SUPREME COURT OF AZAD JAMMU AND KASHMIR

[Appellate Jurisdiction]

PRESENT:

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

1. Civil Appeal No.587 of 2019
(PLA filed on 16.11.2019)

M. Tabassum Aftab Alvi, Chief Justice, High Court of Azad Jammu & Kashmir, Muzaffarabad.

……APPELLANT

VERSUS

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

…..RESPONDENT

2. Chairman, Azad Jammu and Kashmir Council through Secretary, AJ&K Council, Sector F-5/2, Islamabad, Pakistan.

3. Azad Jammu & Kashmir Council, through Secretary, AJ&K Council, Sector F-5/2, Islamabad, Pakistan.

4. Secretary Azad Jammu and Kashmir Council, Sector F-5/2, Islamabad, Pakistan.

5. Hon'ble President of Azad Jammu & Kashmir through Secretary to President, President Secretariat, Muzaffarabad.

6. Azad Government of the State of Jammu & Kashmir through Chief Secretary, New Secretariat, Muzaffarabad.

7. Law, Justice, Parliamentary Affairs and Human Rights Department, through Secretary Law,

Justice, Parliamentary Affairs and Human Rights Department, New Secretariat, Muzaffarabad.

….. PROFORMA-RESPONDENTS

[On appeal from the judgments of the High Court dated 01.11.2019 and 15.11.2019 in writ petition No.1787/2018]

FOR THE APPELLANT: Mr. Abdul Rashid Abbasi, Advocate.

FOR RESPONDENT NO.1: In person.

2. Civil PLA No.768 of 2019
(Filed on 13.11.2019)

M. Tabassum Aftab Alvi, Chief Justice, High Court of Azad Jammu & Kashmir, Muzaffarabad.

……PETITIONER

VERSUS

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

…..RESPONDENT

2. Chairman, Azad Jammu and Kashmir Council through Secretary, AJ&K Council, Sector F-5/2, Islamabad, Pakistan.

3. Azad Jammu & Kashmir Council, through Secretary, AJ&K Council, Sector F-5/2, Islamabad, Pakistan.

4. Secretary Azad Jammu and Kashmir Council, Sector F-5/2, Islamabad, Pakistan.

5. Hon'ble President of Azad Jammu & Kashmir through Secretary to President, President Secretariat, Muzaffarabad.

6. Azad Government of the State of Jammu & Kashmir through Chief Secretary, New Secretariat, Muzaffarabad.

7. Law, Justice, Parliamentary Affairs and Human Rights Department, through Secretary Law, Justice, Parliamentary Affairs and Human Rights Department, New Secretariat, Muzaffarabad.

….. PROFORMA-RESPONDENTS

[On appeal from the order of the High Court dated 12.11.2019 in writ petition No.1787/2018]

FOR THE PETITIONER: Mr. Abdul Rashid Abbasi, Advocate.

FOR RESPONDENT No.1: In person.

3. Civil Review No.47 of 2019
(Filed on 29.11.2019)

M. Tabassum Aftab Alvi, Chief Justice, High Court of Azad Jammu & Kashmir, Muzaffarabad.

……PETITIONER

VERSUS

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

…..RESPONDENT

2. Chairman, Azad Jammu and Kashmir Council through Secretary, AJ&K Council, Sector F-5/2, Islamabad, Pakistan.

3. Azad Jammu & Kashmir Council, through Secretary, AJ&K Council, Sector F-5/2, Islamabad, Pakistan.

4. Secretary Azad Jammu and Kashmir Council, Sector F-5/2, Islamabad, Pakistan.

5. Hon'ble President of Azad Jammu & Kashmir through Secretary to President, President Secretariat, Muzaffarabad.

6. Azad Government of the State of Jammu & Kashmir through Chief Secretary, New Secretariat, Muzaffarabad.

7. Law, Justice, Parliamentary Affairs and Human Rights Department, through Secretary Law, Justice, Parliamentary Affairs and Human Rights Department, New Secretariat, Muzaffarabad.

….. PROFORMA-RESPONDENTS

[In the matter of review of judgment of this Court dated 05.11.2019 in Civil Appeal No.327/2019]

FOR THE PETITIONER: Mr. Abdul Rashid Abbasi, Advocate.

FOR RESPONDENT NO.1: In person.

Dates of hearing: 16.01.2020 & 17.01.2020

JUDGMENT:

Ch. Muhammad Ibrahim Zia, C.J.– The appellant (M. Tabassum Aftab Alvi) has called in question the judgment of the High Court dated 15.11.2019, whereby his appointment as Chief Justice and Judge of Azad Jammu and Kashmir High Court has been set-at-naught, whereas, in the petition for leave to appeal the interim order of the High Court dated 12.11.2019 is challenged and a review petition for review of order of this Court dated 05.11.2019 has also been filed. The propositions involved in all the titled cases are inter-connected.

2. The succinct facts forming the background of this case are that the appellant was elevated as Judge of the High Court through notification dated 24.02.2011. Prior to the instant lis, some persons challenged his appointment by filing a writ petition before the High Court which was disposed of on some technical grounds vide judgment dated 17.11.2015. Finally, through the case reported as *Ahmed Nawaz Tanoli vs. Chairman AJ&K Council &*

others [2016 SCR 960], the matter was decided and writ petition was declared not maintainable on the ground of mala fide, coupled with laches. Meanwhile, through notification dated 03.04.2017, the appellant was elevated as Chief Justice of High Court. Respondent No.1, herein, who is an Advocate of the High Court and Supreme Court of Azad Jammu and Kashmir, challenged the appointment of appellant as Judge of High Court by filing writ petition No.1787/2018 on 17.10.2018. The main ground to challenge the appointment of the appellant raised in the writ petition is violation of Article 43(2-A) of the Azad Jammu and Kashmir Interim Constitution, 1974 *(hereinafter to be referred as "the Constitution")*, as alleged that the then Chief Justice of Azad Jammu and Kashmir High Court has not been consulted wih according to the spirit of the Constitution. It is further alleged that the disputed appointment is unconstitutional, discriminatory and without following the due process of law. The respondent prayed as follows:-

> "It is therefore most humbly prayed that the petition may kindly be accepted and respondent No.7 may kindly be asked that under what authority of law he is holding the office of Judge/Chief Justice of the High Court of AJ&K and the notification No.LD/AD/372-412/201 dated 24.02.2011 issued on the basis of invalid, illegal and unlawful advice may kindly be declared to have been issued in violation of the constitutional provisions so the same may kindly be set aside and declared to be without any legal effect, consequently the post of Judge/Chief Justice be declared vacant to be filled in accordance with law. Any other relief admissible in the eye of law may also be granted for the interest of justice."

The appellant contested the writ petition, inter alia, on the grounds that the same is hit by laches, based on mala fide, the matter has already been settled by the apex Court, the notification of subsequent elevation of the appellant as Chief Justice has not been challenged, etc. At the stage of preliminary hearing, the writ petition was dismissed in limine vide order dated 29.05.2019, being hit by laches and based on mala fide. The said order was assailed before this Court by filing an appeal by leave of the Court. This Court vide judgment dated 24.08.2019 while setting aside the order of the High Court, remanded the matter with the direction

to place the same before the bench seized with the matter of appointments of other Judges of the High Court. A direction for disposal of the writ petition within a period of 45 days was also issued.

3. After remand of the case, the learned senior most Judge of the High Court i.e., Mr. Justice Azhar Saleem Babar, vide order dated 16.09.2019 recused and ordered for placing the case before the Division Bench consisting of Mr. Justice Muhammad Sheraz Kiani and Mr. Justice Sadaqat Hussain Raja. After hearing the parties, the learned Division Bench of the High Court on 01.11.2019 handed down a dissenting judgment whereby one of the members of the Bench (Mr. Justice Muhammad Sheraz Kiani) dismissed the writ petition, whereas, the other, (Mr. Justice Sadaqat Hussain Raja) accepted the same while setting aside the appointment of the appellant as Judge as well as Chief Justice of High Court. On the same date, the learned Division Bench of the High Court due to difference of opinion directed for placing the file before the Chief Justice for referring the matter to

third Judge for opinion/decision on three points formulated therein. The Registrar, High Court was also directed to seek further reasonable extension of time from this Court for disposal of the writ petition, whereupon, the matter was placed before this Court on 05.11.2019. While considering the request for further extension of time it was noticed that despite direction of Division Bench regarding referring the matter to third Judge, no further order under Article 43(1-A)(c) of the Constitution was passed by the then Chief Justice of the High Court. In these special circumstances, through order dated 05.11.2019 while granting two weeks' time, it was directed by this Court that the case shall be placed before next senior most Judge of the High Court for further proceedings in the light of Article 43(1-A) of the Constitution. Thereafter, on 12.11.2019, respondents No.4 to 7 (in the writ petition) filed an application before the High Court for constitution of another Bench on the ground that the learned senior most Judge has already recused vide order dated 16.09.2019. The said application was turned

down vide order dated 12.11.2019, which is subject matter of civil petition for leave to appeal No. 768/2019 filed on 13.11.2019.

4. Finally, through the majority judgment dated 15.11.2019, while accepting the writ petition the appointment of the appellant as Judge of the High Court and thereafter as Chief Justice of the High Court has been set aside. This judgment has been challenged by the appellant by filing civil appeal by leave of the Court (No.587/2019) on 16.11.2019.

5. After final judgment of the High Court and filing of petition for leave to appeal, the appellant/petitioner also filed petition (No.47/2019) on 29.11.2019 for review of the order dated 05.11.2019 whereby the direction was issued by this Court for placing the case before the next senior most Judge of the High Court.

6. Mr. Abdul Rashid Abbasi, Advocate, the learned counsel for the appellant after narration of almost above stated facts firstly preferred to argue the review petition and petition for leave to appeal.

He submitted that this Court has fell in error of law while directing vide order dated 05.11.2019 for hearing of the writ petition by next senior most Judge of the High Court. The order is ambiguous as in the Constitution there is no concept of next senior most Judge rather only senior most Judge is designated. He argued that the senior most Judge being expected beneficiary of the subject-matter already recused from hearing of the writ petition, therefore, according to the constitutional provisions the writ petition could not have been made over to him for hearing and disposal. He further argued that according to the provisions of Article 43(1-A) of the Constitution, only the Chief Justice of the High Court can constitute the Bench or made over the case to any Judge, thus, the direction issued by this Court is not consistent with the constitutional provisions. He further stated that under the provisions of Article 42-A of the Constitution, this Court is vested with the powers to issue direction or pass any order only in a pending case. As there was no case pending before this Court, hence, direction

for placing the writ petition before the next senior most Judge is not proper exercise of constitutional powers. He further argued that the direction was issued for placing the case before the next senior most Judge which means the Judge next to senior most, hence, placing of the writ petition before Mr. Justice Azhar Saleem Babar, is not in accordance with the direction of this Court. As the error and mistake is apparent on the face of the record, thus, the order dated 05.11.2019 is liable to be reviewed. In support of his arguments, he referred to the cases reported as *Ghazi Vegetable Ghee & Oil Mills Limited vs. Deputy Commissioner of Income Tax & others* [2004 SCR 158] and *Secretary AJ&K Council vs. Muhammad Munir Raja & others* [2015 SCR 474].

