SUPREME COURT OF AZAD JAMMU AND KASHMIR
(APPELLATE JURISDICTION)

PRESENT:
Ch. Muhammad Ibrahim Zia, C.J.
Raja Saeed Akram Khan, J.
Ghulam Mustafa Mughal, J.
Sardar Abdul Hameed Khan, J.

Civil Appeal No.232 of 2017
(PLA filed on 17.08.2017)

1. Imran Khursheed Awan, President Non-Gazetted Employees Association, Azad Jammu & Kashmir, Muzaffarabad.
2. Abdul Waheed, Secretary General, Non-Gazetted Employees Association, Azad Jammu & Kashmir, Muzaffarabad.
3. Raja Awais, President, Non-Gazetted Employees Association, District, Muzaffarabad.
4. Syed Siddique Hussain shah, President all Pakistan Clerks Association (APCA), Azad Jammu & Kashmir, Muzaffarabad.
5. Muhammad Maroof Mughal, Vice President, All Pakistan Clerks Association (APCA), Azad Jammu & Kashmir, Muzaffarabad.
6. Irshad Mughal, President All Pakistan Clerks Association (APCA), Azad Jammu & Kashmir, Muzaffarabad.
7. Tariq Chaudhry, Chairman Paramedical Staff Association/Health Employees Organization, Azad Jammu & Kashmir, Muzaffarabad.
8. Sardar Muhammad Afzal Shaheen, Paramedical Staff Association/ Health Employees Organization, Azad Jammu & Kashmir, Muzaffarabad.
9. Mir Muhammad Arif, General Secretary, Paramedical Staff Association/ Health Employees Organization, Azad Jammu & Kashmir, Muzaffarabad.
10. Malik Ashraf, Member Paramedical Staff Association/Health Employees Organization, Azad Jammu & Kashmir, Muzaffarabad.

11. Abdul Hafeez Awan, Representative, Paramedical Staff Association/Health Employees Organization, Azad Jammu & Kashmir, Muzaffarabad.

….APPELLANTS

VERSUS

1. Azad Govt. of the State of Jammu & Kashmir through its Chief Secretary having his office at New Secretariat, Muzaffarabad.
2. Law, Justice, Parliamentary Affairs and Human Rights Department, Govt. of the Azad Jammu & Kashmir, through its Secretary, having his office at New Secretariat, Chatter, Muzaffarabad.
3. Services and General Administration Department, Govt. of Azad Jammu & Kashmir through its Secretary having his office at Assembly Secretariat, Chatter, Muzaffarabad.
4. Legislative Assembly of AJ&K through its Speaker having his office at Assembly Secretariat, Lower Chatter, Muzaffarabad.
5. President of Azad Jammu & Kashmir through Secretary Presidential Affairs, having his office at Presidential Secretariat, Muzaffarabad.

….RESPONDENTS

(On appeal from the judgment of the High Court dated 20.07.2017 in writ petitions No.633 of 2016 and 332 of 2017)

FOR THE APPELLANTS: Barrister Hamayun Nawaz Khan, Advocate.

FOR THE RESPONDENTS: Mr. Raza Ali Khan, Advocate-General.

Date of hearing: 08.11.2017

JUDGMENT:

***Ghulam Mustafa Mughal, J.*—** The captioned appeal by leave of the Court arises out of the consolidated judgment dated 20.07.2017, passed by the Azad Jammu and Kashmir High Court in writ petitions No. 633 of 2016 and 332 of 2017.

2. The facts forming the background of the captioned appeal are that two writ petitions, one by Imran Khurshid and others claiming to be the representatives of Non-Gazetted Employees Association and All Pakistan Clerks Association (APCA), and; the other by Tariq Javed Chaudhary and others claiming to be the representatives of Paramedical Staff Association/Health Employees Organization Azad Kashmir, were filed before the Azad Jammu and Kashmir High Court, challenging, therein, the vires of the Azad Jammu and Kashmir Employees Service Associations (Registration and Regulation) Act, 2016. The legality and propriety of the impugned Act was challenged to the extent of imposition of ban on strikes, lock out and go slow including the provisions of disciplinary action as being

violative of Sections 4(4)(5), 4(4)(6), 4(4)(7) and 4(4)(9) of the Azad Jammu & Kashmir Interim Constitution Act 1974.

3. Common facts in both the writ petitions are that the petitioners are state subjects of Azad Jammu and Kashmir and representatives of the Employees associations mentioned in the body of the petitions, which have been registered with the AJ&K Council and the Government, vide Council Order No. 309/56, dated 30.8.1956 and Government notification dated 30.12.1993, respectively. It was claimed that on 9th February 2016, the AJ&K Legislative Assembly passed an Act known as the "Azad Jammu and Kashmir Employees Service Associations (Registration and Regulation Act), 2016, which was published in the extraordinary gazette on 10.12.2016 (hereinafter to be called as the impugned Act). It was claimed that the petitioners' Associations have been duly registered with the Services and General Administration Department of the Azad Government of the State of Jammu and Kashmir and are struggling for the welfare and betterment of the employees within the frame work of applicable by-laws. It was claimed that Sections 2(x), 7(2),

