

**SUPREME COURT of AZAD JAMMU AND KASHMIR**  
[Review Jurisdiction]

**PRESENT:**

*Raja Saeed Akram Khan, CJ.*  
*Kh. Muhammad Nasim, J.*  
*Raza Ali Khan, J.*  
*Muhammad Younis Tahir, J.*

Civil Review No.17 of 2020  
(Filed on 26.03.2020)

M. Tabassum Aftab Alvi, Ex-Chief Justice High Court of Azad Jammu and Kashmir, House No.ZB-1255/11, Gulshan Colony, Eid-Gah Road, Muzaffarabad.

..... PETITIONER

**VERSUS**

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

....RESPONDENT

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

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

4. Hon'ble President Azad Jammu and Kashmir through Secretary to President, Presidential Secretariat, Muzaffarabad.
5. Azad Government of the State of Jammu and Kashmir through Chief Secretary New Secretariat Complex, Muzaffarabad.
6. Law, Justice, Parliamentary Affairs and Human Rights Department through its Secretary, Civil Secretariat, Muzaffarabad.
7. Accountant General Azad Jammu and Kashmir, Sathra, Muzaffarabad.

.....PROFORMA RESPONDENTS

(In the matter of review from judgment of this Court dated 17.02.2020 in civil appeal No.587, civil PLA No.768 and civil review petition No.47 of 2019)

FOR THE PETITIONER:	In person.
FOR THE RESPONDENT:	Ex-parte
FOR THE PROFORMA-RESPONDENTS:	Mr. Bashir Ahmed Mughal, Advocate and Advocate-General.
Date of hearing:	09.02.2022

**JUDGMENT:**

**Raja Saeed Akram Khan, CJ:** The captioned petition has been filed for review of the judgment of this Court dated 17.02.2020, whereby the appeal as well as a petition for leave to appeal and review petition filed by the petitioner, herein, were dismissed.

2. Briefly stated, the facts leading to the filing of the instant review petition are that the appointment of the petitioner as Judge High Court was challenged before the High Court by way of a writ petition by the respondent, herein. The learned High Court vide its judgment dated 01.11.2019, accepted the writ petition and set aside the appointment of the petitioner as Judge High Court. The petitioner, herein, approached this Court by filing an appeal by leave of the Court and on some ancillary issues also filed a petition for leave to appeal as well as review petition and this Court after hearing the parties dismissed the appeal as well as the

petition for leave to appeal and review petition vide judgment under review dated 17.02.2020, hence, this review petition.

3. The petitioner appeared in person and stated that on the same point a writ petition earlier filed against the petitioner was dismissed and appeal filed before this Court was also dismissed, hence, the subsequent writ petition was hit by the doctrine of constructive res-judicata, but this point has not been decided in the impugned judgment in a legal manner. He further stated that the petitioner was elevated as Chief Justice of the High Court after due process of law vide notification dated 03.04.2017 and this notification was not challenged in the writ petition, as the office of Chief Justice is separate from the office of Judge, hence, the writ petition was not maintainable but this Court has overlooked this aspect of the case. In continuation of this

argument, he submitted that the appointment as Chief Justice of the High Court is not a promotion rather an altogether separate procedure has been provided in this regard in the Constitution; hence, without challenging the subsequent process of appointment of the petitioner as Chief Justice of the High Court and the notification issued in furtherance thereof, the petitioner could not be deprived of the accrued rights of pensionary benefits etc. as Chief Justice of the High Court. He referred to and relied upon the case law reported as *Chaudhry Muhammad Zaman v. Azad Government and others* [1996 SCR 171], *Muhammad Ilyas Khan and 5 others v. Sardar Muhammad Hafeez Khan and 4 others* [2001 SCR 179], *Shafqat Hayat v. Muhammad Shahid Ashraf and 18 others* [2005 SCR 57], Constitutional petition No.127 of 2012 [PLD

2013 SC 829] and *Bashir Ahmed Mughal v. Azad Govt. & 6 others* [2014 SCR 1258].

4. Mr. Bashir Ahmed Mughal, Advocate, the learned counsel appearing on behalf of proforma respondents No.2 and 3 stated that as the subsequent notification through which the petitioner was appointed as Chief Justice of the High Court was not challenged, hence, the petitioner is entitled to the pensionary benefits and other perks and privileges as admissible under law to the retired Chief Justice of the High Court. The learned Advocate-General also conceded this position.

