

SUPREME COURT OF AZAD JAMMU AND KASHMIR

[Review Jurisdiction]

PRESENT:

*Raja Saeed Akram Khan, ACJ.
Ghulam Mustafa Mughal, J.*

Civil review petition No.22 of 2020
(Filed on 17.08.2020)

1. Azad Government of the State of Jammu and Kashmir through Secretary Law, Justice, Parliamentary Affairs and Human Rights Department, Block No. 10, New Civil Secretariat Muzaffarabad.
2. President of Azad Government of the State of Jammu and Kashmir through Secretary to the President having office at President Secretariat, Jalalabad Muzaffarabad.
3. Secretary to the President having office at President Secretariat Jalalabad Muzaffarabad.
4. Department of Law, Justice, Parliamentary Affairs and Human Rights, Muzaffarabad through its Secretary.
5. Secretary Law, Justice, Parliamentary Affairs and Human Rights, Department,

Block No. 10 New Civil Secretariat
Muzaffarabad.

6. Muhammad Ejaz Khan Advocate, Ex-Judge Azad Jammu and Kashmir High Court, Muzaffarabad.
7. Chaudhary Khalid Yousaf Advocate, Ex-Judge Azad Jammu and (Kashmir High Court, Muzaffarabad.
8. Raza Ali Khan Advocate, Ex-Judge Azad Jammu and Kashmir High Court, Muzaffarabad.
9. Raja Sajjad Ahmed Khan Advocate, Ex-Judge Azad Jammu and Kashmir High Court, Muzaffarabad,

... PETITIONERS

VERSUS

1. Barrister Adnan Nawaz Khan, Advocate Supreme Court of Azad Jammu & Kashmir at. Rawalakot.
2. Shamshad Hussain Khan, Advocate Supreme Court of Azad Jammu and Kashmir, at Rawalakot.

3. Sardar Javed Sharif, Advocate High Court of Azad Jammu and Kashmir, at Rawalakot.
4. Raja Izzat Baig, Advocate High Court of Azad Jammu & Kashmir, at Rawalakot (Respondents 1 to 4 are Petitioners in Writ Petition No.1092/18 in the High Court)
5. Aamir Ali Awan, Advocate Supreme Court of Azad Jammu and Kashmir Muzaffarabad (Respondent No. 5 is the Petitioner in Writ Petition No. 1130/18 in the High Court)
6. Sardar Saif Ullah Hajazi Advocate High Court at District Bar Association Rawalakot.
7. Sardar Khalid Mehmood Advocate High Court, District Bar Association Rawalakot.
8. Malik Muhammad Asghar Advocate High Court District Bar Kotli.
9. Raja Tariq Mehmood Advocate High Court District Bar Kotli.
10. Ashfaq Anjum Advocate High Court, District Bar Kotli.
11. Mehmood-ul-Hassan Advocate High Court, District Bar Kotli.
12. Sardar Muhammad Ibrahim Khan, Advocate High Court, District Bar Kotli.

13. Raja Sakandar Iqbal Advocate High Court, Tehsil Bar Hajira.
14. Wajid Ali, Advocate High Court, Tehsil Bar Hajira.
15. Khalil Qaiser Advocate High Court, Tehsil Bar Hajira.
16. Muhammad Amin Advocate High Court Tehsil Bar Hajira.
17. Javed Ayub Advocate High Court Tehsil Bar Hajira.
18. Sardar Raees Inqlabi Advocate High Court, Tehsil Bar Hajira.
19. Arslan Nisar Advocate High Court, District Bar Sudhnoti.
20. Sajjad Zia Advocate High Court, District Bar Sudhnoti.
21. Ahmed Fraz Advocate High Court, President Tehsil Bar Association Thorar, District Poonch. (Respondents No. 6 to 21 are Petitioners in Writ Petition No. 1194/18 in High Court).
22. Ch. Muhammad Mumtaz Advocate Supreme Court, AJ&K, Mirpur, former Vice Chairman of AJK Bar Council.

