

P L D 2007 Supreme Court 52

Present: Iftikhar Muhammad Chaudhry, C. J., Abdul Hameed Dogar and Saiyed Saeed Ashhad, JJ

Hafiz HAMDULLAH---Appellant

Versus

SAIFULLAH KHAN and others---Respondents

Civil Appeal No.961 of 2005, decided on 25th May, 2006.

(On appeal from the judgment dated 27-7-2005, passed by Balochistan High Court, Quetta in C.P. No.46 of 2004).

(a) Constitution of Pakistan (1973)---

---Art. 199(1)(a)---Constitutional jurisdiction of High Court---Scope---"Aggrieved person"---Connotation---Constitutional jurisdiction of High Court, under Art. 199(1)(a) of the Constitution, can be invoked by an aggrieved person, which denotes a person who has suffered a legal grievance, against whom a decision has been pronounced which has wrongfully deprived him or wrongfully refused to him something which he was legally entitled to---Further requirement is that the person invoking Constitutional jurisdiction under Art.199 of the Constitution has to establish that any of his legal or fundamental rights guaranteed under the Constitution has been violated resulting in legal loss.

(b) Constitution of Pakistan (1973)---

---Art. 199(1)(b)(ii)---Writ of quo warranto---Scope---Aggrieved person---Person seeking writ of quo warranto---Locus standi---Writ of quo warranto is in the nature of laying an information before a Court, against a person who claimed and usurped an office, franchise or liberty, requesting for holding an enquiry to enable him to show the authority under which he supported his claim of right to the office, franchise or liberty--Object of writ of quo warranto is to determine legality of the holder of a statutory or Constitutional office and decide whether he was holding such office in accordance with law or was unauthorizedly occupying a public office---Where a person prays for a writ of quo warranto, the Court would be under an obligation to inquire whether the incumbent is holding the office under the orders of a competent authority and also to examine whether he would be legally qualified to hold the office or to remain in the office---For issuance of a writ of quo warranto, the person invoking the jurisdiction of High Court under Art.199 of the Constitution is not required to fulfil the stringent conditions required for bringing himself within the meaning of an aggrieved person---

Any person can move High Court to challenge the usurpation or unauthorized occupation of a public office by the incumbent of that office and he is not required to establish his locus standi to invoke Constitutional jurisdiction under Art.199 of the Constitution in the manner as generally required by this Article---Writ of quo warranto can be instituted by a person though he may not come within the meaning of word aggrieved person.

M.U.A. Khan v. Rana Muhammad Sultan and another PLD 1974 SC 228; Al-Jahad Trust through Raees-ul-Mujahidin Habibul Wahabul Khairi v. Federation of Pakistan and others PLD 1996 SC 324; Malik Asad Ali and others v. Federation of Pakistan through Secretary Law, Justice and Parliamentary Affairs Islamabad and others PLD 1998 SC 161 and Captain retired Muhammad Naseem Ejazi v. Province of Punjab 2000 SCMR 1720 rel.

(c) Representation of People Act (LXXXV of 1976)---

---Ss. 14, 52 & 99(1)(a)(k)---Conduct of General Elections Order (7 of 2002), Arts. 8-D (2)(a) & 8-E---Constitution of Pakistan (1973), Arts. 63 (2), 199(1)(b)(ii) & 225---Petition for writ of quo warranto---Maintainability---Member of Provincial Assembly--Disqualification---High Court disqualified the returned candidate on a petition filed by a person who himself was not a candidate in election---Plea raised by appellant was that in view of the bar contained in Art.225 of the Constitution, High Court could not set aside the election---Validity---Appellant was not qualified to contest for the seat of Provincial Assembly in view of the provisions contained in Art.8-D(2)(a) of Conduct of General Elections Order, 2002, read with S.99(1)(a)(k) of Representation of People Act, 1976, thus he was suffering from pre-election disqualification---Petitioner before High Court was not a candidate in general election held for electing members of Provincial Assembly, as such could not have recourse to Ss.14 and 52 of Representation of People Act, 1976, nor any other remedy made available to him by any law, rules or regulations to challenge the election of appellant as member of Provincial Assembly, which emphatically claimed/described to be absolutely illegal and void---Only remedy available to the petitioner before High Court was by way of institution of a Constitutional petition praying for writ of quo warranto, requesting High Court to inquire from the appellant to show that under what authority or law he was entitled to hold the office of member of Provincial Assembly---Constitutional petition was maintainable before High Court.

