jammu & Kashmir, Muzaffarabad.
3. Legislative Assembly of Azad Jammu & Kashmir through Secretary Legislative Assembly, Muzaffarabad.
4. President of Azad Jammu & Kashmir through Secretary / Presidential Affairs, President House, Muzaffarabad.

…..APPELLANTS

VERSUS

1. Ch. Tariq Farooq, Member/Deputy Opposition Leader Legislative Assembly of Azad Jammu and Kashmir Muzaffarabad.
2. Dr. Najeeb Naqi, Member Legislative Assembly of Azad Jammu and Kashmir, Muzaffarabad.
3. Raja Sajjad Ahmed Khan, Advocate Supreme Court, Muzaffarabad.
4. Azad Jammu & Kashmir Council through its Secretary having its office at AJ&K Council Secretariat, Sector F-5/1, Islamabad.

…… RESPONDENTS

5. Ch. Anwar-ul-Haque, Former Speaker of Legislative Assembly of Azad Jammu & Kashmir r/o Bhimber, City Bhimber, Azad Kashmir.
6. Mrs. Shaheen Kausar Dar, Member/Deputy Speaker, Legislative Assembly of Azad Jammu & Kashmir, Muzaffarabad.

7. Chief Secretary of Government of Azad Jammu & Kashmir, Muzaffarabad.
8. Secretary Election Commission of Azad Jammu & Kashmir, Muzaffarabad.

…… PROFORMA RESPONDENTS

(On appeal from the judgment of the High Court dated 12.01.2016 in Writ Petition No. 2740/2015)

FOR THE APPELLANTS: Mr. Mansoor Pervaiz Khan, Advocate-General and Barrister Humayun Nawaz Khan, Advocate.

FOR THE RESPONDENTS: M/s. Sadaqat Hussain Raja and Raja Khalid Mehmood Khan, Advocates.

Date of hearing: 25.01.2016.

JUDGMENT:

Mohammad Azam Khan, C.J.- Through short order dated 25th January, 2015 the titled appeals were disposed off. The operative part of the short order is as under:-

"4. Since the matter is of public importance therefore, the appeals are being disposed of through the following short order for the reasons to be recorded later:-

(a) There is no procedure prescribed for initiation of the process for appointment of the Chief Election Commissioner. The advice issued by the Azad Jammu and Kashmir Council on 16th November, 2015 of an eligible person who qualifies to be appointed as Chief Election Commissioner under the Act, 1992 is a valid advice.

(b) Under Section 50 of the Constitution Act, the Chief Election Commissioner has to be appointed by the President on the advice of the Council and section 6-A of the amending Ordinance XIX of 2015, provides appointment of Chief Election Commissioner without the 11 advice of Council, therefore, this provision offends the Section 50 of Constitution Act.

(c) Since we have drawn the conclusion that the advice issued by the Council on 16th November, 2015 is valid and legal which is holding the field, therefore, in view of the conclusion reached at in civil appeal No.7/2016 titled AJ&K Council vs. AJ&K Govt. & others, in presence of the advice for appointment of permanent Chief Election Commissioner, Acting Chief Election Commissioner cannot be appointed.

> Consequently, the civil appeal No.7/2016 titled AJ&K Council vs. AJ&K Govt. & others is accepted. The civil appeal No. 8/2016 titled Ch. Tariq Farooq & others v. Azad Govt. & others has become infructuous in the light of the conclusion drawn in civil appeal No.7/2016 titled AJ&K Council vs. AJ&K Govt. & others, hence stands dismissed whereas the civil appeal No.11/2016 titled Azad Govt. & others vs. Ch. Tariq Farooq & others is partly accepted to the extent of modification in the impugned judgment of the High Court."

The following are detailed reasons for the short order:-

2. The Chief Election Commissioner, Azad Jammu & Kashmir is appointed under section 50 of the Azad Jammu & Kashmir Interim Constitution Act, 1974 (hereinafter to be referred as Act, 1974), by the President on the advice of the Azad Jammu & Kashmir Council. The office of the Chief Election Commissioner fell vacant on 14th April, 2015 due to retirement of Mr. Justice, (*Rtd*.) Munir Ahmed Chaudhary. The Azad Jammu & Kashmir Council issued an advice for appointment of Mr. Justice (*Rtd*.) Munir Ahmed Chaudhary (former Judge) High

Court as Chief Election Commissioner on 7th September, 2015. The advice was returned by the President. The Chairman Azad Jammu & Kashmir Council on 15th November, 2015 withdrew the advice for appointment of Mr. Justice (*Rtd*), Munir Ahmed Chaudhary and issued fresh advice for appointment of Mr. Justice, Ghulam Mustafa Mughal, Chief Justice Azad Jammu & Kashmir High Court as Chief Election Commissioner. Before the issuance of advice by the Azad Jammu & Kashmir Council, the Azad Jammu & Kashmir Legislative Assembly amended the Chief Election Commissioner (Terms and Conditions) Act, 1992 (hereinafter shall be referred as the Act 1992), through the amending Ordinance XIX of 2015. The order for appointment of the Chief Election Commissioner in pursuance of advice dated 15th November, 2015, was not issued. The President, Azad Jammu & Kashmir while acting under section 6-A of the Chief Election Commissioner (Terms and Conditions) Act, 1992, appointed Mr. Justice, Ghulam Mustafa Mughal, Chief Justice of the High Court as Acting Chief Election Commissioner on 29th December, 2015. The

appellants, in appeal No.8 of 2016 filed a writ petition in the Azad Jammu & Kashmir High Court, whereby they challenged the provisions of section 6-A of the amending Ordinance, 2015 being ultra vires the Act, 1974 and also challenged the notification for appointment of the Acting Chief Election Commissioner dated 29th December, 2015 with the further prayer that the notification dated 29th December, 2015 may be brought in conformity with the provisions of section 50 of Act, 1974 and the office of the Chief Election Commissioner Azad Jammu & Kashmir may be filled in accordance with section 50 of Act, 1974. After necessary proceedings, the High Court through the impugned judgment dated 12th January, 2016, accepted the writ petition while declaring the provisions of section 6-A of Ordinance No.XIX of 2015, ultra vires the Constitution, the notification dated 29th December, 2015 for appointment of the Acting Chief Election Commissioner was set aside and the Azad Jammu & Kashmir Government was directed to send the panel of qualified persons to the Azad Jammu & Kashmir Council for appointment of the Chief Election Commissioner after

consultation with the Leader of the House and the Leader of the Opposition. A further direction was issued that the Act, 1974 be suitably amended. The Azad Jammu & Kashmir Council, the Azad Government of the State of Jammu & Kashmir and Ch. Tariq Farooq and others have filed three separate appeals from the impugned judgment.

3. The Azad Jammu & Kashmir Council has challenged a part of the judgment and prayed that while modifying the judgment a direction be issued to respondents No.1 to 3, 6 and 7 to act in accordance with the advice sent by the Azad Jammu & Kashmir Council dated 15th November, 2015, the notification for appointment of the Hon'ble Judge, Mr. Justice, Ghulam Mustafa Mughal, Chief Justice High Court as Chief Election Commissioner, may be issued in the interest of justice and observation of the High Court for panel be quashed.

4. In Civil Appeal No.8 of 2016, titled *Ch. Tariq Farooq and others vs. Azad Government and others*, a request has been made that by modifying the judgment of

the High Court, a direction be issued to the respondents that they shall modify the notification dated 29th December, 2015 and appoint Mr. Justice, Ghulam Mustafa Mughal, Chief Justice of the High Court as Chief Election Commissioner, Azad Jammu & Kashmir under section 50 of the Act, 1974 instead of Acting Chief Election Commissioner.

5. In the third appeal titled *Azad Government and others vs. Ch. Tariq Farooq and others*, Civil Appeal No.11 of 2016, the judgment of the High Court has been challenged to the extent of striking down section 6-A of Ordinance No.XIX of 2015 and appointment notification of the Chief Election Commissioner dated 29th December, 2015 with a prayer that the judgment to this extent may be set aside.

6. Mr. Sadaqat Hussain Raja, Advocate, counsel for the appellants, Azad Jammu & Kashmir Council in appeal No.7 of 2016, argued that the Chief Election Commissioner Azad Jammu & Kashmir is appointed under section 50 of the Act, 1974 by the President on the

advice of the Azad Jammu & Kashmir Council. The judgment of the High Court to the extent of paragraphs No.18, 19, 20 and 21 is against the provisions of the Act, 1974, particularly section 50 of the said Act. The learned counsel submitted that the Act, 1974 is unique in its character, apart from advice under Section 7 like Article 48 of the Constitution of Islamic Republic of Pakistan, 1973, in the scheme of Act, 1974, three types of other advices are provided. The advice under section 7 of Act, 1974 provides that the President has to act on the advice of the Prime Minister. The opening words of section 7 of Act, 1974, say that "subject to an express provision to the contrary" in this Act, the President shall act on and in accordance with the advice of the Prime Minister. The learned counsel submitted that the use of words "subject to an express provision to the contrary" in this Act makes it clear that there is some contrary provision relating to the exercise of powers by the President under Act, 1974. These words are missing in the Constitution of Islamic Republic of Pakistan, 1973. The second type of advice is provided under sections 42 and 43 of the Act, 1974 for

appointment of the Judges of the Supreme Court, the Judges and the Chief Justice of the High Court which provide that a judge of the Supreme Court shall be appointed by the President on the advice of the Council after consultation with the Chief Justice of the Azad Jammu & Kashmir and section 43 of Act, 1974 provides that the Chief Justice of the Azad Jammu & Kashmir High Court shall be appointed by the President on the advice of the Council after consultation with the Chief Justice of the Azad Jammu & Kashmir. Section 43 of Act, 1974, further provides that a Judge of the High Court shall be appointed by the President on the advice of the Council after consultation with the Chief Justice, Azad Jammu & Kashmir High Court and the Chief Justice of the Azad Jammu & Kashmir. The appointments of the Judge of the Supreme Court, Chief Justice of the High Court and a Judge of the High Court are made by the President on the advice of the Council after consultation. The learned counsel submitted that the third type of advice relates to the appointment of the Chief Justice, Azad Jammu & Kashmir, Chief Election Commissioner and the Auditor