7. The learned Advocate further submitted that the order of the High Court dated 12.11.2019 through which the learned Judge rejected the application for recusing from hearing the writ petition, is also not sustainable, because he had already shown his inability to hear the case being

expected beneficiary. Therefore, while converting the petition for leave to appeal into appeal and by accepting the appeal the same be recalled and the position of the case prior to this order be restored.

8. While arguing in appeal, he submitted that according to his point of view all the proceedings conducted by the High Court are against the constitutional provisions, hence, the impugned judgment of the High Court is nullity in the eye of law. The impugned judgment of the High Court, besides others, is liable to be set aside on the following grounds:-

(i) the writ petition filed by the respondent was not maintainable as the appointment of the appellant had already been declared valid by the High Court and upheld by this Court in the case reported as *Ahmed Nawaz Tanoli vs. Chairman Azad Jammu and Kashmir Council & others* [2016 SCR 960], thus, no subsequent writ petition is maintainable. In this context the reliance can be placed on the case reported as *Attiq-ur-Rehamn & others vs. Muhammad Ibrahim & another* [1984 SCMR 1469];

(ii) the respondent has filed the writ petition with the connivance of some other persons after almost a period of eight years, thus, the writ petition was liable to be dismissed on the sole ground of laches. On this point, the cases reported as *Ahmed Nawaz Tanoli vs. Chairman AJ&K Council & others* [2016 SCR 960], *University of AJ&K & others vs. Raja Muhammad Azad Khan* [1997 SCR 42], *Saleem Akhtar vs. Judge Family Court & others* [1997 SCR 381], *Azad Govt. & others vs. Haji Summander Khan* [1995 SCR 259], *Federation of Pakistan vs. Haji Muhammad Saifullah Khan* [PLD 1989 SC 166], *Dr. Kamal Hussain & others vs. Muhammad Siraj ul Islam & others* [PLD 1969 SC 42], *Muhammad Sadique vs. Muhammad Hussain & others* [1983 CLC 2734] and *Muhammad Rafique & others vs. Muhammad Pervaiz & others* [2005 SCMR 1829], have been referred;

(iii) the writ petition has been filed by the respondent/petitioner on the basis of mala fide which is clearly proved from the averments of the writ petition. The respondent himself mentioned in the memo of writ petition that he has filed the instant writ petition after filing of the writ petitions against the newly appointed five Judges in the High Court. He also stated

that he is practicing law since long, thus, despite having knowledge of appointment of the appellant he has not challenged the same for pretty long time, which proves his mala fide;

(iv) the respondent/petitioner has not challenged the notification of appointment of the appellant as Chief Justice. According to the constitutional provisions, the writ of quo warranto can be issued against the person who is holding the post at the relevant time. As the appellant after elevation as Chief Justice was not holding the post of Judge, hence, against him the writ of quo warranto was not maintainable. Although in the definition clause of the Constitution, the office of Chief Justice also includes the office of Judge but it is only for the purpose of performance of the judicial functions, whereas, the modes of the appointment of the Judge and Chief Justice of the High Court are distinct and different which cannot be amalgamated. The appellant, who has been validly appointed and elevated as Chief Justice, cannot be deemed a Judge because his appointment as Chief Justice is an independent act. Even if there was any lacuna in his appointment as Judge, after his elevation as Chief Justice it remains no more relevant,

therefore, on this score too the impugned judgment of the learned High Court is against law;

(v) the writ has been issued on the basis of misconception of facts. It is proved from the record that the process of appointment of the appellant was completed according to the spirit of the Constitution. The Chief Justice of Azad Jammu and Kashmir was consulted with and it is undisputedly proved from the record that the consultation was made by the appointing authority (the Worthy President) before issuance of the notification of appointment of the appellant as Judge. Reference is made to the letter of the President dated 22.02.2011 and in response to this letter the consultation/recommendations of the Chief Justice of the High Court dated 22.02.2011 fulfills the spirit of the Constitution. The bare reading of the constitutional provisions connotes that the consultation is required prior to the appointment and it makes no difference whether it has been sought before or after advice of the Azad Jammu and Kashmir Council *(hereinafter to be referred as "Council")*. Thus, on merit the writ petition was liable to be dismissed on this sole ground;

(vi) admittedly, the appellant was recommended by the Chief Justice of the High Court and if at all it is presumed that the Chief Justice of the High Court has not recommended him even then (by application of Rule of Primacy) it is proved that the Worthy President has rightly appointed the appellant. The cases reported as *Muhammad Younis Tahir & another vs. Ch. Shoukat Aziz & others* [2012 SCR 213], *Sindh High Court Bar Association vs. Federation of Pakistan & others* [PLD 2009 Supreme Court 879] and *Al-Jehad Trust vs. Federation of Pakistan & others* [PLD 1996 SC 324] can be relied upon in this context;

(vii) the writ petition is not maintainable being filed by the respondent in the representative capacity of the General Secretary, Azad Jammu and Kashmir High Court Bar Association, without any proper authorization. Reliance in this regard can be placed on the cases reported as *Pakistan Diploma Engineers vs. Federation of Pakistan* [1987 CLC 2154], *Anjuman Araian, Bhera vs. Abdul Rashid & others* [PLD 1982 SC 308] and *Pakistan Steel Re-Rolling Mills vs. Province of West Pakistan* [PLD 1967 (W.P.) Lahore 138;

(viii) the learned High Court has travelled beyond its competence and jurisdiction while declaring the

appointment of the Chief Justice as illegal. The findings of the High Court are beyond the pleadings of the parties because the respondent has not challenged the notification of elevation of the appellant as Chief Justice dated 03.04.2017, whereas, according to the settled principle of law the Court cannot go beyond the pleadings of the parties. In this regard, the cases reported as *Muhammad Naveed & another vs. Naveeda Khalid* [2019 SCR 394], *Muhammad Ayub vs. Ali Zaffar & others* [2018 SCR 20], *Imran Khurshid vs. Azad Govt. & others* [2018 SCR 282], *Munshi Khan & others vs. Mehboob Khan & others* [2017 SCR 129], *Aamir Shameem vs. Azad Govt. & others* [2017 SCR 684], *Zulfiqar Azam vs. Azad Govt. & others* [2017 SCR 697], *Azad Govt. & others vs. Muhammad Younas Abbasi & others* [2016 SCR 887] and *Sheikh Javed Iqbal vs. Muhammad Bashir & others* [PLJ 2011 SC (AJ&K) 29], can be relied on;

(ix) the learned High Court has granted the relief suo motu, which is not permissible under law. Reference can be made to the cases reported as *Haji Muhammad Sadiq & others vs. Khairati* [1984 CLC 2239] and *Akhtar Abbas & others vs. Nayyar Hussain* [1982 SCMR 549];

(x) the appellant has held the office for a long period without any complaint, hence, he cannot be removed from the office while issuing the writ of quo warranto as has been held in the cases reported as *Baij Nath Singh vs. The State of Uttar Pardesh* [AIR 1965 Allahabad 151], *Routtoungee and Company vs. State of West Bengal and others* [AIR 1967 Calcutta 450] and *Hari Shankar Prasad Gupta vs. Sukhdeo Prasad and another* [AIR 1954 All. 227]; and

(xi) the writ petition filed by the respondent was also liable to be dismissed for the reason that the respondent has been appearing before the appellant/Chief Justice without raising any objection, thus, the principle of acquiescence is attracted. Reliance in this regard has been placed on *Routanjee & Company's case* (supra) as well as *Ahmed Nawaz Tanoli's case* (supra);

He finally argued that as the impugned majority opinion of the High Court is not in accordance with facts and law, hence, the same is liable to be set aside.

9. The respondent himself argued the case and seriously refuted the arguments of the learned counsel for the appellant being against law, the

facts and judgments of the superior Courts. While arguing on maintainability of the petition for leave to appeal and review petition, he submitted that these are fruitless attempts because the matter has been finally decided on merit by the High Court. If the appellant/petitioner had any legal grievance, he should have timely approached the Court. The arguments of the learned counsel for the petitioner relating to order of this Court dated 05.11.2019 are also baseless. The Division Bench of the High Court due to divergent opinion directed on 01.11.2019 for placing the case before the Chief Justice but the learned Chief Justice/petitioner despite this clear direction has not taken any action till 05.11.2019 with mala fide intention merely to keep the matter pending till his superannuation. It is also a daylight fact that the matter of appointment of five Judges is sub judice before this Court and according to the controversy raised, therein, three of them have not been nominated by the Chief Justice of High Court. In this state of affairs, none of the five Judges of the High Court was available for hearing, whereas,

the other two available Judges of the High Court have passed the divergent judgment while formulating the points for referring the same to the third Judge. In this state of affairs, the only Judge available was senior most Judge of the High Court, thus, this Court has rightly passed the order dated 05.11.2019 which does not suffer from any illegality or infirmity. The order has also been acted upon, hence, cannot be questioned. He further stated that this Court has got ample power to issue any direction or pass order in any case or matter pending before it. The term "matter" is of wide connotation. In continuation of earlier judgment of this Court whereby the matter was remanded with the direction of expeditious disposal of the writ petition, the matter of "expeditious disposal of the writ petition" was pending before this Court. As with reference to this mater the learned High Court sought extension of time, thus, the exercise of powers by this Court under Article 42-A of the Constitution are quite justified and there is hardly any invalidity or lack of jurisdiction. On this point,

the final judgment of the High Court cannot be disturbed, therefore, the review petition filed by the appellant/petitioner is not maintainable.

10. He further submitted that the petition for leave to appeal filed against the order of the High Court dated 12.11.2019 has become infructous as subsequently the writ petition has finally been decided by the High Court, thus, the events taken place subsequently cannot be reversed. If there is any valid ground, the same can be agitated in the appeal filed against the main judgment but merely on technical ground the multiplicity of the litigation amounts to misuse of process of law and the Courts and indicative of the mala fide of the appellant that he intentionally planned for making the writ petition infructous by efflux of time on attaining of his superannuation. Such like litigation cannot be encouraged.