Khuda Bakhsh v. Mir Zafarullah Khan Jamali 1997 SCMR 561; Miss Benazir Bhutto v. Federation of Pakistan and another PLD 1988 SC 416 and PLD 2003 Quetta 94; Farzand Ali v. Province of Pakistan PLD 1970 SC 98; Masoodul Hasan v. Khadim Hussain and another PLD 1963 SC 203; Rex v. Spever 1916 IKB 595 rel.

(d) Civil service---

---Resignation---Continuation in service---Principles---On mere tendering/submitted of resignation, services of government/civil servant would not come to an end and the same has to be accepted for its effectiveness by competent authority---Till such time as the resignation is accepted by competent authority, the civil/government servant would

continue to be in government service and would be under obligation to perform his duties---If he fails or omits to perform his duties without prior authorization or leave, he would be deemed to be an absentee rendering himself liable for disciplinary proceedings under appropriate law and rules.

Chairman Pakistan Space and Upper Atmosphere Research Commission (SPARCO), Karachi and another v. Ahmad Mumtaz Mustehsan and another 2000 SCMR 890; Moti Ram v. Param Dev and another 1993 SCMR 2137 and Province of West Pakistan and others v. Ch. Din Muhammad and others PLD 1964 SC 29 ref.

(e) Representation of People Act (LXXXV of 1976)---

---Ss. 14, 52 & 99(1)(a)(k)---Conduct of General Elections Order (7 of 2002), Arts.8-D (2)(a) & 8-E---Constitution of Pakistan (1973), Arts.63(2), 199(1)(b)(ii) & 225---Writ of quo warranto---Member of Provincial Assembly---Disqualification---Tendering of resignation from civil service---Effect---Relevant dates for filing of nomination papers---Appellant tendered his resignation on 3-11-1999 from service, which was accepted on 13-11-2003, and was elected as member Provincial Assembly---Election of appellant was set aside by High Court in exercise of jurisdiction under Art. 199(1)(b)(ii) of the Constitution, on the ground that he did not cease to be a government servant two years before the elections---Plea raised by appellant was that his resignation would be deemed to have been accepted immediately on its tender, which would have removed his disability---Validity---Appointments of government/civil servants were made and governed by the provisions of Civil Servants Act, 1973, the Rules made thereunder and the terms and conditions agreed by the parties incorporated in the appointment letter/ notification---Service of government/civil servant was a result of mutual agreement between him and the government---Employment/service being result of a bilateral agreement between him and the government, unilateral action of government/civil servant to relinquish his right in relation to an office/post would be operative or effective unless accepted by the competent authority---Resignation tendered by appellant and communicated to competent Authority on 3-11-1999 was accepted on 13-11-2003, therefore, he continued to be a government/civil servant till 13-11-2003---Acceptance of resignation, tendered by a civil servant, by competent authority was an essential requirement for its effectiveness and till such time as it was accepted or approved, civil servant would continue to be in service---Resignation would be effective from the date of its acceptance and not from back date---Requirement for contesting election to a seat in Assembly for government servant was that period of two years should lapse after his retirement/resignation for becoming eligible to contest the election---Relevant dates for completion of two years were the dates of retirement/resignation and filing of nomination papers---Appellant's resignation having been accepted on 13-11-2003, he was a government servant at the time of filing of nomination papers and on the date of polling, thus was disqualified from contesting the election and his election was rightly declared void by High Court--Supreme Court declined to interfere in the judgment passed by High Court---Appeal was dismissed.

Civil Appeals Nos.1374, 1375 & 1672 of 2003; Muhammad Ayub v. Abdullah Khan PLD 2004 SC 479 rel.

