

SUPREME COURT OF AZAD JAMMU AND KASHMIR

[Appellate Jurisdiction]

PRESENT:

Raja Saeed Akram Khan, CJ.

Civil PLA No.71 of 2021

Civil Misc. No.90 of 2021

(Filed on 21.06.2021)

Mian Muhammad Shafique s/o Mian Muhammad Shafi r/o Jhaag Sharif, Tehsil Athmuqam, District Neelum (Candidate for Membership of LA-26 Legislative Assembly of AJK)

.....PETITIONER

VERSUS

1. Azad Govt. of the State of Jammu and Kashmir through Secretary Law, Justice Parliamentary & Human Rights Department having his office at New Secretariat, Muzaffarabad.
2. Secretary, Law, Justice, Parliamentary Affairs & Human Rights Department having his office at New Secretariat, Muzaffarabad.
3. Secretary Services and General Administration Department having his office at New Secretariat, Muzaffarabad.
4. Secretary to President of Azad Jammu and Kashmir having his office at Presidential Secretariat, Muzaffarabad.
5. Law Department through Secretary Law, Justice, Parliamentary Affairs and Human Rights Department having his office at New Secretariat, Muzaffarabad.
6. Azad Jammu and Kashmir Legislative Assembly through its Secretary having his office at Assembly Secretariat, Muzaffarabad.

FOR THE RESPONDENTS: Raja Inamullah Khan,
Advocate-General and
Mr. M. Sagheer Javed,
Advocate.

Date of hearing: 21.06.2021

ORDER

Raja Saeed Akram Khan, CJ– The captioned petition for leave to appeal has arisen out of the judgment of the High Court dated 16.06.2021, whereby the writ petitions filed by the petitioner and proforma-respondents, herein, have been dismissed. Vide short order dated 21.06.2021 the titled petition for leave to appeal

2. The facts of the case, as simply stated, are that the petitioner, herein, was serving in the Azad Jammu and Kashmir Legislative Assembly as Reporter, B-16. Later on, he resigned from the office on 01.09.2021. His resignation was accepted on 08.09.2020. It is alleged that the petitioner decided to contest the General Elections of the Legislative Assembly from Constituency LA-XXVI, District Neelum Valley and received marvellous response from the public at large due to which the respondents, in connivance with each other, just to

interrupt petitioner's political career introduced the Azad Jammu and Kashmir Elections (Amendment) Ordinance, 2021 [Ordinance VIII of 2021] (*hereinafter to be referred as "impugned Ordinance"*) on 10.05.2021. According to section 5 of the impugned Ordinance, an amendment has been introduced in section 31 of the Azad Jammu and Kashmir Elections Act, 2020 (*hereinafter to be referred as "Elections Act"*) and for contesting the General Elections, a condition of expiry of two years from the date of cessation of service of AJ&K has been made mandatory. The petitioner, feeling dissatisfied, invoked the extraordinary writ jurisdiction of the High Court. During pendency of the writ petition, the impugned Ordinance was placed before the Azad Jammu and Kashmir Legislative Assembly and the same was passed as Act XIII of 2021. The Act passed by the Assembly was challenged by the petitioner through amended writ petition. The writ petition was clubbed with other three petitions of similar nature. After necessary proceedings, the learned High Court

dismissed the writ petitions through the impugned judgment, hence, this petition for leave to appeal.

