SUPREME COURT OF AZAD JAMMU AND KASHMIR

[Appellate Jurisdiction]

PRESENT:

Kh. Muhammad Nasim, J.

Raza Ali Khan, J.

Civil Appeal No. 78 of 2019

(PLA Filed on 7.8.2018)

1. Azad Govt. of the State of Jammu & Kashmir through its Chief Secretary, Lower Chatter, Muzaffarabad.
2. President of Azad Jammu & Kashmir through Secretary Presidential Affairs, President House, Muzaffarabad.
3. Azad Jammu &Kashmir Public Service Commission through its Chairman District Complex, Muzaffarabad.
4. Department of Law, Justice, Parliamentary Affairs & Human rights, Govt. of the Azad Jammu & Kashmir through its Secretary having office at New Secretariat Lower Chatter Muzaffarabad.
5. Services and General Administration Department, Govt. of AJ&K, Chatter Muzaffarabad.

.... APPELLANTS

VERSUS

1. Kh. Muhammad Saleem Bismal s/o Muhammad Husain r/o House No. 13, Street No. 8, Black A, Margalla view Housing Society, Sector D-17/2, Islamabad.
2. Brig. (Rtd) Jamil Azam, Ex-Member, Azad Jammu & Kashmir Public Service Commission, House No. B-13 Mohalla Gracy Lines Chaklala Cant Rawalpindi.
3. Manzoor Ahmed Kayani, Ex-member, Azad Jammu & Kashmir Public Service

Commission, Main Road No. 3 House No. 570 Sector B-Islamabad.

4. Muhammad Saeed Mughal, Ex-Member, Azad Jammu & Kashmir Public Service Commission, Mohajar Colony No.1 Upper Chatter Muzaffarabad.
5. Ch. Ghulam Mustafa, Ex-Member, Azad Jammu & Kashmir Public Service Commission, House No. 141 Sector D-1 Allama Iqbal Road Mirpur.
6. Prof. Aslam Zafar, Ex-Member, Azad Jammu & Kashmir Public Service Commission, Supply Bazar Kohind Parrat Post Office Rawalakot Tehsil Rawalakot District Poonch.
7. Prof. Muhammad Kabir Chughtai, Ex-Member, Azad Jammu & Kashmir Public Service Commission, Chatter No.2 Post Office Bagh Tehsil and District Bagh (Qandeel Colony Tehsil & District Bagh).
8. Khurshid Ahmed, Ex-Member, Azad Jammu & Kashmir Public Service Commission, Daharra Khas Post Office Palangi Tehsil and District Haveli Kahuta AK.
9. Prof. Rafia Shireen, Ex-Member, Azad Jammu & Kashmir Public Service Commission, House No. 67 Valley Home Near Abas Town Chanchian Road Mirpur AK.
10. Kh. Shahad Ahmed, Ex-Chairman, Azad Jammu & Kashmir Public Service Commission, C /o 20-B Law Chambers Opposite GPO, New Secretariat Complex Muzaffarabad.

..... RESPONDENTS

11. Mr. Mohsin Kamal, Chairman Public Service Commission, District Complex Muzaffarabad.
12. Mr. Naeem Ahmed Sheraz, Member Public Service Commission District Complex Muzaffarabad.

13. Mr. Muhammad Akram Sohail, Member Public Service Commission District Complex, Muzaffarabad.
14. Mr. Munir Hussain, Member Public Service Commission, District Complex Muzaffarabad.
15. Ms. Matlooba Dar, Member Public Service Commission District Complex, Muzaffarabad.
16. Syed Nisar Hussain Shah, member Public Service Commission District Complex, Muzaffarabad.
17. Ms. Shaheen Ishai, Member Public Service Commission District Complex, Muzaffarabad.
18. Dr. Muhammad Khan, Member Public Service Commission District Complex, Muzaffarabad.

…. PROFORMA RESPONDENTS

(On appeal from the judgment of the High Court dated 6.6.2018 in Writ Petitions No. 78 & 120 of 2017)

APPEARANCES:

FOR THE APPELLANTS: Mr. Mazhar Waheed Khan, Additional Advocate-General.

