

HIGH COURT OF AZAD JAMMU & KASHMIR

Writ Petition No.621/13;
Date of inst. 30.04.2013;
Date of decision 10.09.2013.

1. Raja Muhammad Farooq Haider Khan, Ex-Prime Minister of Azad Jammu & Kashmir Member Legislative Assembly Azad Jammu & Kashmir, Leader of Opposition in the Azad Jammu & Kashmir Legislative Assembly.
2. Razaq Ahmed S/O Said Muhammad, Advocate Supreme Court Ex-President District Bar Association Mirpur.

...Petitioners

VERSUS

1. Azad Jammu & Kashmir Govt. through its Chief Secretary Muzaffarabad;
2. Secretary Services and General Administration Department Muzaffarabad;
3. Syed Mumtaz Hussain Naqvi, Chairman Azad Jammu & Kashmir Public Service Commission Muzaffarabad;
4. Professor Retired Sardar Muhammad Ibrahim R/O District Bagh, Member Azad Jammu & Kashmir Public Service Commission Muzaffarabad;
5. Professor Retired Dr. Muhammad Aslam Zafar R/O District Rawalakot, Member Azad Jammu & Kashmir Public Service Commission Muzaffarabad;
6. Mr. Khurshid Ahmed Rathore R/O District Haveli, Member Azad Jammu & Kashmir Public Service Commission Muzaffarabad;
7. Ch. Muhammad Arif Kataria R/O District Kotli, Member Azad Jammu & Kashmir Public Service Commission Muzaffarabad;
8. Mr. Muhammad Saeed Mughal R/O Tehsil and District Neelum, Member Azad Jammu & Kashmir Public Service Commission Muzaffarabad;
9. Mrs. Arifa Rabbani R/O Chowkian Tehsil Baloch District Sudhnooti, Member Azad Jammu & Kashmir Public Service Commission Muzaffarabad;
10. Ch. Muhammad Rafique Olvi, Advocate R/O Nakyal District Kotli, Member Azad Jammu & Kashmir Public Service Commission Muzaffarabad;
11. Ch. Ghulam Mustafa, Retired Officer Management Group R/O Chamb Barnala District Bhimber, Member Azad Jammu & Kashmir Public Service Commission Muzaffarabad;
12. Professor Retired Muhammad Karim R/O District Rawalakot, Member Azad Jammu & Kashmir Public Service Commission Muzaffarabad.

... Respondents

WRIT PETITION

**Before: Justice Ghulam Mustafa Mughal, C.J.
Justice M. Tabassam Aftab Alvi, J.
Justice Abdul Rasheed Sulehria, J.
Justice Sardar Abdul Hameed Khan, J.**

PRESENT:

Raja Sajjad Ahmed Khan, Advocate for the petitioners.
Mr. Abdul Rasheed Abbasi, Advocate for the respondents.

ORDER:

(Justice Ghulam Mustafa Mughal, C.J) Through this petition filed under section 44 of the Azad Jammu & Kashmir Interim Constitution Act, 1974 the Azad Jammu & Kashmir Public Service Commission (Amendment) Ordinance No.LD/Legis-Ord/728-38/2012 dated 27.11.2012 has been challenged on the ground that the same is ultra-vires of the Interim Constitution Act, 1974 as well as the Azad Jammu & Kashmir Public Service Commission Act, 1986. The private respondents are also required to show cause under what authority of law they are holding public office of the Chairman and members of the Azad Jammu & Kashmir Public Service Commission.

Brief facts forming the background of the captioned petition are that Ordinance No.LD/Legis-Ord/728-38/2012 dated 27.11.2012 was promulgated by the President of Azad Jammu & Kashmir whereby the Azad Jammu & Kashmir Public Service Commission Act, 1986, has been amended. The aforesaid Ordinance has been challenged by the petitioners herein. Petitioner No.1 is ex-Prime Minister of Azad Jammu & Kashmir and at present is Leader of opposition of the Legislative Assembly of Azad Jammu & Kashmir whereas petitioner No.2 is an advocate of