23. Ch. Muhammad Riaz Alam Advocate Supreme Court Mirpur, former President District Bar Association & Member AJK Bar Council.
24. Ch. Shakeel Zaman Advocate Supreme Court AJK, Mirpur, Member AJK Bar Council.
25. Mirza Muhammad Amin Ba|g, Advocate High Court Mirpur (former ,Senior Vice President District Bar Association Mirpur).
26. Ch. Tehseen Ahmed Advocate Supreme Court of AJK Mirpur, former General Secretary District Bar Association Mirpur.
27. Kabeer Ahmed Hashim Advocate Supreme Court Mirpur, Joint Secretary AJK Supreme Court Bar Association.
28. Muhammad Muddasar Iqbal Advocate Mirpur, former General Secretary District Bar Association.
29. Khawaja Muhammad Ilyas Advocate High Court AJK Mirpur.
30. Shamraiz Asif Advocate High Court Mirpur. (Respondents No. 22 to 30 are Petitioners in Writ Petition No. 1235/18 in the High Court).

31. Fayyaz Ahmed Janjua, Advocate Supreme Court of Azad Jammu and Kashmir, Member Central Bar Association Old Secretariat Muzaffarabad. (Respondent No. 31 is Petitioner in Writ Petition No. 1255/18 in High Court).
32. Shahid Ajmal Advocate Supreme Court, Member Sahensa Bar Association Kotli Azad Kashmir. (Respondent No. 32 is Petitioner in Writ Petition No. 1296-A/18 in High Court)

..... RESPONDENTS

33. Chairman Azad Jammu and Kashmir Council through Secretary Azad Jammu and Kashmir Council, having office at AJK Council Secretariat Sector F-5/2 Islamabad.
34. Azad Jammu and Kashmir Council through its Secretary having office at AJK Council Secretariat Sector F-5/2 Islamabad.
35. Secretary Azad Jammu and Kashmir Council Secretariat, having office 'at AJK Council Secretariat Sector F-5/2 Islamabad.

36. Joint Secretary Azad Jammu and Kashmir Council Secretariat, having office at AJK Council Secretariat Sector F-5/2 Islamabad.
37. Minister for Kashmir Affairs & Gilgit-Baltistan, Red Zone Islamabad. (Proforma Respondents 33 to 37 are Respondents in Writ Petition No. 1092/18, 1130/18, 1194/18, 1235/18, 1355/18, 1296/18 in High Court)
38. Registrar Supreme Court of Azad Jammu and Kashmir Muzaffarabad.
39. Registrar High Court of Azad Jammu and Kashmir Muzaffarabad. (Proforma Respondents No. 38 and 39 are Respondents in Writ Petition No. 1235/18 and 1255/18 in High Court)
40. Accountant General Azad Jammu and Kashmir Muzaffarabad.
41. AJ&K Bar Council, through its Vice Chairman having his office at Old 'Kacheri Muzaffarabad.
42. Supreme Court Bar, through its President Supreme Court Bar having his office at Supreme Court Building Muzaffarabad.

43. High Court Bar, through its President having his office at Block-A, Old ' Secretariat Muzaffarabad.
44. Central Bar Association, through its President Central Bar Association Muzaffarabad.
45. Mirpur Bar Association, through its President Mirpur Bar AJK.
46. Rawalakot Bar Association, through its President having its office at District Complex Rawalakot.
47. Kotli Bar Association, through its President having his office at District Court Complex Kotli AJ&K. (Proforma Respondents No. 40 to 47 are Respondent and Proforma Respondents in Writ Petition No. 1255/18 in High Court).

.... PROFORMA RESPONDENTS

(In the matter of review from the judgment of this Court dated 17.07.2020 in civil appeals No. 111, 112, 113, 114, 115, 116 and 484)

FOR THE PETITIONERS: Sardar Tahir Anwar Khan, Raja Ibrar Hussain and Ch.

Shoukat Aziz,
Advocates.

FOR THE RESPONDENTS: Barrister Hamayun
Nawaz Khan, Mr.
Khalid Rasheed Ch.,
Barrister Adanan
Nawaz Khan and
Syed Shahid Bahar,
Advocates.