11. While arguing on the allegation of mala fide, he submitted that the same is without any justification. This point is no more debatable as the findings of the High Court in this regard have

already been turned down by this Court vide judgment dated 24.08.2019, which has attained finality, thus, now it is a past and closed transaction and the arguments of the learned counsel for the appellant in this regard are mere wastage of time and against his own conduct. He, with full vehemence, argued that the way in which the proceedings have been conducted in this case is self-evident proof of the misconduct and mala fide of the appellant. Despite the request and averments in the memo of writ petition that the proposition raised in the writ petition is also sub judice before the Court in other writs, thus, the same be clubbed together; the appellant, who at the relevant time was the Chief Justice, became Judge in his own cause and intentionally with mala fide intention constituted the different Bench consisting of single Judge of his own choice. The appellant/Chief Justice in violation of the rules deliberately managed to cause delay in hearing of the writ petition. On number of dates when the writ petition was fixed for hearing, the appellant despite having knowledge

deputed the concerned Judge to circuit tour so that the writ petition may not be heard and disposed off. It is speaking proof of mala fide on the part of the appellant and also against the conduct of the Chief Justice. So far as the objection relating to his (respondent) conduct is concerned, neither after vacation of the office of the Chief Justice any benefit can be extended to him nor he has any other personal interest. Being a lawyer and State Subject, he has faced a lot of hardships while pursuing the case but he kept struggling for supremacy of the Constitution. The learned counsel for the appellant has argued the points which have already been finally decided and cannot be re-opened. If he had any justification, he should have filed the review petition against the judgment of this Court dated 24.08.2019 because through the said judgment this Court closed the chapter of mala fide and laches, hence, these points are no more debatable.

12. While arguing on main controversy, he submitted that the scope of the arguments is confined only to three points formulated by the

Division Bench of the High Court while referring the matter to the third Judge. The fate of the case has to be decided with reference to these points and all other arguments are not available to the appellant. So far as the first point regarding consultation, is concerned, it is of vital importance with reference to the independence of the judiciary and spirit of the Constitution. According to the long-standing practice and the constitutional provisions the consultation of the Worthy President with the Chief Justices prior to seeking advice of the Council is pre-requisite, which can be easily spelt out from the appreciation of the constitutional provisions in reverse order. It is also logical because the Chairman of Council, according to the ground realities and nature of his functions has no direct source or channel to gain knowledge relating to the competence, suitability, eligibility etc. of any person to be elevated as Judge High Court or Supreme Court of Azad Jammu and Kashmir. According to the settled principle of law enunciated by the superior Courts, the most concerned and binding

opinions in this context are of the Chief Justices of Azad Jammu and Kashmir and High Court. Without their effective, meaningful, purposive, consensus oriented and simultaneous consultation, neither the Worthy President can seek advice of the Council nor can appoint anybody otherwise it will amount to directly shift the powers of appointment of the Judges to the Executive by excluding the judiciary which is totally against the spirit of the Constitution and independence of the judiciary. In this case, it is undisputedly proved from the record, relied upon by the appellant himself, that the Worthy President/appointing authority after receiving the advice from the Council had initiated the process of consultation with the Chief Justice of the High Court, which on the face of it is violative of the Constitution, long-standing practice and the conventions. Moreover, the referred letter of the Chief Justice of the High Court does not amount to consultation rather it is just an information relating to the qualification of a person, named therein, but this letter does not fulfill the mandatory

requirement of the effective, meaningful, purposive, consensus oriented and simultaneous consultation. Thus, the disputed consultation, firstly being post advised and secondly being not fulfilling the required ingredient, is totally alien to the Constitution, hence, not acceptable. In this state of affairs, the learned High Court has rightly declared the appointment of the appellant as unconstitutional.

13. He further argued that so far as the next point formulated regarding the Rule of Primacy, is concerned, it also has no nexus with the case in hand. According to the admitted facts, the Worthy President after advice of the Council has initiated the consultation process with the Chief Justice, hence, the application of the Rule of Primacy does not arise. If the Worthy President would have applied the Rule of Primacy, then there was no occasion for initiating the post advice consultative process, thus, it is proved from the record and the sequence of events that the Worthy President has not applied the Rule of Primacy. So far as the third

point that the appellant was appointed as Chief Justice and his appointment as Chief Justice has not been challenged, is concerned, it is also against the record and the facts. The appointment of the appellant as Chief Justice is not an independent act rather it is continuation of his appointment as Judge of the High Court. In the Constitution there is no separate mode for appointment of the Chief Justice, except the only requirement that for such appointment the consultation of the Chief Justice of the Azad Jammu and Kashmir is mandatory. He submitted that in the memo of the writ petition, he has mainly prayed for declaring the holding of office of Chief Justice of High Court by the appellant as illegal. Even otherwise, in the writ of quo warranto the petitioner is mere an informer/relator and it is the duty of the Court, after receiving such information, to determine whether the concerned person is validly holding the public office or is a usurper. The notification of appointment of the appellant as Chief Justice of the High Court clearly speaks that he has been assigned the duties of the

Chief Justice being senior most Judge of the High Court, thus, his appointment as Chief Justice is not an independent or separate action. If for the sake of argument, it is presumed so even then it makes no difference as if the appointment of the appellant as Judge of the High Court is declared illegal then all the superstructure has to fall to the ground. The impugned judgment of the High Court is well in accordance with law, therefore, the appeal filed by the appellant is liable to be dismissed.

14. In support of his arguments, he referred to the cases reported as *Muhammad Younas Tahir & another vs. Shoukat Aziz Advocate Muzaffarabad & others* [2012 SCR 213], *S. P. Gupta v. V. M. Tarkunde* [AIR 1982 SC 149], *Ghulam Mustafa Mughal vs. The Azad Government & others* [1993 SCR 131], *Sharaf Faridi & others vs. The Federation of Islamic Republic of Pakistan through Prime Minister of Pakistan & another* [PLD 1989 Karachi 404], *Al-Jehad Trust through Raeesul Mujahideen Habibi-ul-Wahabb-ul-Khairi & others vs. Federation of Pakistan & others* [PLD 1996 SC 324], *Azad*

Government of the State of Jammu & Kashmir through Chief Secretary & others vs. Sardar Javed Naz & others [PLD 2016 SC (AJ&K) 1], *Bashir Ahmed Mughal vs. Azad Govt. & others* [2014 SCR 1258], *Sindh High Court Bar Association through Honorary Secretary vs. Federation of Pakistan through Ministry of Law and Justice Islamabad & others* [PLD 2009 Karachi 408], *Atta Muhammad Qureshi vs. The Settlement Commissioner Lahore & others* [PLD 1971 SC 61], *Raja Hamayun Sarfraz Khan & others vs. Noor Muhammad* [2007 SCMR 307], *Azad Jammu & Kashmir Council vs. Azad Jammu & Kashmir Government & others* [2016 SCR 145], M. Manohar Reddy & Anr. Vs. Union of India & others [AIR 2013 SC 795], *Kh. Noor ul Ameen vs. Sardar Muhammad Abdul Qayyum & another* [1993 SCR 27], *Custodian of Evacuee Property AJ&K & another vs. Fatima Bibi & others* [2003 SCR 88], *Sh. Tariq Mehmood & others vs. E.T.P.C. & others* [2011 YLR 2850], *District Bar Association Rawalpindi & others vs. Federation of Pakistan & others* [PLD 2015 SC 401], *President of Hamidpur*

Colony Chakswari vs. Mst. Fazeelat Begum & others [2000 SCR 547], *Mst. Aziza Begum & others vs. Muhammad Hussain Khan & others* [2013 SCR 563], *Abdul Baseer Tajwar vs. AJ&K Public Service Commission & others* [2016 SCR 1599], *Moulana Atta-ur-Rehman vs. Al-Hajj Sardar Umer Farooq & others* [PLD 2008 SC 663] and *Yousaf Ali vs. Muhammad Aslam & others* [PLD 1958 SC 104].

15. The parties were also allowed to file summary of their arguments and case law, which has been accordingly submitted.

16. **WE** have heard the learned counsel for the appellant as well as the respondent, minutely examined the record and had the survey of the case law referred to and relied by both sides. First of all, we would like to deal with the petition for leave to appeal filed against the order of the High Court dated 12.11.2019, whereby the application filed by the petitioner/appellant for constitution of another Bench has been rejected. The order impugned is of interim nature passed during the proceedings of the writ petition. The petitioner has challenged the

same after final disposal of the writ petition vide judgment dated 15.11.2019, thus, if at all any legal objection is available to him that can be agitated in appeal against the final judgment. On this sole score, in view of peculiar facts and circumstances of this case, the petition for leave to appeal is not maintainable.

17. Even on merit, in the light of the arguments of the parties and admitted facts, the petition for leave to appeal hardly requires any detailed discussion or deliberation. This Court vide order dated 05.11.2019 referred the matter to the next senior most Judge of the High Court for hearing and disposal. Under the provisions of Articles 42-A and 42-B of the Constitution the direction of this Court is of binding nature, hence, the learned Judge of the High Court was left with no option except to comply with the direction. No illegality has been committed by the learned Judge while rejecting the application of the petitioner, thus, in this state of affairs, petition for leave to

appeal No.768/2019, having no substance, is hereby dismissed.

18. The petitioner/appellant has also sought review of the order of this Court dated 05.11.2019, whereby the matter was referred to the next senior most Judge of the High Court for hearing and disposal. The review has been sought on the following two grounds:-

> "(a) That the referee bench (third Judge) comprising of the senior most Judge of the High Court being an expected beneficiary, had already refused to hear the case vide order dated 16.09.2019. Having already refused to hearing the case, he could not be directed to hear the case under the cannons of law and justice. In view of the aforesaid order dated 16.09.2019, the learned Judge was barred to hear the case.
>
> (b) That under Sub-Article (1-A) of Article 43 of the Azad Jammu and Kashmir Interim Constitution, 1974 power of constituting the bench vests in the Chief Justice of the High Court, hence the impugned order dated 05.11.2019 is against the provisions of the Constitution."

In our considered view, the careful examination of these grounds reveals that no error or mistake apparent on the face of record has been pointed out rather it appears that in shape of

review petition the petitioner has attempted to file an appeal for reopening and rehearing of the matter which is out of the scope of the review and not permissible in view of consistent practice of this Court.

19. However, leaving aside this aspect, we have dispassionately considered the arguments advanced at bar. Before proceeding further, we deem it appropriate to bring on record some special features of this case. According to the respondent's version, the writ petition was filed before the High Court during pendency of other writ petitions filed against the five newly elevated Judges of the High Court. Despite the request of the respondent for clubbing together all the petitions, the petitioner, who at the relevant time was the Chief Justice of the High Court instead of clubbing together the petitions, constituted a single Bench in the instant lis. It is also evident from the interim orders recorded during the proceedings of the case that even for preliminary hearing the writ petition remained pending for pretty long time. It is also

borne out from the record that the petitioner himself constituted the Bench but despite having knowledge of importance of case, on several dates of hearing, he deputed the concerned Judge to circuit tours which caused unnecessary delay. Although the adopted practice is not consistent with the required standard, dignity, impartiality and neutrality of the Chief Justice, be that as it may, at this stage we are not concerned with the conduct of the petitioner/the then Chief Justice.

