SUPREME COURT OF AZAD JAMMU AND KASHMIR

(Appellate Jurisdiction)

PRESENT

Ch. Muhammad Ibrahim Zia, C.J.
Raja Saeed Akram Khan, J.

Civil Appeal No.327 of 2019
(PLA filed on 10.07.2019)

Raja Waseem Younis, Advocate, Ex-General Secretary, Azad Jammu & Kashmir High Court Bar Association, Mirpur, Azad Kashmir.

…. APPELLANT

VERSUS

1. The Chairman, Azad Jammu & Kashmir Council (Prime Minister of Pakistan) through Secretary Azad Jammu & Kashmir Council, Council Secretariat, Islamabad, Pakistan.
2. The Azad Jammu & Kashmir Council, The Chairman, Azad Jammu & Kashmir Council, through its Secretary Azad Jammu & Kashmir Council, Council Secretariat, Islamabad.
3. The Secretary, Azad Jammu & Kashmir Council, having his office at Kashmir

Council Secretariat, Islamabad, Pakistan.

4. The President of Azad Jammu & Kashmir through Secretary to President, AJ&K having office at Presidential Secretariat, Muzaffarabad.
5. The Azad Govt. of the State of Jammu & Kashmir through its Chief Secretary having office at new Secretariat Complex, Muzaffarabad.
6. The Department of law, Justice, Parliamentary Affairs and Human Rights through Secretary having office at new Secretariat, Muzaffarabad, Azad Kashmir.
7. Hon'ble Mr. Justice Tabassum Aftab Ali, the Chief Justice High Court of Azad Jammu & Kashmir Muzaffarabad.

….RESPONDENTS

(On appeal from the judgment of the High Court dated 29.05.2019 in writ petition No. 1787 of 2018)

FOR THE APPELLANT: In person.

FOR THE RESPONDENTS: Mr. Abdul Rashid Abbasi & Mr. Bashir Ahmed Muhgal, Advocates.

Date of hearing: 23.08.2019.

JUDGMENT:

***Raja Saeed Akram Khan, J.*—**The captioned appeal by leave of the Court is directed against the judgment of the High Court dated 29.05.2019, whereby the writ petition filed by the appellant, herein, has been dismissed in limine.

2. The brief facts of the case are that the appellant, herein, is an Advocate of the Supreme Court of Azad Jammu and Kashmir and the General Secretary of the High Court Bar Association. He filed a writ petition before the High Court on 17.10.2018, while challenging the appointment of respondent No.7 as Judge of the High Court of Azad Jammu and Kashmir. It was claimed that the

notification dated 24.02.2011, regarding appointment of respondent No.7 has been issued on the basis of an invalid, illegal and unlawful advice and the same is against the Constitution. It was further claimed that earlier the appointment of respondent No.7 was challenged through a writ petition which stood dismissed on technical grounds, however, after elevation of five Judges in the High Court the issue of elevation of respondent No.7 was also highlighted. He prayed for strucking down the impugned notification dated 24.02.2011. During the pendency of the writ petition, the petitioner-appellant, herein, also moved an application for consolidation of the writ petition with the other six writ petitions on the ground that identical points are involved in all the writ petitions. After hearing the preliminary arguments, the learned High Court dismissed the writ petition in limine through the

impugned judgment dated 29.05.2019, hence, this appeal by leave of the Court.

3. The appellant, Raja Waseem Younis, Advocate, submitted that the impugned judgment/order of the High Court is against law and the facts of the case. He contended that important legal questions were raised in the writ petition but the learned High Court without attending the same dismissed the writ petition on the sole ground of mala fide. He added that the learned High Court has not even discussed any material in support of the findings recorded in respect of mala fide attributed to him. He submitted that the findings recorded by the High Court regarding the applicability of principle of laches are also against law as under the settled principle of law in the writ of quo warranto mere delay is not sufficient to dismiss the writ petition until it is proved that the petitioner is guilty of delay

coupled with improper conduct, whereas, no such act of the appellant has been discussed by the High Court while applying the principle of laches. He submitted that he filed personal affidavit in support of the contents of writ petition which remained un-rebutted. He further submitted that throughout his practice as lawyer nothing is available on record to show that there was any ill-will of the appellant against respondent No.7, rather he always paid high regard and respect to respondent No.7 and the Courts. In continuation of the argument, he added that there is no material available against the appellant that he ever made any statement on the appointment of respondent No.7 from where opinion can be gathered that there was some ulterior motive of the appellant against respondent No.7, therefore, in absence of that the learned High Court was not justified to

