

SUPREME COURT OF AZAD JAMMU AND KASHMIR
[Appellate Jurisdiction]

PRESENT:

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

Civil Appeal No.251 of 2016
(PLA filed on 19.07.2016)

Sardar Ghulam Sadiq son of Baga Khan (Speaker)
resident of Phagwati, MLA, candidate for Member of
AJK Legislative Assembly from LA-XVIII Poonch
Sudhnooti-II,

.....APPELLANT

VERSUS

1. Khan Bahadar Khan son of Mohabat Khan,
resident of Phul-Jari, District Sudhnooti.

.... RESPONDENT

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

...PROFORMA-RESPONDENTS

[On appeal from the judgment of the High Court
dated 18.07.2016 in Writ Petition No.2142/2016]

FOR THE APPELLANT: Sardar Abdul Hamid Khan
& Mr. Mushtaq Ahmed
Janjua, Advocates.

FOR RESPONDENT No.1: Raja Khalid Mehmood
Khan, Advocate.

Date of hearing: 08.12.2016.

JUDGMENT:

Mohammad Azam Khan, C.J.- The appellant and respondent No.1, filed the nomination papers for contesting the General Elections to the Azad Jammu and Kashmir Legislative Assembly (*hereinafter to be referred as, the Legislative Assembly*), to be held on 21st July, 2016, for Constituency No.LA-XVIII, Poonch Sudhnooti-II. The appellant was a sitting member and also the Speaker of the Legislative Assembly. He was elected as a member of the Legislative Assembly from the said Constituency in the General Elections held in years 2001, 2006 and 2011. He was appointed as the Advisor to the Prime Minister of Pakistan/Chairman of the AJ&K Council on 30th November 2008, and remained as such till July, 2011. Respondent No.1

raised objection on the nomination papers of the appellant to the effect that the appellant is disqualified from contesting the General Elections 2016, of the Legislative Assembly on the ground that apart from receiving the salary of the Advisor to the Chairman of the AJK Council, he kept on receiving the salary of the member the Legislative Assembly. After receiving the salaries against the two offices simultaneously, he is disqualified from contesting the election under section 5(1) of the Azad Jammu & Kashmir Legislative Assembly (Elections) Ordinance, 1970 (*hereinafter to be referred as, the Ordinance, 1970*). A further objection was raised that in the capacity of the Speaker of the Legislative Assembly, the appellant directed the District Education Officer Schools (Female) Sudhnoti for making appointments of the certain persons illegally. The Returning Officer, turned down the objections and accepted the nomination papers of the appellant. An appeal filed before the Chief Election Commissioner was also dismissed. Respondent No.1,

herein, filed a writ petition in the Azad Jammu & Kashmir High Court. The learned High Court through the judgment dated 18th July, 2016, accepted the writ petition while declaring that respondent No.2, appellant herein, was not qualified at the time of filing of his nomination papers by virtue of section 24(2)(f) of the Azad Jammu & Kashmir Interim Constitution Act, 1974 (*hereinafter to be referred as, the Act, 1974*), read with section 5(1) of the Ordinance, 1970, set aside the orders passed by the Returning Officer and the Chief Election Commissioner dated 17th June, 2016, and 25th June, 2016, respectively, and ordered for deletion of the name of the appellant from the list of the validly nominated candidates, hence this appeal by leave of the Court.

2. Sardar Abdul Hamid Khan, Advocate, counsel for the appellant submitted that the judgment of the High Court is against law and the record. The writ petition was filed in violation of rule 32(2) of the Azad Jammu & Kashmir High Court

Procedure Rules, 1984. The attested copies of the orders were not filed, only the photocopies were filed. The writ petition was liable to be dismissed on the sole ground but the High Court while relying upon the photocopies, accepted the writ petition, as such the impugned judgment is not maintainable. The learned counsel argued that the appellant and respondent No.1, have been the rival candidates for the last many elections. The appellant was elected as the member of the Legislative Assembly in the last three elections. The writ petition has been filed with *mala-fide* intention. The allegation against the appellant is that he has received double salary from years 2008 to 2011, prior to the General Elections of the Legislative Assembly held in year 2011. No objection, whatsoever, was raised on the nomination papers of the appellant in the General Elections of 2011. The writ petition is not maintainable. The learned counsel further argued that the salary of the Advisor to the Chairman of the AJ&K Council and the member of the Legislative Assembly were paid

to the appellant through the computerized system. He never examined the statement of his account. As soon as, he acquired the knowledge that the salary of the said period from the two offices has been paid, he immediately deposited back the excess amount wrongly credited during the said period before filing of the nomination papers, as such he is not hit by any disqualification. The learned counsel argued that the writ petition was not maintainable because complicated questions of the facts were raised in the writ petition requiring recording of the evidence. Without recording of the evidence, such complicated questions cannot be resolved in the writ jurisdiction. The respondent had alternate remedy of filing of the election petition. The appellant was not declared guilty by any Court of law. Without trial and declaring the appellant guilty by any Court of law of competent jurisdiction, the High Court has no jurisdiction to declare the appellant as disqualified. The learned counsel further argued that the High Court has held that the appellant has admitted the