3. Barrister Humayun Nawaz Khan, Advocate, the learned counsel for the petitioner addressed very lengthy arguments. The gist of his arguments is that the petitioner in view of the prevailing law resigned from the service of AJ&K to contest the General Elections. He applied for the party ticket for contesting Elections and successfully got the same. At the time of resignation, there was no restriction upon the retired government servants to participate in the election after expiry of two years from the date of retirement/relinquishing the office but the respondents just to knock out the petitioner from contesting the elections promulgated the impugned Ordinance, hence, the petitioner was left with no option except to invoke the extraordinary writ jurisdiction of the High Court. The learned High Court while admitting the writ petition for regular hearing suspended the operation of section 5 of the impugned Ordinance on 26.05.2021, however, the respondents without

having regard to the suspension order passed by the High Court laid the impugned Ordinance before the Azad Jammu and Kashmir Legislative Assembly on 28.05.2021 which was made an Act bearing No.XIII of 2021 despite the fact that the operation of section 5 of the impugned Ordinance was suspended by the High Court, thus, it could never be been presented before the Legislative Assembly. This fact was specifically brought into the notice of House by the member of Opposition but despite this the impugned Act has been enacted in derogation of the constitutional provisions. He argued that the impugned Ordinance has been issued without approval of the Cabinet as is evident from the letter dated 20.05.2021, whereas, according to the principle of law laid down by the apex Court of Pakistan, an Ordinance promulgated without approval of Cabinet is *ultra vires* the Constitution. In this regard, he referred to the case reported as *Mustafa Impex vs. Government of Pakistan & others* [PLD 2016 SC 808]. He further added that the impugned Ordinance has been issued in clear

violation of Rules 23(1)(b) and 25(1) & (6) of Rules of Business, 1985 and the procedure prescribed under law has not been adopted. He further added that the impugned Ordinance has been laid before the Assembly under Article 41(2) of the Azad Jammu and Kashmir Interim Constitution, 1974 read with Rule 34 of AJ&K Rules of Business, 1985, whereas, the same should have been presented as a separate Bill under Rule 32 of the AJ&K Rules of Business, 1985. He added that the impugned legislation is liable to be struck down for the reason that the same has been maneuvered just to knockout the petitioner from participating in the General Elections. It is an attack upon the fundamental guaranteed rights of the petitioner, whereas, section 6(c) of General Clauses Act, 1897 protects the accrued rights of the petitioner. He added that there was no record regarding presentation of matter for *post ipso facto* approval of impugned Ordinance under Rule 23(2) of Rules of Business, 1985. He further added that the impugned Ordinance has been promulgated at the

verge of the General Elections. If there was any intention of the Legislature to impose the disputed condition, the Ordinance should have been promulgated at least two years prior to the Elections but this important aspect has not been considered by the learned High Court while delivering the impugned judgment. In support of his arguments, he referred to the cases reported as *Jammu and Kashmir Tehrek Ammal Party and others vs. The Azad Jammu and Kashmir Government and another* [PLD 1985 AJK 1995], *Messrs Mustafa Impex & others vs. The Government of Pakistan & others* [PLD 2016 SC 808] and submitted that important legal propositions are involved, hence, grant of leave is justified.

4. Conversely, Mr. Muhammad Sagheer Javed, Advocate, the learned counsel appearing for respondent No.10 stated that contesting the General Elections is not an absolute fundamental right of a citizen, rather it is subject to some qualifications and disqualifications. He stated that

the impugned legislation has rightly been enacted. In order to challenge the impugned legislation, the petitioner has to show that the same is against the constitutional provisions or infringes any fundamental right guaranteed by the Constitution, whereas, no such ground has been taken by the petitioner. The argument of the learned counsel for the petitioner that after suspension of section 5 of the impugned Ordinance, the same was not available for presentation before the Legislative Assembly, is misconceived. This point has specifically been attended to by the learned High Court in the impugned judgment. Furthermore, the Ordinance has been laid before the Assembly as a separate Bill. He further argued that the other argument of the learned counsel for the petitioner that the approval of the Cabinet has not been obtained is also misconceived as it is evident from the letter dated 25.05.2021 that the Cabinet has unanimously approved the draft Bills presented before the Legislative Assembly. He added that no mala fide can be attributed to the Legislature, thus,

the argument of the learned counsel for the petitioner that the impugned Ordinance has been promulgated mala-fidely, just to knockout the petitioner from contesting the General Elections, is also misconceived. No legal ground exists for grant of leave, hence, this petition is liable to be dismissed.