dismissed the writ petition on the ground of mala fide. He maintained that the learned High Court while passing the impugned judgment/order has heavily relied upon the judgment of this Court delivered in the case reported as *Ahmed Nawaz Tanoli and others v. Chairman Azad Jammu and Kashmir Council and others* [2016 SCR 960] without adhering to that the circumstances of that case were quite different as this Court upheld the judgment of the High Court while discussing the mala fide on the part of the persons who filed the writ petitions, whereas, no such eventuality is available in the instant case. He forcefully contended that in the judgment supra this Court has held that if the writ petition is not maintainable that should be dismissed in limine without discussing the merits of the case, whereas, in the impugned judgment/order the learned High Court also

discussed the merits of the case which is a clear deviation from the principle of law laid down by this Court. He added that in the writ of quo warranto if the delay is explained satisfactory then the same is not fatal but the learned High Court has not taken into consideration the explanation offered by the appellant in the writ petition. He contended that the learned High Court has also overlooked the important aspect of the case that similar questions of law are involved in the other writ petitions, pending before the High Court, in which this Court has already issued the direction and under the provisions of rule 11(2) of the High Court Procedure Rules, 1984, it was incumbent upon the High Court to decide the instant writ petition along with other writ petitions involving the identical points. He also contended that after filing the writ petition a number of time he travelled

from Mirpur to Muzaffarabad to argue the case but due to non-availability of the bench the same could not be heard and after a lapse of considerable time the learned High Court dismissed the writ petition in limine in a slipshod manner.

4. On the other hand, Mr. Abdul Rasheed Abbasi, Advocate, the learned counsel for respondent No.7, strongly controverted the arguments advanced by the appellant. He submitted that the impugned judgment/order of the High Court is perfectly legal which is not open for interference by this Court. He submitted that earlier the notification of the appointment of respondent No.7 was challenged through two separate writ petitions which were dismissed in limine and the judgment/order of the High Court was upheld by this Court, therefore, this matter comes within the purview of past and closed

transaction which cannot be reopened as much water has flown under the bridge, moreover, after working Judge of the High Court respondent No.7 was elevated as Chief Justice of the High Court through another notification, which has not been challenged, thus, on this ground too the writ was not maintainable. He added that it is not necessary to prove the element of mala fide through some material in written form rather the mala fide can be gathered from the circumstances and the conduct of the person who approached the Court. He added that the contents of the writ petition itself show that the appellant filed the same for the benefit of some other persons on the motivation of the persons known to him. He submitted that the appellant after enrolment as an Advocate in Azad Jammu and Kashmir remained silent for a period of three year and he challenged the appointment

notification of respondent No.7 when the appointment notification of some other Judges of the High Court was challenged which apparently a counter blast and this fact is sufficient to form the opinion that writ petition has been filed with mala fide. He forcefully contended that the case in hand is not similar to the cases pending before the High Court regarding the appointments of the Judges of the High Court as in this case the question of pre and post consultation is involved, whereas, in the pending cases the facts and circumstances are quite different. He added that earlier on the same points the writ petitions were filed which were dismissed, therefore, the subsequent writ is not maintainable and if such practice is allowed then there will be no end of litigation.

5. Mr. Bashir Ahmed Mughal, Advocate, the learned counsel for respondents No.1 to 3,

while adopting the arguments advanced by the learned counsel for respondent No.7 submitted that the points involved in the instant case have already been decided by this Court in *Ahmed Nawaz Tanoli's* case, therefore, the learned High Court was fully justified to dismiss the writ petition in limine.

6. We have heard the arguments and gone through the record made available along with the impugned judgment/order. In the matter in hand the appellant challenged the notification dated 24.02.2011, whereby respondent No.7 was elevated as a Judge of the High Court of Azad Jammu and Kashmir. The perusal of the impugned judgment/order shows that the learned High Court dismissed the writ petition mainly on two grounds, i.e. (i) mala fide on the part of appellant and (ii) writ is hit by the principle of laches. The leave was

granted in the case to examine the following points:-

(i) whether the points involved in this writ petition are identical and similar to the other writ petitions for hearing of which the division bench has been constituted and in this stage of affairs this writ petition should also have been entrusted to the same bench or not;

(ii) whether the High Court should have decided the question of admission of writ petition within one month time as laid down in judicial policy;

(iii) whether the proceedings have been conducted in the writ petition in a fair and transparent manner;

(iv) whether due to earlier decision of this Court the subsequent writ petition is not maintainable; and

(v) whether there was sufficient material and circumstances justifying the High Court to form

opinion relating to mala fide of the petitioner.