fact of receiving double salary, as such it is a confession. He argued that a part of the statement cannot be treated as a confession. The statement has to be accepted or rejected as a whole. He forcefully argued that the High Court has incorrectly applied the law and delivered the judgment against the settled principles of interpretation. He relied upon the cases reported as *Shah Ghulam Qadir v/s Sardar Gul-e-Khandan & 8 others* [2015 SCR 1], *Iffat Bibi v/s Azad Govt. & 19 others* [2015 SCR 83], *Saira Bashir Butt v/s Azad Govt. & 7 others* [2015 SCR 631], *Ch. Muhammad Aziz v/s Faisal Mumtaz Rathore & 15 others* [2015 SCR 159], *Muhammad Malik & another v/s Manzoor Hussain & 90 others* [2015 SCR 259], *Secretary Services & 2 others v/s Bashir Mir* [2015 SCR 851], *Ghulam Akbar Lang v/s Dewan Ashiq Hussain Bukhari & others* [2012 SCMR 366], *Federation of Pakistan v/s Mian Muhammad Nawaz Sharif & others* [PLD 2009 Supreme Court 531], *Khawand Bakhsh alias Khawando v/s The State* [2004 P.Cr.L.J. 677], *Muhammad Sharif Shar v/s The State* [2000 P.Cr.L.J. 1882], *The State through Ehtesab Cell v/s Zahirud Din & 8 others* [2000 P.Cr. L.J. 1105], *Kiramatullah Khan v/s Haji Abdur Rehman Khan* [1999 CLC 1746], *Sardar*

Muhammad Razaq Inqalabi & another v/s Sardar Muhammad Abdul Qayyum Khan, Prime Minister of Azad Jammu & Kashmir Government, Muzaffarabad & another [PLJ 1996 65 (FB)], *Ch. Abdul Majid v/s Chief Election Commissioner, Azad Jammu & Kashmir & 3 others* [PLD 1985 Azad J&K 83], *Nusrat Fatima v/s Azad Government of the State of Jammu & Kashmir & 2 others* [PLD 1985 SC (AJ&K) 93], *Chief Secretary/Referring Authority, Azad Jammu & Kashmir Government v/s Sardar Muhammad Abdul Qayyum Khan* [PLD 1983 SC (AJ&K) 95] and *Sardar Khan Bahadur Khan v/s Chief Secretary, Azad Government of Jammu & Kashmir* [PLD 1983 SC (AJ&K) 199]. He requested for acceptance of appeal.

In the case reported as *Shah Ghulam Qadir v/s Sardar Gul-e-Khandan & 8 others* [2015 SCR 1], while interpreting section 10 of the Electoral Rolls Ordinance, 1970, it was observed by this Court that the qualification for enrolment of a State Subject as voter is that he is not less than 18 years of age, doesn't stand declared by a competent Court to be of unsound mind and is, or is deemed under section 12, to be resident in the electoral area.

In the case reported as *Iffat Bibi v/s Azad Govt. & 19 others* [2015 SCR 83], this Court observed that under article 87 of the Qanoon-e-Shahadat Order, 1984, sub Article (2) and (3) of the Amending Act, 1996, of the Azad Jammu &

Kashmir, the Photostat copy of public document is not admissible unless the officer having the custody of original document certifies that same to be true copy.

The same view has been reiterated by this Court in the case reported as *Muhammad Azam & 3 others v/s Khadim Hussain & 2 others* [2015 SCR 126].

In the case reported as *Saira Bashir Butt v/s Azad Govt. & 7 others* [2015 SCR 631], this Court observed that the application/petition apart from setting out the name and description of the applicant, exact nature of the relief sought and the ground on which it is sought, shall be accompanied by an affidavit verifying the facts relief on, a certified copy of the impugned order and at least two copies thereof including annexure if any. The filing of certified copy of the impugned order is mandatory and photocopy cannot be relied upon. It was further observed that photocopy of a document is not admissible in evidence and certified copy is the one which is issued by the authority having the custody of record verifying therein that it is certified true copy of the original record.

In the case reported as *Ch. Muhammad Aziz v/s Faisal Mumtaz Rathore & 15 others* [2015 SCR 159], this Court observed that Order XIII, Rule 2 and Order XVIII, Rule 6 of the Azad Jammu & Kashmir Supreme Court Rules, 1978, recognize the judgments of the Supreme Court of Pakistan. The principle of law enunciated by the Supreme Court of Pakistan shall be followed keeping in view the facts and circumstances of the case.

In the case reported as *Muhammad Malik & another v/s Manzoor Hussain & 90 others* [2015 SCR 259], the rule of law laid down is that mere delay cannot be a ground for dismissal of writ petition but unexplained delay is always considered fatal in writ jurisdiction.

In the case reported as *Secretary Services & 2 others v/s Bashir Mir* [2015 SCR 851], this Court observed that according to the complex and complicated factual proposition like the one involved in that case requiring detailed inquiry and probe, cannot be resolved in writ jurisdiction.

In the case reported as *Ghulam Akbar Lang v/s Dewan Ashiq Hussain Bukhari & others* [2012 SCMR 366], the Supreme Court of Pakistan, observed that, if the High Court has already recorded findings on any issue raised before it, which is again raised in the subsequent proceedings and the findings of the High Court in earlier constitutional petition were not set aside, the subsequent petition on the same issue would be barred on the principle of *constructive res judicata*.

In the case reported as *Federation of Pakistan v/s Mian Muhammad Nawaz Sharif & others* [PLD 2009 Supreme Court 531], the Supreme Court of Pakistan, while hearing a review petition, observed that the judgments under review of the High Court, and of the Supreme Court, were *ex parte* on account of which the certain factual aspects and legal provisions having bearing on the issues raised, were not brought to the notice of the court and, therefore, were not considered leading to miscarriage of justice. Such

omission was an error apparent on the face of record warranting review.

In the case reported as *Khawand Bakhsh alias Khawando v/s The State* [2004 P.Cr.L.J. 677], the Federal Shariat Court, observed that confession of the accused in Islamic Criminal Justice System is used in the meaning of acknowledgement. Confession is, thus, the total acknowledgement of one's guilt. Technically, confession means the evidence of a person against himself which is one of the strongest source of proof in Islamic Criminal Justice System.