(f) Order---

---Executive order---Retrospective effect---Executive/departmental authority has no power to pass orders with retrospective effect.

Noor Muhammad v. The Member Election Commission, Punjab and others 1985 SCMR 1178 and Noor Muhammad v. Muhammad Abdullah and 7 others 1984 SCMR 1578 rel.

Kamran Murtaza, Advocate Supreme Court for Appellant.

Syed Iftikhar Hussain Gillani, Senior Advocate Supreme Court and Mehr Khan Malik, Advocate-on-Record for Respondent No.1.

Nemo for Respondents Nos. 2 to 5.

Mrs. Naheeda Mehboob Ellahi, D.A.-G. (on Court Notice).

Date of hearing: 25th May, 2006.

JUDGMENT

SAIYED SAEED ASHHAD, J.---This civil appeal by leave of the Court assails the judgment of Balochistan High Court, dated 27-7-2005 in Constitutional Petition No. 46 of 2004 whereby the respondent challenged the election of the appellant as member of Balochistan Provincial Assembly. The High Court vide its judgment, dated 27-7-2005 allowed the petition and declared the election of the appellant as Member of the Balochistan Provincial Assembly as illegal.

2. The brief facts of the case as stated by the appellant in his appeal under the heading "Facts" are reproduced as under:--

"Brief facts giving rise to file the petition for leave to appeal are that respondent No.1 filed a constitutional petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 contending therein that he is a registered voter and concerned with elections of the persons for his constituency in the General Elections from PB-11 Killa Abdullah-1, according to him though the respondent No.1 before the High Court (present petition) was elected having more votes than the others as such declared to be returned candidate, but allegedly he was in Government service being a Junior Vernacular Teacher (JVT) who tendered his resignation on 1-12-2001 to the respondent No.2, which was accepted with effect from 1-12-2001 by the respondent No.3, while the elections were held on 10-10- 2003. That it was further alleged that the present petitioner was not a registered voter of the constituency and his name was not existing in the Electoral Roll at the time of General Elections held on 10-10-2002.

3. The appellant submitted that the above facts were not correctly stated by respondent No.1 before the High Court as he had never tendered any resignation, dated 1-12-2001 which was said to have been accepted with effect from 1-1-2002. It was further stated that the appellant tendered his resignation on 1-11-1999 duly received in the office of Director (Schools) Balochistan, Directorate of Education Shahwak Shah Road, Quetta on 3-11-1999 but the same was not attended to and was also not traceable. Subsequently, on an application filed by him the same was traced out and accepted on 13-11-2003 with effect from 1-11-1999. It was also submitted that the resignation of appellant having been accepted with effect from 1-12-1999 therefore, he was qualified to contest election as on that date he submitted his nomination papers, the period of two years had elapsed since he was ceased to be a Government Servant.

4. Balochistan High Court after taking into consideration the arguments of the learned counsel for the parties, perusal of the record and the relevant law allowed the constitutional petition declaring his election as Member of Balochistan Provincial Assembly to be illegal. It will also be appropriate to reproduce the operative portion of the judgment of Balochistan High Court as under:--

"In view of above discussion, we, are inclined to hold that the respondent No.1 has been unable to show the authority of law under which his claim to have been elected to and continues to be Member of Balochistan Provincial Assembly from the Constituency PE-11 Killa Abdullah-I, as such; action of Election Commission (respondent No.4) having notified the respondent No.1 in the Official Gazette to have been duly elected as such member is without lawful authority and of no legal effect. As a necessary corollary to this finding a declaration would go to the respondent No.4 to undo the wrong and to withdraw notification by which respondent No.1 was declared to have been duly elected. As a result thereof Constituency PB-11 Killa Abdullah-I would fall vacant. The petition is accordingly allowed with no order as to costs."

5. Appellant feeling aggrieved and dissatisfied with the judgment of Balochistan High Court has assailed the same by filing a civil petition for leave to appeal. This Court vide order-dated 29-7-2005 granted leave to appeal to the appellant.