20. It is also of worth mentioning that presently in the High Court, excluding the petitioner, eight Judges are functioning. Out of these eight Judges, five were appointed in the year 2018, whose appointments have been challenged on the main ground that only two of them were recommended by the petitioner (Chief Justice). For final determination, the matter of all these five Judges is sub judice before this Court, therefore, in view of the raised controversy none of them was suitable for hearing of the instant case. Whereas, out of the other three Judges two have already

heard the case and among them there is divergence of opinion. The only remaining Judge was senior most Judge of the High Court. In this background, while taking into consideration all the aspects of the matter, we have consciously ordered for hearing of the case by the next senior most Judge. For convenience, the relevant portion of the order dated 05.11.2019 is reproduced hereunder:-

> "…. The perusal of the record reveals that the learned Chief Justice of the High Court is respondent in this writ petition and one of the member of bench has already declared his appointment illegal. In this state of affairs, no one can be a judge of his own cause. As in this case, not only the dignity of the judiciary but also the office of the Chief Justice of the High Court is involved, therefore, the matter requires expeditious disposal, hence, for doing complete justice, while exercising the powers vested in this Court, it is directed that the case shall be placed before the next senior most judge of the High Court for further proceedings in the light of sub Article (1-A) of Article 43 of the Azad Jammu & Kashmir Interim Constitution, 1974. The learned Judge shall finally disposal of the writ petition within two weeks' time from today."

The sequence of the order clearly conveys that the term "next senior most Judge" has been intentionally applied with reference to the senior

most Judge next to the Chief Justice of the High Court. In view of the peculiar facts of this case, if such clarification would have not been made there might have been an ambiguity that perhaps senior most means the senior most of the five Judges because the two Judges had already passed the divergent judgments and the senior most Judge had recused. Thus, the argument of the learned counsel for the petitioner that the next senior most Judge means the Judge next to the senior most appears to be misconceived and against the spirit of the order of this Court.

21. The other most heated argument advanced on behalf of the petitioner is that under the provisions of Article 43(1-A) of the Constitution the Bench can only be constituted by the Chief Justice of the High Court and none else can exercise these powers. No doubt in the ordinary practice and course of law, it is the prerogative of the Chief Justice of the High Court to constitute or reconstitute the Bench but the Constitution is silent whether in the special and exceptional

circumstances when the Chief Justice himself is a party whether the matter can be left upon the sweet discretion of the Chief Justice to refer the same to the third Judge or not. It is evident from the record that while deciding the writ petition with divergence of opinion, the learned Division Bench also directed for placing the case before the Chief Justice vide order dated 01.11.2019 but the Chief Justice (petitioner) despite this has not taken any step or passed any order for referring the case to a third Judge or taken any other alternate constitutional legal action which also indicates that the petitioner (Chief Justice of the time) has consciously not passed any order and opted for not referring the case to third Judge which amounts to create a dead lock. As according to the judgment of the one of the Judges, the appointment was declared illegal, hence, the petitioner/the then Chief Justice has shown intentional reluctance towards constitution of Bench or referring the matter to any other Judge. Moreover, the provisions of Article 43(1-A) of the Constitution do not expressly

provide that in case of difference of opinion in the Division Bench, the matter shall be referred to the third Judge by the Chief Justice, specially, when the Chief Justice himself is respondent and one of the Judges has issued writ of quo warranto against him. The special eventuality, arisen in this case, required special wisdom and action to come out of a dead lock situation.

22. The other argument of the learned counsel for the petitioner is that this Court is vested with the powers under Article 42-A of the Constitution to pass any order only in the case pending before it, whereas, through the order under review, the direction was issued without being any case pending before the Court. This argument appears to be result of superficial approach. Neither it is supported from the special facts of this case nor consistent with the spirit of the Constitution. The relevant statutory provision of Article 42-A of the Constitution reads as under:-

> **"42-A. Issue and execution of processes of Supreme Court.**-(1) The Supreme

> Court shall have power to issue such directions, orders or decrees and as may be necessary for doing complete justice in any case or matter pending before it including an order for the purpose of securing the attendance of any person or the discovery or production of any document.
>
> (2) …….
>
> (3) …….
>
> (4) …….”

This constitutional provision clearly speaks that this Court may exercise such powers in “any case or matter pending”. The words “case or matter” are of vital importance. Unambiguously, the term “case” relates to the matter involved in the appeals, petitions etc. or any lis requiring action by this Court. The scope of “case” has been elaborated in the case reported as *Adam Khan vs. The State* [2005 PCr.LJ 1988] as follows:-

> “In the above context, it would also be pertinent to mention here that in legal sense though the words case, cause or action are convertible terms, each meaning a proceedings in a Court yet, in common parlance the word “Case” is more comprehensive and enfolds not only a decision on a particular issue or with regard to an accused but also includes determination of matters ancillary thereto or connected therewith, hence, in my view, the Court

> would not become functus officio till final decision of the case."

The term 'case' has been further discussed in the case reported as *Naeem Ahmed vs. Additional District Judge* [1983 CLC 113] as follows:-

> "6. It is well recognized that the word "case" does not always mean the whole suits, its meaning is wide enough to include a decision on any substantial question in controversy between the parties affecting their rights, even though the same may be of interlocutory one and interlocutory order deciding a question of this kind as distinguished from purely formal and incidental order would be a "case decided" within the meaning of section 115, C.P.C. but it would be open to revision only if the other conditions expressly laid down in section 115, C.P.C. are satisfied and the order has resulted or is likely to result in such gross injustice or irreparable injury cannot be remedied otherwise than the revisional jurisdiction at this stage."

23. The term "matter" is of more wider connotation which includes the other incidental and ancillary matters arisen in any proceeding or matter under consideration of this Court. The proposition of exercise of inherent powers under Article 42-A of the Constitution in relation to any "case or matter" came under consideration of this Court in the case reported as *Sardar Muhammad Ibrahim vs. Azad Govt. & others* [PLD 1990 SC(AJ&K) 23]. In the referred case the learned Judges of the High Court

failed to exercise the jurisdiction and omitted to send the case to a third Judge for his view on the controversial point. This Court held that:-

> "63. Let us now proceed to determine the extent and scope of the inherent powers of the Supreme Court. Section 42-A(1) of the Constitution Act deals with such powers. It reads as under:—
>
> > 'The Supreme Court shall have powers to issue such directions, orders or decrees as may be necessary for doing complete justice in any case or matter pending before it including an order for the purpose of securing the attendance of any person or the discovery or production of any document.'
>
> 64. It is important to note that the words "doing complete justice in any case or matter pending before it" occurring in section 42-A(1) are used with the intention to invest the Supreme Court with the widest possible powers for the dispensation of complete justice which must be understood in a sense extending beyond the mere resolution of the rights inter se of the parties before the Supreme Court in any cause. Besides, the employment of the expression "matter" is not without significance. It positively has a reference to all judiciable matters and, therefore, possesses a scope far exceeding than the word "cause" which is limited by the sense it carries, i.e., a grievance coming to notice at the instance of a party against another.
>
> 65. The words "doing complete justice" and "matter" occurring section 42-A(1) of the Constitution Act are the key words which furnish the clue. When read in conjunction with the words "judgment", "order" or "decree" under section 42(12) of the Constitution Act, it leads to the inference that the intention of the law-makers in using the word "matter" in section 41-A(1) was to extend the jurisdiction of the Supreme Court to look into the entire controversy unfettered by any consideration stipulated under section 42(11) and (12) of the

Constitution Act. The word "matter", in Black's Law Dictionary, is defined as "the subject- matter of controversy" or substantial facts forming the basis of a claim or defence.

66. It, thus, admits of no doubt that by virtue of section 42-A(1), the Supreme Court has ample powers to issue such orders as may be necessary for doing complete justice in any case or matter pending before it. The word matter is comprehensive enough to include any form of matter upon which the Court has applied its mind. It, thus, may include "opinions", "orders" etc. This provides complete answer to the grievance of the learned Advocate-General that the opinions of the Judges cannot be looked into by the Supreme Court.

67. The Supreme Court is also all competent to pass any order to secure the ends of justice under Order XLIII, rules 4 and 5 of the Supreme Court Rules which read as under:—

> "4. The Court shall have power to pass any decree and make any order which ought to have been passed or made, and to pass or make such further or other decree or order as the case may requires and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree, and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties have filed any appeal or objection.
>
> 5. Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court".

The combined reading of the provisions of the Supreme Court Rules and Constitution Act leaves no room for doubt that in a fit case, or matter pending in the Supreme Court, the Supreme Court is competent to pass any order to the to meet the ends of justice. There are no fetters to do so. The "matter", as discussed, is comprehensive to include any "matter" even short of judgment, order or decree. It was

observed in Muhammad Farash Khan v. Mst. Nishadar Jan PLD 1983 SC (AJ&K) 43:-

> 'Before we part with the case, we may state that the Supreme Court even otherwise is also competent to pass any order to secure the ends of justice under Order XLIII, rules 4 and 5 of the Azad Jammu & Kashmir Supreme Court Rules, 1978 read with section 42-A(1) of the Azad Jammu and Kashmir Interim Constitution Act, 1974....
>
> The reading of the provisions of the Supreme Court Rules and Constitution makes us to believe that in a fit case, like the present one, the Supreme Court is competent to pass any order to meet the ends of justice.'

68. There, thus, remains no ambiguity that under the provisions of Azad Kashmir Constitution Act read with Supreme Court Rules, referred to above, this Court is competent to pass any order as may be necessary for doing complete justice in any case or matter pending before it and such powers may be exercised by the Court notwithstanding that the appeal is lodged only to the part of the decree or order and it may be exercised in favour of all or any of the respondents or party although such respondents or party may not have lodged any appeal or objections. Identical view was also owned in Riaz Ahmad v. Amin Baig (PLD 1977 SC (AJ&K) 22) wherein it was held:-

> '.....In short the Supreme Court has ample powers to pass such decree or order as may be necessary for doing complete justice and may finally dispose of a case itself or may remand a fit case to the lower Court for re-hearing of the same according to law and for resolution of the points inadvertently omitted by that Court'

69. It is to be noticed that the jurisdiction and powers of the Supreme Court of Azad Jammu and Kashmir are identical and at par with the powers of the Supreme Court of Pakistan. This view we have in Muhammad Khan v. The State (PLD 1978 SC (AJ&K) 1). It was observed in this case:—

> 'The powers of the Supreme Court of Pakistan and Supreme Court of Azad Jammu and Kashmir derived from the respective Constitutions of Pakistan and Azad Kashmir are identical. Under the provisions of sub section (10) of section 42 of the Interim Constitution Act, 1974, the Supreme Court of Azad Jammu and Kashmir is fully constituted Court for hearing criminal appeals from the judgments and orders passed by the High Court. The Supreme Court of Pakistan derives its powers from the Constitution of the Islamic Republic of Pakistan, 1973, which has identical provision in the matter.'