General. The Chief Justice is appointed under section 42 of Act, 1974 by the President on the advice of the Council. The Chief Election Commissioner is appointed under section 50 of Act, 1974 by the President on the advice of the Council and the Auditor General is appointed under section 50-A of the Act, 1974 by the President on the advice of the Council. There is no concept of consultation for appointment to these offices. The appointments have to be made only on the advice of the Council. The concept of panel is interconnected with the consultation. When the President consults with the Chief Justice for appointment of a Judge, the consultation is provided in the form of panel. This Court observed in Younis Tahir's case [PLD 2012 SC (AJ&K) 42] that the Chief Justice shall send the panel of suitable persons to the President and the President shall seek advice from the Council. The appointment of the Judges has to be made from the panel recommended by the Chief Justice. There is no concept of panel for appointment of Chief Justice of Azad Jammu and Kashmir, the Chief Election Commissioner and the Auditor General. The Younis Tahir's case (supra) is based

upon the judgment of the Supreme Court of Pakistan in the case reported as [PLD 1996 SC 324]. The learned counsel also referred to the cases reported as [PLD 1997 SC 84] and [PLD 2011 SC 265]. He also referred to section 53 of the Act, 1974 which relates to the powers of the President and issuance of proclamation of emergency on the advice of the Chairman of the Council and submitted that there is no concept of consultation. The President has to act on the advice of the Chairman of the Council. He submitted that the findings recorded by the High Court that the President shall send a panel of suitable persons after consultation with the Leader of the House and the Leader of the Opposition for appointment of Chief Election Commissioner, is against the Act, 1974 and not maintainable. He also submitted that a direction be issued to the President to issue order for appointment of the Chief Election Commissioner in accordance with the advice issued by the Azad Jammu & Kashmir Council on 15th November, 2015. He further submitted that the Azad Jammu & Kashmir Government referred the matter regarding the legislation for the terms and conditions of

Chief Election Commissioner, promulgated by the Azad Jammu & Kashmir Council in shape of Act, 2000 through Reference No.1 of 2015 to this Court and the Azad Jammu & Kashmir Council while bona-fidely acting on the opinion rendered by this Court in Presidential Reference No.1 of 2015, withdrew the advice for appointment of Mr. Justice (R) Munir Ahmed Chaudhary, as Chief Election Commissioner and issued the fresh advice for appointment of Mr. Justice, Ghulam Mustafa Mughal, Chief Justice of the High Court as Chief Election Commissioner on 15th November, 2015.

7. The learned counsel vehemently argued that schedule V, entry No.18 of the Azad Jammu & Kashmir Council Rules of Business, 1983, provides the process for appointment of the Chief Election Commissioner. He submitted that seeking of advice through panel relates to the cases where the consultation is provided and in the cases where consultation is not provided, there is no concept of panel.

8. The learned counsel submitted that the judgment of the High Court is beyond the pleadings. In para No.19 of the impugned judgment, such relief has been granted to the respondents which was not prayed for. He lastly argued that the word “advice” in section 50 of the Act, 1974, has been used in the sense of command. He requested for acceptance of the appeal.

In the case reported as [PLD 1997 SC 84], the scope of presidential powers before eighth amendment and after eighth amendment in relation to advice in Article 48 and discretionary powers has been resolved.

In the case reported as *Shahid Orakazi and another vs. Pakistan through Secretary Law, Ministry of Law Islamabad and another* [PLD 2011 Supreme Court 365], the question raised before the Supreme Court of Pakistan was regarding the appointment of Chairman National Accountability Bureau without consultation of the Leader of the Opposition in the National Assembly. It was declared that neither the President of Pakistan, nor the Prime Minister of Pakistan consulted with the Leader of the Opposition in the National Assembly in any manner whatsoever, thus, a mandatory requirement in that regard had remained unfulfilled. The appointment was set aside.

9. Barrister Humayun Nawaz Khan, Advocate, counsel for the appellants, in Civil Appeal No.11 of 2016 and respondents in Civil Appeals No.7 and 8 of 2016, submitted, that the writ petition was not maintainable. The petitioners in the High Court were not aggrieved from the non-implementation of the advice of the Council. Only the Azad Jammu & Kashmir Council was aggrieved, therefore, the writ petition merited dismissal on the sole ground. The learned counsel argued that the process for appointment of the Chief Election Commissioner has to be initiated from the office of the President and not the Azad Jammu & Kashmir Council. He submitted that the advice cannot be issued in vacuum. The advice is always issued when sought by the appointing authority. The President is the appointing authority of the Chief Election Commissioner. The President initiated the process for appointment of the Chief Election Commissioner by sending the panel of suitable persons. The Council has no jurisdiction to issue advice for appointment of Chief Election Commissioner beyond the panel sent by the President. He heavily relied upon the judgment of this

Court delivered in the case reported as *Muhammad Younis Tahir and others vs. Azad Government and others* [PLD 2012 SC (AJ&K) 42] and the opinion rendered by this Court in Presidential Reference No.1 of 2015. He submitted that the direction cannot be issued for implementation of advice dated 15th November, 2015. He submitted that the office of Chief Election Commissioner was vacant, therefore, after consultation with the Chief Justice of Azad Jammu & Kashmir, the Acting Chief Election Commissioner was appointed by the President under section 6-A of Act, 1992. After returning the advice to the Council, the advice no more is in field, therefore, it can not be implemented. He submitted that the advice issued by the Council is not valid as it was not sought by the appointing authority. The President sought the advice only in respect of three persons in the form of penal. No advice can be issued outside the penal. The learned counsel argued that even otherwise the advice cannot be implemented because it has been issued against the Council Rules of Business, 1983. The process has not

been initiated by the competent authority and the approval has not been obtained from the Council Secretariat.

10. The learned counsel submitted that the portion of the judgment of the High Court, whereby section 6-A of the amending Ordinance XIX, 2015 has been declared ultra vires the Constitution, is against the statutory provisions. No office has been created through the amending Ordinance. Only the stop-gap arrangement has been provided when the Chief Election Commissioner is not available, therefore, it was a valid piece of legislation. The learned counsel submitted that the Courts have no powers to place an embargo on the legislative authority of the Azad Jammu & Kashmir Legislative Assembly. The amending Ordinance XIX of 2015, including section 6-A is valid piece of Legislation. The learned counsel relied upon the judgment of the Supreme Court of Pakistan delivered in the case reported as *District Bar Accession, Rawalpindi & others vs. Federal of Pakistan & others* [PLD 2015 SC 401]. He referred to different pages of the judgment.

In the case titled *District Bar Accession, Rawalpindi & others vs. Federal of Pakistan & others* [2015 PLD SC 401] the matter before the Court was amendment in the Constitution and not in subordinate law. We respectfully agree with the view observed therein about general principals laid down by the Supreme Court of Pakistan. The Rule of law laid down in amendment of Constitution is not applicable in the matter in hand.

11. Ch. Shoukat Aziz, Additional Advocate General, submitted that according to entry No.20 of Schedule V of Rules of Business 1985, the Election Commission is a special institution of Law, Justice, Parliamentary Affairs & Human Rights Department and the process for appointment of the Chief Election Commissioner has to be initiated from the Law, Justice, Parliamentary Affairs & Human Rights Department of the Azad Jammu & Kashmir. He relied upon the cases reported as [2014 SCR 43], [PLD 1994 SC 324] and [1999 SCR 234].

12. Mr. Mansoor Pervaiz Khan, Advocate-General although admitted that there is no concept of consultation in section 50 of the Act, 1974 unlike sections 42 and 43 of the Act, 1974, however, he submitted that the word "consultation" should be read under section 50 like sections 42 and 43. He requested for dismissal of the appeal filed by the Azad Jammu & Kashmir Council and acceptance of appeal filed by the Azad Jammu & Kashmir Government.

13. Raja Muhammad Hanif Khan, Advocate counsel for the appellants in appeal No.8 of 2016, submitted that the Chief Election Commissioner is appointed under section 50 of the Act, 1974 by the President on the advice of the Azad Jammu & Kashmir Council. The Chief Election Commissioner cannot be appointed without the advice of the Council. When the Chief Election Commissioner is appointed on the advice of the council, the Acting Chief Election Commissioner cannot be appointed without the advice of the Council. In Section 6-A of the amending Ordinance XIX of 2015, the

word “advice” is missing, therefore, Section 6-A of the amending Ordinance XIX of 2015 is against the provisions of section 50 of the Act, 1974. The learned counsel submitted that the Chief Election Commissioner has to exercise the powers under various laws, including the Azad Jammu & Kashmir Council (Elections) Act, 1976 and the Azad Jammu & Kashmir Legislative Assembly (Elections) Ordinance, 1970. These Acts, refer to the Chief Election Commissioner appointed under section 50 of the Act, 1974. Under the referred laws, only such Chief Election Commissioner can exercise powers, who is appointed under section 50 of the Act, 1974. The Acting Chief Election Commissioner appointed without the advice of the Council cannot exercise powers under the referred laws, as such, the High Court was right in declaring the provisions of section 6-A of the Ordinance of 2015 against section 50 of the Act, 1974. The learned counsel further submitted that the Azad Jammu & Kashmir Council issued the advice for appointment of the Chief Election Commissioner on 15th November, 2015. The advice has not been withdrawn by the Council. It is

still holding the field. In the presence of advice under section 50 of the Act, 1974 for appointment of Chief Election Commissioner, the order for appointment of Acting Chief Election Commissioner cannot be issued. The learned counsel further submitted that the advice was issued under Section 50 of Act, 1974 and it is binding on the President and the President has to issue orders for appointment of the Chief Election Commissioner accordingly. The learned counsel for interpretation of the word "advice" relied upon the *Corpus Juris* second volume. The learned counsel lastly argued that the High Court has recorded certain observations which are beyond the pleadings and not prayed for by the petitioners, appellants herein. He submitted that the observation made by the High Court that the President shall send the panel of suitable persons after consultation with the Leader of the House and the Leader of the Opposition in the Legislative Assembly to the Council for appointment of the Chief Election Commissioner, is against the statutory provisions. Under the Constitution of Islamic Republic of Pakistan, 1973, under Article 213, the consultation with

the Leader of the House and the Leader of the Opposition is specifically provided. The finding is not maintainable. He requested for issuance of direction to the respondents to implement the advice of the Council issued on 15th November, 2015.

