

SUPREME COURT OF AZAD JAMMU AND KASHMIR
[Appellate Jurisdiction]

PRESENT:

Mohammad Azam Khan, C.J.
Ch. Muhammad Ibrahim Zia, J.

Civil Appeal No. 234 of 2016
(PLA filed on 29.8.2016)

1. Azad Govt. of the State of Jammu & Kashmir, through Chief Secretary, having his office at New Secretariat Muzaffarabad.
2. Joint Admission Committee of Medical College, through its Chairman having his office at AJ&K Medical College, Muzaffarabad.
3. Nomination Board, Azad Jammu & Kashmir, through Secretary Nomination Board, Civil Secretariat, Muzaffarabad.
.... APPELLANTS
4. Muhammad Sajjad Butt
...INTERVENER

VERSUS

1. Iqra Sajjad d/o Sardar Sajjad Hussain Mughal, r/o Kail, Tehsil Sharda District Neelum, Azad Kashmir.
..... RESPONDENT
2. Zafar Rana s/o Hassan Din r/o village Seagam, Tehsil Authmaqam District Neelum, presently Ayub Medical College Abbotabad.
..... PROFORMA RESPONDENT
3. Umair Khan
.... INTERVENER

(On appeal from the judgment of the High Court dated 28.6.2016 in Writ Petition No. 2505 of 2015)

FOR THE APPELLANTS: Sardar Shahid Hameed
Khan, Advocate.

FOR RESPONDENT NO.1: Mr. Muzaffar Hussain
Mughal, Advocate.

FOR INTERVENER:
MUHAMMAD SAJJAD BUTT: Mrs. Bilqees Rasheed
Minhas, Advocate.

FOR INTERVENER Mr. Amjid Hameed Siddiqui,
UMAIR KHAN: Advocate.

Date of hearing: 19.1.2017.

JUDGMENT:

Mohammad Azam Khan, C.J— In a writ petition filed in the High Court on 4th December, 2015, the respondent, Iqra Sajjad, challenged clause 1 of the notification dated 17th April, 2014, alleging therein that she is a resident of “Kail”, District Neelum. She passed her Intermediate (Pre-medical examination) from Islamabad College, Muzaffarabad and secured 900/1100 marks. She appeared in the entry test and applied for nomination in any one of the Medical Colleges. The joint Admission Committee prepared the merit list, wherein she

is at serial No. 11. Ten (10) seats are reserved in the quota for District Neelum. The candidates at serial No. 1 to 10 in the merit list were nominated against the quota of District Neelum. One seat is reserved for "Kail" in the medical colleges. Zaffar Rana, respondent has been nominated against the said seat, who is not resident of village Kail. He is resident of village Seagam, District Neelum. The learned single Judge in the High Court after necessary proceedings, through the impugned judgment dated 28th June, 2016 accepted the writ petition, nomination of respondent, Zaffar Rano was set aside and a direction was issued to the official respondents that they shall nominate the petitioner, therein, for admission in any one of the medical colleges of Pakistan against the special reserved seat for Kail. This judgment is subject of the appeal by leave of the Court.

2. Sardar Shahid Hameed Khan, Advocate, the learned counsel for the appellants submitted that two special seats were reserved

for Neelum and Leepa Valley in the Medical Colleges of Pakistan. Previously, there remained a practice that the candidates hailing from the said area had been nominated against the seat reserved for those areas, but later on, in the light of the direction of P.M.D.C., the policy notification was amended through notification dated 17th April, 2014 and a condition was inserted that against the seats reserved for Leepa Valley and Neelum Valley only those candidates will be eligible who have completed their examination from the Medical Institutions situated in the said area. Clause 1 of the said notification was challenged by different students by filing a writ petition and ultimately the matter came up before this Court. This Court in *Jaweria Maqsood's* case (Civil Appeal No. 507/2015 decided on 14.1.2016) validated the provisions of the said notification. The learned counsel requested for setting aside the judgment of the High Court.

3. While controverting the arguments, Mr. Muzaffar Hussain Mughal, Advocate, the learned counsel for respondent No.1 defended the impugned judgment of the High Court on all counts and requested for dismissal of the appeal.

4. Mrs. Bilqees Rasheed Minhas, Advocate, the learned counsel for intervener, Muhammad Sajid Butt, who was allowed to join as respondent, argued that the judgment of the High Court is perfectly legal. There is no illegality in the judgment. The appeal merits dismissal. She relied upon the cases reported as *Raja Abdul Majid and 24 others vs. Syed Abdul Latif Shah and 4 others* (1999 SCR 459), *Syed Riaz-ul-Hassan vs. Azad Government through Chief Secretary Muzaffarabad and 4 others* (2012 SCR 17) and *Minister Forest and 3 others vs. Aurangzeb and 12 others* (2014 SCR 848).