70. On a careful examination of all the relevant facts and the law, we feel, convinced that it is our (Supreme Court's) solemn duty to do full and complete justice and correct, so far as lies within our powers, any injury that we find to have been done to the very means and instrument by which justice is dispensed at the highest level. Here the injury to the parties, we believe, has been done by the operative order of the High Court, which is and was misleading. On the basis of the difference of opinion of the two Judges, the matter was to be referred to the third Judge by the Chief Justice but it was not so done. So it is legitimate to say that the injury has been done to the very means and instrument by which justice is dispensed at the highest level. This fact had occasioned legal injury not only to the appellant but also to the respondent. From Pakistan jurisdiction in Syed Ali Nawaz Gardezi v. Lt.-Col. Muhammad Yusuf (PLD 1963 SC (Pak.) 51), it was observed:—

> 'On a careful examination of all relevant matters, and bearing in mind the solemn duty resting upon us, while doing full and complete justice in this case, also to consider and correct, so far as lies in our power, any injury that we find to have been done to the very means and instrument by which justice is dispensed al the highest level.'

71. Therefore, the conclusion to which we reach is: that in cases where there are compelling reasons, the

Supreme Court should not hesitate to exercise inherent powers to decide the case itself, especially, when it would affect none of the parties adversely. In such circumstances, the technicalities, in order to do substantial justice, are to be ignored and if the Court comes to the conclusion that some injustice has been done to a party and the case warrants a review of the decision appealed against, the power would be exercised to undo the mistake.

72. Identical powers we find with the Supreme Court of India under Article 142(1) of the Indian Constitution, which reads:-

> ‘The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.’

Provisions alike to the Indian Constitution we find in Article 187(1) of the Constitution of Pakistan of 1973 which says:-

> ‘Subject to clause (2) of Article 175 the Supreme Court shall have power to issue such directions, orders or decrees as may be necessary for doing complete justice in any case or matter pending before it, including an order for the purpose of securing the attendance of any person or the discovery or production of any document.’

73. Under the aforesaid Articles, the Supreme Courts of Pakistan and India, both, in any case or matter seized with, felt always free to pass any order as may be necessary for doing complete justice. The words "doing complete justice" and "matter", we believe, empower the Supreme Court to make any order as may be necessary for doing complete justice

in any case or matter pending before it and it contains no word of limitation.

74. We are also of the view that even orders of the learned Judges of the High Court can well be termed under section 42-A(1) of the Constitution Act as "matters" which can be scrutinized by this Court. It also goes without saying that if for the sake of "doing complete justice" in a matter, it becomes necessary for the Supreme Court even to examine its own record for the purpose of dilating upon the matter before it, it will not allow itself to be deterred in the performance of that duty, by any considerations of its own dignity or of the sanctity of its records. This statement of law was found in a case entitled Fazal Ellahi v. The Crown (PLD 1953 FC 35).

75. Therefore, it is our considered view that while considering the circumstances of a particular case, if this Court considers it to be necessary in the interest of justice to interfere, it has competence to do so in any matter in exercise of its inherent powers. In the instant case we note that the learned Judges in making the operative part of the impugned judgment, failed to exercise the jurisdiction in omitting to send the case to a third Judge for his view on the controversial point. We think that in the circumstances the case for our interference is made out."

(underlining is ours)

Same like in the case reported as *Abdul Ghaffar Lakhani vs. Federal Govt. of Pakistan and others* [PLD 1986 Karachi 525] it was held that:-

"16. The word "matter" is defined in Law Lexicon by Iyer, 1940 Edition at page 797 as 'some substance or essential thing opposed to form,' in law, 'a fact or facts constituting a whole or part of a ground of action or defence. At the same page cause or matter is defined as 'a most comprehensive term'.

17. In Oxford English Dictionary printed in 1961, Vol. VI at page 241 "matter" is defined as "ground,

> reason or cause of doing of being something". It is further described on the same page in vague sense as "thing or something of a specified kind involving or related to a specified thing." Further on same page "matter" is defined as "something which is to be tried or proved, statements or allegation which come under the consideration of the Court." On the next page it is explained as "the circumstances or state of things which actually involves or concerns some person on thing". Taking the things as a whole, speaking generally'.
>
> In the same dictionary at page 242 (third column) "in the matter of", is shown to mean "in relation to, with regard to";
>
> 18. It, therefore, appears to us that "matter" is a very wide term and almost covers even a thing concerned with or in relation to the particular person or thing described. Therefore, the expression "matter arising out of service" would appear to include everything connected with the service of the member of the armed forces or in relation to the same or in respect of the same."
>
> (underlining is ours)

24. According to the admitted facts, earlier this Court vide judgment dated 24.08.2019 while setting aside the order of the High Court, whereby the writ petition was dismissed in limine, directed for disposal of the writ petition on merit within a specified time. Thereafter, the High Court sought extension of time, thus, in this state of affairs, the matter of expeditious disposal within specified time was pending before this Court. Keeping in view the above stated special eventuality, when the

petitioner/Chief Justice shown reluctance in taking any action for referring the case to the third Judge for disposal of writ petition; this Court in continuation and furtherance of the judgment dated 24.08.2019 exercised the powers vested in it under Article 42-A of the Constitution relating to the pending matter of expeditious disposal of the case. As without having a Judge to hear the case grant of prayed extension would be a futile exercise, thus, in this background, the exercise of powers by this Court was constitutional requirement for administration of justice and meeting the ends of justice. The case law referred to by the learned counsel for the petitioner in this context is not helpful to the petitioner. As stated hereinabove, the order under review was passed in the matter pending before this Court, thus, there is no violation of any principle of law enunciated in the referred case law. The arguments of the learned counsel for the petitioner, having no weight, are repelled.

25. In the instant case, the petitioner has sought review against the order dated 05.11.2019 after its implementation, whereas, according to the principle of law laid down by this Court after implementation of the judgment/order, the review may be refused. In this regard, reliance may be placed on the case reported as *Secretary AJ&K Council & another vs. M. Munir Raja & others* [2015 SCR 474], wherein it has been held that:-

> "7. Here we may observe that the judgment of this Court has been implemented in letter and spirit by the AJ&K Council and respondent No. 1 has been reinstated in service, meaning thereby that the department has accepted the findings recorded by this Court, therefore, in such state of affairs, the review petition has become infructuous. However, it is not an absolute rule that after implementation of the judgment the review cannot be sought but for review of a judgment under law an error apparent on the face of the record must be pointed out."

The points agitated on behalf of the petitioner do not fall within the scope of review as there is no error or mistake apparent on the face of record, therefore, finding no force the review petition is hereby dismissed.

26. **NOW,** we would like to attend and decide the main controversy raised in appeal No.578/2019. Before proceeding further, it is felt advised to observe that the writ petition was heard by the Division Bench and due to difference of opinion, vide order dated 01.11.2019, three specific points were formulated for referring the same to the third Judge. The formulated points read as follows:-

> "1. Whether in view of Article 43(2-A) of the Interim Constitution, 1974, the consultation in regard to appointment of respondent No.7 with the consultee/Chief Justice High Court, after receipt of advice from the Kashmir Council and before the appointment by the President is valid or not?
>
> 2. Whether the principle of Primacy, attached to the opinion of the Chief Justice of Azad Jammu and Kashmir, in light of various judgments of the Superior Courts, particularly, Al-Jehad Trust's case (PL 1996 SC 324) and Muhammad Younis Tahir's case, (2012 SCR 213), is attracted in the present case in relation to appointment of respondent No.7 or not?
>
> 3. Whether, when the respondent No.7, herein has been appointed as Chief Justice of High Court, vide notification dated 03.04.2017, and is holding his office, the writ of quo warranto can be issued against him on the basis of any infirmity in his

> appointment as Judge of the High Court vide notification dated 24.02.2011."

The appellant has not challenged the order dated 01.11.2019, thus, it is admitted and attained finality, hence, in our considered view, in the titled appeal the controversy is only confined to aforesaid three points but despite this the learned counsel for the appellant wasted most of his time while arguing the points such like, conduct of the respondent, laches etc.

27. As mentioned hereinabove, this Court vide judgment dated 24.08.2019 while setting aside the order of the High Court dated 29.05.2019 whereby the writ petition was dismissed in limine, on the grounds of laches and mala fide etc.; admitted the writ petition for regular hearing and directed the High Court for deciding the same on merit within a period of 45 days, thus, the chapter of mala fide, laches etc., stood closed in view of judgment of this Court dated 24.08.2019. This judgment has attained finality because the appellant has not objected to or challenged the same. In this state of

affairs, it will be an exercise in futility to record detailed reasons regarding the arguments of the learned counsel for the appellant in relation to laches, mala fide, holding of office by the appellant for long time, writ cannot be issued against the Chief Justice, etc., because in view of the above referred final judgment of this Court and final order of the High Court formulating three points for determination, all other arguments/points have become irrelevant and mere of an academic nature. In this state of affairs, the deliberation on the arguments relating to past and closed transactions is not required.

28. **THE** first point deals with practice, procedure and mode of appointment of the Judge of the High Court, which is of basic nature and vital importance. For proper appreciation of this point, the relevant constitutional provisions i.e. Article 43(2-A) of the Constitution read as under:-

> "43. …….
>
> (2-A) A Judge of High Court shall be appointed by the President on the

> advice of the Council and after consultation-
>
> (a) with the Chief Justice of the Azad Jammu and Kashmir; and
>
> (b) except where the appointment is that of Chief Justice, with the Chief Justice of the High Court."

The learned counsel for the appellant attempted to argue that the scheme and phraseology of these constitutional provisions requires appointment after consultation and it is immaterial whether the consultation is made after or before the advice. Having regard to all his knowledge, we are unable to agree with him. This version is consistent neither with the custom, practice and procedure prevailing since long nor with the spirit of the Constitution. The phraseology of the constitutional provisions is clear and simple. If the constitutional provisions are considered in reverse order the position of 'advice after consultation' is quite clear. It is not only the long-standing practice and manner adopted for appointment of the Judges but also appears to be in accordance with the spirit of the Constitution in

view of the dignity and independence of the judiciary. In this context, the apex Court of Pakistan and this Court in a number of cases while appreciating these constitutional provisions handed down the scholarly and authoritative judgments which clearly speak that for seeking the advice of the Council, the consultation of the appointing authority with the Chief Justices is pre-requisite. The Chief Justices, in view of the practice and ground realities, are only the concerned persons who are best Judge of the ability, neutrality and other required qualities of the persons to be appointed as Judge High Court. Neither the President nor the Council has other alternate or direct means or source to Judge the required abilities of a person for Judgeship.

29. The proposition of consultation came under consideration of the apex Court of Pakistan and this Court in a number of cases wherein after thorough deliberation the inevitable requirements, mode, scope, manner and ingredients of the consultation have been determined conclusively. In

this regard the case reported as *Al- Jehad Trust & others vs. Federation of Pakistan & others* [PLD 1996 SC 324] is a comprehensive and scholarly authority. The opinion expressed in the judgment (supra) has been fully endorsed and relied upon by this Court in the case reported as *Muhammad Younis Tahir & another vs. Shoukat Aziz & others* [2012 SCR 213]. According to the enunciated principle of law, it is now almost settled that for consideration of a person to be appointed as Judge of the High Court, the consultation of the Chief Justice of AJ&K and Chief Justice of the High Court is most basic pre-requisite. According to the consensus of the apex Courts and constitutional spirit this requirement can only be fulfilled if the appointing authority has sought an effective, meaningful, purposive, consensus oriented and simultaneous consultation with both the Chief Justices. We would like to refer here the relevant observations of this Court in *Younis Tahir's* case (supra), which read as follows:-

> "23. The word 'consultation' used in section 42(4) and section 43(2-A) of the Act, 1974 is used in similar sense as used in Articles 177 and 193 the

Constitution of 1973. The Supreme Court of Pakistan has held that the consultation should be effective, meaningful, purposive, consensus oriented, leaving no room for complaint or arbitrariness or unfair play. The opinion of the Chief Justice of Pakistan and the Chief Justice of a High Court as to the fitness and suitability of a candidate for Judgeship is to be accepted in absence of sound reasons to be recorded by the President/Executive. While applying the above criteria, we will decide the matter in hand."