In the case reported as *Muhammad Sharif Shar v/s The State* [2000 P.Cr.L.J. 1882], the Karachi High Court, observed that the Courts were sanctuaries of the rights of the persons brought before them. The Courts should leave no stone unturned in discharge of their duty conferred upon them by statute and should not hesitate in exercising power to do real justice. Justice hurried would mean justice buried.

In the case reported as *The State through Ehtesab Cell v/s Zahirud Din & 8 others* [2000 P.Cr. L.J. 1105], the Azad Jammu & Kashmir High Court, observed that the criminal intention is the basis for criminal implication which is to be proved by the prosecution by placing on record the evidence that the accused knew that what they were doing was illegal or that it is was done with dishonesty and in a deceitful manner.

In the case reported as *Kiramatullah Khan v/s Haji Abdur Rehman Khan* [1999 CLC 1746], the Election Tribunal, NWFP, recorded finding to the effect that the returned candidate had fully proved that he was not defaulter of the loans and the Government dues and utility expenses, either at the time of submission of the nomination papers or on polling day. The election petition filed against the returned candidate, was dismissed in circumstances.

In the case reported as *Sardar Muhammad Razaq Inqalabi & another v/s Sardar Muhammad Abdul Qayyum Khan, Prime Minister of Azad Jammu & Kashmir Government, Muzaffarabad & another* [PLJ 1996 65 (FB)], the Azad Jammu & Kashmir High Court, dismissed the writ petition whereby it was prayed that respondents No.1 and 2 being of impeachable character for their willful misconduct and breach of oath of office and trust being *prima facie*, disqualified may kindly be so declared and be disallowed to continue as the Members of the Assembly or Prime Minister/President and be restrained to contest the said offices in future. The High Court dismissed the writ petition on the ground that under section 44 of the Azad Jammu & Kashmir Interim Constitution Act, 1974, the High Court has no jurisdiction to enter into the functions which the petitioners want it to do, in view of subsection (2) of section 25 of the Constitution, where such a jurisdiction vests in the Speaker and the Chief Election Commissioner.

In the case reported as *Ch. Abdul Majid v/s Chief Election Commissioner, Azad Jammu & Kashmir & 3 others* [PLD 1985 Azad J&K 83], the Azad Jammu & Kashmir High Court, in a case wherein the nomination papers of Ch. Abdul Majid, petitioner therein, were rejected, observed that the petitioner resigned from the membership and from being office-bearer of a political party, and after acceptance of such resignation before filing of the nomination papers he was no more office bearer of that party and the Election Authority having failed to consider and apply its mind to legal aspect of the case and consequences of such resignation. Such failure of the Election Authority amounted to error of law and order passed in consequence was without lawful authority in circumstances.

In the case reported as *Nusrat Fatima v/s Azad Government of the State of Jammu & Kashmir & 2 others* [PLD 1985 SC (AJ&K) 93], on the question of *laches*, this Court observed that equity aids vigilant and not indolent.

In the case reported as *Chief Secretary/Referring Authority, Azad Jammu & Kashmir Government v/s Sardar Muhammad Abdul Qayyum Khan* [PLD 1983 SC (AJ&K) 95], this Court observed that subsection (4)(4) of section 4 of the AJ&K Interim Constitution Act, 1974, which employs the words 'punishment' and 'punishable' without defining them, cannot legally be made applicable to civil disabilities and disqualifications in bringing them within the definition of punishment.

In the case reported as *Sardar Khan Bahadur Khan v/s Chief Secretary, Azad Government of Jammu & Kashmir* [PLD 1983 SC (AJ&K) 199], this Court observed that the witnesses failing to implicate accused, the Tribunal mainly relying on statement of accused, the statement as a whole indicating that the accused not admitting accusation, the statement of the accused not correctly read by the Tribunal, the finding of the Tribunal having been recorded without any evidence in circumstances, recalled by the Supreme Court.

3. Mr. Mushtaq Ahmed Janjau, Advocate, another counsel for the appellant argued that the salary as the member of the Legislative Assembly was being deposited through the computerize process in the account of the appellant. During the disputed period, no amount was withdrawn from the account by the appellant as such he was not in the knowledge that the salary against his membership of the Legislative Assembly is also being credited to his account. It was an inadvertence. He argued that the High Court has held that the words 'qualifications' and 'disqualifications' are practically interchangeable terms and two shades of the same picture. This finding is not correct. The

'qualifications' and 'disqualifications' are two different things. Section 24(1) of the Act, 1974, provides qualifications, while section 24(2) of the Act, 1974, provides disqualifications. Only three qualifications are mentioned in section 24(1) of the Act, 1974. No other qualification is recognized by the said section, while in section 24(2) of Act, 1974, apart from five disqualifications, i.e. (a), (b), (c), (d), and (e), clause (f) provides that one who is otherwise disqualified from being of a member of the Assembly by this Act or by or under any other law. The learned counsel submitted that the qualifications added through section 5(1) of the Ordinance, 1970, cannot be applied against the appellant as being not postulated by the Act, 1974. He requested for acceptance of appeal.

4. Raja Khalid Mehmood Khan, Advocate, counsel for respondent No.1, argued that the judgment of the High Court is perfectly legal. Section 24(2) of the Act, 1974, provides disqualifications. He submitted that apart from

section 24(1) of Act, 1974, section 5 of the Ordinance, 1970, provides further qualifications and disqualifications. The qualifications and disqualifications are inter-changeable. The appellant is not sagacious, righteous, honest, *ameen* and non-profligate. He submitted that the similar qualifications and disqualifications are provided in Article 62 and 63 of the Constitution of Islamic Republic of Pakistan, 1973. He relied upon the cases reported as *Syed Mehmood Akhtar Naqvi vs. Federation of Pakistan through Secretary Law and others* [PLD 2012 SC 1089] and *Ishaq Khan Khakwani and others vs. Mian Muhammad Nawaz Sharif* [PLD 2015 Supreme Court 275]. The learned counsel further argued that section 5 (1)(f) of the Ordinance 1970, provides that if a person is not sagacious, righteous, honest, *ameen* and non-profligate, he is disqualified from being elected as member of the Assembly. The appellant received double salary and also issued the illegal orders for appointment of the certain persons in the Education Department, as such he is not sagacious, righteous,