17, 19(f) and 22 of the impugned Act are against the fundamental rights guaranteed under Section 4(4)(5), 4(4)(6), 4(4)(7) and 4(4)(9) of the Azad Jammu and Kashmir Interim Constitution Act, 1974. It was further stated that the impugned Act has been enacted with retrospective effect, hence illegal. It was claimed that through the impugned Act, the right of protest of the employees has been snatched which was a guaranteed right. It was also claimed that the Legislative Assembly was not competent to pass any such law which is violative of the basic constitutional rights It was claimed that through the impugned Act, the respondents have illegally imposed ban on strike, lock out, go slow or to instigate strike, etc. and re-registration of all associations/ unions has been made compulsory. The writ petitions were contested by the respondents by filing separate written statements. The common defence taken was that the petitioners are not aggrieved and they have failed to point out any infringement of their legal right, so the constitutional jurisdiction of the High Court could not be invoked. It was claimed that the employees associations registered prior to the promulgation of the impugned Act,

were not registered under any law or Act of the Assembly, so it was necessary to make law for registration, regulation and welfare of service associations of employees and to safeguard the best interests of the public at large and matters incidental and ancillary thereto. It was stated that the impugned law does not impose any ban on the associations of employees and it just regulates their registration and working for welfare. It was claimed that the Azad Jammu and Kashmir Legislative Assembly was quite competent to legislate the impugned law which was made for good governance and betterment of the state institutions and that the impugned Act does not militate against or violate any of the rights conferred by the Interim Constitution or any other law. After necessary proceedings, the learned High Court dismissed both the writ petitions through the impugned judgment dated 20.07.2017. The appellants, herein, have challenged the legality and correctness of the said judgment of the learned High Court through the captioned appeal by leave, almost on the same grounds which were taken before the High Court.

4. Barrister Humayun Nawaz, the learned Advocate appearing for the appellants, contended that the impugned Act is in direct conflict with Sections 4(4)(5), 4(4)(6), 4(4)(7), 4(4)(9) and 4(4)(15) of the Azad Jammu & Kashmir Interim Constitution Act, 1974 because the fundamental rights guaranteed to the petitioners as members of the associations have been curtailed and unreasonable restrictions have been imposed on lawful activities of the employees associations. The learned Advocate further argued that the impugned Act generally and the provisions of its sections 2(x), 7(2), 17, 19(f) and 22, specifically, are against the fundamental rights of the petitioners and the law already holding the field on the subject. The learned Advocate argued that the Azad Jammu & Kashmir Legislative Assembly is not competent to enact such a law which abridges or curtails the constitutionally guaranteed rights in view of Section 4 of the Azad Jammu and Kashmir Interim Constitution Act, 1974. The learned Advocate further argued that the learned High Court travelled beyond the pleadings of the parties while issuing direction in para 15 of the impugned judgment and it is well settled law that

no relief can be granted which has not been specifically prayed for. The learned Advocate argued that an arbitrary and unguided mechanism is provided by enacting Section 14, 16 and 17 of the impugned Act. The learned Advocate argued that the right of appeal granted through the impugned Act to the petitioners' association is also violative of the principle of natural justice as no one can be a Judge in his own cause. The learned Advocate referred to and relied upon the relevant provisions of the Azad Jammu and Kashmir Interim Constitution Act, 1974, as well as the following cases:

1. Saiyyid Abul A'la Maudoodi and others vs. The Government of West Pakistan and another [PLD 1964 SC 673]

2. All India Bank Employees' Association, Appellant v. The National Industrial Tribunal (Bank Disputes), Bombay, and others, respondents [AIR 1962 SC 171]

3. Miss Benazir Bhutto vs. Federation of Pakistan and another [PLD 1988 SC 416]

4. Tamizuddin Ahmd vs. The Government of East Pakistan [PLD 1964 Dacca 795].

In Syed Abul A'la Maudoodi's case referred to hereinabove, the

expression “reasonable restriction” has been interpreted by the Apex Court of Pakistan in the light of the fundamental rights involved in the case of the petitioners, therein, but the facts of the present case are totally different and the principle of law laid down, therein, is not applicable. In the second case referred to and relied upon by the learned counsel for the appellants, the Indian Apex Court has considered Article 19 (1) (C) of the Indian Constitution and at page 181 of the report, it was observed as under:-

> “(22) Besides the qualification subject to which the right under sub-cl (c) is guaranteed, viz., the contents of Cl. (4) of Art. 19 throw considerable light upon the scope of the freedom, for the significance and contents of the grants of the Constitution are best understood and read in the light of the restriction imposed. If the right guaranteed included not merely that which would flow on a literal reading of the Article, but every right which is necessary in order that the association brought into existence fulfils every object for which it is formed, the qualifications therefore would be not merely those in cl. (4) of Art. 19 but would be more numerous and very different, restrictions which bore upon and

took into account the several fields in which associations or unions of citizens might legitimately engage themselves. Merely by way of illustration we might point out that learned counsel admitted that through the freedom guaranteed to workmen to form labour unions carried with it the concomitant right to collective bargaining together with the right to strike, still the provision in the Industrial Disputes Act forbidding strikes in protected industries as well as in the event of a reference of the dispute to adjudication under S.10 of the Industrial Disputes Act was conceded to be a reasonable restriction on the right guaranteed by sub-cl. (c) of Cl. (1) of Art. 19. It would be seen that if the right to strike were by implication a right guaranteed by sub-cl (c) of cl. (1) of Art. 19, then the restriction on that right in the interests of the general public viz., of national economy while perfectly legitimate if tested by the criteria in cl. (6) of Art. 19, might not be capable of being sustained as a reasonable restriction imposed for reasons of morality or public order. On the construction of the Article, therefore, apart from the authorities to which we shall refer presently, we have reached the conclusion that even a very liberal interpretation of sub-cl. (c)

> of cl. (1) of Art. 19 cannot lead to the conclusion that the trade unions have a guaranteed right to an effective collective bargaining or to strike, either as part of collective bargaining or otherwise, The right to strike or the right to declare a lock-out may be controlled or restricted by appropriate industrial legislation, and the validity of such legislation would have to be tested not with reference to the criteria laid down in cl. (4) of Art. 19 but by totally different considerations."