6. We have heard the arguments of Mr. Kamran Murtaza, Advocate Supreme Court on behalf of the appellant and Syed Iftikhar Hussain Gillani, Senior Advocate Supreme Court for respondent No.1.

7. Mr. Kamran Murtaza learned Advocate Supreme Court assailed the judgment of Balochistan High Court on the following grounds:

(i) that the High Court has completely ignored the fact that the constitutional petition under Article 199 of the Constitution of Islamic Republic of Pakistan (hereinafter referred to as the "Constitution") was not maintainable to challenge the election of the appellant in view of Articles 225 and 63(2) of the Constitution and availability of alternative remedy under section 8-E of the Conduct of General Elections Order, 2002 (hereinafter referred to as the "Order") placing reliance on the judgments in the cases of (i) Khuda Bakhsh v. Mir Zafarullah Khan Jamali (1997 SCMR 561), (ii) Miss

Benazir Bhutto v. Federation of Pakistan and another (PLD 1988 SC 416) and (iii) PLD 2003 Quetta 94;

(ii) that the High Court erred in holding that respondent No.1 was an aggrieved person within the meaning of Article 199 of the Constitution so as to invoke the constitutional jurisdiction of the High Court to challenge the election of the appellant as Member of the Balochistan Provincial Assembly;

(iii) that the High Court has misconstrued and misinterpreted the provisions of law, rules/regulations and instructions relating to the acceptance of resignation tendered by a Government/Civil Servant and it ought to have held that service of appellant came to an end on 1-11-1999 when it was tendered as no order of acceptance of resignation was required. In support of his above contention he placed reliance on the case of Chairman Pakistan Space and Upper Atmosphere Research Commission (SPARCO), Karachi and another v. Ahmad Mumtaz Mustehsan and another (2000 SCMR 890). He also relied on an unreported judgment of this Court in Civil Appeals Nos. 1374, 1375 and 1672 of 2003;

(iv) that the petition involved decisions on contested questions of facts, which could not be decided by the High Court in its constitutional jurisdiction.

(v) that vide Order No.A-132/10589-94/EB the competent authority namely the Director of Education Balochistan, Quetta accepted the resignation of the appellant with effect from 1st December, 1999 which clearly establishes that the appellant had ceased to be in Government Service from 1-12-1999 and period of two years had elapsed before he contested elections for a seat of Balochistan Provincial Assembly in October, 2002;

(vi) that the purported entries in the service book of the appellant relating to acceptance of his resignation vide order, dated 25-1-2002 with effect from 1-1-2002 are of no avail as the order of acceptance of resignation was passed by an authority who was not competent to accept the resignation of the appellant; and

(vii) that the registration, dated 1-12-2001 purported to have been filed by the appellant disclosing his intention to resign from service on 1-1-2002 was a fabricated document and Respondent No.1 did not produce any proof nor filed his affidavit or of the concerned authority in support of his above claim whereas the appellant had succeeded in establishing that he actually submitted resignation, dated 1-11-1999 requesting for acceptance of his resignation with immediate effect which was duly received in the Department on 3-11-1999.

8. Syed Iftikhar Hussain Gillani, learned Senior Advocate Supreme Court appearing on behalf of respondent No.1 supported the judgment of Balochistan High Court and submitted that the High Court in holding that the appellant was not legally competent to contest election for a seat of Balochistan Provincial Assembly in October, 2002 as he has not fulfilled the requisite condition of expiry of two years from the date he ceased to be in Government service till the holding of elections had not elapsed as per requirements of Article 8(D)(A) read with section 99(1-A/K) of the Representation of

the Peoples Act, 1976 (hereinafter referred to as the "Act"). Accordingly, the High Court did not commit any illegality and the same was just, proper and valid order, Mr. Gillani assailed the appeal on further following grounds:--

(i) that the order, dated 13-11-2003 whereby the resignation of the appellant was accepted from 1-12-1999, even if assumed to be valid and proper would still not remove the disqualification as the period of two years would not elapse between the resignation and filing of nomination paper;