honest, ameen and non-profligate, and liable to be disqualified. The learned counsel submitted that in reply to para 4 of the writ petition, the appellant, herein, has admitted that he has received double salary and issued the orders for illegal appointments, as such he has admitted the guilt, therefore, he is disqualified from contesting the elections to the Legislative Assembly. He referred to *Sura Al-Nisa* and *Sura Al-Maida*. He referred to the cases reported as *Federation of Pakistan through Secretary, Cabinet Division, Islamabad and others vs. Mian Muhammad Shahbaz Sharif and others* [PLD 2009 Supreme Court 237], *Muhammad Anwar Khan and another vs. Khalid Mahmood and others* [2015 MLD 1090], *Muhammad Yousaf vs. M. Irshad Sipra and others* [1988 CLC 2475], *Hameed Akbar Khan vs. Election Appellate Tribunal and others* [PLD 2013 Lahore 548] and [2013 SCMR 1295]. The learned counsel further argued that under the AJ&K Council Advisors Salaries Act, 1976, an advisor is entitled to “a” salary. The appellant has received two salaries,

therefore, he was proved as not a sagacious, righteous, honest, *amen* and non-profligate, as such he is disqualified. He submitted that denial must be specific. No specific denial of receiving double salary and issuance of the illegal appointment orders, has been made by the appellant, therefore, he is liable to be disqualified. He requested for dismissal of appeal.

In the case reported as *Syed Mehmood Akhtar Naqvi vs. Federation of Pakistan through Secretary Law and others* [PLD 2012 SC 1089], it was observed in para 45 and 46 of the report as under:-

“45. The legislature intentionally has not used the word “Member of the Parliament” in Article 63 to be disqualified if he acquires citizenship of a foreign State. In terms of Articles 63(1), “ A person” who holds dual citizenship but wishes to be elected or chosen to become Parliamentarian has to renounce citizenship of foreign State first, otherwise he would be disqualified to be elected, if at the time of submitting his/her nomination paper, he/she was holding citizenship of foreign State. Likewise if any member of the Parliament acquires citizenship of foreign State, he will become disqualified to remain member of the Parliament.

46. As regards the contention of learned counsel for the respondents that Article 63 of the Constitution, is related to pre and post election disqualification the same has no force. On plain reading of the said article, the Legislature has used the word "a person" which demonstrates the intention that any person whether he is Member of the *Majlis-e-Shoora* shall be disqualified if any one of the disqualifications mentioned in the said Article applicable upon him. The Article further provides that the person shall be disqualified "from being elected or chosen" relates to pre election disqualification whereas "from being a Member of *Majlis-e-Shoora*" relates to post election disqualification. The Article 63 of the Constitution has dealt with both i.e. pre and post election disqualification."

In the case reported as *Ishaq Khan Khakwani and others vs. Mian Muhammad Nawaz Sharif* [PLD 2015 Supreme Court 275], the Supreme Court of Pakistan held as under:-

"Thus the consistent view of the Courts has been that if the determination of any question raised before the Court requires interpretation or application of any provisions of the Constitution the Court is obliged to adjudicate upon the same notwithstanding that the action

impugned or the question raised has political overtones". It was further observed that "it may be added that even if the factual averments made in these petitions as to words and expressions used by the respondents are taken as stated, these will not constitute admissible and actionable evidence before a Court so as to justify a declaration in terms of Article 62(1)(f) and /or a conviction in terms of Article 63(1)(g), by a Court of competent jurisdiction. It is clear from these two constitutional provisions that it is the Court alone which must first make a declaration or pronounce a conviction before the Speaker of the National Assembly can initiate the process for unseating a Member of Parliament."

In the case reported as *Federation of Pakistan through Secretary, Cabinet Division, Islamabad and others vs. Mian Muhammad Shahbaz Sharif and others* [PLD 2009 Supreme Court 237], the Supreme Court of Pakistan, while interpreting Article 63(1)(g) of the Constitution of Pakistan, 1973, and section 99(1-A) of the Representation of the Peoples Act, (LXXXV of

1976), held that the candidate was defaming and propagating to bring into ridicule the judiciary and that the loans obtained by him exceeding the amount of two million rupees were remaining unpaid since the year 1998. The candidate also had not declared a pending case against him in his nomination papers, in the circumstances he was disqualified from being elected or chosen as and from being a member of the Provincial Assembly.

In the case reported as *Muhammad Yousaf vs. M. Irshad Sipra and others* [1988 CLC 2475], the Election Appellate Authority, while interpreting Articles 62, 63 and 113 of the Constitution of Islamic Republic of Pakistan observed that scheme of Constitution apart from qualifications/disqualifications enumerated in Articles 62 and 63 also recognizes disqualifications for the time being imposed under any law for the time being in force from being elected or chosen to Parliament or to Provincial Assembly.

In the case reported as *Muhammad Anwar Khan and another vs. Khalid Mahmood and others* [2015 MLD 1090], while interpreting Articles 62, 63 and 199(1)(b)(ii) of the Constitution of Islamic Republic of Pakistan, 1973, it was held that the member of the Provincial Assembly who was not a graduate and as such he submitted false information on oath while contesting the election of the Member of Provincial the Assembly and succeeded to defraud the voters of the constituency, his election as the Member of the Provincial Assembly was declared as fraudulent and of no legal effect.