The facts of Miss Benazir Bhutto's case referred to and relied upon by the learned counsel for the appellants are also different and the rule of law laid down therein is also not attracted to the facts of the case in hand. The last case referred to and relied upon by Barrister Hamayun Nawaz Khan i.e. Tamizuddin Ahmed's case (supra) is also not helpful to the case because in that case, it was observed that the maxim "*Audi Alteram Partem*" is not applicable to an administrative or ministerial order. The contention of the petitioner, therein, was rejected by the learned Dacca High Court while observing as under:-

“ The next point raised is that as the order has been passed without hearing the party it is void. The principle underlying the maxim “*Audi Alteram Partem*” has no application to an administrative or ministerial order. By no stretch of imagination can the function of the Provincial Government under section 16 be called Judicial or quasi-judicial in nature. As we have seen already, the second ground of attack on the impugned notifications has succeeded mainly because section 16 imposed unreasonable restrictions on the freedom of association. In coming to this conclusion, we have taken into account inter alia the fact that the order can be passed on the subjective satisfaction of the Provincial Government. It is true that we have also found that some ascertainment of fact is necessary, but that is only for the purpose of informing the mind of the Government. In this view of the mater, it is very difficult to see how it can be seriously contended that in this case the notifications are liable to be declared void for not following the principle of “*Audi Alteram Partem*.” The provisions of section 16 clearly indicate that the notification has to be published urgently and in this view of the matter also the question of service of notice does not arise. We are,

> therefore, not impressed by the argument of the learned Advocate for the petitioner on the basis of the maxim "*Audi Alteram Partem*."

The principle of natural justice in the present case is also not attracted because it is not provided that before enacting a law, the Legislative Assembly should provide an opportunity of hearing to the general public including the petitioners.

5. Conversely, Mr. Raza Ali Khan, the learned Advocate General appearing for the respondents, strenuously argued that the impugned Act is not violative of any of the fundamental rights of the state subjects enshrined in the Azad Jammu and Kashmir Interim Constitution Act, 1974, hence the appellants have no *locus standi* to challenge the vires of the impugned Act, which has been enacted in the public interest and for the betterment of the state institutions as well as for achieving the target of good governance. The learned Advocate General argued that through the impugned Act, the formation of associations/unions as well as their activities have been regulated and no ban as has been claimed, is imposed on the formation of the associations/unions. The Legislative

Assembly, according to the learned Advocate General, has got power and competence to legislate in respect of any matter which is not covered by the Council Legislative List. The learned Advocate General argued that even the provisions of the impugned Act which have been specifically challenged are not offending the rights of the petitioners; rather some reasonable restrictions have been placed on strike etc. to safeguard the best interests of the public at large. The learned Advocate General placed reliance on the cases reported as:

1. *Asdullah Mangi and others vs. Pakistan International Airlines Corporation and others* [2005 SCMR 445]

2. *Civil Aviation Authority, Islamabad and others vs. Union of Civil Aviation Employees and another* [PLD 1997 SC 781]

3. *Ardeshir Cowasjee and 11 others vs. Sindh Province and others* [2004 CLC 1353].

In *Abdullah Mangi's* case, referred to, hereinabove, it was observed that "equality of citizen" does not mean that all laws must apply to all the subjects. At page 461 of the report, it was observed by the learned Apex Court of Pakistan as under:-

> "9. ……There is no violation of the provisions as contained in Article 25 of the Constitution of Islamic Republic of Pakistan as "equality of citizens" does not mean that all laws must apply to all the subjects or that all subjects must have the same rights and liabilities. The conception of equality before the law does not involve the idea of absolute equality among human beings which is a physical impossibility. The article guarantees a similarity of treatment and not identical treatment. The protection of equal laws does not mean that all laws must be uniform. It means that among equals the law should be equal and should be equally administered and that the like should be treated alike, and that there should be no denial of any special privilege by reason of birth, creed or the like and also equal subjection of all individuals and classes to the ordinary law of the land."

The other two cases need not to be discussed.

6. We have heard the learned Advocates representing the parties and have gone through the record of the case.

7. The right to form association is guaranteed under Section 4(4)(7) of the Azad Jammu and Kashmir Interim Constitution Act, 1974. This right is subject to the

reasonable restrictions imposed by law in the interest of morality or public order. The preamble of the impugned Act reveals that the law has been enacted for registration, regulation and welfare of the service association of Employees and to safeguard the best interests of the public at large and the matters incidental and ancillary thereto. The concept of forming an association or union has not been taken away through the impugned legislation; rather the activities of the associations/ unions formed by the employees of the Government have been regulated. Certain restrictions have already been imposed on the civil servants through the Azad Jammu and Kashmir Government Servants (Conduct) Rules, 1981, which need not be reproduced for the sake of brevity. In the Constitution of the Islamic Republic of Pakistan, 1973, the right of freedom of association is granted to every citizen who is not a civil servant, meaning thereby that a civil servant cannot from a political party or take part in the politics rather an association or union for the betterment of employees can be formed within the frame work of law and subject to

reasonable restrictions imposed by Legislature in the interest of morality or public order.