In the case reported as *Raja Abdul Majid and 24 others vs. Syed Abdul Latif Shah and 4 others* (1999 SCR 459), it was observed by this

Court that if the interests of a party are liable to be jeopardized by an act of the functionaries of the Government which is not in accordance with law, the applicant is an aggrieved person and he may file a writ petition.

In the case reported as *Syed Riaz-ul-Hassan vs. Azad Government through Chief Secretary Muzaffarabad and 4 others* (2012 SCR 17), one Riaz-ul-Hassan filed a writ petition in the High Court for a direction to the authorities for disposal of his processed case relating to promotion against the post of Deputy Director. The writ petition was dismissed on the ground that it relates to the terms and conditions of service. This Court observed that writ petition is maintainable for a direction to the authorities for disposal of pending case.

In the case reported as *Minister Forest and 3 others vs. Aurangzeb and 12 others* (2014 SCR 848), it was observed by this Court that if an order has been issued by a competent authority and it has not been withdrawn, the authority

cannot take stand that the order or action taken by such authority is against law.

5. Mr. Amjid Hamid Siddiqui, Advocate for intervener, Umair Khan, requested for acceptance of appeal and setting aside the judgment of the High Court.

6. We have heard the learned counsel for the parties and perused the record with utmost care.

7. While drafting the judgment we have perused the file of the High Court, which transpires that the writ petition was filed in the High Court on 13th December, 2015. Later on, with the permission of the court, an amended writ was filed on 13.1.2016. The appellants have filed the petition for leave to appeal from the judgment of the High Court dated 28th June, 2016. Along with the petition for leave to appeal, a copy of the writ petition originally filed has been appended. The copy of the amended writ petition has not been filed with the petition for leave to appeal. Order XIII, rule 3(1)(ii) of the

Azad Jammu & Kashmir Supreme Court Rules, 1978 is relevant, which is reproduced as under:-

“ORDER XIII.
PETITIONS FOR SPECIAL LEAVE TO
APPEAL IN CIVIL PROCEEDINGS.

3. (1) The petitioner shall lodge at least four copies of-
- (i)
 - (ii) the judgment and order sought to be appealed from together with grounds of appeal or application before the High Court and the order of the High Court refusing grant of certificate under section 42(11) of the Constitution, if any, one copy each of which shall be certified to be correct.
 - (iii)
 - (iv)
- (2).

It has been declared in a number of cases that filing of documents under Order XIII, rule 3(1)(ii) is mandatory. The identical proposition came under consideration of this Court in the case reported as *Ch. Ajaib Hussain and another vs. Mst. Zareen Akhtar and 11 others* (2000 SCR

70). It was observed at page 75 of the report as under:-

“Clause (ii) reproduced above lays down clearly that certified copies of three documents have to be attached with the petition for leave to appeal which are;

- (i) judgment and order sought to be appealed from;
- (ii) grounds of ‘appeal’ or ‘application’ before the High Court and;
- (iii) order of the High Court refusing grant of certificate, if any.

As is clear, grounds of appeal or application are required to be filed with the petition for leave to appeal. The word “application” without any doubt covers all sorts of applications which can be moved before the High Court resulting in the judgment against which petition for leave to appeal is filed in this Court, be it a bail application or an application for revision, for grant or vacation of a stay order, or transfer application.

The power to issue orders in the nature of writs of mandamus, prohibition, certiorari, quo warranto and habeas corpus etc. is exercisable under section 44 of the Azad Jammu & Kashmir Interim Constitution Act. A perusal of section 44 shows that an action praying for an order mentioned therein is referred to as an “application”. The relevant portion of

sub section (2) and (3) of section 44 may be usefully reproduced below:-

‘(2) subject to this Act, the High Court may if it is satisfied that no other adequate remedy is provided by law.-

(a) on the application of any aggrieved party, made an order:-

(i) directing a person performing functions in connection with the affairs of Azad Jammu & Kashmir or local authority to refrain from doing that which he is not permitted by law to do, or to do that which he is required by law to do: or

(ii) declaring that any act done or proceedings taken by a person performing functions in connection with the affairs of the State or a local authority has been done or taken without lawful authority, and is of no legal effect: or

(b) on the application of any person, make an order:-

(i) directing that a person in custody in Azad Jammu & Kashmir be brought before the High Court so that the Court may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner; or

(ii) requiring a person holding or purporting to hold a public office in connection with the affairs of Azad Jammu & Kashmir to show under what authority of law he claims to hold that office; or

(c) on the application of any aggrieved persons, make an order giving such directions to the person or authority, including the Council and the Government, exercising any power or performing any function in, or in relation to, Azad Jammu & Kashmir as may be appropriate for the enforcement of any of the fundamental rights conferred by this Act.'

The matter becomes further clear when we refer to para B of Chapter 8 of the Azad Jammu & Kashmir High Court Procedure Rules; 1984 which relates to writ petitions, In Rules 32, 33 and 35 the action for issuance of a writ of mandamus, prohibition, certiorari, quo warranto, habeas corpus is referred to as an application. Out of them sub rule 1 of rule 32 may be usefully reproduced:-

- (1) An application under Section 44 of the Constitution for a direction, order or writ in the nature of mandamus, prohibition, certiorari, quo warranto etc. other than a writ in the nature of habeas corpus shall be filed before the Deputy Registrar.'

