

SUPREME COURT OF AZAD JAMMU AND KASHMIR

[Appellate Jurisdiction]

PRESENT:

Raja Saeed Akram Khan, CJ.
Raza Ali Khan, J.

Civil PLA No.57 of 2021
Civil Misc. No.69 of 2021
(Filed on 19.05.2021)

Ahmed Saad Khan

.....PETITIONER

VERSUS

Azad Government & others

....RESPONDENTS

[On appeal from the judgment of the High Court dated
18.02.2021 in writ petition No.999/2017]

(Application for interim relief)

FOR THE PETITIONER: Mian Sultan Mehmood,
Advocate.

FOR THE RESPONDENTS: Mr. Muhammad Zubair
Raja, Addl. Advocate-
General.

Date of hearing: 14.06.2021

JUDGMENT

Raja Saeed Akram Khan, CJ—The captioned petition for leave to appeal has arisen out of the judgment of the High Court dated 18.02.2021, whereby the writ petition filed by the respondents, herein, has been accepted.

2. The brief facts of the case are that the respondents, herein, who are practicing lawyers and members of Azad Jammu and Kashmir High Court Bar Association, filed a writ petition before the High Court claiming therein that being the members of legal fraternity they believe in and struggle for the supremacy of Constitution and enforcement of law. It was alleged that under Article 47 of the Azad Jammu and Kashmir Interim Constitution, 1974 the Legislative Assembly of the Azad Jammu and Kashmir may by Act establish one or more Administrative Courts or Tribunals. In furtherance of the provisions of Article 47 of the Constitution, the Azad Jammu and Kashmir Government adapted the Pakistan (Administration of Evacuee Property) Act, 1957 through Azad Jammu and Kashmir Adaptation of Laws Act, 1959. After adaptation of the Act the Government is empowered to appoint Custodian of Evacuee Property under the said Act. The Government may also make Rules under section 57 of Act, 1957 regarding terms and conditions of service of Custodian and other officers appointed under this Act. It was alleged that the Government keeping in view the functions and duties of the Custodian introduced the

Azad Jammu and Kashmir Custodian of Evacuee Property (Terms and Conditions of Service) Rules, 1992, under which a person qualified to be the Judge of High Court may be appointed as Custodian. Thereafter, The Government decided to amend the said Rules and a proposal for the purpose was sent to Law Department, however, the respondents contrary to the draft prepared by Law Department introduced the Azad Jammu and Kashmir Custodian of Evacuee Property (Appointment, Terms and Conditions of Service) Rules, 2017 whereby the method of appointment and removal of Custodian is provided under Rule 4, which provides appointment of Custodian (i) by transfer of a suitable officer of Management Group Service holding grade BPS-20 on regular basis; or (ii) any person who is a State Subject and has minimum legal practice as an Advocate of High Court of Azad Jammu and Kashmir for not less than eight years. The stance of the respondents was that Rules, 2017 are illegal, arbitrary, violative of the Constitution and have been framed just to accommodate the kith and kin of the respondents. The writ petition was resisted from the other side. After necessary proceedings, the learned High Court through

the impugned judgment dated 18.02.2021 accepted the writ petition in the following manner:-

“In view of what has been discussed above, the writ petition is accepted and the impugned Azad Jammu and Kashmir Custodian of Evacuee Property (Appointment, Terms and Conditions of Service) Rules, 2017 are hereby set aside to the extent of Rule 4 which provides the method of appointment and removal of Custodian. The Government is directed to introduce a fresh amendment in the rules keeping in view the status and the job of Custodian for which eligibility criteria should not be less than a person eligible to be appointed as Judge of High Court.”

Hence, this petition for leave to appeal.

3. Mian Sultan Mehmood, Advocate, the learned counsel for the petitioner stated that the impugned judgment passed by the High Court is against the principle laid down by this Court as well as the Supreme Court of Pakistan. He stated that the Supreme Court of Pakistan in the case reported as *Sheikh Riaz-ul-Haq and another vs. Federation of Pakistan and others* [PLD 2013 SC 501] has held that the appointment of Chairman/Member of a Tribunal performing ‘judicial functions’ shall be made with consultation of the concerned Chief Justice. The reason for this is that the Tribunal should not be under the administrative and financial control of Executive. In the case of similar nature, this Court in the case reported

as *Syed Khalid Hussain Gillani vs. Azad Govt. & others* [2016 SCR 228] this Court held that for maintaining the transparency and independence of judiciary the appointment in the office of Chairman Service Tribunal has to be made through consultation process. He added that the Custodian is entrusted with pure judicial functions like the Chairman Service Tribunal, hence, there was no occasion for the High Court to ignore the mode of appointment and removal of judicial officers already settled by apex Court. Although, the learned High Court in its judgment has referred to both the above cases but while issuing direction to the Government the criteria already settled by this Court has been ignored, hence, to this extent the impugned judgment of the High Court is liable to be modified. As important legal propositions are involved, hence, grant of leave is justified.

4. Conversely, Mr. Muhammad Zubair Raja, the learned Additional Advocate-General stated that the official respondents are bound to process the case in the light of judgment of this Court delivered in the case titled *Azad Govt. & others vs. Syed Khalid Hussain Gillani* [2016 SCR 228], as prayed by the petitioner in

the petition for leave to appeal. The impugned judgment of the High Court is well in accordance with law, hence, no interference is required.

5. After hearing the learned counsel for the parties, we are of the view that the proposition that in the light of judgment of this Court reported as 2016 SCR 228 and well as that of Supreme Court of Pakistan reported as PLD 2013 SC 501 what will be the method of appointment and removal of the Custodian; is of public importance requiring detailed deliberation which can only be made in regular appeal. Leave to appeal is, therefore, granted. The petitioner shall deposit security of Rs.1,000/- within a period of one month otherwise the leave granting order shall automatically stand rescinded. The office is directed to proceed further in accordance with rules.

As leave has been granted and the petitioner has succeeded in making out prima facie arguable case, hence, till disposal of the appeal the interim relief already granted shall prevail and no appointment shall be made.

CHIEF JUSTICE

JUDGE
(J-II)

Mirpur,
14.06.2021