5. We have heard the arguments. Before examining the record in the light of the submissions advanced at bar, we deem it proper to observe here that the purpose of review is limited to remedying an apparent error or the resultant grave injustice that has been the consequence of a decision of the

Court. The Court is thus, restricted in the exercise of the power of review only to the cases where there is an error apparent on the face of the record or in accordance with the provisions of Order XLVII, of the Code of Civil Procedure, 1908. The power to review the own decisions is a protective measure against the fallibility of the apex institution of the judiciary so as to ensure the delivery of complete justice and for doing the same the law has provided ample powers to this Court to rectify the error apparent on the face of record. Keeping in mind the parameters of the review, we appreciate the submissions made before us. The first point agitated by the petitioner was that earlier through a writ petition his induction as Judge of the High Court was challenged which was dismissed, hence, the succeeding writ petition on the same points, as were raised in the preceding writ petition, was not maintainable

being hit by the principle of constructive res-judicata, but this point has not been considered by this Court while handing down the judgment under review. We have perused the record cautiously. From the record, it transpires that the High Court had dismissed the subsequent writ petition in limine, but on appeal this Court vide judgment dated 24.08.2019, admitted the writ for regular hearing and remanded the case to the High Court with the direction to decide the same on merits. In the said judgment, this Court had attended and resolved the points raised, in respect of the maintainability of the writ petition. As the judgment/order dated 24.08.2019, was not objected to or challenged by the petitioner; hence, the same has attained finality and now the petitioner cannot raise the objection on the maintainability of the writ petition. Consequently, we repelled the argument of the petitioner that the subsequent



writ petition was hit by the principle of res-judicata and liable to be dismissed on this sole ground, but this Court while handing down the judgment under review has not considered this aspect of the case.

6. The other point agitated by the petitioner that in the writ petition only the notification dated 24.02.2011, was challenged, whereas, at the time of filing the writ petition he had already been elevated as Chief Justice of the High Court after due course of law which is a separate office and the process of induction in the office is also separate, hence, if his appointment as Judge of the High Court was invalid even then the subsequent development which was made validly, in accordance with law, could not be invalidated. The learned counsel appearing on behalf of Azad Jammu and Kashmir Council supported the petitioner's version and the learned Advocate-General also

conceded to this position. To reach the right conclusion, we firstly perused the memo of writ petition which shows that the respondent, herein, only challenged the notification dated 24.02.2011, whereby the petitioner was appointed as Judge of the High Court and neither in the grounds of writ petition nor in the prayer clause even incorporated a single line, challenging therein the subsequent notification dated 03.04.2017, through which the petitioner was appointed as Chief Justice of the High Court. The prayer clause of the writ petition, for better appreciation, is reproduced hereinbelow:-

“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.ID/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 set aside and declared to be without any legal effect, consequently the post of the 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 perusal of the judgment under review shows that though, this point has been discussed to some extent in paragraph 37, however, Constitutional provisions deal with the matter, the mode of appointment of the Chief Justice of the High Court and some other aspects involved in the matter have not been discussed. In such a situation when the appointment of the petitioner as Chief Justice of the High Court was not under challenged and

this Court has also not considered the point in depth, it would be in the interest of justice to consider the point; whether the office of Chief Justice of the High Court is distinct from the office of the Judge of the High Court or not, and in case the appointment of a Judge of the High Court is declared illegal then the subsequent appointment of the said Judge as Chief Justice can ipso facto be reversed? To meet this point at first, it would be appropriate to discuss the Constitutional provisions which deal with the appointments of the Judge of the High Court and the Chief Justice of the High Court. The same is reproduced hereinunder: -

“43(2-A) A Judge of the High Court shall be appointed by the President on the advice of the Chairman of the Council and after consultation-

(a) With the Chief Justice of Azad Jammu and Kashmir; and

(b) Except where the appointment is that of Chief Justice, with the Chief Justice of the High Court.”