(ii) that the observations of the High Court that a resignation tendered by a civil/Government servant would not operate automatically with effect from the date of resignation of the appellant does not suffer from any illegality or infirmity as the same is in consonance with the law, rules `regulations and instructions of the Government as well as the law laid down by this Court. In support of his above contentions he placed reliance on the case of Chairman Pakistan Space and Upper Atmosphere Research Commission (SPARCO), Karachi and another v. Ahmad Mumtaz Mustehsan and another (2000 SCMR 890). He also placed reliance on the case of Moti Ram v. Param Dev and another from Indian Jurisdiction reported in 1993 SCMR 2137;

(iii) that the respondent No.1 had requested for issuance of a writ of quo-warranto and for filing a constitutional petition seeking issuance of a writ of quo warranto a person is not required to be an aggrieved person as required by Article 199 of the Constitution. In support of his above contentions he placed reliance on the case of Farzand Ali v. Province of Pakistan (PLD 1970 SC 98);

(iv) that the order purported to be, dated 13-11-2003 accepting the resignation of the appellant with effect from 1-12-1999 was an illegal and void order as executive/departmental authority had no power to make an order with retrospective effect unless such power is specifically conferred on any executive/departmental authority by rules. In support of his above contentions he relied on the judgment in the case of Noor Muhammad v. The Member Election Commission, Punjab and others (1985 SCMR 1178);

(v) that subsections (5) and (5-A) of section 14 of the Act confer limited jurisdiction on the Tribunal where under it cannot examine the validity, legality, vires or justification of an order passed or a notification issued by an authority in exercise of the powers vested in it and further that provisions of the two subsections can be pressed into service only by a voter or a defeated candidate. In support of his above contention he relied on the judgment of this Court in the case of Farzand Ali (supra).

9. Mrs. Naheeda Mehboob Ellahi, learned Deputy Attorney General appearing on Court's notice adopted the arguments of Syed Ifikhar Hussain Gillani and supported the judgment of Balochistan High Court.

10. We have considered the arguments of learned counsel for the parties and have also gone through the impugned judgment, perused the material on record; the law, the rules and the institutions; and the case law cited at the bar.

11. Mr. Kamran Murtaza, Advocate Supreme Court appearing on behalf of the appellant had assailed maintainability of the constitutional petition before the High Court on two grounds; firstly, that respondent No.1 had no locus standi to file the constitution petition as he was not an aggrieved person as envisaged by Article 199(1) (a) of the Constitution; and secondly, that the subject-matter of the petitioner related to an election dispute which could have been assailed only by way of an election petition as required under section 52 of the Act.

12. With regard to the first objection it may be noted that under Article 199(1)(a) of the Constitutional jurisdiction of the High Court can be invoked by an aggrieved person which denotes a person who has suffered a legal grievance, against whom a decision has been pronounced which has wrongfully deprived him or wrongfully refused him something which he was legally entitled to. It is also the requirement that the person invoking the constitutional jurisdiction under Article 199 of the Constitution has to establish that any of his legal or fundamental right guaranteed under the Constitution has been violated resulting in legal loss. It is, however, to be noted that respondent No.1 has approached High Court of Balochistan by way of a constitutional petition wherein he had prayed for issuance of a writ of quo warranto against the appellant. A writ of the quo warranto is in the nature of laying an information before a Court, against a person who claimed and usurped an office, franchise or liberty, requesting for holding an enquiry to enable him to show the authority under which he supported his claim of right to the office, franchise or liberty. Its object is to determine the legality of the holder of a statutory or constitutional office and decide whether he was holding such office in accordance with law or was unauthorizedly occupying a public office. Where a person prays for a writ of quo warranto the Court would be under an obligation to enquire whether the incumbent is holding the office under the orders of a competent authority and also to examine whether he would be legally qualified to hold the office or to remain in the office. For issuance of a writ of quo warranto the person invoking the jurisdiction of the High Court under Article 199 of the Constitution is not required to fulfill the stringent conditions required for bringing himself within the meaning of an aggrieved person. Any person can move the High Court to challenge the usurpation or unauthorized occupation of a public office by the incumbent of that office and he is not required to establish his locus standi to invoke the constitutional jurisdiction under Article 199 of the Constitution in a manner as generally required by the said Article. This Court in the case of *M.U.A. Khan v. Rana Muhammad Sultan* and another (PLD 1974 SC 228) categorically pronounced that a Civil Petition for issuance of a writ of quo warranto can be moved by a person who may not even be an aggrieved party. The pronouncement to the above effect was reiterated and followed by this Court in the cases of (i) *Al Jahad Trust through Raaees-ul-Mujahidin Habibul Wahabul Khairi v. Federation of Pakistan and others* (PLD 1996 SC 324), (ii) *Malik Asad Ali and others v. Federation of Pakistan through Secretary Law, Justice and Parliamentary Affairs Islamabad and others* (PLD 1998 SC 161); and (iii) *Captain retired Muhammad Naseem Ejazi v. Province of Punjab* (2000 SCMR 1720) It is, thus, to be observed that this Court has consistently held that a writ of quo warranto can be instituted by a person though he may not come within the meaning of word aggrieved person. In this view of the matter this objection is overruled.