From these provisions it is clear that grounds of the application filed before the High Court is one of the mandatory documents which must accompany a petition for leave to appeal and that an application includes one under section 44 of the Azad Jammu & Kashmir Interim Constitution Act. As held in a number of cases mentioned above, omission to the copy of the application is a fatal defect for which the appeal has to be dismissed.”

The provisions of the Azad Jammu & Kashmir Supreme Courts Rules, 1978 are mandatory in nature and non-compliance of Order XIII, rule 3(1)(ii) results in dismissal of petition for leave to appeal. The judgment of the High Court is based upon amended writ petition. The copy of the said amended writ petition has not been annexed with the petition for leave to appeal, which is a violation of Order XIII, rule 3(1)(ii) of the Azad Jammu & Kashmir Supreme Court Rules, 1978. As after the amendment of the pleadings the amended pleadings are taken into consideration and the original pleadings are become immaterial. The Supreme Court of Pakistan in a case reported as *Sardar*

Muhammad Nasim Khan vs. Returning Officer, PP-12 and others (2015 SCMR 1698) observed as under:-

“4. Attending to the question of whether the amended pleading shall merge into the original pleading or otherwise, we have not been able to lay our hands on any case-law from our jurisdiction, however, some jurisprudence has been developed in foreign jurisdiction, such as in English case of Warner v. Sampson and another (1959) 2 WLR 109 wherein the Court of appeal has propounded:- “*once pleadings are amended, that which stood before amendment is no longer material before the Court*”. Per a judgment of Allahabad High Court reported as Brij Kishore v. Smt. Mushtari Khatoon (AIR 1976 Allahabad 399) it has been concluded:- “*the amended pleading alone should be considered and no reference ought to be made to the original pleadings while deciding an issue*”. Another judgment from the same jurisdiction is B. Parbhu Narain Singh and others v. B. Jitendra Mohan Singh and another (AIR (35) 1948 Oudh 307) in which it has been held:- “*Court must take the pleadings in the case as they stand and leave out of consideration the pleadings as they stood before the amendment*”.

5. From the ratio of the above case-law and from our own understanding of law, we are of the considered view that principle of merger as put forth by the learned counsel is neither relevant nor shall apply in this situation, rather

it is the principle of substitution which shall be attracted. For the determination and resolution of issues in disputes before the Court, it is the amended pleading which shall be taken into consideration and not the former pleadings. It is on the basis of the amended pleadings that the issues shall be framed; and if already so framed, shall be modified to either score off any existing issue or to add the issues arising out of the amended pleadings (note:- however in the cases where there is any unauthorized addition in the amended pleadings for scoring it off or for the purposes of confronting someone within the earlier pleadings as a previous statement; the earlier pleadings may have some relevance). The amended petition in this case for all intents and purposes shall be final, independent and separate document (election petition) which had to be verified per the mandate of law. It is conceded by the learned counsel for the appellant, when confronted with the fact that the amended election petition filed by the appellant has not been verified in accordance with law, that if the original election petition is ignored from consideration, the amended petition will be hit by the provisions of section 55(3) and 63 of the Act. Obviously on account of the above, the impugned decision of the Tribunal is unexceptionable.

As regards the other argument of the learned counsel that grounds 'h' and 'i', which were part of the amended petition, should be struck off or ignored from consideration and the Election Petition should be tried per its original contents, suffice it to say that ,

as has been opined above, once the original petition was replaced and substituted by the amended petition, the earlier could not be restored to and it is not left to the choice of the appellant to fall back on the original petition and have the two grounds deleted for the resolution of the election dispute agitated by the appellant. Besides, the striking off of the two grounds mentioned above was not the case of the appellant before the Election Tribunal and such a prayer even does not fall within the purview of Order VI, Rule 16 of the Code of Civil Procedure, which stipulates the striking off the pleadings in the following terms:--

‘Striking out pleadings.—The court may at any stage of the proceedings order to be struck out or amended any matter in any pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial of the suit.’

It may be pertinent to mention here, that per section 64 of the Act, Code of Civil Procedure is attracted and no case has been made out by the appellant in terms of the provisions *ibid* (*for striking off the pleadings*). It may further be added that even in the present appeal, the plea that grounds ‘h’ and ‘i’ to the amended election petition must be scored out has not been set out in particular, therefore, such plea cannot be allowed. In light of the above, no case for interference has been made out. Dismissed accordingly.”

The petition for leave to appeal was not competently filed, hence, the same merits dismissal.

The result of the above discussion is that the appeal is dismissed being not competently filed. No order as to costs.

CHIEF JUSTICE
Muzaffarabad
___.2.2017.

JUDGE

Date of Announcement : 11-02-2017