8. We are not impressed by the argument advanced by Barrister Humayun Nawaz Khan, the learned Advocate for the petitioners/appellants that the impugned Act in general is violative of the Interim Constitution. Under the provisions of Section 31(3) of the Azad Jammu and Kashmir Interim Constitution Act, 1974, the only limitation on the Legislative competence of the Assembly and the Council is that they cannot make any law with regard to the following matters:

> (a) the responsibilities of the Government of Pakistan under the UNCIP Resolutions;
>
> (b) the defence and security of Azad Jammu and Kashmir;
>
> (c) the current coin or the issue of the bills, notes or other paper currency, or
>
> (d) the external affairs of Azad Jammu and Kashmir including foreign trade and foreign aid.

Under Section 31(5) of the Azad Jammu and Kashmir Interim Constitution Act, 1974, there is also an embargo on any enactment which is repugnant to the teachings and requirements of lslam as set out in the Holy Quran and

Sunnah. The impugned Act does not fall under any of the limitations placed on the legislative powers of the Azad Jammu and Kashmir Legislative Assembly.

9. The argument vehemently pressed on behalf of the appellants is that Sections 2(x), 7(2), 17, 19(f) and 22 of the impugned Act are violative of the Fundamental Rights enshrined in the Azad Jammu and Kashmir Interim Constitution Act, 1974, under Sections 4(4)(5), 4(4)(6), 4(4)(7) and 4(4)(9). For convenience of reference, firstly we reproduce below the referred Fundamental Rights:

> "4(4)(5). **Freedom of movement**.- Subject to any reasonable restrictions imposed by law in the public interest, every State subject shall have the right to move freely throughout Azad Jammu and Kashmir territory and to reside and settle in any part thereof."
>
> "4(4)(6). **Freedom of assembly**.- Every state subject shall have the right to assemble peacefully and without arms, subject to any reasonable restrictions imposed by law in the interest of public order"
>
> 4(4)(7). **Freedom of association.-** (1) subject to this Act, every state subject shall have the right to form association or unions, subject to reasonable restrictions imposed by law in the interest of morality or public order.

> (2) No person or political party in Azad Jammu and Kashmir shall be permitted to propagate against, or take part in activities prejudicial or detrimental to, the ideology of State's accession to Pakistan."

> "4(4)9. **Freedom of speech:-**
> Every state subject shall have the right to freedom of speech and expression, subject to any reasonable restrictions imposed by the law in the interest of the security of Azad Jammu and Kashmir, friendly relations with Pakistan, public order, decency or morality, or in relation to contempt of Court, defamation or incitement to an offence."

It may be stated here that all the aforesaid Fundamental Rights are subject to reasonable restrictions imposed by law in the public interest or in the interest of morality or public order. Before proceeding further, it would be appropriate to comprehend the scope of phrases “Reasonable Restriction”, “Morality” and “Public Order” which have been employed, one way or the other, in the relevant section of the Interim Constitution Act, 1974, wherein the fundamental rights have been incorporated. The scope of the phrases “Reasonable Restriction”, “Morality” or “Public Orders” have been considered in various pronouncements of the superior Courts. Some of them can be referred to herein below. In the case reported as

Jammu & Kashmir Tehrik Ammal Party, and 11 others vs. The Azad State of Jammu and Kashmir and another [PLD 1985 Azad J&K 95], the expressions "public order" and "reasonable restriction" have been noticed in para 92 which is reproduced as under:-

> "92. The expression *Public Order* has reference to the maintenance of conditions whereunder the orderly functioning of Government can be carried on. It is the duty of Government to see that the lives, properties and liberties of the citizens are not thrown into jeopardy. 'Public Order' is wider than 'Public Safety' and implies absence of internal disorder, rebellion, a lack of interferences with or obstruction to the supply or distribution of essential commodities or services. Security of state involves something more than the maintenance of public order the latter term having exclusive reference to the creation of internal conditions with a state which make it possible for the state to carry on its duties, and discharge its functions. Security of State implies also an external reference, such as immunity from war, of external aggression, avoidance of unfriendly relations with the neighbouring states, etc."

Again at page 198 of the report it has been observed as under:-

> "A restriction can be said to be in the interests of public order only if the connection between the restriction and the public order is proximate and direct. Indirect or far-fetched or unreal connection, between the restriction and public order would not fall within the purview of the expression 'in the interest of public order'. This interpretation is strengthened by the other requirement of clause (4) that, by itself, the restriction ought to be reasonable. A restriction which does not directly relate to public order cannot be said to be reasonable on the ground that its connection with public order is remote or far-fetched. Therefore, reading the two requirements of clause (4), it follows that the impugned restriction can be said to satisfy the test of clause (4) only if its connection with public order is shown to be rationally proximate and direct."