13. With regard to the contention that the issue in the constitution petition filed before the High Court of Balochistan pertained to an election dispute and the High Court would have no jurisdiction to entertain the same as it could be decided only by way of an election petition under section 52 of the Act in view of the provision of Article 225 of the Constitution, it may be pointed out that according to Respondent No.1 appellant was not qualified to contest that election for a seat of Balochistan Provincial Assembly in view of the provisions contained in section 8-D(2)(a) of the Order read with section 99(1)(a)(k) of the Act. Thus, the appellant was 'suffering from a pre election disqualification. As already noted above respondent No.1 was not a candidate in the general election held for electing members of Balochistan Provincial Assembly from Constituency PB-11 Killa Abdullah-I, as such could not have recourse to sections 14 and 52 of the Act nor there was any other remedy made available to him by any law, rules or regulations to challenge the election of appellant as member of Balochistan Provincial Assembly which he emphatically claimed/described to be absolutely illegal and void. In the circumstance, the only remedy available to respondent No.1 was by way of institution of a constitutional petition praying for a writ of quo warranto requesting the High Court to enquire from the appellant to show that under what authority or law he was entitled to hold the office of member of Balochistan Provincial Assembly. This Court in the case of Lt. Col. Farzand Ali and others v. Province of West Pakistan Lahore (PLD 1970 SC 98) was faced with a similar issue and after minutely examining the provisions of law pronounced that pre-election disqualification of a person/candidate to contest the election for a seat in the Assembly/legislature could be questioned in writ jurisdiction. The reasons advanced by this Court for the above pronouncement was that an election dispute raised by a voter or the defeated candidate in his individual capacity while proceedings in the nature of quo warranto could be invoked in public interest by any person wherein determination of the title of a returned candidate to hold the office is sought and not the validity of the election. It will be appropriate to reproduce the relevant portion from the cited judgment as under:--

"I regret my inability to accept this contention for more than one reason. Firstly, because this would be allowing a person to continue to remain a member of an Assembly even though Article 103 of the Constitution says that he cannot. Secondly, because, the dispute raised after an election is not, a dispute relating to or arising in connection with an election but a dispute regarding the right of the person concerned from being a member of an Assembly. An election dispute is a dispute raised by a voter or a defeated candidate in his individual capacity under the Statute. It determines the Private rights of two persons to the same office but a proceeding for information in the nature of quo warranto is invoked in the public interest. The latter seeks to determine the title to the office and not the validity of the election. These are two distinct and independent remedies for enforcing are two distinct and independent remedies for enforcing independent rights, and the mere fact that the disqualification has been overlooked or what is worse, illegally condoned by the Authorities who were responsible for properly scrutinizing a person's right to be enrolled as a voter or his right to be validly nominated for election would not prevent a person from challenging in the public interest his right to sit in the house even after his election if that disqualification is still continuing. Indeed a writ of quo warranto or a proceeding in the nature of an information of a quo warranto or a proceeding in the nature of an

information for a quo warranto, unless expressly barred by some statute, is available precisely for such a purpose."

