

SUPREME COURT OF AZAD JAMMU & KASHMIR
(Appellate Jurisdiction)

PRESENT:

Mohammad Azam Khan, C.J.
Raja Saeed Akram Khan, J.

Civil Misc. No.189 & 190 of 2016
(Date of institution: 20th July 2016)

Sardar Ghulam Sadiq son of Baga Khan (Speaker) resident of Phagwati, MLA, candidate for Member of AJ&K Legislative Assembly from LA-XVIII Poonch Sudhenuti-II.

..... APPLICANT

versus

1. Khan Bahadur Khan s/o Muhabat Khan r/o Phul-Jari, district Sudhenuti.

..... RESPONDENT

2. Chief Election Commissioner, Azad Jammu & Kashmir, through its Secretary, Muzaffarabad.
3. Returning Officer, Constituency LA-XVIII, Poonch-Sudhenuti-II.

..... PROFORMA RESPONDENT

Application for ad interim relief ex-parte.

FOR THE PETITIONER: Mr. Mushtaq Ahmed
Janjua, advocate.

FOR THE RESPONDENTS: Nemo.

Date of hearing: 20th July, 2016

ORDER:

Mohammad Azam Khan, C.J.—The petitioner filed nomination papers for the elections to the Azad Jammu & Kashmir Legislative Assembly from constituency No.LA XVIII, Poonch Sudhenuti 2. Respondent No.1 is also a candidate from the said constituency. He raised objections on the nomination papers of the petitioner on two grounds (i) that the petitioner wrote a letter to the District Education Officer Sudhenuti for appointment of 10 primary teachers, which is a misuse of powers and, (ii) that he received two salaries at a time; one of the Member of the Legislative Assembly and the other of the Advisor to the Chairman Azad Jammu & Kashmir Council. The Returning Officer rejected the objections and accepted the nomination papers. Dissatisfied the respondent filed an appeal before the Chief Election Commissioner. The appeal was dismissed. Thereafter the respondent filed a writ petition in the High Court, whereby he challenged the order of the Returning Officer as well the Chief Election Commissioner. The learned High Court through judgment dated 18th July 2016, accepted the writ petition and declared that the petitioner was not qualified at the time of filing his nomination papers by virtue of Section

24(2)(f) of the Azad Jammu & Kashmir Interim Constitution Act, 1974 read with Section 5(1)(f) of the Azad Jammu & Kashmir Legislative Assembly (Election) 1970 and ordered that his name shall be deleted from the list of nominated candidates of the Legislative Assembly from the said constituency. The petitioner has challenged the said judgment by way of a petition for leave to appeal, which awaits completion in the Registry Office of the Court. Along with the petition for leave to appeal, the petitioner has filed an application for stay order and in the nature of emergency involved in the case, this application under Order VI, Rules 1 & 2 of the Azad Jammu & Kashmir Interim Constitution Act, 1974 for urgent hearing and ex-parte stay order has also been filed. The matter appears to be one of urgent nature, therefore, ex-parte arguments are heard.

2. Mr. Mushtaq Ahmed Janjua, advocate, counsel for the petitioner, submitted that the judgment of the High Court is against law and the record. The learned counsel argued that clause (f) of Subsection (2) of Section 24 of the Azad Jammu & Kashmir Interim Constitution Act, 1974, refers to the disqualification, apart from this section, under any other provision of the Constitution or any other law.

The learned High Court has applied Section 5(1)(f) of the Ordinance, 1970 and disqualified the petitioner under the said section. Clause (f) of subsection (1) of Section 5 of the Ordinance, 1970 is a qualification and is not a disqualification. The petitioner has not disqualified. The learned High Court has applied incorrect law. He submitted that interpretation of important constitutional provisions and the Election laws is involved and a strong *prima facie* arguable case is made out by the petitioner. The learned counsel submitted that the elections to the Legislative Assembly are going to be held tomorrow; 21st of July 2016. Whole the process is complete. If the name of the name of the petitioner is deleted from the validly nominated candidates, he is kept out of the electoral process and ultimately his petition for leave to appeal/appeal is accepted, then the loss incurred to the petitioner will be irreparable, which cannot be repaired. He referred to and relied upon the cases reported as *Ch. Abdul Majid v/s Chief Election Commissioner, Azad Jammu & Kashmir & 3 others* [PLD 1985 AJ&K 83] and *Sardar Sikandar Hayat Khan v/s Syed Ghulam Mujtaba Bokhari & another* [PLD 1991 Supreme Court (AJ&K) 1] and submitted that in the similar circumstances, where Ch. Abdul Majeed, present