In the case reported as *Hameed Akbar Khan vs. Election Appellate Tribunal and others* [PLD 2013 Lahore 548], while interpreting Article 63(1)(0) of the Constitution of Islamic Republic of Pakistan, 1973, which envisages a default in payment of government dues and utility expenses for over a period of six months at the time of filing of nomination papers, it was held that if the dues were paid before filing of the nomination papers then such disqualification is

cured but these are not paid till filing of nomination papers, after filing of nomination papers the payment of such dues, will not cure the default.

5. Mr. Raza Ali Khan, the learned Advocate-General defended the orders passed by the Chief Election Commissioner and the Returning Officer. He submitted that the findings recorded by the High Court that the qualifications and disqualifications are two shades of the same picture and are interchangeable, is against the canons of interpretation. Section 24 of the Act, 1974, provides two sets of provisions; one for qualifications and the other for disqualifications. The learned Advocate-General submitted that only three qualifications i.e. (a), (b) and (c) are provided in the Act, 1974. No other qualification is recognized by section 24(1), while sub-section (2) of section 24 of the Act, 1974, provides disqualifications enumerated in clauses (a), (b), (c), (d) and (e). Clause (f) of sub-section (2), section 24, provides otherwise disqualified under this Act or by or under any other law. The

disqualifications provided in any other law are recognized by section 24(2), while sub-section (1) does not recognize qualification in any other law. The learned Advocate-General submitted that qualifications and disqualifications are not interchangeable for being a candidate or member of the Legislative Assembly. The Constitution requires only three qualifications and any person possessing three qualifications may file the nomination papers. When a person who is qualified under subsection (1) of section 24 of the Act, 1974, files the nomination papers and he is hit by any disqualification mentioned in section 24(2) of the Act, 1974, or section 5(2) of the Ordinance 1970, then he may be disqualified. He submitted that section 5(1)(f) of Ordinance 1970 is not recognized by the Act, 1974, therefore, a person cannot be disqualified from contesting the elections on the grounds postulated therein. He requested for acceptance of the appeal.

6. We have heard the learned counsel for the parties as well as the learned Advocate-General and perused the record.

7. The admitted facts are that the appellant and respondent No.1, both were the candidates from Constituency LA-XVIII, Poonch Sudhnooti-II, of the Legislative Assembly. It is also admitted that the appellant was elected as member of the Legislative Assembly in the General Elections held in years 2001, 2006 and 2011. During the period from 2008 to 2011, the appellant was appointed as the Advisor to the Prime Minister/Chairman of the AJ&K Council, and during this period he kept on receiving the salary of his being as the member of the Legislative Assembly as well as in the capacity of the Advisor to the Chairman of the AJ&K Council. The explanation furnished by the appellant is that the salary was being credited in the account through computerized process, therefore, he was not aware of the fact that he is receiving double salary. It was also claimed by the counsel for the appellant that the appellant did not

operate the said account during the said period because no transaction was made from the said account. Another allegation against the appellant is that he has issued the direction to the District Education Officer (Female) Sudhnooti for appointment of certain persons, illegally.

8. The terms 'qualifications' or 'disqualifications' for being elected to be a member of the Legislative Assembly are laid down in section 24 of the Act, 1974. For proper appreciation section 24 is reproduced as under:-

"24. Qualification of member of the Assembly.- (1) A person shall be qualified to be elected as, and to be, a member of the Assembly if-

- (a) he is a State Subject;
- (b) he is not less than twenty-five years of age; and
- (c) his name appears on the electoral roll of any constituency in Azad Jammu & Kashmir or Pakistan.

(2) A person shall be disqualified from being so elected if-

- (a) he is of unsound mind and stands so declared by competent Court; or
- (b) he is an undischarged insolvent unless a period of ten years has elapsed since his being adjudged as insolvent; or
- (c) he has been on conviction for any offence sentenced to transportation for any term or imprisonment for a term of not less than two years unless a period of five years has elapsed since his release; or
- (d) he holds any office of profit in the service of Azad Jammu & Kashmir or in the Service of Pakistan other than an office which is not a whole time office remunerated either by salary or by fee other than an office specified in the Second Schedule; or
- (e) he has been dismissed for mis-conduct from the service of Azad Jammu & Kashmir or the service of Pakistan unless a period of five years has elapsed since his dismissal; or
- (f) he is otherwise disqualified from being of a member of the Assembly by this Act or by or under any other laws. ”

The qualifications prior to the Amendment of 1987, section 5(1) of the Ordinance, 1970, is reproduced as under:-

- “(a) he is a State Subject as defined in sub-section (f) of section (3) of the Azad Jammu & Kashmir Electoral Rolls Ordinance 1970 (Ordinance I of 1970);
- (b) he has attained the age of 25 years; and
- (c) his name appears on the electoral roll of any constituency in the Azad Jammu & Kashmir Territory or West Pakistan.”

In the Act, 1974, the ‘qualifications’ and ‘disqualifications’ of member of the Legislative Assembly were provided in section 24, like Articles 62 and 63 of the Constitution of Islamic Republic of Pakistan, 1973. Later on, in the Constitution of Islamic Republic of Pakistan, 1973, certain other qualifications and disqualifications were added in Article 62 and 63. As we have been borrowing the laws from the Islamic Republic of Pakistan, therefore, in the year 1987, through Amending Act No.II, apart from the qualifications enumerated in the Ordinance, 1970, certain qualifications were also added in the

Ordinance 1970. For proper appreciation we deem it necessary to reproduce amended section 5(1) of the Ordinance, 1970, which read as under:

- “(a) he is a State Subject as defined in sub-section (f) of section (3) of the Azad Jammu & Kashmir Electoral Rolls Ordinance 1970 (Ordinance I of 1970);
- (b) he has attained the age of 25 years; and
- (c) his name appears on the electoral roll of any constituency in the Azad Jammu & Kashmir Territory or West Pakistan.”
- (d) he is of good character and is not commonly known as one who violates Islamic Injunctions;
- (e) He has adequate knowledge of Islamic teachings and practices obligatory duties prescribed by Islam as well as abstains from major sins;
- (f) He is sagacious, righteous, honest, ameen and not profligate:

Provided that the provisions (d) and (e) above shall not apply to a person who is a non-Muslim, but such a person shall have a good moral reputation.”