Dates of hearing: 15.12.2020

JUDGMENT: -

Raja Saeed Akram Khan, ACJ—The
petitioners by filing instant petition has sought
review of the judgment of this Court handed
down on 17.07.2020, whereby the appeals filed
by the respondents, herein, have been accepted
and the appointments of the private petitioners,
herein, have been declared *ultra vires* the
Constitution and without lawful authority. The
review petition was decided on 15.12.2020,
through the following short order: -

*"The titled review petition was filed on
17.08.2020. On 02.12.2020 the case
was fixed for preliminary arguments,*

however, Raja Muhammad Hanif Khan, Advocate, one of the counsel for the petitioners sought adjournment on the ground that his client has instructed him not to argue the case in absence of Sardar Tahir Anwar Khan, Advocate. Although, his conduct was very unbecoming, however, his request was accepted and keeping in view the fact that one of us (Mr. Justice Ghulam Mustafa Mughal) is going to retire on 27th instant, the case was fixed with the consent of learned counsel for the parties at Mirpur on 08.12.2020. On the date fixed, once again Raja Muhammad Hanif Khan, Advocate, requested for adjournment due to some injury. Another application was also moved by Sardar Tahir Anwar Khan, Advocate, for adjournment on baseless grounds, which was turned down. On the said date, Raja Muhammad Hanif Khan, Advocate, was asked that when he will be available to argue the case, he stated that on 15th instant he will positively

argue the case, hence, with his consent the case was fixed for today. Despite the fact that yesterday the learned counsel appeared before the Court and argued the lengthy cases, today he has again filed an application for adjournment on the ground of ill-health, thus, it is clear that the application for adjournment is frivolous and filed with mala fide intention. The same stands rejected.

It appears that for one or other reason, the petitioners are intentionally avoiding to argue the case. When the other learned counsel appearing on behalf of the petitioners were asked to argue the case otherwise the Court will decide the case on the basis of material available (as has already been observed in short order dated 02.12.2020) they stated that it is upto the Court to pass appropriate order. The learned counsel were duly engaged and under obligation to argue the case, hence, their conduct fully supports our view

that the petitioners are not ready to argue the case at any cost.

Although, the conduct of counsel for the petitioners demands dismissal of review petition for lack of interest, however, in the interest of justice we had gone through the grounds taken in the review petition and after due deliberation, reached the following conclusion: -

- (i) No error or mistake apparent on the face of the record has been pointed out, hence, the review petition is dismissed for the reasons to be recorded later on;*
- (ii) It may be observed here that the Worthy President of Azad Jammu and Kashmir has been unnecessarily dragged into present litigation without adhering to the fact that he is the constitutional head of the State and holds highly prestigious office. Under Constitution, he is immuned*

from any sort of proceedings in relation to performance of functions of his office. It appears that an attempt has deliberately been made to malign the office of the President on one hand and undermine the authority of this Court on the other hand, whereas, no such observations relating to the office of the President have been made in the judgment under review which can be made basis for review of the judgment; and

(iii) It may also be observed that surprisingly in the review petition the Government has associated the private petitioners No.6 to 9 which gave very bad impression for the reason that Government is not supposed to come forward for contesting the case of private petitioners No.6 to 9.”

2. Before recording the detailed reasons of the above short order, the precise facts of the case are incorporated hereunder: -

Five positions of Judges fell vacant in the Azad Jammu and Kashmir High Court; whereupon, the process for appointment against the same was initiated and consequently, private petitioners, herein and another, were appointed vide notification No.LD/AD/711-30/2018, dated 21.05.2018. The respondents, herein, challenged the aforesaid appointments before the High Court by filing separate writ petitions on numerous grounds. The writ petitions were contested by the other side. The learned Division Bench of the High Court, after necessary proceedings, unanimously through judgment dated 17.09.2019, dismissed the writ petitions to the extent of the appointments of private petitioners, herein, however, accepted the

same to the extent of Ch. Muhammad Munir (who is not party to the review proceedings), while setting aside his appointment as Judge of the High Court. The respondents, herein, challenged the said judgment of the High Court before this Court. This Court through judgment under review decided the appeals in the manners indicated in the preceding paragraph.