Prime Minister of Azad Jammu & Kashmir, was disqualified by the High Court on a writ petition and his nomination papers were rejected by the Chief Election Commissioner, the High Court granted the interim relief and stay order was issued, on the basis of which, he contested elections and ultimately his writ petition was accepted and the Supreme Court also decided the case in his favour. While referring to the latter case, the learned counsel submitted that Sardar Sikandar Hayat Khan, an ex-Prime Minister of Azad Jammu & Kashmir, contested elections from a constituency of Refugees settled in Pakistan (LA 34, Jammu & others 6). His nomination papers were rejected by the High Court on a writ petition. The Supreme Court granted him stay order and he contested the elections on the basis of the stay order issued by the Supreme Court. Ultimately the Supreme Court decided the case against him but he was allowed to contest the elections. The learned counsel submitted that if ultimately the appeal of the petitioner is accepted and he is kept out of the election process, then there will be no remedy but if the appeal of the petitioner is rejected, then there will be no loss to the other party. He requested for grant of stay order.

3. We have heard the learned counsel for the petitioner and perused the record.

4. The petitioner and respondent No.1 are candidates to the elections of the Legislative Assembly of Azad Jammu & Kashmir from constituency No.LA XVIII, Poonch Sudhenuti-2. The respondent has challenged the qualification of the petitioner on the ground that he is not qualified to be a candidate for the relevant date at the time of filing nomination papers. The qualifications and disqualifications for contesting the elections to the Legislative Assembly are laid down in section 24 of the Azad Jammu & Kashmir Interim Constitution Act, 1974 and subordinate law i.e. Azad Jammu & Kashmir Legislative Assembly (Elections) Ordinance, 1970. Subsection (1) of Section 24 of the Azad Jammu & Kashmir Interim Constitution Act, 1974 provides qualifications while subsection (2) of Section 24 provides for disqualifications. Clause (f) of subsection (2) of section 24 is relevant for the purpose of the present application, which is reproduced as under:-

“(f) he is otherwise disqualified from being of a member of the Assembly by this Act or by or under any other Law.”

Clause (f) provides that apart from the disqualifications provided from clause (a) to (e), a person is disqualified, if he is otherwise disqualified from being a member of the Assembly by this Act or by or under any other law. Disqualifications are provided in subsection (2) of Section 5 of the Azad Jammu & Kashmir Legislative Assembly (Elections) Ordinance, 1970. A number of disqualifications are provided but the High Court has rejected the nomination papers on the basis of section 5(1)(f). Section 5(1)(f) deals with the qualifications and not disqualifications. We deem it necessary to reproduce the same, which is as under:-

“(f) he is sagacious, righteous, honest, *ameen* and not profligate.”

5. Whether in the light of section 24(2)(f) of the Azad Jammu & Kashmir Interim Constitution Act, 1974, any disqualification occurs to the petitioner or not, a good *prima facie* arguable case appears in favour of the petitioner. We have come to the conclusion that election process is almost complete. Only the voters have to elect the candidate of their choice. If the judgment of the High Court remains intact and the petitioner is kept out of the electoral process and ultimately his petition for leave to

appeal/appeal is accepted, then there will be no remedy available to him and loss incurred to him cannot be repaired but if ultimately his appeal is dismissed, then no loss will be occurred to respondent No.1. Balance of convenience also appears in favour of the petitioner. The petitioner has also filed an affidavit in support of the contents of his application. Keeping in view the rules governing injunctions (i) *prima facie* arguable case, (ii) balance of convenience and (iii) irreparable loss, it is ordered that the operation of the judgment of the High Court dated 18th July 2016 shall remain in abeyance till disposal of the petition for leave to appeal. The application shall be taken up along with the petition for leave to appeal in the first week of August.

CHIEF JUSTICE

JUDGE

Mirpur
20.7.2016