14. Mr. Sadaqat Hussain Raja, Advocate, in rebuttal submitted that the consultation was made with the Chief Justice for appointment of Acting Chief Election Commissioner, while concealing the fact that the advice for appointment of the Chief Election Commissioner has been issued by the Council. He submitted that the advice dated 15th November, 2015 has not been withdrawn by the Council. It is binding on the President because it has been issued in a lawful manner for appointment of the Chief Election Commissioner. The learned counsel further submitted that from the combined reading of the Rules of Business 1985, and Council Rules of Business, 1983, it is clear that the President has to issue the order for appointment of the Chief Election Commissioner when the advice is issued under section 50 of Act, 1974. The

learned counsel lastly argued that the amending Ordinance XIX of 2015 is against the provisions of section 50 of the Act, 1974. The High Court has rightly struck down the same.

15. Ch. Anwar-ul-Haq, proforma-respondent No.5 in Civil Appeal No.11 of 2016, has filed the written arguments. In the written arguments, it is submitted that the writ petition filed by the petitioners/appellants, Ch. Tariq Farooq and others, was not maintainable because they failed to point out that they are aggrieved persons. They have no locus standi to file the writ petition. The writ petition has been filed to reverse the opinion of this Court in Presidential Reference No.1 of 2015. The writ petition was filed in violation of Rule 32 of the Azad Jammu & Kashmir High Court (Procedure) Rules, 1984, which was liable to be dismissed. It is further submitted in the written arguments that the judgment of the High Court to the extent of sending the panel of suitable persons to the Council for appointment of Chief Election Commissioner is a legal and valid one which has been passed according

to the opinion of this Court rendered in Presidential Reference No.1 of 2015, wherein this Court observed that advice cannot be issued on its own, it is always sought and the President sought the advice by sending the panel of suitable persons. The Council is not legally competent to issue advice beyond the panel sent by the President. It is averred in the written arguments that the executive authority of the Council has to be exercised by the Council Secretariat consisting of the Federal Minister nominated by the Chairman and not more than three advisors appointed by the Chairman from amongst the Members of the Council. The Council has not competently been constituted, therefore, the executive powers exercised by the Council are not valid. He relied upon the judgment of this Court delivered in the case reported as *Muhammad Younis Tahir and others vs. Azad Government and others* [PLD 2012 SC (AJ&K) 42]. The judgment of the High Court to the extent of suitably amending the law is in accordance with the judgment of this Court. He requested for dismissal of the appeal filed by the Azad Jammu & Kashmir Council.

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

17. The Chief Election Commissioner, of Azad Jammu & Kashmir is appointed under Section 50 of Azad Jammu & Kashmir Interim Constitution Act, 1974. The same is reproduced as under:-

> 50. **Chief Election Commissioner ;-**(1) There shall be a Chief Election Commissioner appointed by the President on the advice of the Council on such terms and conditions as may be prescribed.
>
> (2) The person appointed as Chief Election Commissioner under the Azad Jammu and Kashmir Government Act, 1970, or deemed to have been so appointed and functioning as such immediately before the commencement of this Act shall be deemed to have been appointed as Chief Election Commissioner under sub-section (1) on the same terms and conditions of service as are applicable to him immediately before the such commencement.

The language implied in Section 50 is clear that President shall appoint Chief Election Commissioner on the advice of the Azad Jammu & Kashmir Council. The Government of Pakistan while acting in discharge of its

responsibility under the UNCIP Resolutions approved the proposed repeal and enactment of the Azad Jammu & Kashmir Act, 1970 and authorized the President of Azad Jammu & Kashmir to introduce a bill in Legislative Assembly in Azad Jammu & Kashmir known as Azad Jammu & Kashmir Interim Constitution Act, 1974. The Azad Jammu & Kashmir Assembly passed the Act by two third majority and President assented to it. In original Section 50 of Act, 1974, word ‘advice’ was not provided, it was provided that Chief Election Commissioner shall be appointed by the President. Later on, an amendment was brought through 1st amendment Act, 1975, whereby the word ‘advice of council’ were inserted. The AJ&K Council on 7th September 2015 advised the President to appoint Mr. Justice (Rtd.) Munir Ahmed Chaudhary as Chief Election Commissioner under Section 50 of Act, 1974. The President of Azad Jammu & Kashmir while acting under Section 46 (A) of the Act, 1974 invoked the advisory jurisdiction of this Court for opinion that whether the Azad Jammu & Kashmir Council or the Azad Jammu & Kashmir Assembly has Legislative competence to make

a law in respect of terms and conditions of Chief Election Commissioner and interpretation of provisions of the Azad Jammu & Kashmir Council Chief Election Commissioner Terms and Conditions Act, 2000.

18. This Court opined that "the matter of terms and conditions of the Chief Election Commissioner is within the Legislative competence of Azad Jammu & Kashmir Legislative Assembly." Thereafter, the President of Azad Jammu & Kashmir promulgated Ordinance No.XIX of 2015 on 22nd October, 2015, wherein apart from other Sections, 6-A was added, which provided the Acting Chief Election Commissioner, Section 6(A) is reproduce as under:-

> "6-A **Acting Chief Election Commissioner:- at any time when,**
>
> (a) The office of Chief Election Commission is vacant;
>
> (b) The Chief Election Commission is absent or unable to perform the functions of his office due to any other cause;
>
> The person eligible under Section 3 shall be appointed by the President in consultation with the Chief

> Justice as Acting Chief Election Commissioner.”

A bare reading of Section 6-A makes it clear that Acting Chief Election Commissioner has to be appointed by the President with consultation of Chief Justice of Azad Jammu & Kashmir and the advice of the Council has not been provided.

19. After the opinion of this Court in Presidential Reference No.01 of 2015, the Azad Jammu & Kashmir Council withdrew the advice of Mr. Justice (Rtd.) Munir Ahmed Chaudhary, for appointment as the Chief Election Commissioner and on 15th November, 2015 issued the advice of Mr. Justice Ghulam Mustafa Mughal, Chief Justice of the Azad Jammu & Kashmir High Court for appointment as the Chief Election Commissioner. After receiving the advice the President addressed a letter to the Azad Jammu & Kashmir Council that advice of Mr. Justice Ghulam Mustafa Mughal, the Chief Justice of the Azad Jammu & Kashmir High Court for appointment as the Chief Election Commissioner be reconsidered because his name was not in the panel sent by the President of the

Azad Jammu & Kashmir for Chief Election Commissioner. Later on, after consultation with the Chief Justice of the Azad Jammu & Kashmir ordered for appointment of Mr. Justice Ghulam Mustafa Mughal, Chief Justice of the Azad Jammu & Kashmir High Court as Acting Chief Election Commissioner under Section 6-A of the Act, 1992 as added by amending Ordinance XIX of 2015.

20. In this background the writ petition was filed by Ch. Tariq Farooq & others. The Azad Jammu & Kashmir Interim Constitution Act, 1974 has unique characteristics, it provides parliamentary form of Government. The Azad Jammu & Kashmir Legislative Assembly and the Azad Jammu & Kashmir Council are two legislative bodies. The Azad Government and Council exercise executive authority in respect of the matter they have power to legislate. The scheme of the Act, 1974 provides mode for exercise of powers by the President on various types of advices. Like Constitution of Islamic Republic of Pakistan, 1973 , where under article 48 the

President has to act on advice of the Prime Minster/Cabinet, in Section 7 of Act, 1974, except the words "subject to an express provision to the contrary in this Act", the President has to act on and in accordance with the advice of the Prime Minster and such advice is binding. We have already discussed in detail the scope of words "subject to an express provision to the contrary in this Act" in case titled *Muhammad Younas Tahir and another vs. Shoukat Aziz Advocate Muzaffarabad and others* [PLD 2012 SC (AJ&K) 42], and observed that apart from the advice of the Prime Minster in Section 7, the advice of the Azad Jammu & Kashmir council is provided in Section 42 and 43 of the Act, 1974. The President exercises the powers on the advice of the Prime Minster of the Azad Jammu & Kashmir under Section 7. In case titled *Sardar Muhammad Ayub Khan vs. Secretary S&GAD & 4 others* [1999 SCR 235], it was observed by this Court as under:-

> "that law is well settled that section of the Constitution Act is applicable to all sub Constitutional laws and therefore the President has to act on advice even in

> those matters which are not mentioned in the Constitution Act itself. It is equally well settled by now that an express provision to the contrary made in the Constituting Act it self forms an exception to the rule mentioned above.