the Supreme Court and former President of District Bar Association Mirpur. Both the petitioners, as per their claim, believe in the supremacy of the Constitution and implementation of laws enacted by the Legislative Assembly in letter and spirit in order to achieve the good governance in Azad Jammu & Kashmir. It is alleged that vide Ordinance No.LD/Legis-Ord/728-38/2012 dated 27.11.2012 the Azad Jammu & Kashmir Public Service Commission Act 1986 has been amended and Section 2 of the Azad Jammu & Kashmir Public Service Commission Act, 1986 has been substituted, whereas Sections 3 & 4 of the Act have been amended as is indicated in the impugned legislation and section 4(A) has been added. The petitioners have challenged the aforesaid Ordinance on the ground that through the amendment the functions of the Public Service Commission enumerated in Section 7 of the Public Service Commission Act, 1986 have been restricted and curtailed. It is claimed that due to substitution of Section 2 of the Public Service Commission Act the service of Azad Jammu & Kashmir has been excluded from the purview of the Public Service Commission rather an education committee has been setup for induction in the education service. It is contended that provisions of amending Ordinances are contradictory and inconsistent with the provision of Public Service Commission Act, 1986 and ultra vires of the Section 48 of the Azad Jammu & Kashmir Interim Constitution Act, 1974. It is further contended that the aforesaid amendment has been effected with a view to accommodate the political workers of the ruling party because the qualification earlier mentioned in the Public Service Commission Act, has been

deleted and only qualification for the members of the education committee has been inserted. Petitioners have also challenged the appointments of the private respondents as Chairman as well as Members of the Public Service Commission on the ground of mala-fide because all the respondents were either active political workers or nominee of the party in the recent elections and have played an active role in the election campaign of the ruling party. It is stated that qualification prescribed in the Public Service Commission Act has been deleted with mala-fide intention in order to achieve the desired target.

The petition has been contested by the respondents by filing written statement. The respondents have raised various preliminary objections regarding maintainability of the petition. It is pleaded by them that the petitioners are not aggrieved persons because no violation of any law has been alleged or pointed out in the Ordinance under challenge or in the appointments of the private respondents, therefore, the grievance of the petitioners is baseless and without substance. It is further stated that no disqualification for appointment of the Members of the Public Service Commission has been pointed out by the petitioners except pleading that respondents are active workers of ruling party and if this allegation is accepted, even then, appointments of the private respondents as Chairman or Members of the Public Service Commission cannot be struck down on that score because the same is not a bar for appointment of Judges in Higher judiciary of Azad Jammu & Kashmir. It is claimed that the petition has been filed on the basis of clippings from the newspapers, which are not

admissible in the evidence. Moreover, petition is also not maintainable on the ground of estoppel because respondents No.4 and 7 were earlier appointed as members of the Public Service Commission on 16.06.2009 and have been performing functions as such till 2012 and they have been re-appointed second time. The petitioner No.1 who was elected as Prime Minister of Azad Jammu & Kashmir on 22.10.2009, but he did not object to the appointment of the said respondents which constitute estoppel on the basis of acquiescence. It is further averred that through the impugned ordinance not only numbers of the members of the Public Service Commission have been increased but the qualification, integrity and impartiality of the commission has also been ensured because the Chairman and members of the Public Service Commission before entering upon their offices have to take oath as is prescribed in schedule of the Ordinance and minimum qualification has also been prescribed and all the respondents are in possession of the same. The case of the respondents is that the Public Service Commission after its constitution has conducted test and interview for number of posts but no single complaint has been made by any candidate with regard to performance of function or about any favour or disfavour in the test and interview or in process of selection. It is further stated that the disputed question of facts have been raised in the petition which require detailed probe and inquiry, hence, cannot be resolved in writ jurisdiction. It is also contended that petition is also liable to be dismissed on the ground that copy of the impugned Ordinance dated 27.11.2012 has not been attached with the memo of writ petition and the provisions of

Rule 32(2) of the Azad Jammu & Kashmir High Court Procedure Rules, 1984 have not been complied with.

In parawise reply the respondents have also refuted the contentions of the petitioners on the ground that amendment in the Azad Jammu & Kashmir Public Service Commission Act, 1986 has been effected for smooth functioning of the Public Service Commission and in order to enhance confidence of the public in the institution and appointment of the private respondents as Chairman and members of the Public Service Commission cannot be questioned on the ground that they are affiliated with the ruling party because no such disqualification is provided in the constitution as well as in the Public Service Commission Act, 1986.

