

SUPREME COURT OF AZAD JAMMU AND KASHMIR

[Appellate Jurisdiction]

PRESENT:

Ch. Muhammad Ibrahim Zia, C.J.

Ghulam Mustafa Mughal, J.

Civil Appeal No.236 of 2018.

(PLA filed on 19.05.2018)

1. Arshad Hussain Khan s/o Muhammad Rasheed Khan, r/o Muslimabad Pattan Sher Khan, p/o Mang, Tehsil Mang, District Sudhnuti, Azad Kashmir.
2. Muhammad Sarwar Khan s/o Shan Muhammad Khan, r/o Sarly Pattan Sher Khan, p/o Mang, Tehsil Mang, District Sudhnuti, Azad Kashmir.
3. Muhammad Ashraf Khan s/o Khushi Muhammad Khan, r/o Pattan Ser Khan, p/o Mang, Tehsil Mang, District Sudhnuti, Azad Kashmir.
4. Muhamamd Fayyaz s/o Mir Akbar, r/o Korri Pattan Sher Khan, p/o Mang, Tehsil Mang, District Sudhnuti, Azad Kashmir.
5. Altaf Hussain s/o Muhammad Akbar, r/o Muslimabad Pattan Sher Khan, p/o Mang, Tehsil Mang, District Sudhnuti, Azad Kashmir.
6. Waqas Tariq s/o Tariq Hussian, r/o Dana Pattan Sher Khan, p/o Mang, Tehsil Mang, District Sudhnuti, Azad Kashmir.
7. Muhammad Nazir Khan s/o Rakhmat Khan, r/o Dhok Pooth Kalan Pattan Sher Khan, p/o Mang, Tehsil Mang, District Sudhnuti, Azad Kashmir.
8. Altaf Hussain s/o Muhammad Aslam, Ex-Chairman Union Council, r/o Sarlar Pattan Sher Khan, p/o Mang, Tehsil Mang, District Sudhnuti, Azad Kashmir.

9. Muhammad Shafiat s/o Muhammad Ishaque, r/o Sarrat, Pattan Sher Khan, p/o Mang, Tehsil Mang, District Sudhnuti, Azad Kashmir.
10. Muhammad Muzammil Ejaz s/o Muhammad Ejaz, r/o Muslimabad Pattan Sher Khan, p/o Mang, Tehsil Mang, District Sudhnuti, Azad Kashmir.
11. Ajaib Hussain s/o Kaloo Khan, r/o Kohri Pattan Sher Khan, p/o Mang, Tehsil Mang, District Sudhnuti, Azad Kashmir.
12. Sabir Hussain s/o Lal Hussain, r/o Thub Pattan Sher Khan, p/o Mang, Tehsil Mang, District Sudhnuti, Azad Kashmir.
13. Anayat Hussain s/o Muhammad Razzaq, r/o Jandi Pattan Sher Khan, p/o Mang, Tehsil Mang, District Sudhnuti, Azad Kashmir.
14. Muhammad Waheed s/o Muhammad Afzal, r/o Muslimabad Pattan Sher Khan, p/o Mang, Tehsil Mang, District Sudhnuti, Azad Kashmir.
15. Mansoor Umar s/o Muhammad Umar Khan, r/o Kanwal Pattan Sher Khan, p/o Mang, Tehsil Mang, District Sudhnuti, Azad Kashmir.
16. Zameer Khan s/o Muhammad Hussain Khan, r/o Muslimabad Pattan Sher Khan, p/o Mang, Tehsil Mang, District Sudhnuti, Azad Kashmir.
17. Muhammad Tufail s/o Shan Muhammad Khan, r/o Sarlay Kharala Pattan Sher Khan, p/o Mang, Tehsil Mang, District Sudhnuti, Azad Kashmir.

.... APPELLANTS

VERSUS

Inhabitants of Islam Nagar Pattan Sher Ali Khan through:-

1. Muhammad Mansha Khan s/o Mehrban Khan,

2. Shoukat Hussain Gohar s/o Ali Gohar Khan,
3. Sardar Abid Hussain s/o Deedar Bakhsh,
4. Muhammad Jameel Khan s/o Khushhal Khan,
5. Muhammad Nazir Khan s/o Muhabbat Khan,
6. Zafar Fazal,
7. Naseem Afzal s/o Muhammad Fazal,
8. Abdul Qadir s/o Beer Muhammad, all residents of Islam Nagar Pattan Sher Khan, p/o Mang, Tehsil Mang, District Sudhnuti, Azad Kashmir.