Section 24 of the Act, 1974, provides qualifications and disqualifications in sub section (1) and sub-section (2). Sub-section (1), recognizes only three qualifications. The said sub-section in

unequivocal terms lays down that a person who possesses above referred three qualifications is entitled to be elected as a member of Assembly. In the Act, 1974, no other qualification is prescribed, nor it refers to any other sub-ordinate law. Sub-section (2), provides disqualifications in shape of five clauses i.e. (a), (b), (c), (d) and (e). Apart from these five clauses, clause (f) of sub-section 2, provides that apart from above referred five disqualifications, a candidate otherwise disqualified from being a member of the Assembly by this Act or by or under any other law, meaning thereby that disqualification may be provided in any other law. When the Act, 1974, recognizes that disqualification may be provided by any other law then the legislature is fully competent to legislate and add the disqualification apart from five disqualifications provided in the Act, 1974. Sub-section (1) of section 24, does not recognize any other qualification for being a member of the Assembly. In the un-amended Article, 62 of Constitution of Islamic Republic of Pakistan, 1973, four qualifications were

provided i.e. he is a citizen of Pakistan; he is, in the case of the National Assembly, not less than twenty-five years of age and is enrolled as a voter in any electoral roll for election to that assembly; he is, in the case of the Senate, not less than thirty years of age and is enrolled as a voter in any area in a Province or, as the case may be, the Federal Capital or the Federally Administered Tribal Areas, from where he seeks membership; and 4th qualification was provided that he possess such other qualifications as may be prescribed by Act of Parliament. Whereas, under section 24(1) of the Act 1974, only three qualifications are prescribed and there is no concept of other qualification by the sub-ordinate law. It is celebrated principle of interpretation that while interpreting the Constitution the plain meanings have to be assigned. Later on, Articles 62 and 63 of Constitution of Islamic Republic of Pakistan, 1973, were amended and further qualification and disqualification were included.

For proper appreciation it is necessary to reproduce Articles 62 and 63 of the Constitution of Islamic Republic of Pakistan before amendment;

“62. Qualifications for membership of Parliament. A person shall not be qualified to be elected or chosen as a member of Parliament unless-

- (a) he is a citizen of Pakistan;
- (b) he is, in the case of the National Assembly, not less than twenty-five years of age and is enrolled as a voter in any electoral roll for election to that assembly;
- (c) he is, in the case of the Senate, not less than thirty years of age and is enrolled as a voter in any area in a Province or, as the case may be, the Federal Capital or the Federally Administered Tribal Areas, from where he seeks membership; and
- (d) he possesses such other qualifications as may be prescribed by Act of Parliament.

63. Disqualifications for membership of Parliament. (1) A person shall be disqualified from being elected or chosen as, and from being, a member of Parliament, if--

- (a) he is of unsound mind and has been so declared by a competent court; or
- (b) he is an undischarged insolvent; or
- (c) he ceases to be a citizen of Pakistan, or acquires the citizenship of a foreign State; or
- (d) he holds any office of profit in the service of Pakistan other than an office declared by law not to disqualify its holder ; or
- (e) he is so disqualified by Act of Parliament.

(2) If any question arises whether a member of Parliament has become disqualified from being a member, the Speaker or, as the case may be, the Chairman shall refer the question to the Chief Election Commissioner and, if the Chief Election Commissioner is of the opinion that the member has become disqualified, he shall cease to be a member and his seat shall become vacant.”

From the perusal of un-amended and amended Articles 62 and 63 of the Constitution of Islamic Republic of Pakistan,1973, it has become clear that though the un-amended Article 62(d) , recognizes providing of other qualifications under subordinate law. But under Constitution (Eighteenth Amendment)

Act, 2010, (Act X of 2010), the said provision has been deleted and other qualifications have been included in Article 62 of the Constitution of Islamic Republic of Pakistan, 1973. There is no concept of providing further qualifications under the subordinate law.

9. As it has been observed that we have been borrowing the laws from Pakistan. Since further qualifications and disqualifications were added in Articles 62 and 63 of the Constitution of Islamic Republic of Pakistan, 1973, by making the amendments, therein, we followed the amendments made, but instead of providing the qualifications and disqualifications in sub sections (1) and (2), respectively, of section 24 of the Act, 1974, added qualifications and disqualifications in section 5(1)(2) of the Ordinance, 1970. The disqualification can be added as postulated under clause (f) of sub-section (2) of section 24, of the Act, 1974, but there is no concept of adding the qualifications in sub-section (1) of section (5) of the Act, 1970, because section 24(1) does not provide qualification 'by or under any other law',

like section 24(2) (f), provides as such. This Court in the case reported as *Ch. Muhammad Yousaf vs. The State and 4 others* [2001 SCR 380], has laid down the rule of law that without amending the Constitution no qualification can be added in section 24(1) of the Constitutional Act. It was observed in para 10 of the report as under:-

“10. We have no quarrel with the proposition laid down in above referred authorities as these contain the cardinal canon of interpretation that when the meaning of a word or term used in a statute is clear and unambiguous, the Court cannot go beyond them and has to take them in their ordinary dictionary meanings. We also agree with him that without amending the Constitution no “qualification” can be added in sub-section (1) of section 24 of the Constitution Act. As the dispute relates to the “qualifications’ and “disqualifications” of a member of Assembly therefore it appears appropriate to have the reference of section 24 of the Constitution Act which is as follows:-

“24. Qualification of member of the Assembly.- (1) A person shall be qualified to be elected as, and to be, a member of the Assembly if-

- (a) he is a State Subject;
- (b) he is not less than twenty-five years of age; and

- (c) his name appears on the electoral roll of any constituency in Azad Jammu & Kashmir or Pakistan.