24. …….

25 to 30 …….

31. In case titled *Supreme Court Advocates-on-Record Association and another* v. *Union of India* [AIR 1994 SC 268], the Supreme Court of India, dealt with the word "consultation" and elaborated the same in paragraphs 120, 184, 209 and 210. The aforesaid paragraphs are reproduced as under:—

> "120. It is clear that under Article 217(1), the process of 'consultation' by the President is mandatory and this clause does not speak of any discretionary 'consultation' with any other authority as in the case of appointment of a Judge of the Supreme Court as envisaged in clause (2) of Article 124. The word 'consultation' is powerful and eloquent with meaning, loaded with undefined intonation and it answers all the questions and all the various tests including the test of primacy to the opinion of the CJI. This test poses many tough questions, one of them being, what is the meaning of the expression 'consultation' in the context in which it is used under the Constitution. As in the case of appointment of a Judge of the Supreme Court and the High Court, there are some more constitutional provisions in which the expression 'consultation' is used."

> "184. In the light of the above view expressed in Sankal Chand & some of the Judges in Gupta's case, it can be simply held that consultation with the CJI under the first

proviso to Art. 124(2) as well under Art.217 is a mandatory condition, the violation of which would be contrary to the constitutional mandate."

"209. When an argument was advanced in Gupta's case (AIR 1982 SC 149) to the effect that where there is difference of opinion amongst the Constitutional functionaries required to be consulted, the opinion of the CJI should have primacy, since he is the head of the Indian Judiciary and paterfamilias of the judicial fraternity, Bhagwati, J. rejected that contention posing a query, as to the principle on which primacy can be given to the opinion of one constitutional functionary, when clause (1) of Article 217 places all the three constitutional functionaries on the same pedestal so far as the process of consultation is concerned. The. learned judge by way of an answer to the above query has placed the opinion of the CJI on par with the opinion of the other constitutional functionaries. The above answer, in our view, ignores or over-look the very fact that the judicial service is not the service in the sense of employment, and is distinct from other services and that 'the members of the other services .... cannot be placed on par with the members of the judiciary, either constitutionally or functionally'. (See All India Judges' Association and others case (1993 (4) JT(SC) 618) (supra). There are innumerable impelling factors which motivate, mobilise and import momentum to the concept that the opinion of the CJI given in the process of 'consultation' is entitled to have primacy. They are:

(1) The 'Consultation' with the CJI by the President is relatable to the judiciary and not any other service.

(2) In the process of various Constitutional appointments, 'consultation' is required only to the judicial office in contrast to the other high ranking constitutional offices. The prior 'consultation'

envisaged in the first proviso to Article 124(2) and Article 217(1) in respect of judicial offices is a reservation or limitation on the power of the President to appoint the Judges to the superior courts.

(3) The 'consultation' by the President is a sine qua non or a condition precedent to the exercise of the constitutional power by the President to appoint Judges and this power is inextricably mixed up in the entire process of appointment of Judges as an integrated process. The 'consultation' during the process in which an ad-vice is sought by the President cannot be easily brushed aside as an empty formality or a futile exercise or a mere casual one attached with no sanctity.

(4) The context in which the expression 'shall always be consulted' used in the first proviso of Article 124(2) and the expression 'shall be appointed after consultation' deployed in Article 217(1) denote the mandatory character of 'consultation', which has to be and is of a binding character.

(5) Articles 124 and 217 do not speak in specific terms requiring the President to consult the executive as such, but the executive comes into play in the process of appointment of Judges to the higher echelon of judicial service by the operation of Articles 74 and. 163 of the Constitution. In other words, in the case of appointment of Judges, the President is not obliged to consult the executive as there is no specific provision for such consultation.

(6) The President is constitutionally obliged to consult the CJI alone in the case of appointment of a Judge to the Supreme Court as per the mandatory proviso to

> Article 124(2) and in the case of appointment of a Judge to the High Court, the President is obliged to consult the CJI and the Governor of the State and in addition the Chief Justice of the High Court concerned, in case the appointment relates to a Judge other than the Chief Justice of that High Court. Therefore, to place the opinion of the CJI on par with the other constitutional functionaries is not in consonance with the spirit of the Constitution, but against the very nature of the subject matter concerning the judiciary and in opposition to the context in which 'consultation' is required. After having observed that the 'consultation' must be full and effective by Bhagwati, J. in Gupta's case there is no conceivable reason to hold that such 'consultation' need not be given primary consideration.
>
> (7) The very emphasis of the word 'always be consulted' signifies and indicates that the mandatory consultation should be unfailingly made without exception on every occasion and at every time by the President with the constitutional consultees."
>
> "210. In the background of the above factual and legal position, the meaning of the word 'consultation' cannot be confined to its ordinary lexical definition. Its contents greatly vary according to the circumstances and context in which the word is used as in our constitution."

32. While applying the above criteria laid down by the Supreme Court of Pakistan in Al-Jehad Trust's case [PLD 1996 SC 324] and Supreme Court Advocates-on-Record's case [AIR 1994 SC 268], we have to look into the peculiar fact that whether the consultation made by one President in December, 2005 with the Chief Justice of High Court and the consultation made by the new President with the Chief Justice of Azad Jammu and Kashmir in

December, 2006, after one year, is a valid consultation or not.

33. ……

34. ……

35. The process of appointment of a Judge in the High Court has to be initiated by the Chief Justice of the High Court when the President seeks panels for the purpose of consultation. The Chief Justice shall immediately send the panel of eligible persons to the President who shall send the same to the Chief Justice of Azad Jammu and Kashmir and after seeking the panel from him, seek the advice from the Council for issuing the appointment orders."

(underlining is ours)

30. The proposition whether in the instant case, the constitutional requirement of the consultation was fulfilled; has to be judged in view of the undisputed alleged facts and the documents relied upon by the parties. According to the version of the parties and the record of the President office, after receiving the advice of the Council on 21.02.2011, for consultation with the Chief Justice of the High Court, the President has initiated as follows:-

"Subject: **Appointment of Judges in the High Court of AJ&K**

I have received advice of the Chairman AJ&K Council in terms of Section 32 (2-A) of AJ&K Interim Constitution Act, 1974 to appoint the following judges of AJ&K High Court:

1. Mr. Munir Ahmed Chaudhary, District & Sessions Judge,

2. Mr. M. Tabassum Aftab Alvi, Advocate, Muzaffarabad.

2. Fact of the matter is that the name of Munir Ahmed Chaudhary, District & Sessions Judge is included in your panel, received as your consultation with me. The name of Mr. M. Tabassum Aftab Alvi is, however, not included in that panel. Since advice of the Chairman Azad Jammu & Kashmir Council has been tendered to me for appointment of Mr. M. Tabassum Aftab Alvi, Advocate, Muzaffarabad; I, therefore, seek your consultation/opinion on the matter of appointment of Mr. M. Tabassum Aftab Alvi as Judge of the High Court as stipulated by Section 42 (2-A) of the Azad Jammu & Kashmir Interim Constitution Act, 1974.

Raja Zulqarnain Khan

Mr. Justice Ghulam Mustafa Mughal,
Chief Justice of High Court of AJK".

(underlining is ours)

In support of this letter the appellant has also relied upon the personal affidavit of the President of the time which reads as follows:-

"Affidavit

I, Raja Zulqarnain Khan, former President of Azad Jammu & Kashmir, Resident of House No.48, Street No.57, Sector G-6/4, Islamabad, do hereby solemnly affirm as under:-

i. That at the time of elevation of Mr. Justice M. Tabassum Aftab Alvi as Judge of the High Court, vide Govt. notification bearing No.LD/AD/372-412/2011 dated 24th Feb, 2011, I was President of Azad Jammu and Kashmir.

ii. That before issuance of the aforesaid notification, I had consulted to Mr. Justice Ghulam Mustafa Mughal, the then Hon'ble Chief Justice of the High Court for his appointment vide script "RA" dated 22nd Feb, 2011.

iii. That on the basis of the aforesaid script Hon'ble Chief justice of the High Court granted consultation as per script "RB" bearing No.SCJ(HC)06/2011 dated Feb 22, 2011. The deponent then accorded approval to appoint, inter-alia, Mr. Justice M. Tabassum Aftab Alvi, as Judge of the High Court vide (Annexure RC) bearing No.PS 105/2011 dated 24 Feb, 2011.

iv. That the aforesaid appointment was made after due consultation with the Hon'ble Chief Justice of the High Court, strictly in accordance with the provisions of Article 43(2-A) of the Azad Jammu & Kashmir Interim Constitution, 1974.

v. That the contents of this affidavit are true and correct to the best of my knowledge and belief.

DEPONENT

Islamabad,
27.09.2019"

(underlining is ours)

According to the appellant's own relied documents and affidavit there remains no doubt that the President after receiving advice of the Council, consulted with the Chief Justice of the High Court. The phraseology of the President letter is unambiguous. The words used in the letter i.e. *"since advice of the Chairman Azad Jammu & Kashmir Council has been tendered to me for*

appointment of Mr. M. Tabassum Aftab Alvi, Advocate, Muzaffarabad; I, therefore, seek your consultation/opinion on the matter of appointment of Mr. M. Tabassum Aftab Alvi as Judge of the High Court"; clearly prove that prior to the advice of the Council, the President has not consulted with the Chief Justice of the High Court for appointment of the appellant. This fact is further authenticated and testified by the personal affidavit of the President of the time. In paragraph (ii) of the affidavit, reproduced hereinabove, he deposed that *"before issuance of the aforesaid notification, I had consulted to Mr. Justice Ghulam Mustafa Mughal, the then Hon'ble Chief Justice of the High Court for his appointment vide script "RA" dated 22nd Feb, 2011"*. Thus, according to the referred letter and affidavit, the President consulted with the Chief Justice of the High Court on 22.02.2011 after receiving advice of the Council dated 21.02.2011.