As the learned High Court has mainly dismissed the writ petition on the ground that the same has been filed with mala fide after a lapse of considerable time, therefore, before attending the other points we deem it proper to appreciate the points of mala fide and applicability of principle of laches. During the course of arguments the burning argument of the learned counsel for respondent No.7 was that the learned High Court rightly dismissed the writ petition in limine as the same was based on male fide for the benefit of some other persons; however, nothing is available on record to show that from where the learned High Court ascertained that the writ petition has been filed with mala fide. It is an admitted position that the appellant was neither a candidate for his elevation as Judge when

respondent No.7 was appointed nor anything come on the record that he ever created unpleasant situation in the Court or on some other occasions. The learned counsel for respondent No.7 took the plea that some material in writing is not necessary to ascertain the mala fide rather the same can be gathered from the circumstances, however, in the impugned judgment no such circumstances have been discussed. Thus, in such state of affairs it can safely be said that the findings recorded by the High Court are based on presumption. We deem it proper to observe here that it is settled principle of law that for proving mala fide it shall be specifically alleged and to be proved by cogent and reasonable evidence. The ‘mala fide’ has been interpreted by the apex Court of Pakistan in a case reported as *The Federation of Pakistant through the Secretary,*

Establishment Division, Government of Pakistant Rawalpindi v. Saeed Ahmad Khan and others [PLD 1974 SC 151] in the following terms, although the controversy involved in that case was different:-

> "Mala fides is one of the most difficult things to prove and the onus is entirely upon the person alleging mala fides to establish it, because, there is, to start with, a presumption of regularity with regard to all official acts, and until that presumption is rebutted, the action cannot be challenged merely upon a vague allegation of mala fides. As has been pointed out by this Court in the case of the Government of West Pakistan v. Begum Agha Abdul Karim Shorish Kashmiri (PLD 1969 SC 14), mala fides must be pleaded with particularity, and one kind of mala fides is alleged, no one should be allowed to adduce proof of any other kind of mala fides nor should

any enquiry be launched upon merely on the basis of vague and indefinite allegations, nor should be person alleging mala fides be allowed a roving enquiry into the files of the Government for the purposes of fishing out some kind of a case.

'Mala fides' literally means 'in bad faith'. Action taken in bad faith is usually action taken maliciously in fact, that is to say, in which the person taking the action does so out of personal motives either to hurt the person against whom the action is taken or to benefit oneself. Action taken in colourable exercise of powers, that is to say, for collateral purposes not authorized by the law under which the action is taken or action taken in fraud of the law are also mala fide. It is necessary, therefore, for the person alleging that an action has been taken mala fide to show that the person responsible for taking the action has

> been motivated by any one of the consideration mentioned above. A mere allegation that an action has been taken wrongly is not sufficient to establish a case of mala fides, nor can a case of mala fies be established on the basis of universal malice against a particular class or section of the people."

The stance taken by the learned counsel appearing on behalf of respondents is that the appellant filed the writ petition for benefit of others; however, they have failed to point out that for whose benefit the appellant filed the writ petition. Even during the course of arguments a query; whether any material in support of this assertion is available on record, was made but the counsel for the respondents failed to show anything in this regard. Thus, keeping in view the facts and circumstances of the case in absence of any material available on record the High Court was not justified to

dismiss the writ petition on the ground that the same has been filed mala fide.

7. So far as, the other point on which the learned High Court dismissed the writ petition and forcefully raised before this Court that the writ petition was hit by the principle of laches, is concerned, it may be stated that in the writ of quo warranto laches is not always a sufficient ground for dismissal of petition rather laches combined with improper conduct would bar relief. In the case in hand as we have discussed in the preceding paragraph that nothing is available on record to show that the appellant approached the Court with mala fide, therefore, in absence of that under law the High Court was not justified to apply the principle of laches. Reference may be made to a case reported as *Azad Government and 3 others v. Genuine Rights Commission*

and 7 others [1999 SCR 1], wherein it has been held that:-

> "Therefore, we are of the view that mere delay in filing the writ petitions did not justify to stay hands from going into the merits of the petitions and decide the same on merits. Therefore, we are unable to subscribe to the contention of the learned counsel for the appellant that the writ petitions entailed dismissal on the sole ground of being hit by laches. It is correct that laches may be considered as an evidence for the allegation in support of mala fide along with other circumstances in the present writ petitions but the same cannot be made basis for the dismissal of the writ petitions."

8. One of the point forcefully agitated before this Court was that earlier on the same points two writ petitions were filed which were dismissed and this Court through its judgment

reported as *Ahmed Nawaz Tanoli Advocate v. Chairman Azad Jammu and Kashmir Council and others* [2016 SCR 960] upheld the order passed by the High Court, therefore, the subsequent writ was not maintainable. The perusal of the judgment supra shows that after thoroughly discussing the material available in that case this Court formed the opinion that the petitions have been with filed mala fide, whereas, in the instant case, as has been discussed in the preceding paragraph, no such material is available on record to show that the appellant approached the Court with mala fide, therefore, we do not agree with the argument of the learned counsel for the respondents. It will be useful to reproduce here the relevant paragraphs of the judgment of this Court delivered in *Ahmed Nawaz Tanoli's* case which reads as under:-