(2) A person shall be disqualified from being so elected if-

- (a) he is of unsound mind and stands so declared by competent Court; or
- (b) he is an un-discharged insolvent unless a period of ten years has elapsed since his being adjudged as insolvent; or
- (c) he has been on conviction for any offence sentenced to transportation for any term or imprisonment for a terms of not less than two years unless a period of five years has elapsed since his release; or
- (d) he holds any office of profit in the service of Azad Jammu & Kashmir or in the Service of Pakistan other than an office which is not a whole time office remunerated either by salary or by fee other than an office specified in the Second Schedule; or
- (e) he has been dismissed for misconduct from the service of Azad Jammu & Kashmir or the service of Pakistan unless a period of five years

has elapsed since his dismissal; or

- (f) he is otherwise disqualified from being of a member of the Assembly by this Act or by or under any other laws. ‘

11. From the bare reading of the above provision of the Constitution Act, it becomes clear that under sub-clause (f) of section 24 the power to provide “disqualification” can be exercised by enacting law. Admittedly under the scheme of the Constitution Act law can be enacted either by the Assembly or when it is not in session through the promulgation of an Ordinance by the President, if he is satisfied that circumstances exist which render it necessary to take immediate action in this behalf. In our view the “qualifications” provided under sub-section (1) and “disqualifications” provided in sub-section (2) of section 24 of the Constitution Act and by enacting law under the authority of sub-clause (f) of sub-section (2) of section 24 are two shades of the same picture. These are so interchanged to each other that both of them must be read together and not in isolation to each other. Therefore a person who fulfils the requirement of “qualifications” laid down under sub-section (1) of section 24 of the Constitution Act and also does not suffer from any of the “disqualifications” laid down under the Constitution Act and law enacted in exercise of the powers under sub-clause (f) of sub-section (2) of section 24 can

contest election for the legislative body of this part of the State.”

Thus, from survey of case law it is concluded that ‘qualification’ and ‘disqualification’ are two distinct matters, though can be read in continuation. Section 24(1) of the Act, 1974, recognizes only three qualifications, no other qualification can be added in subordinate law without amending the Act, 1974. Whereas, clause (f) of sub-section (2) of section 24 of the Act, 1974, recognizes disqualifications provided under any other law. Disqualification can validly be added by the Act of the Legislative Assembly in subordinate law in sub-section (2) of section 5 of the Ordinance, 1970. Clauses (d), (e) and (f) of sub-section (1) of section 5 of the Ordinance, 1970, added through the amending Act of 1987, cannot be read for disqualifying a person from contesting the elections of the Azad Jammu and Kashmir Legislative Assembly.

10. The learned High Court has accepted the writ petition by observing that qualifications and disqualifications are interchangeable and two shades

of the same picture. We are of the view that qualifications and disqualifications are not interchangeable and have a separate and distinct connotation. The qualifications means possession of those attributes which entitle a person to be considered for some post or office. While disqualification means loss of those attributes by certain acts or omission. In the Black's Laws Dictionary 9th Edition the terms 'qualification' and 'disqualification' are defined as under:-

“qualification. 1. The possession of qualities or properties (such as fitness or capacity) inherently or legally necessary to make one eligible for a position or office, or to perform a public duty or function <voter qualification requires one to meet residency, age, and registration requirements>. ..2. A modification or limitation of terms or language; esp., a restriction of terms that would otherwise be interpreted broadly <the contract contained a qualification requiring the lessor's permission before exercising the right to sublet>.

disqualification, n. 1. Something that makes one ineligible; esp., a bias or conflict of interest that prevents a judge or juror from impartially hearing a case, or that prevents a lawyer from representing a party.....2. The act of

making ineligible; the fact or condition of being ineligible.”

From the above dictionary meanings it becomes clear that the ‘qualification’ and ‘disqualification’ are two distinct things. A person may be qualified or not qualified is one thing and a person is disqualified is another thing. In the case reported as *Ghulam Mohiud Din vs. Election Tribunal* [AIR 1959 All. 357], while dealing with the question of qualification and disqualification it was observed as under:-

“A person’s non-residence for the prescribed period or not attaining the age of 21 years is not his disqualification for registration but amounts to his being no qualified to be registered. So long as one is not qualified no question of disqualification arises. According to Murray’s New English Dictionary ‘disqualification’ means ‘the action of depriving of requisite qualifications’ and ‘to disqualify, means to deprive of the qualifications required for some purpose. A disqualification is, therefore, not identical with the absence of qualification.”

In the case reported as *Government of Pakistan vs. Akhlaque Hussain* [PLD 1965 SC 527], Mr. Justice B.Z. Kaikaus, opined as under:--

“While sometimes qualification and disqualification may present two aspects of the same matter, the two concepts are obviously distinct and it is not possible to contend that there can be no classification into qualification and disqualification of the attributes of a person in relation to a profession, etc. Reference may in this connection be made to Article 103 of this very Constitution which in two separate paragraphs provides for qualifications and disqualifications for membership of an Assembly. ‘Qualification’ as will appear from Aiyar’s Law Lexicon means ‘that which makes person fit to do an act’. The Lexicon goes on to state: ‘qualification relates to the fitness of capacity of the party for a particular pursuit or a profession’. Webster defines qualifications to mean ‘any natural endowment or acquirement which fits a person for a place, office or employment, or enables him to sustain any character with success’. It should be quite appropriate to refer by qualifications to the competence or the positive qualities needed for carrying on a profession and to regard the obstacles in the carrying on of a profession as disqualifications. Every profession requires for the efficient performance of the duties involved in it (1) knowledge, (2) skill and (3) a moral standard. In short whatever goes to his competence or makes a person fit to discharge the duties involved in his profession is a qualification. On the other hand if a person is debarred

from entering a profession though he is admittedly quite competent to discharge his duties for some reason not connected with his competence that is a disqualification. A person may be disqualified because he has served under a foreign Government or because he belongs to a particular tribe or his father was a rebel or because he has already sufficient income from lands or he is a shareholder of a company and so on. He may be the most competent person for carrying on a profession yet he may be debarred because of some other attributes which he possess. That will be a disqualification.”