31. The unambiguous phraseology of Article 43(2-A) of the Constitution clearly connotes that the appointment of the Judge of the High Court

shall be made by the President on the advice of the Council after consultation with the Chief Justice of Azad Jammu and Kashmir and Chief Justice of the High Court. The appreciation of these provisions in reverse order clearly proves that 'on the advice of the Council after Consultation with the consultees'. Thus, according to the constitutional provisions the consultation is pre-requisite for seeking advice of the Council. It is long-standing practice spreading over decades that for appointment of the Judge of the High Court the process of consultation has always been completed prior to seeking advice. Thus, if for the sake of argument, the alleged communication of the Chief Justice of the High Court is deemed consultation, in our considered view, even then there is no concept of seeking consultation after receiving the advice of the Council. Our this view is fortified from *Muhammad Younis Tahir's* case (supra), wherein it has been held that:-

> "33. ……. The Council was to issue the advice on the basis of consultation made by the President with both the Chief Justices in November/December, 2005

> and the recommendations made thereof by two Chief Justices in the written form to the President at the same time was a valid consultation….."
>
> *(underlining is ours)*

32. For determination of this proposition, we have also consulted with the President office relating to the consistent practice adopted in this regard and on scrutiny of record, the President office conveyed that the advice has always been sought on the basis of consultation with the Chief Justices of Azad Jammu and Kashmir and High Court, however, somewhere in the past, once without consultation the advice of the Council for appointment of a Judge High Court was received but the same was not complied with and returned back being violative of the Constitution. In this context, the letter of President of the time, reads as follows:-

> "Sardar Muhammad Ibrahim Khan
> President's House
> Muzaffarabad
> NO.PS/822/2001
> Dated: 28 January, 2001.
>
> My dear
>
> I take this opportunity to draw your kind attention to the fact that the recommendation has been made by the AJK Council for the appointment

of a new Judge to the AJK High Court. This recommendation ignores the panel sent by me after due consultation with the Chief Justice of High & Supreme Courts.

This is blatant violation of section 43-2A(A&B) of AJK constitution which says that "Judge of the High Court shall be appointed by the President on the advice of the council and after consultation with the Chief Justice of Azad Kashmir and Chief Justice of High Court.

You would appreciate that you are constrained to advice the appointment of a Judge to the High Court only from the panel proposed by the President AJK. Any advice otherwise would be unconstitutional and being as such can be challenged in the Court and can be struck down as it was done in famous "Judges case" in 1996 by the Supreme Court of Pakistan.

I would personally like to meet you in this connection. Keeping in view the urgency of the matter, I hope you would spare some time at our earliest convenience.

Yours Sincerely,

(Sardar Muhammad Ibrahim Khan)

General Pervaiz Musharaf NI(M)SBT.,
Chief Executive/Chairman AJ&K Council,
Chief Executive Office, ISLAMABAD.

(underlining is ours)

In view of undisputed facts and record it is proved that for appointment of the appellant as Judge of the High Court, the advice of the Council was tendered without consultation of the Chief Justice of the High Court.

33. The consultation with the Chief Justices of the Azad Jammu and Kashmir and High Court, is not mere a formality rather it is the most basic requirement. It is also in consonance with the ground realities because the Council or its Chairman has no direct source or means to determine the eligibility and suitability of any person for his appointment as Judge of the High Court rather the same can only be determined in the light of consultation made with the consultees mentioned in the Constitution, thus, it can be safely held that the advice of the Council without completion of the consultative process is not constitutional and enforceable, hence, on the basis of such advice no one can be validly appointed as Judge of the High Court.

34. There is yet another sensitive aspect of the matter that the people of the State of Jammu and Kashmir have high respect and regard for the office of Prime Minister of Pakistan/Chairman Council. The advice of such respected office has to be given due deference and non-implementation of

such advice by the President on any technical ground will not create any good taste rather it will be an unpleasant situation which is not desired in view of the cordial relationship of the people of the State of Jammu and Kashmir and the Islamic Republic of Pakistan. In such like sensitive matters, all efforts should be made to conduct the proceedings strictly in accordance with the spirit of the Constitution and each and every requirement must be fulfilled before seeking advice from the Council to avoid any unpleasant situation.

35. There is also another aspect of the matter that whether in response to the letter of the President dated 22.02.2011 the communication/ script of the Chief Justice of the High Court fulfills the requirement of the consultation or not? As mentioned hereinabove, the consultation must be effective, meaningful, purposive, consensus oriented and simultaneous but in this case the alleged communication of the Chief Justice of the High Court does not fulfill the requirements of

consultation. The script of the Chief Justice of the High Court dated 22.02.2011 reads as follows:-

> "Respected President
>
> Aslam-o-Alaikum
> In response to the letter of your Excellency dated 22nd February, 2011, it is stated that Mr. M. Tabassum Aftab Alvi, Advocate qualifies for appointment as a Judge of the High Court and there is nothing against him in the official record.
>
> With regards,
>
> Yours sincerely,
> (Justice Ghulam Mustafa Mughal)
>
> His Excellency,
> Raja Zulqarnain Khan,
> President
> Azad Jammu & Kashmir,
> Muzaffarabad."

This script merely speaks that the appellant, herein, like others, is qualified i.e. has got required length of practice, not crossed the age etc., but it does not disclose whether the appellant, herein, is comparatively suitable or preferable or has such comparative qualities to be preferred among others. It is also borne out from the record and the pleadings of the parties that except this script the President has not attempted to hold any meeting or adopted any other mode for having an effective, meaningful, purposive and consensus

oriented consultation. No doubt for consultation, no specific mode has been prescribed in black and white but it depends upon the appointing authority and the consultees that in what manner and mode they fulfill the ingredients of an effective, meaningful, purposive, consensus oriented and simultaneous consultation. Mere sending a panel is not sufficient rather the appointing authority and the consultees in furtherance of the proved list or panel of nominated qualified persons may hold joint meeting or adopt any other reasonable manner for passing and exchange of information. Even the verbal mode of consultation can be adopted but there must be such practical steps proving that the appointing authority and the consultees have availed the sufficient opportunity and adopted mode of making the consultation effective, meaningful, purposive, consensus oriented and simultaneous. In the light of peculiar facts of this case, except sending the panel and after the advice of the Council, initiation of the President for consultation with the Chief Justice of the High Court; nothing

else has been brought on record that the President has otherwise held any meeting with the Chief Justice of the High Court or verbally consulted with him, thus, in our considered view in the light of principle of law enunciated in famous Judges' case (supra), the relied letter/script of the Chief Justice of the High Court, is mere a document proving that the person named in it is qualified like all others who fulfill ten years' required legal practice etc., but it does not fulfill the requirement of effective, meaningful, purposive, consensus oriented and simultaneous consultation. The mode of 'consultation' has been elaborated in the case reported as *M.D Tahir v. Federal Government* [1989 CLC 1369], as follows:-

> "4. In Oxford English Dictionary (1901 Ed) Vol.II, the word "consultation" is defined as:-
>
> > "the action of consulting or taking counsel together, deliberation, conference."
> >
> > In the Stroud's Judicial Dictionary, the definition of this word is more or less the same. It needs to be recorded that the petitioner did not object to the mode of 'consultation' with the Chief Justice but contended that he was consulted not at all. This argument however, has no substance, for, per record of the Court,

> the names of the respondents for the office of the Judgeship were initiated and duly recommended by the Chief Justice. As regards the mode of consultation, as long as, there is reasonable passing of information, on the matter in issue, between the authorities concerned, the requirement of law is satisfied in Desai's Law Lexicon placed before us by the petitioner, it is clearly stated that the form of consultation is not material but the substance is important."

Thus, for determination of the process of consultation, the basic requirement is reasonable passing of information on the matter in issue, between the authorities concerned, meaning thereby the appointing authority and the Chief Justices. As analyzed hereinabove, except the script of the Chief Justice of the High Court dated 22.02.2011, there is no other proof that there was any reasonable passing of the information on the matter in issue, between the President and Chief Justice of the High Court. In this state of affairs, the majority opinion and judgment of the High Court appears to be consistent with the spirit of the Constitution and does not suffer from any infirmity, calling for any interference, hence, upheld.

36. **THE** other formulated point is the application of Rule of Primacy by the President. No doubt, according to the constitutional provisions the Chief Justice is the *paterfamilia* of the judiciary and his opinion has to be given due weightage, preference and deference. In case of difference between the consultees, the appointing authority after due comparison and appreciation, by applying the Rule of Primacy, may seek advice of the Council for appointment of Judge High Court. The eventuality of Rule of Primacy arises when during the process of consultation after reasonable passing of information between the consultees the consensus could not be developed. In such situation, it is the prerogative of the appointing authority to apply the Rule of Primacy but in our considered view, in this case no such eventuality has arisen. In this case, the script of the President dated 22.02.2011 leaves no room for drawing inference that the President has applied the Rule of Primacy. The order in which the events have taken place and stated, testified, deposed and affirmed

through personal affidavit by the President, relied upon by the appellant himself, makes it clear that the President has not applied the Rule of Primacy either before seeking advice or after receiving the same. If the Rule of Primacy would have been applied, in that case there was no necessity to write to the Chief Justice of the High Court for post advice consultation. In this context, no further deliberation is required and the findings emerging from the majority opinion of the High Court are consistent with law, without any dent or defect.

37. **THE** third formulated point, which has been forcefully argued by the learned counsel for the appellant, is that the respondent has not challenged the appointment of the appellant as Chief Justice and after his elevation to the office of Chief Justice, the writ of quo warranto cannot be issued. According to his version the Chief Justice and the Judge of the High Court are two different offices and even if there is any defect in the appointment of the appellant as Judge High Court, his subsequent elevation to the office of Chief

Justice is valid and the same cannot be challenged. The constitutional provisions dealing with the appointment of the Judge of the High Court have already been referred to hereinabove. It will be useful to reproduce here the definition of term "Judge" as defined in the Constitution:-

> "Judge' in relation to the Supreme Court of Azad Jammu and Kashmir or the High Court, includes the Chief Justice of the Supreme Court of Azad Jammu and Kashmir or, as the case may be, High Court and also includes an ad-hoc Judge of the Supreme Court and Additional Judge of the High Court."