3. We have observed in the short order dated 15.12.2020, that despite clear direction of the Court that further adjournments in the case shall not be granted the counsel for the petitioners for one or the other reason, have tried to linger on the matter. The Court vide order dated 02.12.2020, had already held that in case of non-appearance of the learned counsel for the parties on account of any reason, the case shall be decided on the basis of the material made available on record. As the counsel for the petitioners failed to argue the

case despite granting a number of opportunities by the Court, therefore, in view of the previous order no other option was left with the Court except to decide the review petition after taking into consideration the grounds taken in the memo of review petition and the judgment under review.

4. Here we would like to observe that a review by its very nature is not an appeal or a re-hearing merely on the ground that either party conceives himself to be dissatisfied with the conclusion reached at by the Court. Under the Azad Jammu and Kashmir Supreme Court Rules, 1978, this Court may review its judgment in a civil proceeding on the grounds similar to those mentioned in Order XLVII, Rule 1 of C.P.C. and in a criminal proceeding on the ground of an error apparent on the face of record. To understand the nature of grounds in civil proceedings which may warrant review of

a judgment or order, Rule 1 of Order XLVII, C.P.C. has to be kept in view which is reproduced hereunder: -

"1 Application for review of judgment- (1) Any person considering himself aggrieved; -

- (a) *by a decree or orders from which an appeal is allowed, but from which no appeal has been preferred;*
- (b) *by a decree or order from which no appeals allowed; or*
- (c) *by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain*

a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.”

From the bare reading of the statutory provision reproduced hereinabove, it becomes clear that only an aggrieved person can seek review of the judgment. The term 'aggrieved person' has been defined by the superior Courts in a plethora of judgments wherein it has been held that an aggrieved person is one whose rights are threatened or being denied or whose rights have been affected by a decision. Moreover, an aggrieved must be a person who has suffered a legal grievance or who must be a person against whom a decision has been pronounced which has wrongly deprived him of something or wrongfully refused him something or wrongfully affected his title to something. Reference may be made to a case reported as *Ch. Muhammad*

Yasin v. Sardar Muhammad Naeem Khan and 3 others [2010 SCR 17], wherein the term 'aggrieved person' has been elaborated in the following manners: -

"An aggrieved party is one whose rights are threatened or whose rights are being denied or whose rights have been affected by a decision. The word "rights" is not used in strict juristic sense. It is sufficient if the person alleging to be an aggrieved has a personal interest in the performance of a legal duty which if not performed would result in the loss of some personal advantage. A party who stands to lose or gain an advantage by observance or non-observance of law is an aggrieved party. A person aggrieved must be a person who has suffered a legal grievance or he must be a person against whom a decision has been pronounced which has wrongly deprived him of something, or wrongfully refused him something or

wrongfully affected his title to something.”

In the case in hand through judgment under review this Court set aside the appointments of the private petitioners, herein, on the ground that the consultation with the Constitutional consultees, i.e. Chief Justice of the High Court and Chief Justice of AJ&K, which is mandatory requirement of law, has not properly been made. We wonder how the Government has become aggrieved from the judgment of the Court. In this regard no explanation on the part of the Government is available on record. Even there was no occasion or legal justification for the Government to come forward for contesting the case of the private petitioners rather due to such action anybody can presume that the Government had appointed the Judges in the High Court at its own sweet will; whereas, in view of the concept of independence of judiciary there is no role of the Executive in the

appointment of the Judges in the High Court. Keeping in mind this situation, we observed in the short order that the association of the Government with the private petitioners in the line of the petitioners has conveyed a bad impression in the mind of general public. In the case law reported as *Bashir Ahmed Mughal v. Azad Government and 6 others* [2014 SCR 1258], this Court comprehensively discussed the concept of independence of judiciary and after considering the mode of appointment of the Judges provided in the Constitutions of the different Countries held that there is no concept of appointment of Judges by the Executive at their whim. For better appreciation the relevant findings recorded in the referred report are reproduced here which read as under: -

"A bare reading of these Articles clearly speaks that all the appointment in the judiciary even at the district level are to be made with

consultation. There is no concept of appointment of judges in an arbitrary manner by the executive at their whim.”