..... RESPONDENTS

9. Azad Govt. of the State of Jammu & Kashmir through its Chief Secretary having his office at New Secretariat, Muzaffarabad.
10. Additional Chief Secretary (Development), having his office at New Secretariat, Muzaffarabad.
11. Secretary health, Azad Jammu & Kashmir having his office at New Secretariat, Muzaffarabad.
12. Secretary Works, Azad Govt. of the State of Jammu & Kashmir, having his office at New Secretariat, Muzaffarabad.
13. Director General Health, having his office at New District Complex, Muzaffarabad.
14. Site Selection Committee, District Sudhnuti, through its Chairman/Deputy Commissioner, Sudhnuti/Pallandri.
15. Assistant Commissioner (Mang), Member, District Pallandri/Sudhnuti.
16. District Health Officer (DHO), (Member), Sudhnuti/Pallandri.
17. X.E.N., Building, Member, Technical Division, Sudhnuti.

18. Sub Divisional Officer (SDO), Public Works Department, Mang, District Pallandri/Sudhnuti.

.....PROFORMA-RESPONDENTS

(On appeal from the judgment of the High Court dated 16.04.2018 in Writ Petition No.339 of 2017)

FOR THE APPELLANTS: Mr. Shahzad Shafi
Awan, Advocate.

FOR THE RESPONDENTS: Barrister Hamayun
Nawaz Khan,
Advocate.

Date of hearing: 10.09.2018.

JUDGMENT:

Ghulam Mustafa Mughal, J.— The captioned appeal by leave of the Court has been directed against the judgment dated 16.04.2018, passed by the learned High Court in writ petition No.339 of 2017.

2. The facts precisely stated are that the inhabitants of village Islam Nagar Pattan Sher Khan filed a writ petition before the Azad Jammu & Kashmir High Court on 27.02.2017, through Muhammad Mansha Khan & others, whereby, a

prohibition was sought against the respondents, therein, to refrain from cancelling, amending, modifying, setting-aside and withdrawing the Government notification dated 18.01.2016, issued by the Health Secretariat. A direction was also sought for implementation of the said notification. The facts forming the background of the writ petition were that the Government of Azad Jammu & Kashmir vide notification dated 18.01.2016, decided to construct a Rural Health Center, consisting on 10 beds, in the memory of Haji Sohbat Ali at Islam Nagar Pattan Sher Khan and included the same in the annual development program. A committee headed by the Deputy Commissioner Sudhnuti was constituted for the site selection. The said committee issued feasibility certificate, however, later on a corrigendum was issued by the Government on 26.07.2017, whereby, the name of village Islam Nagar was deleted from the notification dated 18.01.2016. As stated above, the

inhabitants of village Islam Nagar through Mansha Khan & others filed a writ petition before the Azad Jammu & Kashmir High Court and sought a direction to the Government that the Rural Health Center may be constructed at the place mentioned in the notification dated 18.01.2016, instead in Pattan Sher Khan as mentioned in the corrigendum dated 26.07.2017. The writ petition was contested by the respondents by filing comments/written statement. The learned High Court appointed commission headed by the District Judge Sudhnuti to look into the propriety of the claim of the parties and after necessary proceedings, through the impugned judgment dated 16.04.2018, issued the direction for acting upon the Government notification dated 18.01.2016. It was directed that 10 bed hospital namely "Haji Sohbat Ali Memorial Rural Health Center" may be constructed on the place mentioned in the said notification. However, corrigendum dated

26.07.2017, issued during the pendency of the writ petition in violation of the stay order was quashed.

3. Mr. Shahzad Shafi Awan, the learned Advocate appearing for the appellants argued that the appellants, herein, were not party before the High Court because they were not impleaded as such by the respondents, herein. He added that they have been condemned unheard, therefore, by accepting this appeal, the case may be remanded to the High Court for fresh decision. The learned Advocate argued that the committee constituted for determination of the feasibility of the site has approved the site for construction which was originally mentioned in the notification dated 18.01.2016, therefore, the learned High Court was not competent to appoint commission and give any sort of the direction. The learned Advocate further argued that the writ petition was filed by respondents No.1 to 8, herein, in the representative capacity without following the procedure visualized

by section 91 and Order 1, rule 8, CPC, hence, the same was liable to be dismissed on this sole ground.

The learned Advocate further argued that the notification dated 18.01.2016 was issued on the behest of a party purely on political basis.