Raja Sajjad Ahmed Khan, the learned Advocate for the petitioners argued that establishment of the Public Service Commission is provided in Section 48 of the Azad Jammu & Kashmir Interim Constitution Act, 1974. For carrying out the purpose of the aforesaid section the legislature of Azad Jammu & Kashmir has enacted the Public Service Commission Act, 1986. The learned Advocate argued that composition of the Public Service Commission is provided in Section 3 of the aforesaid Act and terms and conditions for the appointments of its Chairman/members as well as functions of the Commission are provided in Sections 4 and 7 of the said Act respectively. The learned Advocate contended that Public Service Commission has a pivotal role in selection of the civil servants in Azad Jammu & Kashmir which is backbone of the Government. He further argued

that better Government and administration/good governance cannot be provided/ achieved unless best lot is selected in the civil service of Azad Jammu & Kashmir and for meritorious selection selectors should be of high caliber, integrity, character and qualification. He maintained that by amending the Azad Jammu & Kashmir Public Service Commission Act, 1986, not only its composition has been changed but its powers and functions have also been restricted which act of official respondents is against the mandate of the Constitution. While making a comparative analysis of the Public Service Commission Act, 1986 and the amending Ordinance the learned Advocate submitted that Section 2 has been completely changed wherein the service of Azad Jammu & Kashmir was defined and the commission was given the task for recruitment on the posts which were included in the service of Azad Jammu & Kashmir. The learned Advocate contended that service of Azad Jammu & Kashmir has been excluded from the purview of the commission and only commission is authorized to recruit the education service through committee setup under subsection (3)(iii) of the Ordinance in question. The learned Advocate submitted that the number of members of the commission could be raised by the President through notification in the official gazette under the proviso of section 3 of the Public Service Commission Act, 1986 and for that purpose amendment in the Public Service Commission was not at all required. The aforesaid change has destroyed the very purpose, structure and composition of the Public Service Commission. The learned Advocate stated that right of profession, which includes the right of competition depends

upon transparent and impartial selection which cannot be made until the Public Service Commission is established consisting of impartial Chairman and Members. The learned Advocate in support of his submissions placed reliance on the following cases:-

1. Azad Jammu & Kashmir Government v. Javed Iqbal Khawaja and another. (1996 SCR 40);
2. Al-Jehad Trust through Raeesul Mujahideen Habib-ul-Wahabb-ul-Khairi and others. v. Federation of Pakistan and others. (PLD 1986 SC 324).

Mr. Abdul Rasheed Abbasi, the learned Advocate for the respondents argued that the petitioners have no locus standi to challenge the vires of the Ordinances, the appointment of the Chairman and the Members of the Public Service Commission because neither they aspire for appointment nor they have challenged violation of their any fundamental right enshrined in the Constitution. The learned Advocate argued that Ordinance in question has competently been promulgated in accordance with the scheme of the Constitution and it has not been pointed out in writ petition or during the course of arguments that which provision of the Constitution has been violated due to promulgation of the Ordinance. The learned Advocate contended that constitution of the Education Service Committee through Ordinance in question is neither violative of the Constitution nor is inconsistent with the Public Service Commission Act, 1986 rather the said provisions have been inserted in light of the public demand and in order to get rid of from illegal and politically motivated appointments in the Education Department. The learned Advocate contended that increase in the number of the members cannot be questioned

because the legislature has the power to increase the number as and when is required. He also argued that experience for appointment of the Members of Public Service Commission has not been relaxed for any specific purpose as has been alleged by the learned Advocate for the petitioners.

The learned Advocate further submitted that mala fide cannot be attributed to the legislature and the Court cannot strike down any piece of legislation on the ground of mala-fide. In this regard the learned Advocate placed reliance on the following cases:-

1. Novelty Enterprises LTD. vs. Deputy Collector and 5 others. (2001 SCR 191);
2. Pir Sabir Shah vs. Shad Muhammad Khan, Member Provincial Assembly, N.W.F.P and another. (PLD 1995 SC 66);
3. Azad Government of the State of Jammu & Kashmir vs. Brig. Muhammad Aslam Khan. (PLD 1981 AJ&K 71);
4. Raja Muhammad Niaz Khan, Ex-chairman, Azad Kashmir Mineral and Industrial Development corporation vs. Azad Government of the State of Jammu & Kashmir, Muzaffarabad. (PLD 1988 SC (AJ&K) 53);
5. Azad Govt. and 3 others. vs. Genuine Rights Commission AJ&K and 7 others.. (1999 SCR 1);
6. Azad Government of the State of Jammu & Kashmir vs. Ansar Burney. (1994 SCR 243);
7. Dr. Muhammad Akram vs. Allotment Committee, Mirpur Development Authority. (PLD 1985 SC (AJ&K) 113);
8. A.K. Gopalan vs. State of Madras. (AIR 1950 SC 27).
9. Azad Jammu & Kashmir Government & others. vs. Muhammad Younas Tahir & others. (1994 SCR 341);
10. Federation of Pakistan vs. Malik Muhammad Miskeen and others. (1995 SCR 43).