21. The word ‘advice’ has been used for the appointment of Judge of the Supreme Court, Chief Justice of the Azad Jammu & Kashmir under Section 42; Judge of the High Court, Chief Justice of the Azad Jammu & Kashmir High Court under section 43; under Section 50 for the appointment of the Chief Election Commissioner and; under Section 50 (A) for the appointment of Auditor General of the Azad Jammu & Kashmir. For proper appreciation Section 42, 43, 50 and 50 A of Act, 1974 are reproduced as under:-

> 42. **Supreme Court of Azad Jammu and Kashmir.-** (1) There shall be constituted a Supreme Court of Azad Jammu and Kashmir to be the highest Court of appeal.
>
> (2) ……..
>
> (3) The Supreme Court shall consist of a Chief Justice to be known as Chief Justice Azad Jammu and Kashmir and two other Judges.
>
> (4) The Chief Justice Azad Jammu and Kashmir shall be appointed by the

> President on the advice of the Council and each of the other Judges of the Supreme Court of Azad Jammu and Kashmir shall be appointed by the President on the advice of the Council after consultation with the said Chief Justice.

Section 43 of Interim Constitution of Azad Jammu & Kashmir, 1974 is reproduced as under:-

> 43. **High Court.-** (1) There shall be a High Court for Azad Jammu and Kashmir, hereafter called the High Court, which shall consist of a Chief Justice and such number of other Judges as may be prescribed by an Act of the Assembly.
>
> 1-A.(a) ……..
>
> (b) …….
>
> (c) ……..
>
> (2) ……
>
> (2-A) A Judge of High Court shall be appointed by the President on the advice of the Council and after consultation-
>
> (a) with the Chief Justice of Azad Jammu and Kashmir, and
> (b) except where the appointment is that of Chief Justice, with the Chief Justice of the High Court.

Section 50 of Act, 1974 has already been produced in earlier part of the judgment in para No.17.

Section 50 (A) of Act , 1974 is reproduced as under:-

> 50-A **Auditor-General.-** (1) There shall be an Auditor-General of Azad Jammu and Kashmir which shall be appointed by the President on the advice of the council.
>
> (2) …….
>
> (3) …….
>
> (4) …….
>
> (a) …….
>
> (b) …….
>
> (5) …….
>
> (6) …….

A combined reading of the Sections 7, 42, 43, 50 and 50 (A) of the Act, 1974 shows that under Section 7 the President has to act on and in accordance with advice of the Prime Minster of the Azad Jammu & Kashmir and such advice shall be binding on him subject to contrary provisions provided in the Act, 1974. Such provisions are exceptions for the appointment of the Chief Justice of the Azad Jammu & Kashmir, a Judge in the Supreme Court, Chief Justice of the Azad Jammu & Kashmir High Court, a Judge in the High Court, the Chief Election Commissioner and the Auditor General. The advice for these offices has to be tendered by the Azad Jammu &

Kashmir Council. Section 42 provides that a Judge of the Supreme Court shall be appointed by the President on the advice of the Council and after consultation with Chief Justice of the Azad Jammu & Kashmir. Under section 43 Judge of the High Court shall be appointed by the President on the advice of the Council after consultation with Chief Justice of the Azad Jammu & Kashmir and Chief Justice of Azad Jammu & Kashmir High Court. The Chief Justice of the High Court is appointed on the advice of the AJ&K Council after consultation with Chief Justice AJ&K. While Chief Justice of the Azad Jammu & Kashmir, the Chief Election Commissioner and the Auditor General shall be appointed by the President on the advice of the Counsel. For the appointment on these three offices the word consultation is missing. The concept of panel relates to the consultation in the matters where consultation is provided. The President shall consult with the consulties, who shall provide panel of the suitable persons, qualified to be appointed against the post and the President shall seek the advice from the Council and Council shall issue advice from the said panel. We have

already resolved the proposition in the case titled *Muhammad Younas Tahir and another vs. Shoukat Aziz Advocate Muzaffarabad and others* [PLD 2012 SC (AJ&K) 42], in para 35, which was observed as under:-

> "35. The process of appointment of a Judge in the High Court has to be initiated by the Chief Justice of the High Court when the President seeks panels for the purpose of consultation. The Chief Justice shall immediately sent the panel of eligible persons to the President who shall send the same to the Chief Justice of Azad Jammu and Kashmir and after seeking the panel from him, seek the advice from the Council for issuing the appointment orders."

The Supreme Court of Pakistan in case titled *Al-Jehad Trust* through *Raees-ul-Mujahidin Habib Al-Wahabul Khairi, and others vs. Federation of Pakistan and others* [PLD 1996 SC 324] has observed in para 80 as under:-

> "80. Coming back to Article 193 of the Constitution the plain reading of the provision is that the appointment of a Judge of the High Court is to be made by the President "after consultation" with :--
>
> (a) Chief Justice of Pakistan;
> (b) Governor concerned; and
> (c) Chief Justice of the High Court (except where the appointment is that of the Chief Justice).
>
> Here the intention is that the appointment is to be made by the President "after consultation" with three consulties, who are mentioned there. In the Constitution

proper scheme is provided for the appointment, hence it can be called Constitutional appointment. For such appointment Constitutional requires "consultation", which cannot be treated lightly as mere formality. To say that the President has sole power of appointment and opinion of the consulties can be ignored particularly of the Chief Justice of the High Court and the Chief Justice of Pakistan, who are supposed to be expert in the particular field of law in which the appointment is to be made, cannot be reasonable construction of the word "consultation". It is understandable that the Governor can find out from intelligence sources about the candidate who is to be appointed as a Judge and his report or opinion is to confined to that 0aspect of the matter. The President can refuse to appointment a candidate in whose favour Chief Justice of the High Court and Chief Justice of Pakistan have given their positive opinions, but Governor has given negative opinion for reasons of improper antecedents. The Chief Justice of the High Court and the Chief Justice of Pakistan normally know Advocates who appear in their Courts regularly and would nominate or recommend names of such Advocates who are capable and fit to be Judges of the High Court and their opinion, which is expert opinion in a way, cannot and should not be ignored, but must be given due weight. "Consultation" in the scheme has envisaged in the Constitution is supposed to be effective, meaningful, purposive, consensus-oriented, leaving no room for complaint of arbitrariness or unfair play. The opinion of the Chief

> Justice of Pakistan and Chief Justice of a High Court as to the fitness and suitability of a candidate for judgeship is entitled to be accepted in the absence of very sound reasons to be recorded in writing by the President/Executive."

Again the Supreme Court of Pakistan while dealing the scope of binding nature of advice in the matters under Article 48 and other Articles of Constitution of Islamic Republic of Pakistan, 1973, in the case titled *Al-Jehad Trust* through *Raees-ul-Mujahidin Habib Al-Wahabul Khairi, Advocate Supreme Court and another vs. Federation of Pakistan and others* [PLD 1997 SC 84] observed as under:-

> " 26. Mr. Khairi contended before us that our Constitution of 1973 as it stands now contemplates the Parliamentary Form of Government but in respect of appointments of Judges of the superior Courts, advice of the Prime Minister is not binding on the President for the following reasons: Firstly, that the Judiciary stands separated from executive as provided under Article 175(3) of the Constitution means the whole judiciary and not the part to the extent of magisterial level. Secondly, in the Constitution on the subject of appointments of Judges in the superior judiciary special provisions exist with particular emphases on Article 177 and 193 to which general provision of Article 48(1) is not attracted, hence advice of the Prime Minister is not

binding on the President. Thirdly, basic structure of the Constitution guarantees complete independence of judiciary. Fourthly, President of Pakistan has positive role in the Constitution to perform and is not a mere ceremonial head. Fifthly, citizen of Pakistan have right to see record of appointments of Judges, as right to information and secrecy in the matter of judicial appointments leads to misunderstanding, which can be avoided by making the appointments transparent. Mr. Khairi supplemented his arguments with large number of rulings which may be adverted to at later stage when the relevant points are taken up for proper consideration.

27. Raja Muhammad Akram, senior Advocate for petitioner in C.P.54/1996, contended that Article 48(1) of the Constitution is generally applicable with the exception of three categories. In First Category, there are cases in which President can act in his discretion. Such language is used in Article 48(6), Article 58(2)(b), Article 105(4), Article 213, Article 242(1)(1-A) and Article 243(2)(c). In the Second Category, there are Articles in which language used is such that advice under Article 48(1) becomes automatically not operative. Such Articles are: Articles 101, 92 and 93 in which there is self-contained provision of advice. In the Third Category, there are provisions where President is to act without advice of the Prime Minister, on the basis of Constitutional compulsion, Article 91(5) provides that Prime Minister shall hold office during the pleasure of the President. If Prime Minister does not command confidence, can be required to have vote of confidence. Article 75 provides for assent of President on the Bills. Article 46 mentions duties of Prime Minister in relation to the President including

> communication of information to him. Article 56(3) enables President to address either House of the Parliament or both Houses assembled together. Under Article 243 Supreme Command of Armed Forces is vested in the President.

A distinction has been drawn in respect of advice of the Prime Minster/Cabinet under Article 48 and certain other Articles, which specifically provide self contained advice, as in Article 92, 93 and 101. The Supreme Court drawn the conclusion that nature of advice of Prime Minster/Cabinet in Article 48 is of general nature while advice mentioned in Article 92, 93 and 101 is of special nature and when advice in respect of these Articles is issued by the Prime Minster it will not be governed under clause 1 of Article 48.

22. In the matters of the appointment of Judge of the Supreme Court, Judge of the High Court, Chief Justice of the High Court, where the President has to appoint Judge on the advice of the AJ&K Council and consultation with the Chief Justice of the Azad Jammu & Kashmir, the Chief Justice of the High Court, advice cannot be issued outside the panel of the eligible persons proposed by the

Chief Justices but in the matter for appointment of the Chief Justice of the Azad Jammu & Kashmir under Section 42, Chief Election Commissioner under Section 50, Auditor General under Section 50 (A) of Act, 1974, there is no concept of consultation. When there is no concept of consultation, it could not be said that while issuing advice for appointment of the Chief Election Commissioner the advice has to be tendered by the Council from panel suggested by the president of the Azad Jammu & Kashmir.