The Constitutional provision (supra), provides a separate consultative process for the offices of the Chief Justice and the Judge of the High Court and Article 43(4) of the Constitution further clarifies the distinction between both the offices in the following terms: -

“43(4) Before he enters upon his office, the Chief Justice of the High Court shall make before the President, and an other Judge of the High Court shall make before the Chief Justice, an oath in the form set out in the First Schedule.”

Bare reading of the above referred Constitutional provision speaks that the oaths of both the offices are also separate. The expression, ‘enters upon his office’, given in the Constitutional carries the significance. It is clear from the Constitutional provision that a person

who is appointed as a Chief Justice is required by the Constitution to take separate oath before he enters upon his office and he shall be deemed to have entered upon his office on the day on which he takes the oath, which is also demonstrating the separation of the office of the Chief Justice from the office of a Judge. Another important factor to be discussed here is the proviso to Article 43(5) of the Constitution which provides that the President may appoint a retired Judge of the High Court of Pakistan to be the Chief Justice directly. Although, such an eventuality of appointing Chief Justice directly is subject to the nonavailability of the Judges in the High Court and this situation is missing in the present matter, however, an opinion can be gathered that if such a clog is imposed that initially the said person shall be appointed as Judge of the High Court and thereafter, he shall be elevated as Chief Justice then it can be

presumed that the invalid elevation in one office may affect the elevation in other office. Similarly, the administrative powers assigned to the Chief Justice by the Constitution i.e., the consultation of the Chief Justice in the case of appointment of the Judge, power to appointing officers and other staff in the institution and the power to constitute benches etc. also stretch an indication that the office of the Chief Justice is different from the office of a Judge. It may be observed here that a person appointed to be a Chief Justice of the High Court can only enter upon his office after making and subscribing the oath required by law despite the fact that earlier he had taken the oath as Judge of the High Court, thus, the imposition of the condition of separate oath is further supportive to form the opinion that the office of the Judge and the Chief Justice is different. After going through the Constitutional provisions, referred to

hereinabove, we are convinced that as the consultative process, oath and appointment notifications etc. in the offices of the Judge and the Chief Justice of the High Court are separate from each other; therefore, it can securely be concluded that both are different offices. In the case in hand, from the pleadings it appears that it is an admitted position that the appointment of the petitioner as Chief Justice of the High Court was validly made after due course of law. In the judgment under review this Court has held that if the appointment of a Judge of the High Court is defective, then consequently his elevation to the office of the Chief Justice also becomes faulty as every structure has to stand on its own foundation and when the foundation is vanished no superstructure can exist. However, in view of the mechanism provided in the Constitution, as discussed hereinabove, it appears that not only the offices of the Judge



and the Chief Justice are separate from each other rather the foundations of both the positions are also independent. Thus, in such state of affairs, when the foundations of both the structures are made independent then by abolishing foundation of one structure, the other structure constructed over a separate foundation cannot be eliminated automatically. In the case reported as *Abrar Hassan v. Government of Pakistan and another* [PLD 1976 SC 315], on the death of Chief Justice of the High Court of Sind and Baluchistan, the President of Pakistan appointed a permanent Judge of the Supreme Court as Chief Justice of the High Court of Sind and Baluchistan on deputation while mentioning in the appointment notification that during the period the learned Judge holds the office of Chief Justice of the High Court of Sind and Baluchistan, he will continue to retain his lien on the office of, and

seniority as, Judge of the Supreme Court. The question before the apex Court was that; whether the Judge of the Supreme Court, who is appointed as Chief Justice of the High Court on deputation, will continue to retain his lien on the office of the Supreme Court or not. The apex Court of Pakistan after exhaustive deliberation on the point held that after appointment as Chief Justice of the High Court permanently, there is no occasion or question of retaining lien or seniority in the Supreme Court and if ever the said Chief Justice is reverted to the Supreme Court that will be a fresh appointment and not in continuation of his previous appointment. Meaning thereby that after entering upon the office of Chief Justice of the High Court on the strength of a separate procedure the situation becomes changed. The findings, in this regard, recorded in the referred report are reproduced as under: -