The learned Advocate further argued that allegation regarding the political affiliation of the sitting Chairman as well as members of the Public Service Commission has no substance because no such disqualification is provided either in the Constitution or Public Service Commission Act. He also argued

that any disqualification which is not provided by the supreme law of the land or is not mentioned in the special law cannot be read by implication in relevant statute. The learned Advocate contended that right to form an association is constitutional right of every State subject which includes the right to join a party, hence, the same cannot be treated as a disqualification for appointment of Chairman or Member of the Public Service Commission. He argued that various personalities who were active politicians and office bearers of the political parties have been appointed as Judges of the High Court and Supreme Court. The learned Advocate in support of these submissions placed reliance on the following case law:-

1. Jammu and Kashmir Tehrik Ammal Party and 11 others vs. The Azad State of Jammu & Kashmir and another. (PLD 1985 AJ&K (H.C) 95);
2. Mian Muhammad Nawaz Sharif vs. President of Pakistan and others. (PLD 1993 SC 473);
3. Muhammad Ashraf and 8 others vs. Azad Government of the State of Jammu & Kashmir and 13 others. (PLD 1985 SC (AJ&K) 102).

The learned Advocate submitted that no judgment can be given on the basis of clippings of the newspapers because such clippings are not admissible in evidence. The learned Advocate in this regard placed reliance on Haji Usman's case (PLD 1986 SC (AJ&K) 120).

We have heard the learned counsel for the parties and gone through the record of the case with our utmost care.

So far as the contention of Mr. Abdul Rasheed Abbasi, the learned Advocate for the respondents that petitioners are not aggrieved is concerned that is devoid of any force. By now

law is well settled that it is not necessary to qualify as an aggrieved person that a right in strict juristic sense should be vested in him, yet a person must at least show that he has some interest that the respondent should act in accordance with law, can approach to this Court for writ/direction contemplated by Section 44 of the Interim Constitution Act, 1974. Recently in a full bench judgment rendered in writ petition No.2318/12 titled Sajjad Hussain Shah and others vs. Azad Jammu & Kashmir Council Secretariat through its Joint Secretary Islamabad and others decided on 20.06.2013 the same view has been approved by this Court and it has been held that where violation of the Constitution or fundamental rights of State Subjects is pointed out then any State subject can competently invoke the extra ordinary jurisdiction of the Court and the question of locus standi shall be considered liberally keeping in view the public interest. In the present case petitioner No.1 is member of the Legislative Assembly and also leader of the opposition and in that capacity it cannot be said that he is not interested in the supremacy of the Constitution and that respondents should act in accordance with law to achieve the good governance in the State. Petitioner No.2 is also practicing advocate and former president of District Bar Association Mirpur, hence, naturally is interested in the supremacy of the Constitution and good governance.

The contention of the learned Advocate for the respondents that petition merits dismissal on account of estoppel because some of the members have been re-appointed and their previous appointments as members of the Public Service Commission have not been challenged by petitioner No.1, is

devoid of any force because after issuance of the impugned legislation the cause of action for filing petition has arisen, therefore, neither the rule of acquiescence nor estoppel is attracted in this case in view of the dictum of the Supreme Court laid down in Umar Hayat's case (PLJ 1999 SC (AJK) 190).

The contention of the learned Advocate for the respondents that copy of the Ordinance in question has not been appended with the petition, therefore, the petition merits dismissal, is also not tenable because the Ordinance under challenge admittedly has been promulgated and the copy of the same has been produced by the learned Advocate for the petitioners at the time of arguments. Even respondents have not denied the promulgation of the Ordinance rather they have claimed that they have been appointed on the basis of the said Ordinance, therefore, Rule 32 of the Azad Jammu & Kashmir High Court Procedure Rules, 1984 pressed into service by the learned Advocate for the respondents is not attracted.