23. The mode of initiation of the process for appointment of Chief Election Commissioner is not prescribed in the Azad Jammu & Kashmir Rules of Business, 1985, nor in Azad Jammu & Kashmir Council Rules of Business, 1983. The schedule 5 of the Azad Jammu & Kashmir Rules of Business, 1985 provides the list of cases to be submitted before the President for approval for issuance of orders. Entry No.20 provides the appointment of Chief Election Commissioner, leave removal and related matters. The counsel for the

Government has heavily relied upon the arguments hat approval has to be granted by the President for appointment of Chief Election Commissioner, therefore, process has to be initiated from the Office of the President and the President has the right to propose the panel of suitable persons and council has to issue advice only from the panel sent by the President. We are unable to subscribe to the argument of the learned counsel. Rule 11 (1) of the Rules of Business, provides that no order shall be issued without approval of the President in the cases enumerated in schedule 5. Similarly, Schedule 5 Azad Jammu & Kashmir Council Rules of Business, 1983 provide the cases which have to be submitted to the Prime Minster of Pakistan/Chairman of the Azad Jammu & Kashmir Council for orders. Entry No.18 of said schedule provides the Chief Election Commissioner.

24. A combined reading of Entry 18 of Schedule 5 of the Azad Jammu & Kashmir Council Rules of Business, 1983 and Entry No.20 of the Azad Jammu & Kashmir Rules of Business, 1985, show that procedure for initiation

of process is not provided in both the Rules, it is only provided that the file shall be placed before the Chairman of the Azad Jammu & Kashmir Council for appointment of Chief Election Commissioner and orders for appointment of Chief Election Commissioner shall not be issued without approval of the President.

25. We have observed in *Muhammad Younas Tahir and another vs. Shoukat Aziz Advocate Muzaffarabad and others* [PLD 2012 SC (AJ&K) 42], that before issuance of the order for appointment of a Judge of the High Court, the President shall consult both the consulties, i.e. the Chief Justice of the Azad Jammu & Kashmir and the Chief Justice of the Azad Jammu & Kashmir High Court and after receiving the panel of suitable persons, he shall seek advice from the Council. Since both the consulties, Chief Justices are expert in their fields the advice could only be issued out of the panel suggested by the Chief Justices. There is no concept of consultation in the appointment of the Chief Election Commissioner, therefore, there is no concept of issuance of advice from the panel suggested by the President. The finding in the

Younas Tahir case *supra,* are clear that two Chief Justices shall send panel of the suitable persons and advice has to be issued from the panel. In Presidential Reference No.01 of 2015, we observed that advice cannot be issued in vacuum, it is issued when sought. The rule of law laid down in the *Muhammad Younis Tahir* Case *supra* is not applicable in the case of the Chief Election Commissioner because there is no concept of consultation, when there is no concept of consultation, the seeking of advice by the President means that the office of the president shall intimate the Azad Jammu & Kashmir Council that office of Chief Election Commissioner is vacant, the advice of eligible person be issued. A panel may be proposed but it is not mandatory to issue advice from the said panel.

The learned High Court while disposing of the writ petition has observed that in Constitution of Pakistan in Article 213, it is provided that Chief Election Commissioner shall be appointed with consultation of the Leader of House and the Leader of Opposition, therefore, President shall send panel of the suitable persons after consultation with the Leader of House and the Leader of

Opposition. In Article 213, of the Constitution of Islamic Republic of Pakistan it is specifically provided that the Chief Election Commissioner shall be appointed by the President after consultation with Leader of House and Leader of Opposition, while no such provision exists in Act, 1974, The findings for sending the panel by the President is not maintainable

26. Section 7 of the Act, 1974, provides that advice of the Prime Minster shall be binding on the President. Although the words “such advice shall be binding on him” have not been used in Section 42, 43, 50 and 50 (A) for the appointment of the Chief Justice of the Azad Jammu & Kashmir, Judge Supreme Court, Chief Justice of the Azad Jammu & Kashmir High Court, Judge High Court, Chief Election Commissioner and Auditor General, but law is settled that where same words and phrases are used in more than one provisions in relation to same subject matter and, if in one provision meaning is clear and in other provisions it has some ambiguity then

the same meaning shall be given to the later provisions as are given in former provision.

27. S.M. Zafar in Understanding Statute Edition, 2008 at page 635 observed as under:-

> " Under this rule where the same words or phrases are used more than once in the same Act in relation to same-subject matter and looking to the same general purpose, if in one connection its meaning is clear and in mother it is doubtful or obscure, it is in the latter case given the same construction as in the former. The object is to avoid "head-on-clash" between two meanings assigned to the same word or expression occurring at two place in the same enactment. As an exception, however, different meaning can only restored to in the event of repugnancy in the subject or context. The presumption that the same words are used in the same meaning is, however, very light, and the larger principle that words must be construed in the context overweighs the presumption."

Maxwells in the interpretation of Statues, Edition 10, page No.522 observed as follows:-

> "It is, at all events, reasonable to presume that the same meaning is implied by the use of the same expression in every part of an Act."

28. Thus it can safely be concluded that advice of the Council is binding on the President, if it is in accordance with law and the Constitution and if advice is against the provisions of Constitution, it cannot be implemented. Sub Section (3)of the Azad Jammu & Kashmir Chief Election Commissioner Terms and Conditions Act (II) of 1992 read with amending Ordinance XIX of 2015 provides that

> " No person shall be appointed as Chief Election Commissioner unless he is or has been the Judge of the Supreme Court or the Judge of the High Court, provided that if a person, who is sitting Judge of the Supreme Court or High Court may be appointed as Chief Election Commissioner with addition to his duties as of judge shall also perform the functions as Chief Election Commissioner."

29. The Judge is defined under section 2 (1) of the Azad Jammu & Kashmir Interim Constitution Act, 1974 as under:-

> **"J**udge in relation to the Supreme Court of the Azad Jammu & Kashmir or the High Court includes the Chief Justice of the Azad Jammu & Kashmir or as the case may be High Court and also includes an Additional Judge of the High Court.

30. The Azad Jammu & Kashmir Council on 15th November, 2015 issued the advice for appointment of Mr. Justice Ghulam Mustafa Mughal, Chief Justice of the Azad Jammu & Kashmir High Court as Chief Election Commissioner under Section 50 of the Interim Constitution Act, 1974. Under Section 3-A of the Chief Election Commissioner Terms and Conditions Act, 1992 read with amending Ordinance XIX of 2015, Mr. Justice Ghulam Mustafa Mughal, Chief Justice of the High Court is qualified to be appointed as Chief Election Commissioner. The Advice was validly issued and valid advice has to be implemented by the President in letter and spirit. The president has no power to refuse to issue order upon a validly issued advice.

31. The Chief Election Commissioner is appointed under Section 50 of the Interim Constitution Act, 1974, office of Acting Chief Election Commissioner is not

provided in section 50. Section 50 provides that terms and conditions of the Chief Election Commissioner may be prescribed. Initially the Azad Jammu & Kashmir Legislative Assembly prescribed the terms and condition of the Chief Election Commissioner through Act, 1992. Later on, the Azad Jammu & Kashmir Council prescribed the terms and conditions of the Chief Election Commissioner through Act, 2000. This Court opined in Presidential Reference No.01 of 2015 that " The matter of terms and condition is within the Legislative competence of the Azad Jammu & Kashmir Legislative Assembly." The Azad Jammu & Kashmir Council while accepting the said opinion withdrew the advice of Mr. Justice (Rtd.) Munir Ahmed Chaudhary, as Chief Election Commissioner and issued advice of Mr. Justice Ghulam Mustafa Mughal, Chief Justice of the Azad Jammu & Kashmir High Court for appointment as Chief Election Commissioner on 15th November, 2015. The President of the Azad Jammu & Kashmir on 22nd October, 2015 promulgated the Ordinance No.XIX of 2015, whereby the Azad Jammu & Kashmir Chief Election Commissioner

terms and conditions Act, 1992 has been amended and in Section 6-A acting Chief Election Commissioner is provided. The Azad Jammu & Kashmir High Court accepted writ petition and declared that by providing Section 6-A a new office has been created, struck down Section 6-A of amending Ordinance. The Section 6-A is reproduce in the earlier part of the judgment in para No.18.

A plain reading of Section 6-A reveals that no new office has been created rather stop-gap arrangement has been provided when the office of the Chief Election Commissioner is vacant. Section 6-A provides that when the office of Chief Election Commissioner is vacant or he is absent or unable to perform functions of his office, the President shall appoint Acting Chief Election Commissioner after consultation with Chief Justice of the Azad Jammu & Kashmir. Section 50 of Act, 1974 provides the appointment of the Chief Election Commissioner on the advice of the Azad Jammu & Kashmir Council. The Azad Jammu & Kashmir

Legislative Assembly has power to make laws under Section 31 of Act, 1974 in the territory of the Azad Jammu & Kashmir in the matters, which falls in Legislative competence of the Assembly. In the Presidential Reference No.01 of 2015 we have declared that matter of the terms and conditions of the Chief Election Commissioner is within the Legislative competence of the Azad Jammu & Kashmir Legislative Assembly. The Assembly has power to make laws in accordance with the provisions of Constitution and has no power to make any law which is against the clear provisions of the Act, 1974.