So far as the concept of 'Morality' is concerned that has been considered in a case titled *The Progress of Pakistan Co., Ltd. Vs. Registrar, Joint Stock Companies, Karachi* [PLD 1958 (W.P.) Lahore 887], wherein, the provisions of ordinance known as Undesirable Company Ordinance was

challenged, while considering the phrase “morality”, at page 902, in para 22 of the report, the learned Division Bench pleased to observe as under:-

> “22. The case of the respondent in the written statement is that the public was being robbed by promotion of these companies and the intention of the impugned Act is to protect the public. Can it be said that under the circumstances this is in the interest of morality ! If the legislation is intended to prevent people from being robbed, it cannot for that reason alone be said to be in the interest of morality. An Act would be said to be enacted in the interest of morality if the object of the Act was to prevent people from behaving in an immoral manner. Of course if the intention was to improve the morals of those who are cheating the public this condition will certainly be satisfied, but it could hardly be urged that the intention was to improve the morals of those who are running these schemes. Plainly the object of the legislation is to prevent financial loss to the public. However, there are two reasons why the impugned Act can be justified as a restriction in the interest of morality. The first is that these Imdadi Schemes engender a spirit of

> gambling amongst the public. They create a lure for the poor wage-earner who thinks he may be able to get a big prize by paying a small sum. In so far as the Act prevents the developing of gambling propensities it is in the interest of morality. In order to be able to hold that a restriction placed by an Act is in the interest of morality I do not consider it essential that the Legislature has this object in view at the time when it legislates. It secure the interest of morality. The second reason is that although the object of the Act was to prevent the public being robbed and the intention was not to improve the morals of those who are cheating the public the effect is that the promoters of these schemes will be prevented from cheating, robbing, and mis-appropriating the public money. An act which prevents all this should be regarded as in the interest of morality."

Again in a case titled *Mehtab Jan v. Municipal Committee Rawalpindi* [PLD 1958 (W.P.) Lahore 929], his Lordship Mr. Justice M.R. Kayani (Late) observed that:

> "Morality and decency are as fundamental as the fundamental rights themselves, and in the context of our Constitution, bearing in mind the preamble and the directive principles, a

> fundamental right is like the moon and morality like the disk of light surrounding it."

Identical view has been taken with reference to the importance of 'Morality' in the case titled *Dr. Mobashir Hassan v. Federation of Pakistan* [PLD 2010 Supreme Court 265]. In a case titled O.K. Gosh and another v. E.X. Joseph [A.I.R. 1963 Supreme Court 812], the Apex Court of India has considered rule 4-A of the Central Civil Services (Conduct) Rules (1955), whereby, any form of demonstration against the Government was prohibited. After considering the earlier case law, in para 8 of the report it was observed as under:-

> "(8) The question about the validity of R. 4-A has been the subject-matter of a recent decision of this Court in Kameshwar Prasad v. State of Bihar, AIR 1962 SC 116. At the hearing of the said appeal, the appellants and the respondent had intervened and were heard by the Court. In that case, this Court has held that R. 4-A in the form in which it now stands prohibiting any form of demonstration is voilative of the Government servants' rights under Art. 19(1)(a) & (b) and should, therefore, be struck down. In striking down the rule in this limited way, this Court made it

> clear that in so far as the said rule prohibits a strike, it cannot be struck down for the reason that there is no fundamental right to resort to a strike. In other words, if the rule was invalid against a Government servant on the ground that he had resorted to any form of strike specified by R. 4-A, the Government servant would not be able to contend that the rule was invalid in that behalf. In view of this decision, we must hold that the High Court was in error in coming to the conclusion that R. 4-A was valid as a whole."

The case law referred to hereinabove, leads to the conclusion that the restrictions imposed through the impugned legislation on the Government employees to instigate or go on strike, lock down and go slow cannot be termed as unreasonable or against the interest of public order or morality. Even otherwise to declare or instigate to go on strike etc. is not a fundamental right of a Government employee rather it is an offence. In the light of the above case law, it can safely be concluded that the allegation of curtailment of fundamental rights of the appellants, herein, by promulgation of the impugned Act is baseless and has no substance in it.

Now we proceed to examine the aforesaid Sections of the impugned Act to see whether any one of those is in contravention of the Fundamental Rights or not.

Section 2(x) of the impugned Act defines "Misconduct" as under:

> "2(x) "Misconduct" means conduct prejudicial to good order or service discipline or contrary to the Government Servants (Conduct) Rules as applicable to the Azad Jammu and Kashmir or conduct unbecoming of an officer or gentleman and includes any act on the part of a civil servant to bring or attempt to bring political or other outside influence directly or indirectly to bear on the Government or any Government officer in respect of any matter relating to the appointment, promotion transfer, punishment retirement or other conditions of services of a civil servant **and also includes strike, lock out or go slow."**

It may be stated here that that in section 2(1)(d) of the Azad Jammu Kashmir Civil Servants (Efficiency & Discipline) Rules, 1977 "misconduct" already stands defined as under:

> "2(1)(d) "Misconduct" means conduct prejudicial to order or service discipline or contrary to the Government Servants (Conduct) Rules as applicable to the Azad Jammu and Kashmir or conduct unbecoming of an officer or gentleman and includes any act on the part of a civil servant to bring or attempt to bring political or other outside influence directly or indirectly to bear on the Government or any Government officer in respect of any matter relating to the appointment, promotion, transfer, punishment,

> retirement or other conditions of services of a civil servant.”

It can be seen clearly that the definition of "misconduct" in Section 2(1)(d) of the Azad Jammu and Kashmir Civil Servants (Efficiency & Discipline) Rules,1977 and Section 2(x) of the impugned Act is verbatim, with the only exception that the words "and also include strike, lock out or go slow" are added at the end of the definition given in the impugned Act. Going on strike, locking out or going slow by the government employees is not their constitutionally guaranteed fundamental right. It is noticed that in the recent years, the associations, at times, completely broke down the Government machinery through strikes and lock down etc., which created problems and difficulties for the general public and also created disappointment besides lowering down the authority of the Government. It is the duty of the Government to make laws in the interest of public, morality and public order, so that the public at large may not be left at the mercy of some associations of employees. It was, therefore, in the public interest to include strike, lock out and go slow in the definition of "misconduct", which was even otherwise an

offence. The legislature was competent to make law in this respect. We are, therefore, of the considered view that the provisions prohibiting strike, lock out and go slow or instigation of such acts contained in Sections 2(x) and other relevant provisions of the impugned Act are not in contravention of any fundamental right guaranteed in the Interim Constitution Act.