The contention of the learned Advocate for the respondents that mala-fide cannot be attributed to the legislature is correct. We are in agreement that a piece of legislation cannot be quashed on the ground of mala-fide but an Act or Ordinance made or promulgated can be declared ultra-vires on the touchstone of the Constitution.

Before attending the next question it appears proper to reproduce the provisions of the Public Service Commission Act and amending ordinance, which are as under:-

<p>2. Definitions:- In this Act, unless there is anything repugnant in the subject or context:</p> <p>(a) “Commission” means the Azad Jammu & Kashmir Public Service Commission;</p> <p>(b) “Government” means the Azad Government of the State of Jammu & Kashmir;</p> <p>(bb) “Civil Servant” means a person who is or who has been a member of a civil service of the Azad Jammu & Kashmir in connection with the</p>	<p>An Ordinance further to amend the Azad Jammu & Kashmir Public Service Commission Act, 1986</p> <p>Whereas It is expedient to amend the Azad Jammu & Kashmir Public Service Commission Act, 1986 (Act XVII of 1986), in order to improve the educational standard and to ensure the recruitment to teaching and administrative cadre of education service on merit in accordance with National Education Policy, 2009 as adapted in Azad Jammu & Kashmir and matter connected therewith and ancillary thereto;</p> <p>And whereas, the Legislative Assembly is not in session and the President is satisfied that circumstances exist which render it necessary to take immediate action;</p> <p>Now, therefore, in exercise of the powers conferred by subsection (1) of Section 41 of the Azad Jammu & Kashmir Interim Constitution Act, 1974, the President is pleased to make and promulgate the following Ordinance:-</p> <p>Substitution of section 2, Act XVII of 1986.- in the Azad Jammu & Kashmir Public Service Commission Act, 1986 (Act XVII of 1986), hereinafter referred to as the said Act, section 2 shall be substituted as under:-</p> <p>“2. Definitions.- In this Act, unless there is anything repugnant in the subject or context:</p> <p>(a) “Act” means the Azad Jammu & Kashmir Public Service Commission Act, 1986;</p> <p>(b) “Commission” means the Azad Jammu & Kashmir</p>
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<p>affairs of the Government or who holds or has held a civil post in connection with the affairs of the Government but does not include:-</p> <p>i) A person who is or has been on deputation to the Azad Jammu & Kashmir from the Federation or any other province or Pakistan or authority;</p> <p>ii) A person who is or has been employed on contract or on work-charge basis, or who is or has been paid from contingencies, or</p> <p>iii) A person who is or has been a 'worker' or 'workman' as defined in the Factories Act, 1934 (XXV) of 1934 or the Workmen's Compensation Act, 1923 (VIII of 1923) as in force in Azad Jammu & Kashmir.</p> <p>(c) "member" means a member of the Commission and includes the Chairman thereof;</p> <p>(cc) "Prescribed" means prescribed by rules made under this Act;</p> <p>(d) "President" means the President of Azad Jammu & Kashmir;</p> <p>(e) "Service of Azad Jammu & Kashmir" means the service of Azad Jammu & Kashmir as defined in the AJ&K Interim Constitution Act, 1974.</p>	<p>Public Service Commission;</p> <p>(c) "Education Service" means civil Servants belonging to teaching and administrative cadre of Education Department.</p> <p>(d) "Education Service Committee" means a Committee constituted for recruitment to the posts of Education Services;</p> <p>(e) "Government" means the Azad Government of the State of Jammu & Kashmir;</p> <p>(f) "Member" means a member of Commission and includes the Chairman thereof;</p> <p>(g) "President" means the President of Azad Jammu & Kashmir;</p> <p>(h) "Prescribed" means prescribed by rules made under the Act;</p>
<p>3. Composition of Commission etc. (1) There shall be an Azad Jammu & Kashmir Public Service Commission consisting of seven members including the Chairman. -----</p>	<p>Amendment of section 3, Act XVII of 1986.-</p> <p>(iii) In sub-section (1), the word "seven" shall be substituted by word "ten";</p>