16۔ سائلان کا یہ کہنا کہ عرضی اجرائیگی پروانہ استفسار بدوں زیر غور لائے تاخیر سائلان خبث باطن وسازش اور مقاصد، سطحی جائزہ کے تحت عمومی طور پر جاری کرنا منشاء آئین ہے، درست معلوم نہ ہوتا ہے۔ بلکہ گزشتہ پیراجات میں متذکرہ قانونی نظائر کے مطابق مخصوص حالات کے تناظر میں اجراء پروانہ استفسار کے لیے سائلان اطلاع دہندہ کے کردار، خبث باطن، مخصوص عزائم اور تاخیر جیسے امور کو زیر غور لایا جانا لازمی قرار دیا گیا ہے۔

17۔ معاملہ ہذا میں متذکرہ خصوصی حالات وواقعات یہ نتیجہ اخذ کرنے میں مکتفی طور پر مددگار ہیں کہ سائلان دائری عرضی میں غافلانہ تاخیر کے مرتکب ہوئے ہیں۔ جو بظاہر مقاصد دائری عرضی کے لیے بیان کیے گئے، سائلان کا طرز عمل اُن کا عکاس نہ ہے بلکہ قرآئن اور شواہد عرضی ہذا کی دائری فیصلہ ججز شریعت کورٹ، تحریر کردہ مسئول نمبر 7، کے ردعمل کی طرف اشارہ کرتے ہیں۔ بلخصوص جبکہ ترتیبی مسئول نمبر 9 کا فیصلہ کی زد میں آنے والے ایک سبکدوش جج، سردار شہزاد احمد، کے چیمبر کارکن ہونے کا امر مسلمہ ہے جس کی تردید نہ کی گئی ہے۔ اس کے اثرات سے بچنے کے لیے اُس کو عرضی استعجازت اپیل میں ترتیبی مسئول درج کرنا حقائق کو تبدیل نہیں کر سکتا۔ اس لیے ہماری رائے میں اعلیٰ عدالتوں کے وضع کردہ اصول کے مطابق مخصوص حالات کے پیش نظر یہ قرار دیے جانے میں کوئی ہچکچاہٹ نہیں کہ سائلان نے خبث باطن کی بنیاد پر مخصوص عزائم کی تکمیل کے لیے تاخیر سے عرضی اجراء پروانہ

استفسار دائر کرتے ہوئے عدالت العالیہ جیسے مقتدر اور معتبر ادارے کو متنازعہ بنانے اور اس کی ساکھ اور کارکردگی کو متاثر کرنے کی کوشش کی ہے، جو کسی طور قابل پزیرائی نہ ہے۔"

In the preceding paragraphs points No.5 and 6 formulated by this Court in the leave granting order have been resolved, whereas, points No.2 and 3 are related to the proceedings conducted by the High Court and are interlinked. We deem it proper to observe here that in the light of the decision made in the Judicial Policy Making Committee, in which respondent No.7 also participated as member being Chief Justice of the High Court, it was incumbent upon the High Court to pass the admission/rejection order in the writ petition within a period of one month, but in the case in hand the situation is otherwise which is a clear deviation from the decision made in the Judicial Policy Making Committee, however, further deliberation on these points is not

required in the instant case. So far as point No.1 formulated in the leave granting order i.e. whether the points involved in this writ petition are identical and similar to the other writ petitions for hearing of which the division bench has been constituted and in this state of affairs this writ petition should also have been entrusted to the same bench or not; is concerned, it may be stated that under the provisions of rule 11(2) of the High Court Procedure Rules, 1984, the cases involving similar or identical points are required to be clubbed together and be heard simultaneous, however, as in the other writ petitions pending before the High Court in respect of the appointments of the Judges of the High Court this Court has already issued a direction for disposal of writ petitions while specifying the period and it will be difficult for the High Court to decide this writ petition along with others in

the period already stipulated; therefore, we do not intend to go into the details in this regard. The learned counsel for respondent No.7 has also taken a plea that the appellant has not challenged the subsequent notification through which respondent No.7 has been elevated as Chief Justice, therefore, the writ petition is not maintainable; as the learned High Court has not finally decided this point; therefore, in our view any findings in this regard would amount to preempt the jurisdiction of the High Court; thus, we restrain ourselves for doing so.

In view of the above, the impugned judgment/order is hereby set aside and while admitting the writ petition for regular hearing the case is remanded to the High Court with the direction to place the same before the bench seized with the matter of appointments of the Judges of the High Court and the concerned bench shall decide the instant writ

petition within a period of 45 days from the communication of the judgment of this Court. The appeal stands accepted with no order as to costs.

Muzaffarabad, **JUDGE** **CHIEF JUSTICE**
24.08.2019