10. Sub-section (1) of Section 7 of the impugned Act provides that a body of employees shall not be entitled for registration unless its Constitution provides the matters enumerated thereunder from (1)(a) to (l). Sub-section (2) provides that:

> "Without prejudice to the provisions of sub-section (1) a body of employees shall not be entitled to registration unless, under its constitution, objectives of the Service Association are limited to welfare activities for employees and it clearly prohibits the Service Association to declare or instigate strike, lock-outs or go slow."

The provisions of Section 7(2) of the impugned Act when read in the light of the Fundamental Right under Section 4(4)(7) of the Interim Constitution, are not found against the fundamental rights. As already stated, strike, lock- out or go slow and also its instigation are offences, therefore, the same

can have no nexus with the lawful activities of a registered association or union formed by the government employees, hence, this provision also does not offend the fundamental right of the petitioners/appellants guaranteed by the Constitution.

11. In sub-section (1) of section 17 of the impugned Act, it is simply stated that if the body of employees of service association shall declare or go on strike, lock out or go slow or absent himself from and any of such action shall be deemed to be Misconduct and shall be liable to disciplinary action under the prevailing law. Sub-section (2) provides that:

> "An employee who continues strike and does not attend office or resume duty on account of strike, lock out or go slow shall not be entitled to salary or any kind of remuneration during his absence as such in addition to any disciplinary action which be taken may against him."

We have already declared that to declare or instigate for strike, lock out and go slow, is an offence, thus, any civil servant has got no fundamental right to get salary or remuneration for the days of his unlawful absence from duty. So, sub-section (2) of Section 17 of the impugned Act

also does not contravene any of the fundamental rights guaranteed by the Interim Constitution.

12. In Section 19 of the impugned Act, certain acts have been declared as offences under the Act. The petitioners/appellants have attacked clause (f) of this section which is to the effect that no service association or office-bearers or any other person shall “commence, continue, instigate or incite others to take part in or expend or supply money or otherwise act in furtherance or support of a strike, lock out or go slow". As we have already reached the conclusion that the provisions prohibiting strike, lock out and go slow are not in conflict with any of the fundamental rights guaranteed by the Constitution, rather strike, lock out and go slow are against the public interest and the same may result into infringement of fundamental rights of other citizens, so the provision of Section 19(f) is not found to be in contravention of fundamental right. We are of the considered view that the right to form association cannot be given extended meaning in order to include the right of strike etc. as the same will be against the Constitution as well as service laws framed by the Legislature under the

command of the Constitution. In this regard reference may be made to a case reported as *All India Bank Employees' Association, Appellant v. The National Industrial Tribunal (Bank Disputes), Bombay, and others, respondents* [AIR 1962 Supreme Court 171]. Further reference may be made to a case reported as *Mujeebullah Gharsheen and another vs. Government of Balochistan through Chief Secretary and 3 others* [2016 PLC (C.S.) 1267].

13. Barrister Humayun Nawaz Khan, the learned Advocate for the appellants has also emphasized that unreasonable restrictions have been placed on the existing associations through Section 22 of the impugned Act. This section provides that:

> "22. **Existing Association etc.-** On enforcement of the Act, any of the employee association shall exist unless it secures registration in the manner prescribed under the Act.
>
> Provided that associations which have already been registered under prevailing law shall continue to exist for a period of one month in order to get registration under the Act."

The learned Advocate argued that the High Court erred in holding that initial registrations of the petitioners' organizations was not backed by law as the same were fully

backed by Rule 32 of the Azad Jammu and Kashmir Government Servants (Conduct) Rules, 1981. To comprehend the proposition, it appears appropriate to reproduce Rule 32 of the said Rules, which reads as under:-

> "32. **Membership of Service Association**:- No Government servant shall be a member, representative or officer of any association representing or purporting to represent Government servants or any class of Government, unless such association satisfies the following conditions, namely:
>
> (a) The association has been sanctioned by the Government and membership of the association and its office bearers shall be confined to a distinct class of Government servants of that class.
>
> (b) The association shall not be in any way connected with, or affiliated to, any association which does not, or any federation of associations which do not, satisfy condition (a) above.
>
> (c) The association shall not be in any way connected with any political party or organization, or engage in any political activity.
>
> (d) The association shall not:
>
> (i) issue or maintain any periodical publication except accordance with any general or special order of the Government; and
>
> (ii) except with the previous sanction of Government, publish any representation on behalf of its members, whether in the press or otherwise;
>
> (e) The Association shall not, in respect of any election to a legislative body, or to a local authority or body, whether in Azad Jammu and Kashmir or elsewhere:

(i) pay or contribute towards any expenses incurred in connection with his candidature by a candidate for such election;

(ii) by any means support the candidature of any person for such election; or

(iii) undertake or assist in the registration of electors or the selection of candidate for such election;

(f) The association shall not:

(i) maintain or contribute towards the maintenance of any member of a legislative body whether in Azad Jammu and Kashmir or elsewhere; or

(ii) pay or contribute towards the expenses of any trade union which has constituted a fund under the Trade Union Act.