32. The Chief Election Commissioner has to be appointed by the President on the advice of the Azad Jammu & Kashmir Council. The stop-gap arrangement for appointment of the Acting Chief Election Commissioner can only be made in the light of Section 50. The Acting Chief Election Commissioner can be appointed on the advice of the Azad Jammu & Kashmir Council without advice Acting Chief Election Commissioner cannot be appointed. The proposition came under consideration of this Court in the case title *Ghulam Mustafa Mughal &*

others vs. Azad Government and others [1993 SCR 131], in the circumstances that two Additional Judges were appointed by the President without the advice of the AJ&K Council in the High Court. The appellant challenged their appointments by filing writ of quo-warranto. The High Court declared that appointment is unconstitutional but dismissed the writ petition on the ground that due to the bar contained in sub Section (5) of Section 44 of the Azad Jammu & Kashmir Constitution Act, 1974 writ cannot be issued against a Judge. Two appeals were filed in this Court. This Court draw the conclusion that since permanent Judge of the High Court is appointed on the advice of the Azad Jammu & Kashmir Council, additional Judge cannot be appointed without advice of the Azad Jammu & Kashmir Council. It was observed as under:-

> " After giving anxious though to the provisions under examination in light of the submissions of the learned counsel for both the parties, I have reached the conclusion that the High Court has formed the correct view that Additional Judge can only be appointed after fulfilling the requirements of section (2-A), namely, if there is advice of the Azad

> Jammu and Kashmir Council and if the Chief Justices of Azad Jammu and Kashmir and High Court have been duly consulted. The reasons are not far to seek. As has been seen, the definition of the word Judge of the High Court includes an Additional Judge of the High Court, therefore, when it is provided in sub-section (2-A) of section 43 that a Judge of the High Court shall be appointed on the advice of the Council and after consultation with the Chief Justices this definition has to apply unless it is found to be repugnant to the subject or context. But I do not find any repugnancy. Sardar Rafique Mahmood Khan vehemently contended that the definition did not apply to sub-section (6) of section 43 but he failed to point out any repugnancy. An illustration of repugnancy is available in section 43 itself. Sub-section (5) of section 43 lays down that:-
>
> "The Chief Justice or a Judge of the High Court shall hold office until he attains the age of sixty-two years unless he sooner resigns or is removed from his office in accordance with law."

It was further observed as under:-

> " The term "Judge of the High Court", according to the definition given in section 2, includes an Additional Judge. Would then an Additional Judge also hold office till he reached the age of sixty-two years. As noticed, it is provided in sub-section (6) that an Additional Judge will hold office for the period for which a Judge is absence or

> unable to perform his functions. Since these two provisions regarding the tenure of office contained in sub-section (5) and sub-section (6) cannot stand together, it is a clear case of repugnancy. Therefore, the definition of a Judge of the High Court as contained in section 2 would apply to sub-section (2-A) and consequently sub-section (2-A) would construed to require that an Additional Judge would also be appointed on the advice of the Azad Jammu and Kashmir Council and after due consultation with the Chief Justices."

33. Section 50 in clear terms provides that the Chief Election Commissioner shall be appointed by the President on the advice of the Azad Jammu & Kashmir Council. When office of the Chief Election Commissioner is vacant, Acting Chief Election Commissioner can only be appointed on the advice of the Azad Jammu & Kashmir Council. The mode of appointment of Acting Chief Election Commissioner in Section 6-A is against the provisions of Section 50 of the Azad Jammu & Kashmir Interim Constitution Act, 1974. It is repugnant to Section 50 of Act, 1974. Section 6-A to the extent of appointment of Acting Chief Election Commissioner is valid law but the portion of Section 6-A which provides the appointment

of Acting Chief Election Commissioner without advice of the Azad Jammu & Kashmir Council is not a valid law. It is ultra vires Section 50 of the Act, 1974. The judgment of the High Court to this extent is amended.

34. Since we have reached on the conclusion that advice for appointment of Chief Election Commissioner under Section 50 and Section 21(7) of the Azad Jammu of the Azad Jammu & Kashmir Interim Constitution Act, 1974, read with Section 3 and 5 of the Azad Jammu & Kashmir Chief Electioneer Commissioner Terms and Conditions Act, 1992 has validly been issued, which is still in existence. The acting Chief Election Commissioner cannot be appointed. Moreover, when law has been declared ultra virus of the Constitution the appointment order for Acting Chief Election Commissioner is also not valid.

35. We have considered the arguments of the learned counsel for the Azad Government and written arguments of Ch. Anwar-ul-Haq former Speaker of Azad Jammu & Kashmir Legislative Assembly that the petitioners in the High Court are not aggrieved, they have no locus standi to file the writ petition. The petitioners in the High Court challenged the provisions of Section 6-A of

Ordinance No.XIX of 2015 being ultra vires the provisions of Section 50 of Act, 1974. In *Azad Jammu & Kashmir Government vs. Muhammad Younas Tahir & others* [1995 SCR 341], this Court observed that the Azad Jammu & Kashmir Legislative Assemble has power to make laws in respect of the matters where its authority exists. It has not power to make laws against the clear provisions of the Constitution. Every State Subject has a right to challenge the law by way of filing writ petition. Whenever the Legislature makes a law which is against provision of Act, 1974. The petitioners in the High claimed that they are sitting Members of Azad Jammu & Kashmir Legislative Assembly. Ch. Tariq Farooq is Deputy Leader of Opposition in the Azad Jammu & Kashmir Legislative Assembly while 3rd petitioner, Raja Sajjad Ahmed Khan is an Advocate and a Member of Azad Jammu & Kashmir Bar Council, have a right to challenge the law and maintain the writ petition, the writ petition was competently filed.

CHIEF JUSTICE JUDGE JUDGE JUDGE

Muzaffarabad
09.02.2016

AJ&K Council & others VS Azad Govt. & others

ORDER:

Ch. Muhammad Ibrahim Zia, J:- I have had the privilege of going through the judgment authored by Hon'ble Chief Justice. Although, I am in agreement regarding the final conclusion drawn but for my own different reasons, I would like to bring on record the reasons appealed to me.

2. On the basis of facts and proposition brought on record in the pleadings of the parties and conclusion drawn by the learned High Court in the impugned judgment, in my opinion, following important points are emerged for deliberation and resolution by this Court:-

(i) whether, the amended provision of section 6-A of the Chief Election Commissioner (Terms and Conditions) Act, 1992 (hereinafter to be referred as Act, 1992) creates new office of Acting Chief Election Commissioner;

(ii) whether, in the given circumstances the appointment process of the Acting

Chief Election Commissioner is legal; and

(iii) whether, the advice issued by the Chairman Azad Jammu and Kashmir Council under section 50 of Azad Jammu and Kashmir Interim Constitution Act, 1974 (hereinafter to be referred as Constitution Act, 1974) for appointment of Chief Election Commissioner is valid or not?

3. So far as the first point regarding validity of the provision of section 6-A of Act, 1992 is concerned, although prior to the opinion given by this Court in Presidential Reference No. 1 of 2015, two acts; one made by Azad Jammu and Kashmir Assembly referred to hereinabove and other made by the AJ&K Council i.e., Chief Election Commissioner (Terms and Conditions) Act, 2000 were holding the field but on seeking the opinion by the President under section 46-A of the Constitution Act, 1974 the position has now been clarified and the AJ&K Assembly has been declared to have legislative competence for prescribing terms and conditions of Chief Election Commissioner. Consequently Act,

2000 passed by the AJ&K Council has no validity. However, it is of worth mentioning that in Act, 2000 the provision of appointment of Acting Chief Election Commissioner was also incorporated. The petitioner in the High Court as well as the learned High Court has deemed section 6-A i.e., provision of appointment of Acting Chief Election Commissioner, to be creation of new office, thus, in their estimation it offends the constitutional provisions of section 50 of Constitution Act, 1974. In my opinion, the conclusion drawn in the impugned judgment in this regard appears to be misconceived and inconsistent with the statutory provisions. The amended section 6-A of the Act, 1992 reads as follows:-

> "6-A. Acting Chief Election Commissioner.- At any time when:-
>
> (a) the office of Chief Election Commissioner is vacant or;
>
> (b) the Chief Election Commissioner is absent or unable to perform the functions of his office due to any other cause;
>
> the person eligible under Section 3 shall be appointed by the President in

consultation with the Chief Justice as Acting Chief Election Commissioner."

(underlining is mine)

The bare reading of this section clearly speaks that it is incorporated to meet the eventuality of the vacancy of already existing office. In this regard the words "when the office of the Chief Election Commissioner is vacant" are suffice to be referred. Thus, when the statutory provision itself speaks of vacancy of already existing office despite this drawing the conclusion that it amounts to creation of new office, is misconceived and not correct appreciation.

4. The other aspect of this provision which requires deliberation is that whether this incorporation falls within terms and conditions of Chief Election Commissioner? The legal phrase "terms and conditions" has neither been defined in the Constitution Act, 1974 nor in the Act, 1992. Therefore, according to the celebrated principle of law the ordinary dictionary meanings have to be adopted. Regarding the word 'term' there is no ambiguity, however, the word 'condition' in the

context of facts of this case is relevant which has been defined in Black's Law Dictionary with pronunciation, fifth Edition, page 265, as follows:-

> "A future and uncertain event upon the happening of which is made to depend the existence of an obligation, or that which subordinates the existence of liability under a contract to a certain future event. Provision making effect of legal instrument contingent upon an uncertain event."

Similarly, in *Law Terms & Phrases Judicially Interpreted with Legal Maxims & Foregin Legal Words and Phrases in ordinary usage by Sardar Muhammad Iqbal Khan Mokal,* page 230 the word 'condition' has been defined as follows:-

> "A restraint placed, Condition implies some state of affairs or events on the happening of which an obligation attaches called *condition precedent*; or in the happening of which an estate is defeated --- called *condition subsequent --- Harms*."

In *The Chambers Dictionary 10th Edition page 318,* it has been defined as follows:-

> "the state in which things exist, e.g. the human condition; a good or fit state; a

particular quality of existence, good, bad, etc; rank (as in a person of condition; archaic); prerequisite, prior requirement, tempor (*obs*); a term of a contract; (in pl) circumstances; that which must be true for a further statement to be true (logic); a clause in a will, etc which requires something to happen or be done before part of the will to which it relates can take effect (law). vi (*rare*) to make or impose terms. vt to restrict, limit; to put into the required state; to prepare a train (a person or animal) for a certain activity or for certain conditions of living; to secure by training (a certain behavioural response to a stimulus which would not normally cause it; psycho). [L *condicio* (wrongly *conditio*) –*onus* an agreement, from condicere, from con-together, and dicere to say].