<p>(2) -----</p> <p>(3) Two members of the Commission shall be persons who have held office in the service of Azad Jammu & Kashmir for not less than twenty years.</p> <p>4. Term of office of members, etc. The term of office of a member shall be three years; Provided that in the case of a person who was in the service of Azad Jammu & Kashmir immediately before his appointment, as member, the term of office shall be three years or till he retires from service of Azad Jammu & Kashmir. Provided further that the President may:</p> <p>(i) extend the term of office of a member for such period as he may</p>	<p>(iv) Sub-section (3) shall be substituted as under:- (3) (i) Seven Members of the Commission shall be appointed from amongst the retired Civil Servants or other outstanding persons having good reputation and educational background of not less than graduation from any recognized University; (ii) Three Members of the Commission shall be educationist to be appointed from amongst the eminent educationists or scholars having good reputation and experience of not less than ten years of teaching or administration or both. (iii) The Education Service Committee shall be comprising of three Members including at least two educationist Members.”</p> <p>4. Addition of section 4-A, Act XVII of 1986.- In the said Act, after Section 4, following new section 4-A shall be added, namely:- “4-A Oath of office.- Before entering upon his office, Chairman and Member shall take oath in the form set out in the Schedule to this Ordinance before the President in case of Chairman and before the Chairman in case of a Member.</p>
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<p>determine; and</p> <p>(ii) for the reasons to be recorded in writing terminate the appointment of a member before the expiration of his term of office.</p> <p>(2) A member may resign his office by writing under his hand addressed to the President.</p>	
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A perusal of the above would show that through the impugned Ordinance “Service of Azad Kashmir” had been omitted and instead “Education Service” had been included. The effect of substitution through the impugned legislation is that functions of the Public Service Commission visualized by section 7 of the Act had been restricted only to “Education Service” while Public Service Commission visualized by the Constitution is to cover all the services, posts in connection with the affairs of the Azad Jammu & Kashmir. The impugned Ordinance has no purpose behind it. A perusal of the preamble of the Ordinance reveals that amendment in Public Service Commission Act had been effected in order to improve the educational standard and to ensure the recruitment to teaching and administrative cadre of education service on merit in accordance with National Education Policy, 2009. In our view for this purpose the amendment in the Public Service Commission Act was not at all necessary. Moreover, the amendment has been effected with a view to increase the numbers of the members of the Public Service Commission which course was already provided under proviso to section 3 of the Public Service Commission Act. Through the impugned amendment it is

provided that seven members were to be from retired civil servants or other outstanding persons having good reputation and educational background of not less than graduation. The words “outstanding persons having good reputation” are quite vague and do not disclose clearly that what are the required qualities and qualification of such persons. Virtually the qualification of a member of the Public Service Commission had been reduced to simple graduation. It is also provided in the impugned legislation that three members of the Commission would be from the “Educationists”. The said expression has also not been defined in the impugned legislation which indicates that unguided discretion has been reserved by the Government for induction of persons of their choice as members of this committee. The In-charge-Secretaries to the Government were ex-officio members under the Public Service Commission Act, 1986 if recruitment was to be made in their department but their role has also been excluded through impugned legislation.

We have considered the impugned Ordinance from another angle that as to whether any provision of the impugned Ordinance could be saved keeping in view the previous amendments made in the Public Service Commission Act, 1986. Only Section 3 whereby number of Members have been increased and section 4-A which provides the oath for the Chairman and Members of the Public Service Commission could be separated but it cannot be saved keeping in view legislative purpose stated in the preamble, deletion of section 2 of the Public Service Commission

Act, 1986 and for the reasons that power of Public Service Commission have been restricted only to the education service.

It may be stated that Public Service Commission is a constitutional institution. It had great responsibilities of selecting and recommending the best from amongst the candidates for induction into the service of the State. Though it is a recommendatory body and its recommendations may not be accepted but recent trend of the judicial pronouncements show that recommendations made by the Public Service Commission command high respect and cannot be lightly ignored. As the civil service is backbone of the State and the persons so inducted are normally to stay in the services of the State till they reached the age of superannuation. They have to maintain a high standard of honesty, integrity, Justice and fair play and some times they have to withstand political pressure and influence of highly placed individuals. Such qualities can be expected from those who got their induction only on the strength of their own ability and merit and not from those who maneuvered their selection on the basis of political backing, favouritism, nepotism and regionalism. The Public Service Commission should gain confidence of not only those who aspire for jobs in Govt. service but of the public at large as well. It needs to mention that when public confidence is lost in any constitutional institution and its credibility and respect diminishes. The role and importance of the Public Service Commission had been debated and stated in various cases. Some of them can be referred as under:-