FOR THE RESPONDENTS: Kh. Attaullah Chak, Advocate.

Date of hearing: 9.2.2022.

JUDGMENT:

Raza Ali Khan, J.— The captioned appeal by leave of the Court arises out of the

judgment dated 6.6.2018 passed by the High Court in writ petition No. 78 & 120 of 2017.

2. The brief facts forming the background of the captioned appeal are that the respondents, herein, were appointed as the Chairman and Members of the Public Service Commission (P.S.C), vide notifications dated 15.8.2014 and 1.9.2014, for a period of 3 years under the provisions of the Azad Jammu and Kashmir Public Service Commission Act, 1986 (Act, 1986) and the rules made thereunder. The Government of the Azad Jammu and Kashmir subsequently, amended the Act, 1986 vide Azad Jammu & Kashmir Public Service Commission (Amendment) Ordinance No. XI, dated 15.12.2016 (Ordinance No. X1 of 2016) and through the amended laws it was provided that the Government may terminate the services of the Members of the Public Service Commission or whole Commission before the expiry of their term of office after recording reasons and without providing the right of hearing. The

respondents, herein, were removed on the basis of the newly amended law. Respondents No.1 and 2 challenged the vires of the Ordinance No.X1 of 2016 as well as the notifications of their removal from offices by filing writ petitions before the High Court, which were contested by the other side by filing the written statements. The learned High Court after hearing the parties, through the impugned judgment dated 6.6.2018, accepted the writ petitions on the ground that the allegations of mal-practice, inefficiency and non-transparency against the petitioners were never probed and verified. The High Court also struck down the Ordinance No.X1 of 2016 on the ground of mala-fide. The respondents were also held entitled to receive the pay and perks for the remaining period of their tenure.

3. Mr. Mazhar Waheed, the learned Additional Advocate General appearing for the appellants argued that the impugned judgment of the learned High Court is illegal and

erroneous because no law can be struck down on the ground of mala-fide. He further argued that the tenure fixed for a specified position can be curtailed by the Legislature and the right of hearing can also be excluded by making amendment in the statute. He further argued that in view of the severe allegations levelled against the Members of the P.S.C., the Government has to take step which was bona-fide and no mala-fide can be attributed to it as has been held by the learned High Court in the impugned judgment. The learned Additional Advocate General further argued that the learned High Court erred in law while not taking into consideration that the promulgation of the Ordinance was approved by the Cabinet, hence, no violation of any law was committed. He contended that the respondents, herein, while holding the august office as the Chairman and Members of P.S.C., had lost the trust and confidence during the tenure of their services, therefore, the termination of their services was

justified, but this aspect of the case was also ignored by the learned High Court while delivering the impugned judgment. The learned Additional Advocate-General requested for acceptance of appeal.

4. Kh. Attaullah Chak, the learned Advocate appearing for the respondents while controverting the arguments advanced by the learned Additional Advocate General, forcefully defended the impugned judgment and stated that the tenure fixed by a statute cannot be curtailed in an arbitrary manner. The learned Advocate further argued that the act of removal of the respondents as the Chairman and the Members of P.S.C., was arbitrary, whimsical and ultra-vires the Constitution as well as the law on the subject, hence, the same has rightly been struck down by the learned High Court. He further argued that the Ordinance No. X1 of 2016 was not sustainable in the eye of law as it not only violates the constitutional provisions regarding equality, discrimination, right of

hearing and right of fair trial etc. but also repeal of section 6 of the Act, 1986, with retrospective effect. The learned Advocate maintained that the Ordinance No.X1 of 2016 was not approved by the Cabinet according to scheme of law i.e. the Rules of Business, 1985 before its assent by the worthy President and an Ordinance cannot be promulgated merely on the advice of the Prime Minister. The learned Advocate contended that the words "committing mal-practices/gross illegality and for not performing duties efficiently and in transparent manner" were liable to be expunged from the impugned notifications dated 15.12.2016 and 20.12.2016, on the ground that neither any such allegation was ever probed and proved against the respondents nor any declaration by a competent forum in this regard was existing. Both the Ordinance as well as the notifications, were issued in sheer violation of law, on political basis and without any fault or failure on the part of the respondents, hence, the respondents cannot be penalized in shape of

their removal from officec, hence, the learned High Court has committed no illegality while issuing the prayed writ. The learned Advocate next argued that the appellants failed to point out any illegality in the impugned judgment, therefore, the appeal filed by them may be dismissed.