(underlining is mine)

In *The New International Webster's Comprehensive Dictionary of the English Language, Encyclopedic Edition, page 272,* it has been defined as under:-

"1. The state or mode in which a person or thing exists. 2. State of health; especially, a favourable or sound state of health. 3. A

modifying circumstance. 4. An event fact, or the like that is necessary to the occurrence of some other, though not its cause; a pre-requisite. 5. Something required as prerequisite to a promise or to its fulfilment. 6. A grade or rank; especially, high social position. 7. *Gram.* That clause of a conditional sentence usually introduced by *if,* unless, etc. 8. A conditional proposition upon which another proposition depends as consequent. 9. U.S. a. A requirement that a student who has not done satisfactory work in a college or university course do additional work to avoid failing the course. b. A grade, often indicated by E, signifying this requirement. – v.t. 1. To place a stipulation or stipulations upon; prescribe. 2. To be the stipulation of or prerequisite to. 3. To specify as a stipulation or requirement. 4. To render fit. 5. *Psycho.* To train to a behaviour pattern or conditioned response. 6. *U.S.*. To subject (a student) to a condition --- vi. 7. To stipulate. [<L *condicio, -onis agreement <condicere < com-together + dicere say]* ---con-di'tion-er n. Con-di-tion-al adj. 1. Expressing or imposing conditions: not absolute. 2. *Gram*. Expressing or implying a condition;

> a conditional clause ----n. *Gram*. A word, tense, clause, or mood expressive of a condition."

According to the ordinary dictionary meaning, happening of uncertain event and happening of something in future are included in the meaning and scope of the word 'condition'. Thus, when already office is created by the Constitution and a situation of temporary vacancy or eventuality arises it falls within the scope of the 'condition'. Hence, there is no difficulty in holding that meeting the eventuality of temporary occurrence of vacancy in the office of Chief Election Commissioner falls within the scope of prescribing the condition which is within the competence of Azad Jammu and Kashmir Legislative Assembly. For this conclusion, I also find support from the paramateria provision of laws dealing with the terms and conditions of civil servants. In the rules called the Azad Jammu and Kashmir Civil Servants (Appointment & Conditions of Service) Rules, 1977 to meet the condition of happening of temporary vacancy against a post different modes for stop-gap arrangement i.e., Acting/Current charge

and officiating appointments have been provided. All these situations are administrative arrangements to meet the eventualities of vacant posts as stop-gap arrangements which have neither been considered as creation of new office nor a new induction. Thus, the findings and opinion of the High Court on this point is not consistent with the law, therefore, the same is not sustainable.

5. According to the scheme of the Constitution the office of Chief Election Commissioner is of extraordinary vital importance. The Chief Election Commissioner has to perform and discharge the duties conferred upon him under the provisions of more than dozen Statutes including:

1. The Azad Jammu and Kashmir Electoral Rolls Ordinance, 1970;
2. The Azad Jammu and Kashmir Legislative Assembly Ordinance 1970 (Ordinance VI of 1970);
3. The Azad Jammu and Kashmir Delimitation of Constituencies Ordinance, 1970;

4. The Azad Jammu and Kashmir Legislative Assembly (Elections) Ordinance, 1970;
5. Constitutional provisions relating Elections (Extract from the Azad Jammu and Kashmir Interim Constitution Act, 1974);
6. The Azad Jammu and Kashmir Council (Election) Act, 1976;
7. The Azad Jammu and Kashmir Electoral Rolls Rules, 1970;
8. The Azad Jammu and Kashmir Legislative Assembly (Election) Rules, 1970;
9. The Azad Jammu and Kashmir Political Parties (Audit of Accounts) Rules, 1979;
10. The Azad Jammu and Kashmir President (Election) Rules, 1985;
11. The Azad Jammu and Kashmir (Reserved Seats) Election Procedure 1986; and
12. The Azad Jammu and Kashmir Political Parties Act, 1987.

The spirit of powers, duties and functions conferred upon the Chief Election Commissioner under the provisions of these Statutes clearly speak

that from the overall system of Government, establishment and suitability of democratic institutions to the safeguard of fundamental rights of individual specially the right of franchise, the role of Chief Election Commissioner is very important. Thus, the nature and sprit of functions and duties of Chief Election Commissioner rules out the vacancy of this office. In this background, addition of section 6-A through amendment providing appointment of Acting Chief Election Commissioner appears to be an appropriate and proper legislative step for removing the flaw and meeting the eventuality.

6. However, I have taken notice of another aspect of the matter, according to the scheme of the Constitution or subordinate laws for acting appointment against an office, ordinary the persons who are already appointed by the competent authority in the prescribed manner and holding the office are considered to be eligible and suitable and no direct or new induction is permissible. According to the present shape of amended section 6-A of the Act, 1992 there is a chance that a person who is not

appointed by competent authority or holding the post according to the Constitutional provisions can be appointed as Acting Chief Election Commissioner. The person who is eligible to be appointed as Chief Election Commissioner as mentioned in section 3 of Act, 1992 is one who is or has been a Judge Supreme Court or Judge High Court which means that person who is not presently holding any post of Judge is also eligible for appointment as Chief Election Commissioner. Consequently application of provisions of section 6-A of Act, 1992 indirectly offends the spirit of section 50 of Constitution Act, 1974 which speaks that appointment against the office of Chief Election Commissioner shall be made on the advice of Chairman AJ&K Council. Therefore, in my opinion, to this extent partially the amended section 6-A is not valid. To further elaborate this point, in the Constitution the provision of Acting President, Acting Prime Minister, Acting Chief Justice of Azad Kashmir and Acting Chief Justice High Court clearly speaks that the persons who are holding the office according to the constitutional provisions or

appointed on the advice of Chairman Kashmir Council are eligible to be appointed against the vacancy till regular appointment. Same like, in the laws dealing with the civil servants, there is no concept of direct induction against any post on Acting, Officiating or Current charge basis rather the persons who are already validly holding the civil posts are eligible to be appointed in the above stated manner. Thus, the section 6-A of Act, 1992 which speaks that any eligible person can be appointed as Chief Election Commissioner, is partially not valid because under this provision even a retired Judge who is not holding the office can be appointed. Therefore, for avoiding indirect violation of constitutional provision of section 50 of Constitution Act, 1974 the provision of section 6-A of Act, 1992 should be suitably amended to exclude the chance of direct appointment of person who is not holding the office on the basis of appointment made on advice of AJ&K Council. This view is already adopted by this Court in the judgment reported as *Bashir Ahmed Mughal vs. Azad Govt. and others* [2014 SCR 1258]

wherein direction for appointing Judges of High Court as Judges Shariat Court is issued.

7. From the stated facts, it is clear that through the amended Ordinance dated 22.10.2015, the provision of section 6-A of appointment of Acting Chief Election Commissioner has been enforced, whereas the process of appointment of Acting Chief Election Commissioner is initiated on 14.12.2015. But according to admitted facts before initiation of process for appointment of Acting Chief Election Commissioner an advice already issued on 16.11.2015 by the Chairman AJ&K Council under the provision of section 50 of Constitution Act, 1974 is holding the field. As there is no dispute regarding the powers of Chairman AJ&K Council to issue advice under provision of section 50 of Constitution Act, 1974, therefore, in these circumstances neither any academic discussion is required nor any philosophy is involved rather it is very simple that advice for appointment of Chief Election Commissioner issued almost a month earlier has to be culminated into a formal appointment notification. The process for

appointment of Chief Election Commissioner almost near to completion rules out the initiation of process for appointment of Acting Chief Election Commissioner because after issuance of advice by Chairman AJ&K Council the eventuality and vacancy for acting appointment has been vanished. Therefore, there is hardly any difficulty in declaring that the process initiated for acting appointment and issuance of notification in this regard is without lawful authority, hence, the notification dated 29.12.2015 is declared illegal.

8. Now, I advert to the point of status of advice issued by the Chairman AJ&K Council. Section 50 of Constitution Act, 1974 reads as follows:-

> "50. Chief Election Commissioner:- (1) There shall be a Chief Election Commissioner appointed by the President on the advice of the Council on such terms and conditions as may be prescribed.
>
> (2) The person appointed as Chief Election Commissioner under the Azad Jammu and Kashmir Government Act, 1970, or deemed to have been so appointed and functioning as such immediately before the commencement of

this Act shall be deemed to have been appointed as Chief Election Commissioner under sub-section (1) on the same terms and conditions of service as are applicable to him immediately before such commencement."

It is not the case of any party that the Chairman AJ&K Council is not competent to issue advice or appointment can be made without his advice. The only controversy is regarding the manner and initiation of process for appointment. According to the admitted position there is no prescribed manner, neither there is any expressed provision in Rules of Business of AJ&K Government or AJ&K Council or Act, 1992. While exercising the writ jurisdiction for declaring any act illegal, the pre-requisite requirement is that there should be law on the touchstone of which it can be declared that whether the challenged act of a person is legal or illegal. When there is a vacuum and no express provision exists, in that state of affairs any act done cannot be declared illegal. Specially, according to settled principle of law acts done by competent authority are ordinarily deemed to be valid. Even

from the enforcement of Act, 1992 there remained no consistent practice that the appointment of Chief Election Commissioner is necessarily initiated or made on the basis of panel sent by AJ&K Government or President of Azad Jammu and Kashmir. The *para materia* provision of section 50-A of Constitution Act, 1974 is also helpful to draw the conclusion as under the constitutional provisions the same phrase has been used for appointment of Auditor General. No one has stated that the Auditor General is appointed from the panel sent by the AJ&K Government or the case of appointment is initiated by the AJ&K Government or President of Azad Jammu and Kashmir. Thus, in this state of affairs the advice issued by the AJ&K Council dated 16.11.2015 cannot be declared invalid rather it is valid and has been issued under the constitutional provisions having force of law. However, I would like to observe that for avoiding such unpleasant situations as has been created in this case and for removing the ambiguity the concerned authority may provide through statutory provisions the manner and

procedure for initiation of the process of filling in the vacancy in the office of Chief Election Commissioner.