In case titled Azad Jammu & Kashmir Government and others v. Muhammad Younas Tahir and others (1994 SCR 341) at page 379 of the report it was observed as under:-

“As has been seen the functions prescribed are referable to section 48 of the Interim Constitution Act. In my view when such a provision is made by the Constitution the functions prescribed by the Act of the Assembly have the same force as functions prescribed by the Constitution itself. It follows that it is in pursuance of the command of the Constitution that Public Service Commission performs the functions assigned to it. It is true that by an Act of the Assembly the functions of the Public Service Commission may be changed or enlarged. But once they have been entrusted they are to function under the Constitution.”

Again in case titled Azad Jammu & Kashmir Government v. Javed Iqbal Khawaja and another the apex Court in para 20 and 21 of the report observed the sanctity and importance of the Public Service Commission as under:-

“20. I may observe that Public Service Commission of Azad Jammu and Kashmir is an institution which follows an international pattern. Such institutions exist in many countries of the world. In England recruitment of all permanent civil servants is in the hands of Civil Service Commission which conducts competitive examination for that purpose. The qualifications for appointment to any appointment under the Crown, whether permanent or temporary, are also subject to the approval of the Commission. The functions of Canadian Civil Service Commission is to conduct recruitment to civil service, it also supervises promotion and organization of services. In Australia the Public Service Board recruits and qualifies personnel and also makes suggestions for promoting departmental efficiency and economy. It is the power of the Board to report to the House of Parliament if its suggestions are not accepted. There is a similar Commission in United States and is known as ‘Federal Service Commission’ and covers

practically the entire Federal Services. However, it is, like the Public Service Commission of Azad Jammu and Kashmir, and advisory body. Public Service Commission is in existence there from the very birth of Pakistan. Such a Commission was in existence in undivided India under Government Act of 1935.

21. Service Commissions are constitutional bodies and enjoy independence in their functioning so that best results are achieved. These Commissions are manned by persons nominated by executive but it is universally recognized that they have to be free from executive control. This is not a pious wish but is explicitly found in the laws of Azad Jammu and Kashmir. Section 48 of the Interim Constitution Act gives constitutional status to Public Service Commission and its functions. Then it is laid down in Section 10 of the Public Service Commission Act that the Commission shall present to the President annually a report on the work done by the Commission, and the President shall cause a copy of the report to be laid before the Legislative Assembly of Azad Jammu and Kashmir. It is further laid down that the report to be submitted by the Commission shall set out the cases in which the advice of the Commission was not accepted and the matters on which the commission was, where the required, not consulted. The reasons for not accepting the advice or for not consulting it have also to be stated. It is provided in the Public Service Commission Act that Chairman and members of the Commission shall be appointed by the President and on ceasing to hold the office they shall not be eligible for further appointment in the service of Azad Jammu and Kashmir. All these provisions show the independence of the Public Service Commission. On the contrary there is no law which may directly or indirectly, lay down that the Government may control the functional body. Our Constitution lays down separate functions for all organs set up by it these functions cannot be controlled or circumvented except in accordance with the Constitution. Thus in my view Para (1) of Notification No. 1 is without lawful authority.”

The role of the Public Service Commission has been highlighted in para 34 of (2000) 4 Supreme Court Cases 309 as under:-

“The credibility of the institution of a Public Service Commission is founded upon the faith of the common man in its proper functioning. The faith would be eroded and confidence destroyed if it appears that the Chairman or the members of the Commission act subjectively and not objectively or that their actions are suspect. Society expects honesty, integrity and complete objectivity from the Chairman and members of the Commission. The Commission must act fairly, without any pressure or influence from any quarter, unbiased and impartially, so that the society does not lose confidence in the Commission. The high constitutional trustees, like the Chairman and members of the Public Service Commission must forever remain vigilant and conscious of these necessary adjuncts.”