(g) The term of office of President and General Secretary of Employees Associations. President and General Secretary elected nominated respectively as such shall hold office for one term only during his whole of service and the term shall not exceed three years."

It is clear that the above rule did not provide any mechanism for registration and there was no independent legislation for registration and regulation of service associations. Therefore, asking for or directions to such associations/unions to get themselves registered under the new law within the stipulated period does not offend against

any constitutional right of the appellants, herein, and legislation cannot be declared unconstitutional on this account if the same is otherwise enacted competently within the framework of the Constitution.

14. The contention of Barrister Hamayun Nawaz Khan, Advocate that the impugned Act is discriminatory viz. a viz., to the employees serving in the nongovernmental organizations is also devoid of any substance as certain rights have been granted to the employees serving in the nongovernmental organizations and the same have been regulated by the provisions of the Industrial Relations Ordinance, 1974. No equality on the basis of those rights can be claimed by the appellants, herein, because they are Government servants and their services are regulated by a different law (AJ&K Civil Servants Act, 1976). Even in the cases referred to and relied upon by the learned Advocate-General, a right of equality can be claimed when the claimants are placed in the similar circumstances and not otherwise.

15. Another contention of the learned Advocate for the appellants is that the learned High Court has travelled

beyond the pleadings of the parties while deciding the petition. It is correct that the parties are bound by their pleadings and relief cannot be claimed or granted beyond the pleaded facts but the High Court while concluding the judgment, has given directions besides others, in paragraph 15, sub-paras vi, vii and viii as under:

> "vi. In future, if Government/civil servants and employees of statutory bodies are found indulged in observance of strike or holding demonstrations at or by public thoroughfares, they shall not only be guilty of misconduct, but also contempt of Court liable to be proceeded against accordingly;
>
> vii. It shall be the duty of Secretary of the concerned Department/Statutory body to immediately initiate departmental disciplinary action against the delinquent civil servants and employees of Statutory bodies involved in the activities mentioned in preceding paragraphs
>
> viii. In the event of failure of Secretary concerned/ Head of Statutory body to initiate action in above terms, Chief Secretary, Azad Jammu and Kashmir Government, shall initiate disciplinary proceedings against the Secretary concerned, as well as delinquent Government/civil servants/employees of statutory bodies"

The above directions even otherwise, in our view, were not at all necessary because after declaring the impugned legislation lawful, the functionaries assigned different

responsibilities under law have to act in the prescribed manner.

16. We have noticed that a complete mechanism has been provided in the impugned Act under Chapter III for resolution of demands. Section 14 of the impugned Act provides that where any service association passes a resolution with two-third majority of its members regarding any demand from the Government, it shall be submitted to the department concerned for due consideration. In Section 15 of the impugned Act, it is provided that on receipt of resolution, the department concerned examine the demands made through the resolution for seeking redressal, remedy etc, with due diligence and in consultation with other relevant department, shall form its recommendations to be presented to the government or any authority concerned for consideration and appropriate decisions. The decision made with respect to the demand shall be notified or communicated to the service association. Section 16 provides that if the association is not satisfied with the recommendation of the department concerned it may prefer an appeal to the Appellate Tribunal constituted under

Section 13 of the impugned Act. A perusal of Section13 reveals that the Appellate Tribunal shall be headed by the Additional Chief Secretary (General) and Secretary Services and General Administration Department and Secretary Law shall be its members. We are of the considered view that the Legislature has rightly provided the right of appeal to the appellants, herein, under section 16 of the impugned Act. However, at this juncture it may be stated that the whole grievance of the appellants, herein, is that the right of appeal is provided before the Tribunal which is working directly under the supervision of the Government which may have an impact to curtail the statutory rights of appeal of the appellants, herein. It is correct that the right of appeal is very important right and in the present case the Members of the Tribunal are Government Functionaries and they are under the direct control of the Government in one way or the other, therefore, the apprehension of the appellants, herein, is genuine and in the ordinary course of human behavior their apprehension cannot be brushed aside. The chance of exercising influence over the Members of the Tribunal by the Government cannot be ruled out. The right of appeal is

a statutory right and when granted it cannot be curtailed by placing un-reasonable restrictions. It is also a well settled law that judicial or quasi-judicial authority cannot be a Judge in his own cause and if there is a chance of interest, then it cannot be said that the tribunal shall exercise the jurisdiction independently. In the case titled *Dr. Muhammad Aslam Khaki and others vs. Government of Punjab and others* [PLD 2005 Federal Shariat Court 3], the scope of right of appeal in the light of principle of natural justice having regard to the principle enshrined in Shariah, has been discussed and it was observed as under:-

> "16. In Shariah, the jurists are unanimously agreed on the point that a Qazi cannot hear his own case nor deliver judgment in his own favour. If he does so, his act would create suspicion in the minds of the people. (Zaidan: Nizamul Qaza page 272). In this respect Allam Qarrafi writes ' ولا ينبغى لله القضاء بين احد من عشرتہ و خصہ و ان رضى الخصم' (it would not be desirable to give a judgment in a dispute amongst his family members and his opponents though the opponent, express his consent)**'<u>Al-Farooq Vol. 4 page 43-44</u>**."