5. We have heard the learned Advocates representing the parties and have gone through the record of the case made available along with the impugned judgment. Respondents No. 1, 3 to 9, herein, were appointed as the Members and respondent No. 10 was appointed as the Chairman, P.S.C. vide notification dated 15.8.2014, for a period of three years. Respondent No.2, herein, was appointed as Member, P.S.C. vide notification dated 1.9.2014. The respondents had hardly completed a period of almost two years and four months when their services were terminated vide notifications dated 15.12.2016 and 20.12.2016, while amending the Act, 1986. Feeling aggrieved, the respondents,

herein, challenged the legality and correctness of the amendment introduced through Ordinance No. XI of 2016, (Ordinance No. X1 of 2016) dated 15.12.2016, along with notifications dated 15.12.2016 and 20.12.2016, on the ground that the same have been issued arbitrarily in sheer violation of law, against the constitutionally guaranteed fundamental rights. The learned High Court after hearing the parties, accepted the writ petitions through the impugned judgment, dated 6.6.2018, whereby Ordinance No. XI of 2016, has been struck down and the petitioners-respondents have been held entitled to receive the salary for the remaining period of their contract services. The argument of the learned counsel for the appellants that the Ordinance XI of 2016 was no more in existence at the time of rendering impugned judgment as it was substituted by the Azad Jammu & Kashmir Public Service Commission (Amendment) Act, 2017) (P.S.C. (Amendment) Act, 2017), but this aspect of the case was not

taken into account by the learned High Court. The argument of the learned Additional Advocate General has substance as P.S.C. (Amendment) Act, 2017 had received the assent of the President on 7.3.2017 and the same had come into force at once, whereas the notifications, whereby the services of the respondents, herein, were terminated were issued on 15.12.2016 and 20.12.2016 by the competent authority under 2nd proviso to section 4 of Ordinance No. X1 of 2016 was repealed by P.S.C. (Amendment) Act, 2017 dated 7.3.2017. On the relevant date of announcement of the impugned judgment the Ordinance No. X1 of 2016 was not in existence and had turned into shape of the P.S.C. (Amendment) Act, 2017, even more than a month before expiry of the time specified for validity of an Ordinance under the AJ&K Interim Constitution, 1974. The High Court has overlooked this aspect of the case in the light of the Constitutional and legal command at the time of rendering the judgment.

6. So far as the argument of the learned counsel for the appellants that the legislative action made by the legislature cannot be struck down on the ground of mala-fide, is cornered, in our considered view, the stance taken is in line with the dictat laid down by the Superior Courts. We also have no reason to agree with the findings of the learned High Court, whereby it has been held that the Ordinance No. X1 of 2016 was promulgated with mala-fide intention. The law is very well settled that it is enjoined upon the Courts to save the law rather than destroying it and Court must lean in favour of upholding the constitutionality of a legislation unless it is found violative of constitutional provisions. Our view is fortified by the judgment of the Apex Court of Pakistan in the case reported as *Messrs Elahi Cotton Mills Ltd. and others vs. Federation of Pakistan through Secretary M/o Finance, Islamabad & others* (PLD 1997 582), the relevant paragraph is reproduced as under:-

> "…(ix) That the law should be saved rather than be destroyed and the Court must lean in favour of upholding the constitutionality of a 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."