The contention of Raja Sajjad Ahmed Khan, the learned Advocate for the petitioners that active political workers and nominees in the recent elections have been appointed as Chairman as well as members of the Public Service Commission, has not been denied by the respondents in their written statement. It is also admitted that some of the respondents have not filed their personal affidavit with their written statement nor they have submitted their resignations after acceptance of the public office. Mr. Abdul Rasheed Abbasi, the learned Advocate for the respondents met the objection by placing reliance on Jammu and Kashmir Tehrik Ammal Party's case (PLD 1985 AJ&K (H.C) 95) and submitted that to form a political party is constitutional right which is enshrined in section 4(7) of the Interim Constitution Act, 1974 and the political affiliation is not a disqualification for

holding public office under the Constitution and the said disqualification is even not recognized by the Public Service Commission Act, 1986. However, in our view the contention of the learned Advocate is without substance. In Jammu and Kashmir Tehrik Ammal party's case facts were totally different and the petitioners before this Court were political worker who were elected as members of the Legislative Assembly and had a right under the Constitution to remain as such for full tenure. Their this right was curtailed by a piece of legislature. The full bench of this Court held that restriction imposed through the impugned legislature therein falls within unreasonable restriction because same offends the right to form an association. The contention of the learned Advocate that even sitting Judges of this Court and Supreme Court had been a active political workers and their affiliation with the political parties had not been considered as disqualification for appointment in the superior judiciary. We are of the view that this argument of the learned Advocate is also devoid of any force. Mere affiliation with a political party is not a disqualification where holders of the public offices are selected on the basis of an objective criteria not otherwise as the position is in the case in hand. So for appointments in judiciary are concerned those are made from the persons who are in possession of the qualification laid down in sections 42(5) and 43(3) of the Azad Jammu & Kashmir Interim Constitution Act, 1974. For appointments in the Supreme Court or in this Court qualification is fixed by the Constitution itself. The appointments are further subject to the effective, meaningful, purposive, consensus oriented

consultation between the Constitutional consultees and the tenure of the judges is also constitutionally fixed because they have to retire at the age of 65 and 62 years respectively, if not removed earlier in accordance with the scheme of the Constitution, therefore the appointment of judges with the political background is not comparable with the appointment of the Chairman as well as Members of the Public Service Commission. Under the provision of the Public Service Commission Act Chairman as well as Members of the Public Service Commission are appointed on contract for a period of 3 years, which is extendable but the Act gives unguided powers to the Govt. to terminate their contract at any time.

The upshot of the above discussion is that petition is accepted and Ordinances No.LD/Legis-Ord/728-38/2012 dated 27.11.2012 and No.LD/Legis-Ord/312-323/2012 dated 09.07.2012 are declared to have been issued ultra vires of the Constitution and the Public Service Commission Act, 1986. Resultantly, the appointments made on the basis of the said Ordinances are also declared illegal for having been made without lawful authority. Desired that the Public Service Commission Act, 1986 may be amended by the Act of the Legislative Assembly and qualification for the Chairman as well as Members of the Public Service Commission may be provided as has been provided for the other public office holders through the Acts of the Legislative Assembly either Chief Election Commissioner under section 50 of the Azad Jammu & Kashmir Interim Constitution Act, 1974, Chairman Service Tribunal under section 3(a) of the Azad Jammu & Kashmir

Service Tribunals Act, 1975, Chairman Ehtesab Bureau under Section 3 of the Azad Jammu & Kashmir Ehtesab Bureau (Third Amendment) Act, 2010. It is also need to mention that earlier Chief Ehtesab Commissioner under the repealed provisions of Ehtesab Act, 1997 was to be appointed by the President after consultation with the Leader of Opposition and Chief Justice of Azad Jammu & Kashmir. If such course is adopted for appointment of the Chairman of the Public Service Commission by amending the Public Service Commission Act, 1986 then the confidence of common man and those who aspire for job will be ensured. The same course is adopted for appointment of Chairman NAB in Pakistan.

Before parting with the case it may be stated that as the appointments of the private respondents have been declared ultra vires of the Constitution and they will cease to hold the office immediately for the reasons recorded in the judgment, however, the proceedings taken, acts done either financial or administrative by the respondents in their daily business would not be effected by this judgment on the principle of de facto doctrine, as has been held in case titled Muhammad Younas Tahir and another vs. Shaukat Aziz, Advocate, Muzaffarabad and others. (2012 SCR 213).

Muzaffarabad,
10th Sep 2013.(M.N)

CHIEF JUSTICE

**JUDGE
(A)**

**JUDGE
(S)**

**JUDGE
(H)**