“The question whether respondent 2 has been appointed permanent Chief Justice in my opinion is essentially one of intention and on the material placed before us, I have no doubt in my mind, that he was so appointed. The result is that on taking oath as the Chief Justice in the High Court he must be deemed to have resigned judgeship in this Court as soon as he demitted that office. It must not be forgotten that we have to adjudge the validity of the respondent’s appointment under the Constitution which is not to be construed on any narrow or pedantic sense. In interpreting the Canadian Constitution, the Privy Council observed in *A.G. for Ontario v. A.B. for Canada* (1992 AC 571) as follows:-

‘if the text says nothing, then it is not to be presumed that the Constitution withholds that power altogether. On the contrary it is to be taken for granted that the power is bestowed in some

quarter, unless it is extraneous to the statute itself, or otherwise clearly repugnant to its sense.'

The facts in the cases of Malik Ghulam Gillani and Rao Muhammad Ashfaq Khan were entirely different. In each of those cases, on a request in writing by the President addressed to a sitting High Court Judge, he undertook the office of the Law Secretary in the Central Government on the express condition that the period spent in performing the function of the Law Secretary shall be treated as 'actual service' as defined in Article 2(b) of the High Court Judges (Leave, Pension and Privileges) Order 1970 or as the case may be, the High Court Judges Order, 1937. The office of the Law Secretary is at best a ministerial office and not a substantive office under the Constitution like that of a Judge requiring any oath of office. The Judges Orders of 1937 and 1970 expressly provided for temporary undertaking of function by a High

Court Judge other than those of a Judge on a request by the President on the express condition referred to above as to the treatment of service during the interregnum. Therefore, it is wholly fallacious to draw any analogy between the two precedent cases of Malik Ghulam Jilani and Rao Muhammad Ashfaq Khan and the instant case.

For all the foregoing reasons I hold that the appointment of respondent 2 as Chief Justice of the High Court of Sind & Baluchistan is perfectly valid and would dismiss the appeal on merits. This is however, subject to the rider that the direction in the Gazette Notification of 22<sup>nd</sup> January 1975 enabling respondent 2 to retain lien and seniority as Judge in this Court is wholly unmeaning and of no effect. The appointment of respondent 2 as the Chief Justice being permanent, his separation from the Supreme Court judgeship was complete and therefore there was no occasion or question of his

retaining lien or seniority in the Supreme Court. If ever he were to revert to this Court that would be a fresh appointment and not in continuation of his previous appointment."

In the case law referred to by the petitioner reported as *Chaudhry Muhammad Zaman v. Azad Govt. and 4 others* [1996 SCR 171], the matter of seniority of civil servants was under consideration and this Court accepted the appeal on the ground that the contesting respondents failed to challenge a previous order through which the appellant, therein, was appointed as Assistant Engineer in another department.

Same alike, in the case reported as *Muhammad Ilyas Khan and 5 others v. Sardar Muhammad Hafeez Khand and 4 others* [2001 SCR 179], there was a dispute of seniority among the contesting civil servants. In the

referred case, retrospective effect was given to the promotion of the respondent but the said order was not challenged and this Court dismissed the appeal as well as the review petition on the ground that the order of extending retrospective effect to the promotion of the respondent has not been challenged which has attained finality irrespective of the fact that the same was legal or not.

In the case reported as *Shafqat Hayyat v. Muhammad Shahid Ashraf & 18 others* [2005 SCR 57], the controversy involved was regarding the seniority of the civil servants and this Court accepted the appeal on the ground that the regular order of promotion was not challenged if the same was void even then that should have been challenged before the Court within a reasonable time. In the instant case, the situation appears to be more flexible in favour of the petitioner as the appointment as