It also appears that in the instant matter, the worthy President has been dragged in litigation unnecessarily; in spite of the fact that under the scheme of the Constitution the worthy President enjoys complete immunity. The worthy President is not answerable to any Court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties. Although, the immunity granted by the Constitution does not take away the powers of the Court to review judicially the validity of the action taken or done by the worthy President, however, in the matter under review while dealing with the proposition, it has nowhere held that the exercise of powers by the worthy

President is based on mala-fide. It is not clear as to what sort of the legal right of the worthy President has been affected by rendering the judgment under review. After examining the whole record, we are of the considered view that no question has been raised on the bona fide of the worthy President in the judgment under review; therefore, he also does not come within the definition of an aggrieved person. It seems that due to some misconceptions, the review has been filed on behalf of the worthy President. We deem it proper to clarify here that it is the authority of the Court to examine the validity of the acts done by the worthy President and if the Court comes to the conclusion that any function performed by the worthy President is not consistent with the scheme of law, it doesn't mean that the Court targeted the bona fide of the worthy President. In the instant matter, at one hand the legal team of the

worthy President at the time of hearing of appeals while taking the plea that the Court has no jurisdiction to examine the acts done by the President tried to undermine the authority of the Court and on the other hand dragged the worthy President in the litigation by giving the wrong impression that the Court has delivered the judgment against the worthy President. In view of the nature of the instant review petition neither the Government nor the worthy President are aggrieved persons in any way as no such decision has been made which may affect their right, interest or title etc. therefore, to their extent the review petition is not maintainable on this sole ground.

5. So far as, the case of the private petitioners is concerned, they should have filed the independent review petition as being private persons they cannot be associated with the Government for filing the review petition,

hence, from this angle the review petition of the private petitioners is also not maintainable. Moreover, even on the ground of lack of interest of the learned counsel for the petitioners, as has been observed in the short order, the review petition is liable to be dismissed, but to do the complete justice and to clarify some misconceptions, we have examined the points raised in the review petition. The perusal of the contents of the review petition shows that almost in all the grounds a single point has been raised in different ways that the consultation was made in accordance with law but this Court failed to appreciate the record. At the end, it has been stressed that no specific mode for carrying out the process of consultation is provided and under law the worthy President has to seek panel for the purpose of consultation from the Chief Justice of the High Court and when the Chief Justice sends the

panel then the President sends the same to the Chief Justice of Azad Jammu and Kashmir and after seeking the panel from him seeks the advice from Azad Jammu and Kashmir Council for issuing the appointment orders and this practice had validly been done in the instant case. This Court in the judgment under review after thoroughly discussing the consultation process made in the instant matter and the relevant law on the subject in paragraphs No. 12 to 14, has held that the consultation has not been made in accordance with law. The crux of the aforesaid paragraphs reads as under: -

"In the light of the discussion (supra), we have arrived at the conclusion that the consultation in the present matter has not been made in accordance with the spirit of the provisions of Article 43(2-A) of the Constitution and the dictum laid down by the superior Courts."

The Hon'ble Chief Justice of AJ&K (the then) while sending the panel through letter dated 23.12.2017, has also clarified the concept that mere furnishing of the list of candidates does not amount to consultation and further highlighted that according to the enunciated principle of law, consultation means effective, meaningful, consensus oriented and simultaneous which requires joint meeting and deliberation of the concerned. In the review petition, no error has been pointed out and by ignoring the dicta laid down by the superior Courts in respect of the consultation process and the observation made by the Hon'ble Chief Justice AJ&K (the then) in the letter dated 23.12.2017, review has been sought on arbitrary ground, discussed hereinabove.