There is consensus of the Superior Courts of the Sub-Continent that mala-fide cannot be ascribed to the legislature and principles to determine the vires of law are more rigid and lean to uphold the validity of law. In this context resort may be have to the case reported as *Lahore Development Authority through D.G and others vs. Ms. Imrana Tiwana and others* (2015 SCMR 1739), wherein in para 65 of the report it was observed as under:-

> "65. Cooley in his "Treatise on Constitutional Limitations", pages 159 to 186, H.M. Seerval in "Constitutional Law of India" Volume 1, pages 260 to 262, the late Mr. A.K. Brohi in "Fundamental Law of Pakistan" Pages 562 to 592, Mr. Justice Fazal Karim in "Judicial Review of Public Actions" Volume 1, Pages 488 to 492 state the rules which must be applied in discharging this solemn duty to

declare laws unconstitutional. These can be summarized as follows: --

I. There is a presumption in favour of constitutionality and a law must not be declared unconstitutional unless the statute is placed next to the Constitution and no way can be found in reconciling the two;

II. Where more than one interpretation is possible, one of which would make the law valid and the other void, the Court must prefer the interpretation which favours validity;

III. A statute must never be declared unconstitutional unless its invalidity is beyond reasonable doubt. A reasonable doubt must be resolved in favour of the statute being valid;

IV. If a case can be decided on other or narrower ground, the Court will abstain from deciding the constitutional question;

V. The Court will not decide a larger constitutional question than in necessary for the determination of the case;

VI. The Court will not declare a statute unconstitutional on the ground that it violates the spirt of the Constitutions unless it also violates the letter of Constitution;

VII. The Court is not concerned with the wisdom or prudence of the legislation but only with its constitutionality;

VIII. The Court will not strike down statute on principles of republican or democratic government unless those principles are placed beyond

> legislative encroachment by the Constitution.
>
> IX. Male fides will not be attributed to the Legislature."

Similar proposition came under consideration of the Supreme Court of India in the case reported as *K. Nagaraj and others vs. State of Andhra Pradesh and another* (AIR 1985 Supreme Court 551), wherein, it has been observed as under:-

> "…Besides, the ordinance-making power being a legislative power, the argument of mala fides is misconceived. The legislature, as a body, cannot be accused of having passed a law for an extraneous purpose. Its reasons for passing a law are those that are stated in the Objectives and Reasons and if, none are so stated, as appear from the provisions enacted by it. Even assuming that the executive, in a given, case, has an ulterior motive in moving a legislation, that motive cannot render the passing of the law mala fide. This kind of 'transferred malice' is unknown in the field of legislation."

Thus, keeping in view the above pronouncements, we disagree with the findings recorded by the learned High Court in the impugned judgment that the Ordinance No. X1

of 2016, was promulgated with mala-fide intention.

7. The contention of the learned Advocate for the appellants that the right of hearing can be excluded by the legislature by making amendment in the statute and similarly the tenure of office can also be curtailed through legislation, hence, the Ordinance No. X1 of 2016 was rightly issued, but the learned High Court struck down the same erroneously through the impugned judgment. We have no cavil with the proposition that the legislature is competent to make, amend and change law as and when it feels the need, within the limits imposed by the Constitution. If any law or enactment is passed or made in violation or contravention of any provision of the Constitution, such law or enactment is amenable to the judicial review by the Constitutional Courts. In the case in hand, the respondents were performing their duties as the Members and Chairman of the P.S.C. and their services were terminated vide notification

dated 15.12.2016 and 20.12.2016, on account of alleged mal-practices/gross illegality and for not performing duties efficiently and in a transparent manner on the same day when the Ordinance No.X1, 2016, was promulgated. From the record it reveals that before issuance of the said notifications, no notice ever appears to have been served upon the respondents, nor any probe in relation to the allegations levelled against them, was conducted, in this way, they were condemned un-heard. It may be stated here that right of hearing, fair trial and due process are constitutionally guaranteed fundamental rights of every State Subject and no order or decree can be passed against a person without providing an opportunity of hearing as well as the right of fair trial. The right to a fair trial includes the assurance that the process leading up to and following a trial protects an individual's fundamental rights. In an inquiry or prosecution, the individual faces the overwhelming power of the department, the