In the case reported as *Mian Muhammad Shahbaz Sharif vs. Ch. Muhammad Altaf Hussain, Governor of Punjab, Lahore and 2 others* [PLD 1995 Lahore 541], it was observed as under:-

“38. Although much can be said in support of both the views but I am inclined to agree with the points of view put forth by Mr. Sharif ud Din Pirzada with his usual skill and excellence that disqualifications mentioned in Article 63 of the Constitution cannot be taken into consideration while determining whether or not a person was qualified to be appointed as Governor. Article 101(2) of the Constitution on its plain wording speaks of a person qualified to be elected as Member of the National Assembly. The qualifications of a member of National Assembly are provided in Article 62 of the Constitution which, therefore, by

reference becomes applicable. Both, the heading as also the wording of this Article specially speak of qualifications while Article 63 lays down the disqualifications. This Article is a separate and distinct from Article 62 of the Constitution. As reference in Article 101(2) is a person qualified and not a person not disqualified, Article 63 cannot be read into Article 101(2) of the Constitution.

39. It is also to be noticed that Article 62 of the Constitution was imported by P.O. 14 of 1985 and clauses (e) to (h) were added thereto which contained certain disqualifications. As these disqualifications have been added to Article 62 which prescribe the qualifications it can perhaps be successfully argued that the disqualifications contained in the qualification clause must also be taken into consideration while determining whether a person was qualified to be appointed as a Governor. However, there is no warrant for importing Article 63 of the Constitution which is a provision separate and distinct and deals with disqualifications only.

40. The next argument of the petitioner's learned counsel that both Article 62 and 63 must be given effect to while determining the eligibility of the appointee to the office of the Governor proceeds on mistaken assumption that lack of qualifications is the same thing as disqualification. However, there is no warrant for such assumption. While qualification means possession of certain necessary elements and attributes, disqualifications arise when a person is deprived or divested of some of the qualifications. In Black's Law Dictionary,

5th Edition, at page 1116, 'qualification' is defined as under:--

"The possession by an individual of the qualities, properties or circumstances, natural or advertitious, which are inherently or legally necessary to render him eligible to fill an office or to perform a public duty or function. Thus, a 'qualified voter' is one who meets the residency, age and registration requirements.

Also, a modification or limitation of terms or language; usually intended by way of restriction of expressions which, by reason of their generality, would carry a large meaning than was designed.'

At page 424 of the same book, the following definition of 'disqualification' appears:--

"The divest of deprive of qualifications: to incapacitate to render ineligible or unfit, as, in speaking of the 'disqualification' of a Judge by reason of his interest in the case, of a juror by reason of his holding a fixed preconceived opinion, or of candidate for public office by reason of non-residence, lack of statutory age, previous commission of crime, etc.'

41. It will thus be seen that lack of qualification and disqualification are not synonymous but have different connotations. Consequently as Article 101(2) of the Constitution refers to a person "qualified to be" a member of National Assembly, there is no occasion to import the provision referring to his 'disqualification' also therein.

42. The question as to whether 'qualification' would include 'disqualification' has been subject-matter of various cases, some of which have taken the view advocated by Mr. Muhammad Akram Sheikh. The preponderance of opinion, however, appears to be that want of qualification and disqualification are not interchangeable expressions and a person not possessing requisite qualifications cannot be said to be disqualified. The distinction appears to be that a person is said to be not qualified when he is divested of any of the qualifications."

It was forcefully argued by Sardar Abdul Hameed Khan, Advocate, counsel for the appellant that without judgment/order of a competent Court a person cannot be declared as disqualified merely on the ground that the facts are admitted. As we have drawn the conclusion that qualification cannot be added by amending Act II of 1987, in sub-section (1) of section 5 of the Ordinance, 1970, therefore, the same cannot be read against the appellant without amending the AJ&K Interim Constitution Act, 1974. Therefore, we left this question open to be decided in some other proper case.

11. As we have reached the conclusion that the qualification added through the amending Act II, 1987

in sub-section (1) of section (5) of the Ordinance, 1970, are not recognized by the AJ&K Interim Constitution Act, 1974, are not attracted in the case and the appeal merits acceptance on the same ground, therefore, there is no need to dilate upon the decision on factual aspects.

12. Before parting with we may observe that an elected representative of the people shall be role model for society, being a person having such qualifications like law abiding, good character, sagacious, righteous, non-profligate honest and ameen. The elected representative of the people must possess such qualifications, if any of the candidates lacks any of such qualifications he is cannot represent the people. The AJ&K Interim Constitution Act, 1974, recognizes only three qualifications, such like qualifications cannot be added through amendment in sub-ordinate law. It is desirable that the legislature and the Government shall make arrangement for bringing suitable amendments for providing such qualifications in the AJ&K Interim Constitution Act,

1974, as in the Constitution of Islamic Republic of Pakistan, 1973.

The result of the above discussion is that the appeal is accepted. The judgment of the High Court dated 18.07.2016 is set-aside. Resultantly, the writ petition filed by respondent No. 1 before the High Court is dismissed with no order as to costs.

CHIEF JUSTICE

JUDGE

Mirpur.

.....2017.