6. In the review petition another ground has been taken with vehemence that the Rule of Primacy was attracted in the case but this

Court has not considered its legal position. We are afraid that during the course of hearing of appeals, the learned counsel for the petitioners, herein, in the open Court conceived that Rule of Primacy has not been applied in the matter rather the appointments have been made after proper consultation; even then this Court while handing down the judgment under review, in the interest of justice, formulated/considered the point; whether the Rule of Primacy is attracted in the instant case or not? In paragraph No.15, of the judgment under review this Court examined the pith and substance of the matter required for applicability of the Rule of Primacy, at all corners and thereafter held that the Rule of Primacy is not attracted in the present case. For better appreciation the last portion of the relevant paragraph is reproduced here which reads as under: -

"The expression given in both the summaries, sent by the worthy President to the Council, is sufficient to hold that the eventuality requiring for application of the Rule of Primacy, discussed in the case law referred to hereinabove, is not available in the instant case. In the first summary, the worthy President mentioned that the consultation has been duly made with the Chief Justice of Azad Jammu and Kashmir and Chief Justice of the High Court. This summary was rejected by the Council and coupled with the other grounds, it was pointed out that in the summary all the persons recommended by the President are the nominees of the Chief Justice of Azad Jammu and Kashmir with none of them having been recommended by the Chief Justice of the High Court. In view of the clear findings of the Council, if the eventuality required for applying the Rule of Primacy existed, the worthy President should have clarified the position, but the President in the subsequent summary has not pointed out any such eventuality rather he has mentioned that the "consultation with

the Chief Justice of Azad Jammu and Kashmir and Chief Justice of the High Court conducted under section 43(2-A) of the Interim Constitution Act, 1974, remain valid and has been re-confirmed by the two Hon'ble Chief Justices". In the subsequent summary sent to the Council by the worthy President while mentioning the names of the candidates, an order of priority (consisting of the names of five (5) persons) was set by the President himself in which two (2) names from the list furnished by the Chief Justice of the High Court were included which was later on approved by the Council; meaning thereby that the Rule of Primacy has not been applied as under law in case of difference of opinion between the consultees, the primacy shall be given to the opinion of the Chief Justice of Azad Jammu and Kashmir and it is not the discretion of the Executive to pick the names of the candidates at his own choice. In view of the contents of the summary, it becomes crystal clear that the Rule of Primacy was neither attracted nor

applied, therefore, further deliberation on the point is no more required."

7. Amongst others, a point has also been raised in the review petition that this Court has observed in the impugned judgment that the Council rejected the summary sent by the worthy President, meaning thereby that the Court has vested the powers to the Council to exercise a power of revision or appeal on the consultative process. It may be observed here that the Council returned the summary to the worthy President on the ground that the same is not in accordance with the guidelines given in the case reported as *Muhammad Younas Tahir and another v. Shoukat Aziz Advocate Muzaffarabad and others* [2012 SCR 213] and in the judgment under review if word 'rejection', has been used, it does not change the law as law is very much clear on the point that the office of the worthy President or the Council have no authority to reject the consultative

process duly made or to make changes in the names of the candidates recommended by the consultees; even then we clarify here that the word 'rejected' should be taken in the sense of word 'returned'. Here we would also like to clarify another observation made in the judgment under review by this Court, pointed out in the review petition, 'that no minutes of joint meetings of the consultees are available on record', we aware of the fact that no such practice is required under law, however, the purpose of such observation was only that nothing is available on record to show that any joint meeting of the consultees was ever convened, even in this regard the letters or summaries of the office of the worthy President are also silent. From the observation discussed hereinabove, it cannot be presumed that preparation of the minutes of meetings of the consultees is mandatory requirement of law.

8. In a number of grounds, the different paragraphs of the judgment of the High Court and the concise statements have been reproduced and it has been tried to develop the argument that this Court has not appreciated the record in true perspective, however, no specific error or mistake on the face of record has been pointed out. In the judgment under review all the points involved in the matter have duly been attended and resolved in accordance with law; therefore, this review petition is also not tenable on merit.

Above stated are the detailed reasons of our short order dated 15.12.2020, through which the instant review petition was dismissed. No order as to costs.

ACTING CHIEF JUSTICE JUDGE

Muzaffarabad,
17.12.2020