Again in paragraph No.19 and 20, it was opined as under:-

> "19. It is well-settled that justice should not only be done but it should also appear to be done.
>
> In Anwar v. The Crown PLD 1955 FC 185, Muhammad Munir C.J. has observed that:--
>
> > 'If a judge is functioning under an influence about his own act… which has the effect of paralyzing his judicial faculties, there is not fair trial.' He further added that 'there is a species of bias which vitiates judicial proceedings irrespective of the correctness or otherwise of the result, but that is not because bias, whatever form it may assume, avoids the result of judicial proceedings, but because the judge with that kind of bias is, on grounds of public policy, disqualified to be a Judge. Thus no Judge can be a Judge in his own cause, or in a cause in which he is personally interested, not because his decision must invariably be in his own favour but on the principle that justice must not only be done but seen to be done, and however right the Judge deciding a cause in his own favour may be, neither the public nor the aggrieved party will be satisfied with the adjudication….' (Underlining is ours).
>
> In 'Mubarik Ali Bhatti v. Fiaz Ali Khan and others'(PLD 1963 Lah. 8), the above principle was applied. Mubarik Ali Bhatti who was

working under the West Pakistan Board was screened out by Faiz Ali Khan Chairman of the Screening Committee for unsatisfactory work. Rule 6 of the Public Conduct (Scrutiny) Rules, 1959 provided that against such an order appeal would lie to the appointing authority. Thereafter Faiz Ali Khan himself heard the appeal. The learned Division bench of High Court held that hearing of the appeal by the authority who had himself participated in the original proceedings was against natural justice with the result that the appellate order was quashed. Also see Rehmatulah v. Government of West Pakistan PLD 1965 Lahore 112.

In Muhammad Mohsin Siddiqi's case PLD 1964 SC 64 Supreme Court of Pakistan has held:--

> 'The whole proceedings in a departmental enquiry is required by the rules to be conducted in accordance with the principles of justice. The superior Courts will not tolerate, and certainly not within the framework of the judicial administration itself, conditions in which officials can be made prosecutors, Judges and punishing authorities when they themselves are the complainants, merely on the ground that the power of removal is vested in them as appointing authorities under the rules. There is

> power and there are facilities available, to place the conduct of the enquiry and the report thereon in other hands and …....'

In Muhammad Abdullah v. R.T.C. (PLD 1964 Lahore 743) another principle was laid down to the effect that the person/functionary who decided the matter at initial stage would become disqualified to hear the same matter at any level i.e. appellate/review proceedings. The mere presence of such a person in these proceedings 'renders it incompetent to function as such' and 'it is immaterial in appellate/revisional forum what part that particular member played in the proceedings of the Tribunal and how far he was able to influence its decision'. Also see Dr. Abdul Hafeez v. Chairman M.C. PLD 1967 Lahore 1251.

Another principle evolved on the subject merits to be noticed from a judgment delivered by Grifith C.J. of Australia High Court in 'Dickanson v. Edward's' 10 CLR 243 whereunder participation of a disqualified person in the proceedings of the Tribunal was held to render the same to be vitiated as a whole. Relevant portion reads as under:--

> ‘It is said the District Chief Ranger did not take any part in the proceedings. I am willing to give the fullest credit to that, but I do not think it is material. He was a member of the Tribunal that tried the case; he was present when it was heard, and, applying the ordinary rules, I cannot say that his being there did not vitiate the proceedings altogether…… For these reasons I think the findings of both the District judicial Committee and the District Appeal Committee were vitiated by the presence of the District Chief Ranger.’”

20. The employees having been penalized by the Vice-Chancellor, could not in the ordinary course of human behavior, have faith in him, when he presides over the meeting of the Syndicate to decide his appeal. Whether or not the Vice-Chancellor sits there with open mind, unbiased by his previous decision in the matter, is immaterial, as Islamic system of justice requires that the aggrieved person (herein the employee) should not harbour any apprehension in his mind that he would not be able to receive fair and impartial decision of his appeal. The possibility of the lurking fear in his mind that some members of the Syndicate, might be influenced by the presence of the Vice-Chancellor cannot be ruled out. It was mainly for this reason that Hazrat Umar, just and

> upright though he was, deemed it proper to refer the case between himself and opponent to third person for decision as Qazi. This principle of administration of justice was affirmed by the apex Court of the country in Muhammad Nawaz's case PLD 1973 SC 327 wherein their Lordships have laid down that it is of paramount importance that parties arraigned before Courts should have confidence in the impartiality of the Courts.
>
> Indeed reasonable apprehension would arise in the mind of aggrieved employee that the presence of Vice-Chancellor in the meeting of the Syndicate would adversely affect the decision of the appeal against his order. It provided ample jurisdiction for transfer of the Lis to another forum of competent jurisdiction, which, in the scheme of the Act, is non-existent."

Therefore, we desire that Section 16 of the impugned Act may be amended in a suitable manner to include a judicial officer as member of the Tribunal not below the rank of District Judge qualified for appointment as Judge High Court. This amendment in our view will increase the dignity of the Tribunal on one hand and will create sense of

impartiality, confidence and faith in the employees on the other hand.

The nutshell of the above discussion is that the impugned Act has competently been made by the Azad Jammu & Kashmir Legislative Assembly and the Act does not violate any of the fundamental right of the appellants, herein, guaranteed in the Azad Jammu & Kashmir Interim Constitution Act, 1974. However, sub-paragraphs (VI) to (VIII) of the impugned judgment of the High Court being found unnecessary and without jurisdiction are hereby struck down.

The instant appeal is partly accepted in the terms indicted above.

Mirpur **JUDGE CHIEF JUSTICE JUDGE JUDGE** ___.12.2017

Date of announcement: 14-12-2017 JII

J-I JIII-