The definition of "Judge" clearly speaks that the Judge includes the Chief Justice but even leaving aside this definition, the bare reading of Article 43(2-A) of the Constitution shows that only for the purpose of consultation the distinction between "Judge" and "Chief Justice" has been drawn that except where the appointment is that of Chief Justice, the consultation shall also be made with the Chief Justice, whereas, all other qualifications and disqualifications are same as for Judge. If according to the version of the appellant's counsel, the appointment of Chief Justice of the

High Court is treated altogether different from Judge of the High Court then one can say that for Chief Justice there is no qualification mentioned in the Constitution. Surely no such argument can be advanced. The Constitution or any statute has to be read as a whole. The reading of the Constitution as a whole transpires that all the qualifications and disqualification are common for a Judge and Chief Justice of the High Court. It is also undisputed that the appellant was elevated to the office of the Chief Justice being senior most Judge of the High Court. If his appointment as Judge High Court is defective, consequently, the elevation to the office of the Chief Justice also becomes faulty. According to the principle of law enunciated by the superior Courts, every structure has to stand on its own foundation and when the foundation is vanished no superstructure can exist. On this proposition there is a chain of authorities. The basic one is the case reported as *Yousaf Ali vs. Muhammad Aslam Zia* [PLD 1958 SC 103], which has been subsequently followed in the case reported as *Karim Dad vs.*

Member III Board of Revenue & others [PLD 1985 Quetta 252]. In this regard, this Court in the case reported as *Abdul Baseer Tajwar vs. AJK Public Service Commission & others* [2016 SCR 1599] has held that:-

> "11. Now, the question arises whether on the basis of such disputed result any legal right has been vested in favour of the recommended candidates. It is almost now settled that if the basic process is illegal the whole superstructure built upon it falls to the ground. No doubt, a valid final selection of the candidates is of legal importance but the legal right vests when on the basis of such recommendations the matter is finalized and candidates selected are appointed. Before occurrence of final step of appointment, neither vested right is legally created nor cause of action arises. Our this view finds support from the principle of law laid down by the apex Court of Pakistan in the case reported as *Dr. Habib ur Rehman vs. The West Pakistan Public Service Commission and others* [PLD 1973 SC 144], wherein while discussing the status of the recommendations of Public Service Commission and on the basis of such recommendations the accrual of cause of action, it has been held as follows:-
>
> > "Yet another aspect of the matter may also be noted, viz. that the recommendations of the Public Service Commission being only advisory in nature and it being open to the appointing authority under Article 188 of the Constitution not to accept its advice, it is difficult to see how a petition of this nature can be maintained. The grievance of the candidate would arise only when the Government has made an appointment in contravention of the rules; until that time the advice tendered by the Commission remains confidential and inchoate and cannot give rise to a grievance or cause of

> action within the meaning of Article 98 of the former Constitution."

The case reported as *Molana Atta-ur-Rehman vs. Al-Hajj Sardar Umar Farooq & others* [PLD 2008 Supreme Court 663] can also be referred to in this context.

38. Mere non-mentioning in the memo of writ petition regarding the notification of appointment of the Chief Justice does not debar the High Court to issue the writ of quo warranto. If the Court is satisfied that holding of public office by a person is against law or in violation of law, the writ of quo warranto can be issued. The respondent has clearly prayed in the writ petition for declaration of the office of the Judge/Chief Justice as vacant. Moreover, the writ of quo warranto is not like a plaint of a civil suit rather the petitioner is mere a relator/informer and it is upto the Court to determine whether the concerned person is holding the office according to law or not and once it is proved that the holder of the office has not been validly appointed then it is the duty of the Court to

get the public office vacated and a usurper cannot be protected merely on technical ground, hence, the majority opinion of the High Court on this point is also upheld.

39. The learned counsel for the appellant has taken most of time in arguing on the point that the High Court has travelled beyond the pleadings of the parties while declaring the notification of appointment of the appellant as Chief Justice, as against law. According to the enunciated principle of law, once the writ of quo warranto is filed the burden shifts upon the holder of the office to justify that he is holding the office validly. As stated hereinabove, the pleadings in the writ of quo warranto are not like the pleadings in civil cases, i.e. plaint etc. The respondent arrayed the appellant, herein, as respondent No.7 in the writ petition being the holder of office of Chief Justice and also in the prayer clause sought remedy in the words *"…respondent No.7 may be asked that under what authority of law he is holding the office of Judge/Chief Justice of the High Court…."*. It is clear

that the holding of office of the Chief Justice by the appellant was questioned, thus, the burden was upon the appellant to justify that he was holding the said office validly. In this state of affairs, the argument of the learned counsel for the appellant that the High Court has travelled beyond the pleadings of the parties is repelled in view of the above stated facts.

40. The connected argument that the High Court cannot grant relief suo motu, is also misconceived. As stated hereinabove, no suo motu relief has been granted by the High Court rather the relief granted was duly prayed for. Even otherwise, the High Court is competent to grant any sort of relief which is consequential upon the main relief. In this context, both the referred cases being outcome of appellate and revisional jurisdiction, have no application being distinguishable, whereas, in this regard the relevant citation is the case reported as *Sharaf Faridi & others vs. The Federation of Islamic Republic of Pakistan and*

others [PLD 1989 Karachi 404], wherein it has been held that:-

> "However, there cannot be any doubt that a Court having jurisdiction to adjudicate upon a matter, has the power to mould a relief according to the circumstances of the case, if dictates of justice so demand even if such a relief has not been expressly claimed provided the relief to be given is within the compass of the jurisdiction of the Court."

On this proposition, this Court has also laid down authoritative judgments. Reference may be made to the case reported as *Abdul Rasheed & others vs. Board of Trustees & others* [2008 SCR 417], wherein it has been held that:-

> "Even otherwise it is not only the relief clause which has to be considered for determining the relief claimed. The whole of the controversy including the grounds of claim made in the writ petition are to be considered and even the Court in suitable cases has powers to mould the relief if the facts pleaded in the writ petition warrant so in order to meet the ends of justice. The Court has ample power to alter and mould the relief in favour of a petitioner, even if it is not prayed for. Reference in this respect may be made to the case reported as 2005 CLC 759, wherein while discussing the constitutional jurisdiction of High Court it has been so held."

Same like, it has been held by this Court in *Muhammad Ramzan vs. Muhammad Latif* [2013 SCR 326] that:-

> "…. In such state of affairs, the grant of decree by the Trial Court is quite in accordance with the principle of law and

justice. Now the question arises that whether the Court can mould relief or give such kind of relief. In the peculiar facts of this case we are of the opinion that ordinarily the litigants are not the expert of measurement. Normally in such-like circumstances without proper demarcation or measurement conducted by the expert officials, the statement is made on the basis of a rough estimation. For the ends of justice if the relief which flows from the pleadings and also proved from the evidence, the Courts are empowered to mould and grant the same. Our this view finds support from *Muhammad Rafiq v. Allah Rakha's case* (NLR 2002 Civil 592). The facts of this case are nearly identical to the case in hand. In this case, the Commissioner was also appointed to inspect the site of sit property and submit the report. The relief was granted according to the report. The Court resolved this issue in para 8 of the judgment which is reproduced as following:-

> '8. The last ground urged by Mr. Sikandar Khan Yasir is that the prayer made in the listed application is beyond the scope of the reliefs claimed by the plaintiff in the suit. In reply to this, Mr. Rasheed A. Razvi has rightly referred the provision of Order VII, Rule 7, C.P.C. and cases reported in PLD 1988 Karachi 414, PLD 1978 Supreme Court 220 and PLD 1989 Karachi 404. The ration of these cases is that the Courts are not denuded of their powers to mould and grant such relief to a party as dictates of justice may demand in the changed circumstances of the case, even if such relief has not been expressly claimed by a party, provided otherwise that Court has jurisdiction to grant such relief. In view of this legal position the last objection of Mr. Sikandar Khan Yasir has also no force.'

Almost the same principle has been laid down in *Muhammad Yaqoob vs. Muhammad Ishaque's* case PLJ 1980 Karachi, 203. The Courts are also vigilant of the facts that for avoiding multiplicity of proceeding and shortening the litigation the Courts are competent to mould the relief. In a case titled *Messrs Muhammad Amin Muhammad Bashir Limited and another vs. Pakistan through Secretary, Ministry of Communications Rawalpindi and 5 others* [2000 CLC 1559), while dealing this aspect of the matter the Karachi High Court observed as following:-

> ‘It is settled law that now Courts are competent to mould relief according to altered circumstances but this discretion is to be judicially exercised in the larger interest of justice with a view to avoid multiplicity of proceedings, to shorten litigation and to do complete justice between the parties. If any reference is needed, see *Mst. Amina Begum and others vs. Mehar Ghulam Dastgir* PLD 1978 Supreme Court 220. The rule laid down in Amina Begum’s case (ibid) was reiterated by a Full Bench of Honourable Supreme Court in *Muhammad Aslam v. Wazir Muhammad* PLD 1985 SC 46 rel. at 51.’

A Division Bench of Lahore High Court in Majhena, Advocate’s case 2000 YLR 280, observed as following:-

> ‘We have observed that the respondents only asked for the relief of possession and did not make a specific prayer for the recovery of the sale price. In law, the Court is competent to mould the relief and also to grant the relief to a party to which the said party is found entitled, keeping in view the substance of the plaint and also the evidence on record, no matter such relief is not specifically asked for. Reference can be made to *Samar Gul v. Central Govt. & others* (PLD 1986 SC 35) and *Mst. Amina Begum and others v. Mehar Ghualm Dastgir* (PLD 1978 SC 220). In the given circumstances, the appropriate relief, which could be claimed in the suit was for recovery of the sale price or in the alternative for recovery of possession.’

The Karachi High Court in Paryaldas and others’ case (2000 YLR 584) while embarking on this point held:-

> “The Trial Court rightly held that the relief of declaring the instrument can be granted under Order VII, Rule 7, C.P.C. Even otherwise as held in PLD 1986 Supreme Court 35 (supra) the Court is empowered to grant such relief as justice

> of case demand and for determining the relief asked for whole of the plaint must be looked into so that the substance rather than the form should be examined. The suit was filed for cancellation of sale and possession but it appears that there is no prayer clause to the effect of cancellation of sale-deed. A perusal of the plaint shows that it is a suit for cancellation of the sale-deed Exh.89 in respect of the suit property and for possession thereof. It will not be appropriate not to grant a relief of cancellation of the sale-deed though it has not been specifically prayed for."

41. Another argument advanced by the learned counsel for the appellant is that the writ petition is incompetent as the same has been filed by the respondent being General Secretary of the Azad Jammu and Kashmir High Court Bar Association without any proper authorization of the Bar Association. For determination of this proposition, the memo of writ petition is relevant, the perusal of which shows that nowhere in the memo of writ petition it has been claimed that the writ petition has been filed in the representative capacity i.e., on behalf of the Bar Association rather the careful examination of the contents of the writ petition reveals that it has been filed by the respondent in personal capacity being a State

Subject. Mere mentioning by the respondent that he is General Secretary of High Court Bar Association, cannot be taken in isolation to say that the writ petition has been filed on behalf of High Court Bar Association. It is also evident from the affidavit filed in the High Court by the respondent in support of the application for leave to amend that the same was sworn in being "Raja Waseem Younis, Advocate, having office at District Bar Association, Mirpur". It has already been mentioned that in the writ of quo warranto the petitioner is just a relator/informer and like other writ petitions it is not required that he must show that he has any personal interest or right or is aggrieved person., thus, the argument of the learned counsel for the appellant is hereby repelled. The case law relied upon in this context is also not relevant.

42. Before parting with the judgment, we deem it necessary to observe that most of the case law referred to by both sides is not applicable to the case in hand, being having distinguishable facts and propositions. Moreover, the majority of the case law

referred to relates to the points which, as stated hereinabove, are now past and closed transaction in the light of judgment of this Court dated 24.08.2019.

For the foregoing reasons, the titled appeal, having no substance, is dismissed.

CHIEF JUSTICE JUDGE

Muzaffarabad,