Government or the State. There needs to be equal access to justice and fair, humane and just criminal legal system that redress this imbalance of power leaning against the individual or individuals. Fair trial helps to establish the truth, which is vital for every one being inquired under any allegation or required to prove the guilt. Right of hearing is a fundamental to the concept of the fair trial, which serves to limit governmental abuse, promote transparency and help prevent miscarriage of justice. Without fair trial, trust in government and the rule of law can collapse. The right to fair trial is recognized internationally as a fundamental human right. Article 10 of the Universal Declaration of Human Rights, 1948, and Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973 also recognize the concept of fair trial and due process as the right of every person and he cannot be deprived of this basic and fundamental right. Article 4(4)(19)

of AJ&K Interim Constitution, 1974 deals with the right to fair trial, which speaks as under: -

> 19. "Right to fair trial.- For the determination of his civil rights and obligations or in any criminal charge against him, a person shall be entitled to a fair trial and due process."

Similarly, due process is a requirement that legal matters be resolved according to established rules and principles, and treated fairly. Due process means that a person who would be affected by a government decision must be served show-cause notice of what the government intending to do and how the government's action may adversely affect him. The due process right guarantees that the Government cannot take a person's basic right without due process of law. This Court in the case reported as *Saleem Akbar Kayani vs. Dr. Rehana Mansha Kayani & 4 others* (2016 SCR 1) has held as under:-

> "There is no concept of arbitrariness in the law. The right of hearing is a constitutionally guaranteed fundamental right of every citizen. No order or decree can be passed against a person

> without providing an opportunity of hearing to him…"

Similar view was taken by this Court in the case reported as Khawaja Azam Rasool and 26 others vs. Raja Sajjad Ahmed Khan Advocate & others (2018 SCR 35), wherein, in para No. 12 of the report, it was observed as under:-

> 12۔ یہ امر بھی غیر متنازعہ ہے کہ حاکم مجاز کے تحت قانون جاری کردہ تقرر ناموں کے بعد منتظمین بلدیاتی ادارہ جات اپنی ذمہ داریاں سنبھال چکے تھے ۔ ان تقرر ناموں میں واضح طور پر درج تھا کہ یہ تقرریاں تا انعقاد بلدیاتی انتخابات ہیں۔ نہ تو ان تقرریوں کو کسی طور پر بھی انعقاد انتخابات میں رکاوٹ تصور کیا جاسکتا ہے اور نہ ہی اپیلانٹان کو سماعت کا موقع دیئے بغیر بیک جنبش قلم فارغ کیا جاسکتا ہے۔ جب سے نظام فراہمی انصاف کے ادارے قائم ہوئے ہیں ساری دنیا میں انصاف کا بنیادی سنہری اصول مسلمہ طور پر رائج ہے کہ سماعت کا موقع دیئے بغیر کسی بھی شخص کو نہ تو اس کے قانونی حقوق سے محروم کیا جاسکا ہے اور نہ ہی اُس کے خلاف کوئی فیصلہ کیا جا سکتا ہے۔ حکم زیر نزاع سے اس بنیادی اصول کی بھی خلاف ورزی ہوئی ہے"۔

In another case reported as *M/s Valley Trackers vs. Azad Govt. & 8 others* (2020 SCR 361), while dealing with the same proposition, it has been observed by this Court as below: -

> As the notification dated 14.5.2015, issued by the competent authority was acted upon and the possession of the land was handed over to the appellant-company who as per stand of the learned counsel for the appellant has invested a huge amount on the project, therefore, it was enjoined upon the Government to provide an opportunity of hearing to the appellant-company

> before rescinding the notification dated 14.5.2015, because right of hearing is essential and nobody can be condemned unheard."

In the instant case, on the one hand the appellants levelled serious allegations against the respondents and on the other hand, removed them from their offices without any show-cause notice, providing them an opportunity of hearing and fair trial. The allegations levelled against the respondents might be true, but the manner in which they have been removed from the services, does not carry the sanctity of transparency and fairness as their constitutionally guaranteed fundamental rights were snatched from them by not being given them the opportunity to respond to the allegations made against them. Through the introduction of new amendment in the Act, 1986 in section 4, after the first proviso, following second proviso was added which reads as under: -

> "Provided further that the President may for reasons to be recorded in writing terminate the appointment of a Member or the whole

> commission, as the case may be, before the expiration of his term of office."