5. Raja Inamullah Khan, Advocate-General, adopted the arguments advanced by Mr. Sagheer Javed, Advocate and further added that the petitioner has filed the writ petition with the misconception that his right has been snatched, whereas, in view of the impugned legislation his right to contest the election is still alive. He is at liberty to contest the General Elections after expiry of two years from the date of cessation from service. The petitioner in his resignation has not mentioned that he is resigning from the service of AJ&K to contest the General Elections, hence, it cannot be said that the impugned Ordinance has been passed just to knockout the petitioner from contesting the General Elections. He referred to the

case reported as *Ch. Yousaf vs. State of AJ&K* [2001 SCR 380] and prayed for dismissal of the petition.

6. I have heard the arguments of the learned counsel for the parties and gone through the record made available.

7. The controversy in hand relates to the right of the petitioner to contest the General Elections of the Legislative Assembly. It is alleged by the petitioner that he was a civil servant and in order to participate in the coming General Elections, he resigned from service. His resignation was accepted on 08.09.2020. The petitioner succeeded to obtain the party Ticket to contest the Elections for the Legislative Assembly as candidate for Pakistan Tehreek-e-Insaf, however, just to knockout the petitioner the respondents have promulgated an Ordinance on 10.05.2021 according to which, by introducing an amendment in the Elections Act, a condition has been imposed that a civil servant can only qualify to participate in the General Elections after elapse of two years period

from the date of cessation of service. Due to this act of the respondents, the accrued vested rights of the petitioner are stated to be infringed.

8. Legislature, executive and judiciary are three important organs of the State and all the three organs have been constitutionally mandated to act within their spheres demarcated under the Constitution. The Legislature is constitutionally entrusted with the powers to legislate. A legislation can be invalidated by the Court only when the same is found inconsistent with the Constitution or where there is violation of fundamental rights. In the case reported as *Fauji Foundation & another vs. Shamimur Rehman* [PLD 1983 SC 457], it has been held that:-

“Therefore, when a Court, which is a creature of the Constitution itself, examines the vires of an Act, its powers are limited to examine the legislative competence or to such other limitations as are in the Constitution; and while declaring a legislative instruction “it is not because the judicial power is superior in degree or dignity to the legislative power” but because it enforces the Constitution as a paramount law either where a legislative instruction is in conflict with the Constitutional provision so as to give effect to it or where the

Legislature fails to keep within its constitutional limits.”

In *Elahi Cotton Mills Ltd. Vs. Federation of Pakistan* [PLD 1997 SC 582] it has been held that:-

“..... the law should be saved rather than be destroyed and the Court must lean in favour of upholding the constitutionality of legislation, keeping in view that the rule of constitutional interpretation is that there is a presumption in favour of the constitutionality of the legislative enactments unless ex facie it is violative of a constitutional provision.”

In the instant case, the petitioner has not come to the Court with the stance that the Legislature has no competence to promulgate the impugned Act or the same is violative of the Constitution. In this state of affairs, it is clear that no eventuality exists to declare the impugned Ordinance ultra vires the Constitution or against the fundamental rights.

9. One of the arguments of the learned counsel for the petitioner is that the impugned Ordinance has been promulgated just to knockout the petitioner from contesting the General Elections of the Legislative Assembly. I am afraid that the

argument of learned counsel for the petitioner has no substance. When any person attributes mala fide to the Legislature he must have strong proof otherwise malice cannot be attributed to Legislature. It has been held by the apex Court of Azad Jammu and Kashmir in the case reported as *Azad Govt. & others vs. Inhabitants of Village Baghar* [2016 SCR 696] that for proving mala fide it should be specifically alleged and to be proved by cogent and reasonable evidence. The presumption of bona fide is attached to the Law promulgated by the President through Ordinance. In this regard, I would like to refer here the case reported as *Ch. Yousaf vs. State of AJ&K* [2003 SCR 380], wherein it has been held that:

“28. We fully endorse the view expressed in the above referred cases that malice cannot be attributed to the legislature without any strong proof. Under the scheme of the Constitution Act law can be enacted either by the Assembly or by the President in exercise of the powers available to him under section 41 of the Constitution Act. The Ordinance promulgated by the President, therefore, has got the same force and effect as that of the Act of the Assembly. The presumption that law is made with bona

fide reasons shall therefore apply also to such law which is enforced by the President through an Ordinance. The argument of the learned counsel for the appellants that the impugned Ordinance has been enacted with mala fide intention cannot be entertained in the absence of any evidence in support of such allegation.”

Similarly, in the case reported as *Fauji Foundation & another vs. Shamim-ur-Rehman* [PLD 1983 Supreme Court 457] it has been held that:-

“....in order to prove legislature mala fide the party alleging the same must prove it through some evidence before expecting adverse presumption against such legislation otherwise the presumption would be in favour of bona fide intention of the legislature.”

The citations (supra) make it abundantly clear that mala fide cannot be attributed to the Legislature until and unless the same is proved through strong and cogent evidence. Even otherwise, the learned counsel for the petitioner in the open Court has stated that he has not come to this Court with the stance that the impugned Ordinance is based on mala fide. Having due regard to the statement of the learned counsel for the petitioner, the perusal of the writ petition shows

that the petitioner's stance was that the impugned Ordinance has been promulgated just to knockout the petitioner from contesting the General Elections of the Legislative Assembly, however, he has failed to bring on record any strong proof in support of his contention.

10. During the course of arguments, the main stress of the learned counsel for the petitioner was that the impugned Ordinance was promulgated on 10.05.2021, however, the operation of its section 5 was suspended by the High Court on 26.05.2021 till next date of hearing i.e., 11.06.2021. The impugned Ordinance was laid before the Legislative Assembly on 28.05.2021, meaning thereby, the Ordinance was laid before the Assembly without disputed section 5. This act of the respondents amounts to challenge the authority of the High Court. It may be stated here that the learned High Court in its judgment has specifically observed that the Court has not issued any order for restraining the concerned authorities from further legislation. The observations of the High Court are fully

endorsed. Even otherwise, the Ordinance was presented in the Assembly as a separate Bill duly approved by the Cabinet as evident from the letter dated 25.05.2021, hence, the argument of the learned counsel for the petitioner is based on misconception, hence, the same is repelled.

11. The other argument that the impugned Ordinance was not available for presentation before the Assembly as the same was issued without approval of the Cabinet, also has no force. This point was also specifically taken into consideration by the learned High Court in the impugned judgment. Under Rule 23(2) of the Rules of Business, 1985, the Prime Minister may, in cases of urgency or other exceptional circumstances, give directions as to the manner of disposal of a case without prior reference to the Cabinet, but such case shall be reported to the Cabinet at the earliest opportunity thereafter. It has been resolved by the High Court in the impugned judgment that the matter was reported to the Cabinet in the earliest opportunity on 24.05.2021 and the Cabinet

approved draft Bills with the direction to place the same before the Assembly. In the light of the decision of Cabinet, the Bill was presented before the Assembly on 26.05.2021, hence, the argument of the learned counsel for the petitioner is baseless.

12. It has rightly been pointed out by the learned counsel for the respondents that the right to contest the Elections of Legislative Assembly is not a fundamental guaranteed right, rather it is a qualifying right. A person who wishes to be elected as a member of the Legislative Assembly has to show that he is qualified and is not subject to any of disqualifications prescribed by law. If any person fulfils the qualifications enumerated in the Constitution as well as the sub-ordinate legislation, he has right to be elected as a member of Legislative Assembly. It has been held by the superior Courts that contesting elections to the legislative bodies is not a fundamental right. Similarly, to impose a disqualification restricting right to contest the elections is not an infringement of a fundamental right. In this regard, the case

reported as *Jammu and Kashmir Tehrik Ammal Party vs. The Azad State of Jammu and Kashmir & others* [PLD 1985 AJ&K 95], can be referred wherein it has been held that:-