9. I have noticed that the learned High Court has also directed for drawing the panel with the consultation of leader of opposition of AJ&K Assembly, perhaps the learned High Court has taken influence from the constitutional provisions of Islamic Republic of Pakistan but no such provision exists in the laws enforced in Azad Jammu and Kashmir. According to the celebrated principle of law the Courts have to interpret the enforced laws and not legislate. No word can be omitted or added in the Statute by the Courts rather the Courts are duty bound to interpret the law as it is and not as it should be. Therefore, the observation and direction of the High Court to this extent is unnecessary which is expunged.

10. The examination of the impugned judgment reveals that the learned High Court has drawn the inference from the opinion given by this Court in Presidential Reference No. 1 of 2015. In the impugned judgment the referred observation of this

Court was basically a reference of previously decided case reported as *Muhammad Younas Tahir and another vs. Shaukat Aziz & others [*PLD 2012 SC(AJK) 42], in the context of procedure and process of appointment of Judge High Court. Thus, the referred judgment in this context appears to be *obiter dictum* and does not amount to *ratio decindendi* in the matter of reference under section 46-A of Constitution Act, 1974*.* The inference drawn by the learned High Court in the impugned judgment is not a correct approach for the reason that the referred observation does not fall within the scope of already decided question of law as envisaged in section 52-B of Constitution Act, 1974 because the constitutional provisions dealing with the scope of Reference are itself very much clear which confines the opinion of this Court made in the Reference only to the question referred. Sub-section (2) of section 46-A of Constitution Act, 1974 reads as follows:-

> "46-A. Advisory Jurisdiction.- (1) If, at any time, the Chairman of the Council or the President desires to obtain the opinion of the Supreme Court of Azad Jammu and

> Kashmir on any question of law which he considers of public importance, he may refer the question to the Supreme Court of Azad Jammu and Kashmir for consideration.
>
> (2) The Supreme Court of Azad Jammu and Kashmir shall consider a question so referred and report its opinion on the question to the Chairman of the Council, or as the case may be, the President."

Thus, it is clear from the bare reading of this statutory provision that the advisory jurisdiction is confined only to the question referred. In the Presidential Reference No. 1 of 2015 neither the question of issuance of advice for appointment of Chief Election Commissioner by Chairman AJ&K Council was referred nor any report or opinion in this regard has been given by this Court.

11. The other ground which makes the opinion of the High Court misconceived, is that in the Reference the observation made by this Court clearly refers to the judgment in which the proposition of procedure and manner for appointment of Judge High Court was involved. There is a material difference in the appointment of the Judge High

Court and Chief Election Commissioner as the constitutional provisions dealing with the appointment of Judge High Court and Chief Election Commissioner are not paramateria rather there is material difference as for appointment of Judge High Court a pre-requisite is the process of consultation with the Chief Justice of Azad Jammu and Kashmir and High Court, whereas, there is no such requirement in case of issuance of advice for appointment of Chief Election Commissioner. Thus, in this context it can be safely observed that the learned High Court has drawn improper inference from the observation of this Court.

12. The term ‘advice’ in the Constitution Act, 1974 has been used in different sections and in each section it has its peculiar connotation and scope according to the context of relevant section and whole scheme of Constitution. Therefore, it is not necessary that in the Constitution wherever the advice is required it means that advice can only be given when it is sought. In this regard section 7 of Constitution Act, 1974 can be referred to where the

President is bound to act according to advice of Prime Minister. It is very much clear that there is no occasion that the President has to seek advice and then the Prime Minister gives the same. Same like, the scope of word 'advice' may be directory or mandatory but it has to be determined according to spirit and context of the relevant law. The word 'advice' has also not been defined in Constitution. In *Black's Law Dictionary with pronunciations, fifth Edition page 50*, the word 'advice' has been defined as follows:-

> "View; opinion; information; the counsel given by lawyers to their clients; an opinion expressed as to wisdom of future conduct, Hughes v. Van Bruggen, 44 N.M. 534, 105 P.2d 494, 496.
>
> The instruction usually given by one merchant or banker to another by letter, informing him of shipments made to him, or of bills or drafts drawn on him, with particulars of date, or sight, the sum, and the payee. Bills presented for acceptance or payment are frequently dishonored for want of advice."

In *Law Terms & Phrases Judicially Interpreted with Legal Maxims & Foregin Legal Words and Phrases in ordinary usage by Sardar Muhammad Iqbal Khan Mokal,* page 50 the word 'advice has been defined as follows:-

> "Any direction given by a correspondent in business transactions, Any notification of a business transaction apprising an agent or a customer that a certain thing has been done. This is an important matter of daily detail; neglect of which may lead to serious consequences."

In *Chambers 21st Century Dictionary, page 19,* the word 'advice' has been defined as follows:-

> "1. suggestions or opinions given to someone about what they should do in a particular situation. 2. Business an official note about a transaction, etc. • **take advice** 1. To ask someone for an opinion about what one should do. 2. To act on advice given."

In *The New International Webster's Comprehensive Dictionary of the English Language, Encyclopedic Edition, page 22,* it has been defined as under:-

> "1. Encouragement or dissuasion; counsel; suggestion. 2. *Often pl.* Information; notification. 3. *Obs.* Deliberation; fore-thought; hence, opinion."

In *K.L.R. Encyclopaedia Law Dictionary alongwith Legal Maxims Latin, Words and Phrases Judicially Defined, Key Law Reporters (K.L.R.), page 29,* the word 'advice' is defined as follows:-

> "Counsel given or an opinion expressed as to the wisdom of future conduct; *(Abbot L. Dicto.).* In *mercantile usage*, direction given by a correspondent *(Burril L. Dict.);* information given by letter by one merchant or banker to another in regard to some business transaction which concerns him. (Cyc. Law Dict.)."

The above reproduced dictionary meaning speaks that the word 'advice' is capable of multi-dimensional meaning. The status and scope of term 'advice' has yet to be appreciated from another aspect which is the status of the person/authority who is advising and the status of person to whom it is advised. Ordinarily, when the advice is given by the person who is superior in authority or has commanding position, it shall be treated as

command, order and direction as advice under sections 7, 28 etc., of the Constitution Act 1974, whereas when the advice is tendered by the person who holds inferior position, it can be deemed suggestion, opinion, request or proposal as the advice of the Advocate-General under the provision of section 20 of the Constitution Act, 1974. Thus, for determination of the status of advice the multi-dimensional aspects have to be appreciated and no uniform or universal one word definition can be assigned. In my view, not only the statutory provision dealing with the specific proposition has to be interpreted while keeping in view the overall scheme and spirit of the Statute but all other possible aspects have also to be considered for determination of the status and scope of the term 'advice'. It is further clarified that seeking of advice is also not a universal requirement. The advice even can be given without being sought, specially, when the person giving the advice is in authoritative commanding position. Therefore, requirement of seeking the advice also depends upon the

interpretation of relevant statutory provisions in specific context and circumstances.

13. Keeping in view the special status of Azad Jammu and Kashmir, through Constitution Act, 1974 a unique system has been provided. Ordinarily, in the State the executive authority is exercised by the Government of the State, whereas, in the Azad Jammu and Kashmir the AJ&K Council is also vested with the executive authority relating to specified matters. As a whole according to constitutional spirit the parliamentary system of Government is provided in which the President is a ceremonial head having no executive powers and under provisions of section 7 of Constitution Act, 1974 in performance of his functions he has to act in accordance with the advice of the Prime Minister who is Chief Executive of Azad Jammu and Kashmir whereas in a special case of dissolution of Assembly specific provisions regarding advice and its operation is provided in section 28 of the Constitution Act, 1974. Thus, in relation to functions relating to Azad Jammu and Kashmir Government comprehensive general provision of

section 7 has been incorporated without separate or special repetition of the same in other constitutional provisions. But in case of AJ&K Council no general provision has been provided. For performance of functions by President in relation to matters to which the Executive Authority of the Council extends, he has to act on the advice of the Council as enumerated separately in the constitutional provisions of sections 41, 42, 42-E, 43, 50, 50-A and 53. According to the spirit of the Constitution in performance of functions the President has either to act on the advice of Prime Minister as mentioned in sections 7 and 28 or act on advice of Council as enumerated in relevant constitutional provisions. The sections 12 and 21 read with section 19 of the Constitution Act, 1974 clearly demarcate and mention the exercise of executive authority by Government and AJ&K Council. The advice given by the AJ&K Council in compliance and furtherance of hereinabove specifically mentioned constitutional provisions is binding to be carried out by the President. The role of the ceremonial head in the

democratic system has been defined by *Teja Singh, C.J.,* in the judgment reported as *Gursewak Singh Harnam Singh vs. The State* [AIR 1954 PEPSU 129] in the following words:-

> "It is the essence of all democratic Constitutions of the kind we have in this country that even in matters which must be submitted to the Head of the State for his approval the latter is bound to follow the advice given to him by his Ministers."

Muzaffarabad, JUDGE
09.02.2016

AJ&K Council & others v. Azad Govt. & others

ORDER:

RAJA SAEED AKRAM KHAN, J: I have honour to go through the proposed judgment authored by the Hon'able Chief Justice and the separate note authored by my learned brother Mr. Justice Ch. Muhammad Ibrahim Zia. I am

in agreement with the conclusion drawn by the Hon’able Chief Justice in the proposed judgment and the reasoning assigned by my learned brother Mr. Justice Ch. Muhammad Ibrahim Zia, in para 6 of the separate note, regarding the appointment of the Acting Chief Election Commissioner.

Muzaffarabad, JUDGE
09.02.2016