If the reasons are of such nature involving basic fundamental rights, as has been involved in the case in hand, then proceedings shall be initiated in accordance with the relevant law and without following the due process of law, one cannot be allowed to act in an arbitrary, fanciful and whimsical manner. The very requirement of assigning reason is to prevent unfairness or arbitrariness in reaching conclusion, this principle is based on jurisprudential doctrine that justice should not only be done, it should appear to be done as well. A just but unreason conclusion does not appear to be just to those who read the same. Reasoned and just conclusion on the other hand will also have the appearance of justice. An order passed by a quasi-judicial authority or even administrative authority affecting the rights of people individually or collectively must be speaking one. "Recording reasons" had reference to the

required evidently threshold. It is legal standard and it has to be met as pre-condition before exercising the intrusive power under 2nd proviso to section 4 of Act, 1986. As without fair trial and affording the opportunity of being heard, it cannot be established that the person against whom any allegation is levelled, is an accused or innocent. From the above discussion, the argument of the learned counsel for the appellants that the right of hearing can be denied by the legislature by making amendment in the statute, also proved to have no substance.

8. It may be stated here that Act, 1986 provides a complete and comprehensive mode for removing the Chairman or any Member of the P.S.C. on the ground of any misconduct. In such situation, to look into the matter, a Judge of the High Court is appointed by the President and after completion of inquiry, proceedings for removal of any Member or Chairman, can be initiated. In presence of clear and conspicuous procedure, removal of the respondents from

their respective offices on the same day when the Ordinance No. X1 of 2016 was promulgated, is beyond comprehension. Even otherwise, if it is assumed that there were no statutory provisions even then the principle of natural justice demands that order should be based on reasons and fairness, which is lacking in the matter in hand. The doctrine of natural justice has been evolved and followed by the judiciary to protect the fundamental rights of people and to feature the concept of fairness by administrative authorities. At every stage of the proceedings, the essentials and principles of natural justice are always kept in mind so as to prevent the miscarriage of justice and arbitrariness and to uphold fairness, reasonableness, good conscience, equity and equality. The doctrine of natural justice is so flexible in nature that it changes itself to an extent where the rights of an individual are infringed. If any authority violates the principle of “natural justice in causa sua” then the order passed would be voidable i.e. it

can be challenged before any Court. But if any authority violates the principle of "audi-alteram partem" then the order would regarded as "void ab-initio". Thus, the adjudicating authority must have sufficient knowledge about principles of natural justice i.e. memo Judex in Causa Sua" and "Audi-alterm Partem" before articulating any judgment, hence, it should be concluded that;

> "**the universal and absolute law is that natural justice which cannot be written down, but which appears to hearts of all".**

This Court in the case reported as *Muhammad Yousaf vs. Arshad Mehmood and another* (2014 SCR 1521), has been held as under:-

> The survey of the judgments on the subject reveals that the Courts especially in criminal cases of conviction have liberally exercised powers of condonation of delay and

■The principles of Natural Justice: duty to Act fairly" by Tanya Sharma)

> the wisdom behind exercise of such powers in such manner is clear that at least the convicted person should have no doubt in his mind that his right of hearing has been denied.
>
> 12. As it is divine right even the Allah Almighty who is omni potent, is so kind that he also provided this right to His creatures. In this case, the unusual mode of conducting the proceedings by the trial Court creates some doubts in the minds that the proper course of safe administration of justice has not been adopted."

9. We have perused the impugned judgment of the learned High Court, except the observations made in the impugned judgment regarding 'mala-fide of the Legislature', the impugned judgment is a well-reasoned judgment, hence, we are left with no option except to concur with the findings recorded by the learned High Court. The appellants have failed to point out any error or defect in the impugned judgment,

which may convince us to reverse the fate of the writ petitions filed by the respondents.

In view of the above discussion, the appeal is found to have no substance in it and we have no reason to differ with the conclusion drawn by the High Court while accepting the writ petitions, as such the appeal is dismissed. The parties shall bear their own costs.

JUDGE JUDGE.

Muzaffarabad.
15.3.2022