4. Conversely, Barrister Hamayun Nawaz Khan, the learned Advocate appearing for the respondents, argued that the appellants, herein, were not aggrieved, hence, they have no right of appeal. He further argued that admittedly the appellants, herein, are also residents of Pattan Sher Khan, where the Rural Health Center is to be constructed, hence, they would be equally benefitted and their appeal is just to prolong the construction of the public project which practice may be discouraged.

5. We have heard the learned Advocates representing the parties and have gone through the record of the case. A perusal of the record reveals that initially the Government of AJ&K decided to construct 10 bed Rural Health Center in Islam Nagar

as is evident for the notification dated 18.01.2016 and for selection of the site, a site-committee was constituted who after inspecting the spot, declared that the land measuring 15 *kanal*, situated in village Pattan Sher Khan, is suitable for construction of the Hospital. The name of village Islam Nagar is not mentioned in the Waqaf-deed and *Aks-Latha*, prepared by the patwari, appended with the certificate. During pendency of the writ petition, a corrigendum was issued by the Government vide notification dated 26.07.2017, whereby, village Islam Nagar was deleted from the notification dated 18.01.2016. The respondents, herein, filed a writ petition before the Azad Jammu & Kashmir High Court in the representative capacity under Article 44 of the Azad Jammu & Kashmir Interim Constitution Act, 1974. As the CPC is applicable to the writ proceedings before the High Court, hence, for filing of the writ petition in the representative capacity, the permission of the Advocate-General as visualized by

section 91 of the CPC or permission of the Court as is required by Order 1, rule 8 of the Code of Civil Procedure, was a condition precedent for filing of the writ petition. Without obtaining the permission of the Advocate-General or the Court, the writ petition in the representative capacity was not competent and was liable to be dismissed on this sole ground. Reference may be made to the cases reported as *Raja Ali Shan vs. Messrs Essem Hotel Limited and others* [2007 SCMR 741], *Mir Alam and 2 others vs. Sahibzada and 7 others* [2007 SCMR 1157] and *Islamuddin and others vs. Ghulam Muhammad and others* [PLD 2004 Supreme Court 633].

6. It may be observed here that admittedly Pattan Sher Khan and Islam Nagar are two different villages located in the same vicinity. The corrigendum, whereby, the approval was granted for construction of the Hospital in Pattan Sher Khan, was not specifically challenged by amending the

writ petition before the High Court and even the residents of the area who were necessary party and had right to be heard in view of the corrigendum dated 26.07.2017, were not impleaded in the line of respondents. In case of violation of the Court's order, appropriate proceedings should have been taken and an order which is not subject-matter of the writ petition cannot be quashed. In such circumstances, the solicited direction could not be issued without hearing the appellants, herein. It may also be stated here that the policy decisions made by the Government can only be challenged in the writ jurisdiction when they are violative of any law or rules or is against the fundamental rights of the citizens, otherwise, such decisions which are made by the public functionary after visiting the spot etc., in the public interest, can neither be shifted to the Court nor the Court can substitute its finding in place of the Government official because judging the suitability or making the policy in respect of the

development projects, is within the exclusive domain of the Government unless some violation of law, as stated above, is pointed out. Reference may be made to the cases reported as *Watan Party and another vs. Federation of Pakistan and others* [PLD 2013 Supreme Court 167], *Ramessa Khalid vs. Government of Punjab* [PLD 2013 Lahore 45] and *Ch. Latif Akbar & 261 others vs. Azad Govt. & 10 others* [2017 SCR 305], wherein, it was observed that policy making of the development projects are in the exclusive domain of the Federal or Provincial Government, as the case may be, and the Courts should refrain from interfering with the policies launched by public authorities for smooth working of public institutions, until and unless they are proved to be repugnant to fundamental rights of the citizens. This Court in the last cited case has also approved the same view and at page 324 of the report has observed as under:-

“15.No doubt it is the prerogative of the Government to take administrative steps and formulate the policy but while formulating the policy the Government cannot ignore the public interest and rights accrued to the state subjects or beneficiaries of any enforced policy. The authority of the Government to shift the posts, establish the institutions, organize the departments or reorganize the same is provide under the Statute. In this regard this Court has already enunciated the principle of law in the case reported as *Muhammad Akhtar and others vs. Azad Govt. & others* [2016 SCR 853] that the Courts are not supposed to interfere in the domain of other institutions.....”

The upshot of the above discussion is that this appeal is accepted and the impugned judgment dated 16.04.2018, passed by the High Court is, hereby, vacated. Resultantly, the writ petition filed by the respondents, herein, stands dismissed. The