Chief Justice of the High Court is not promotion rather for appointment as Chief Justice of the High Court consultative process, advice, oath and notification etc. are separate and the respondent while filing writ petition did not challenged the same. Thus, also in view of the principle of law enunciated in the referred reports and special situation available in the present case, favour the petitioner, that a right had been accrued to him by not challenging his induction as Chief Justice of the High Court in the writ petition coupled with the submissions made by the learned Advocate appearing on behalf of Azad Jammu and Kashmir Council and the learned Advocate-General, depriving the petitioner of the accrued right of pensionary benefits etc. as admissible to a retired Chief Justice of the High Court, will be against the interest of justice especially when no one objected to the validity of the subsequent



induction of the petitioner as Chief Justice of the High Court. In this regard, the argument of the petitioner that when at the time of filing the writ petition the subsequent notification of induction of the petitioner as Chief Justice of the High Court was holding the field and no one challenged the said notification, the Court was not justified to declare the same illegal, appears to be weighty in nature. In our view, the findings recorded by this Court that if the appointment of a Judge of the High Court is defective, then automatically his elevation to the office of the Chief Justice becomes redundant, are being inconsistent with law come within the purview of an error apparent on the face of record and liable to be altered for doing the complete justice.

7. On the aforesaid ground through short order dated 09.02.2022, the review petition

was accepted partially in the following manners: -

“Despite notice, no one appeared on behalf of respondent No.1, hence, ex-parte proceedings are ordered against him.

After hearing the arguments and perusing the record we are of the unanimous view that appointment in the office of Chief Justice of the High Court is not proposition rather it is an independent appointment as its mode of appointment including consultative process, advice, oath etc. is different. This Court while handing down the judgment under review has overlooked this point, therefore, we partially accept this review petition and hold that the petitioner’s appointment as Chief Justice of the High Court was valid. Consequently, he is entitled to pensionary benefits and perks and privileges admissible to a retired

Chief Justice of the High Court from the date of his retirement.”

Before parting with the judgment, we would like to clarify here that the appointment of the petitioner as Chief Justice of the High Court has been declared valid and he has also been declared entitled to the pensionary benefits etc. The qualifying service for getting pensionary benefits is 5 years and if any such question is arisen in the case of the petitioner that should be dealt with in the light of the judgment of Lahore High Court Lahore delivered in the case titled *Justice (R) Rauf Ahmad Sheikh v. Accountant General of Punjab* (writ petition No.105298 of 2017) wherein same proposition was under consideration. In the referred judgment the learned Lahore High Court observed that:-

“This writ petition and connected writ petitions (W.P. Nos. 105307 & 115014 of 2017), inter alia, seek a

direction from this Court to the respondents to fix the pension of the petitioners, who are all retired judges of this Court, in accordance with length of their service.

2. The learned Deputy Attorney General has today placed on record a statement in writing by the Secretary Law and Justice, Government of Pakistan, giving details of the pension package to the retired Judges of this Court. The relevant portions of the statement read as under:-

3. The permanent Judges under section 474(b) of CSR are entitled to receive proportionate pension at the rate of 17.5% per annum for each year of service and the period of service above 6 months is to be reckoned as 1 year of service of pension.

4. The retired Judges from the district judiciary, in addition to their pension as a Judge of High Court shall also receive 2% extra pension for each completed year of

service of Pakistan. The maximum pension not exceeding 70% of salary payable to a judge.'

3. Learned counsel for the petitioners is satisfied with the pension package mentioned in the written statement and has no objection if the petitions are disposed of in view thereof.

4. Justice (R) Mian Saeed-ud-Rehman Farrukh was appointed on 29.08.1992 for a period of two years. He was then appointed again on 10.10.1996 to 31.07.1998 with the total length of period of service coming to three years, nine months and twenty-one days, which period shall be reckoned for the purposes of pension.

5. The above mentioned pension package shall also ensure to the benefit of all those retired judges of this Court who are not parties before this Court and to whom this package is applicable.

6. Disposed of in terms of the afore-mentioned statement in

writing filed by the Secretary Law and Justice, Government of Pakistan.”

Against the judgment (supra) of the Lahore High Court an appeal was filed before the apex Court of Pakistan, however, the same was also disposed of on the statement of the Attorney General of Pakistan, who stated before the Court that the Federal Government stands by the statement made before the Lahore High Court. As the formula of proportionate pension adopted in Pakistan, in the light of the judgments (supra), is also applicable in Azad Jammu and Kashmir, hence, Secretary Law is directed to accordingly process the case of the petitioner.

**CHIEF JUSTICE**      **JUDGE**      **JUDGE**      **JUDGE**  
14.02.2022