“27. The analysis of the genesis of political parties and their establishment leads to the inference that elections to local bodies, Legislative Assembly or the Council are a means and not an end in itself. Therefore, when a political party participates in an election, it does not mean that the participation in the election is an end in itself. Here, in the present case, the fact that political parties participated in the election and captured certain seats and now by operation of section 6-A, they are to lose those seats, this losing of the seats in the Assembly, can by no stretch of imagination be called non-infringement of a fundamental right. Mr. Qayum Malik rightly pointed out that to contest election is not a fundamental right and to impose a disqualification restricting the right to contest election is not an infringement of a fundamental right. Nevertheless, the operation of section 8-A, which suspends the functioning and political activities of political parties, obviously, abridges the basic right. For, we have already seen that the right to form an association means the right to continuance of the association.”

(underlining is mine)

Likewise, in the case reported as *Ch. Yousaf vs. State of AJ&K* [2001 SCR 380] it has been held that:-

“21. As we all know the right to participate in election has been made available to the State Subjects by a statute and not under any Fundamental Right conferred by the Constitution Act. The Constitution has authorised the legislature to enact the law relating to the elections of the Legislative Assembly. The legislative powers can be exercised either by the Assembly or under section 41 of the Constitution Act by the President. The Ordinance promulgated by the President has the same force and effect as an Act of the Assembly. The President in the present case has competently promulgated the under challenge Ordinance, therefore, it cannot be said that it lacks legal competence. Therefore; in the light of the above discussion, the arguments of the learned counsel for the appellants is misconceived that the impugned legislation is opposed to Fundamental Right No. 7.”

(underlining is mine)

In this background, I have no hesitation to hold that the act of resignation of petitioner from service of AJ&K does not accrue a vested right in his favour rather he has to fulfill the qualifications provided under law to contest the election. It may be stated here that the condition of expiry of two

years since cessation to be in service is specifically incorporated in Article 63(k) of the Constitution of the Islamic Republic of Pakistan, 1973, hence, the impugned condition is not altogether new one. This condition also previously remained the part of statutory Law in Azad Jammu and Kashmir.

13. The argument of the learned counsel for the petitioner that the impugned Ordinance has been issued in violation of Rules 23(1)(b) and 25(1) & (6) of Rules of Business, 1985, hence, it could not be presented before the Assembly; in view of the observations made hereinabove, is also repelled.

14. Similarly, the argument that the impugned Ordinance was not presented in the Legislative Assembly as a separate Bill under Rule 32 of the AJ&K Rules of Business, 1985 also has no force because according to letter dated 25.05.2021 the draft Bills were presented in the 48th meeting of the Cabinet and the Cabinet unanimously approved the draft Bills with the direction to present the same in the upcoming session of the Assembly. Likewise, the argument of the learned counsel for

the petitioner that there was no record of presentation of case for *post ipso facto* approval of impugned Ordinance, is also misconceived, hence, the same is repelled.

15. It is also worth mentioning here that the impugned Ordinance has been challenged on the ground that sufficient time has not been provided to the petitioner so that he may become eligible to contest the election. The learned counsel for the petitioner failed to point out any law under which the Legislature can be directed that an Act or Ordinance should be presented at a specific time. Even otherwise, the petitioner's right to contest the election has not been snatched rather the same is still alive and he can contest the next election. The petitioner has failed to prove that the impugned legislation is against the Constitution or amounts to infringement of any legal right, hence, the learned High Court has rightly declined to grant any relief to the petitioner. The impugned judgment of the High Court is perfect and legal one, calling for no

interference. No case of leave has been made out by the learned counsel for the petitioner

For the foregoing reasons, I have dismissed the titled petition through short order dated 21.06.2021.

CHIEF JUSTICE

Mirpur,
23.06.2021