14. From a perusal of the above passage the objection raised on behalf of the appellant relating to the maintainability of the constitutional petition on this ground is also without any substance. Mr. Kamran Murtaza, Advocate Supreme Court laid great emphasis on the Judgment of this Court in the case of Khuda Bakhsh v. Mir Zafarullah Khan Jamali (1997 SCMR 561) to substantiate his argument relative to the maintainability of a constitutional petition in view of the bar contained in Article 225 of the Constitution. In the above cited case this Court pronounced that in view of the bar contained in Article 225 of the Constitution a constitutional petition seeking to challenge the election of a returned candidate would not be maintainable. With due deference to the views expressed by the learned Division Bench we are unable to accept the same on account of the contrary view expressed by a larger Bench of four Judges of this Court in the case of Farzand Ali and others (Supra). The view taken by this Court in the case of Farzand Ali is in consonance with the earlier pronouncement of this Court in the case of Masoodul Hassan v. Khadim Hussain and another (PLD 1963 SC 203). In this case, Bench of three Judges of this Court pronounced that a writ of quo warranto would be maintainable against a holder of public office requiring him to show under what authority he was holding the public office and further that for maintainability of a writ petition for writ of quo warranto the petitioner would not have to establish that he was aggrieved party. In making the above pronouncement this Court had referred to the case of Rex v. Speyer (1916 1KB 595) wherein it was held that an application for a writ of quo warranto challenging the validity of appointment of Privy Council or by a private relator would be maintained. In the case of Miss Benazir Bhutto v. Federation of Pakistan and another (supra) relied upon by Mr. Kamran Murtaza in support of his above contention, this Court amongst others was dealing with the issue of maintainability of a constitutional petition under Article 184(3) of the Constitution wherein the Petitioner had challenged the amendments made in the Political Parties Act, 1962 as violative of Articles 17 and 25 of the Constitution and vires of Freedom of Association Order, 1978. This Court pronounced that when there was allegation of infraction of fundamental right of an individual or a class or a group of persons then proceedings could be activated or maintained by a person who might not be an aggrieved party. The pronouncement made in the cited case does not adversely reflect on the maintainability of the constitutional petition before the High Court and the objection related to the maintainability of the constitutional petition before Balochistan High Court on this ground is also overruled.

15. The point which now requires determination is whether tender of a resignation by a government or civil servant would automatically operate immediately from the date mentioned in the resignation or from the date of expiry of period stated in the resignation. It was submitted by Mr. Kamran Murtaza, that service of government/civil servant would come to an end from the date or period mentioned in the resignation and no formal acceptance of the resignation by the competent/departmental authority was required. In support of his above contention he placed reliance on the case of Chairman Pakistan Space and Upper Atmosphere Research Commission (SPARCO), Karachi and another v. Ahmad Mumtaz Mustehsan and another (2000 SCMR 890). It is the case of the appellant that he had submitted resignation letter/application, dated 1-11-1999 with

immediate effect duly received by the competent authority on 3-11-1999 (which appears at page 78 of the paper book) but the same was not attended to. Mr. Kamran Murtaza, Advocate Supreme Court has not been able to bring to our notice any provision of law, rules, or any other legal instrument in support of his contention that a government/civil servant would stand retired merely on tendering his resignation and no formal acceptance thereof would be required. The case-law relied upon by him is also of no assistance to the appellant. In this case, this Court had observed that the competent authority should take decision on the resignation submitted by the government servant at the earliest possible. It has nowhere been held that on submission of the resignation or pendency thereof for an indefinite period without any action, it would be deemed to have been accepted. This contention also loses force in view of the clear and unambiguous provision/instructions contained in the Esta Code at SL. No.13 of the Chapter under the heading "Termination of Services, Reversion to lower scale/post, Resignation and Desertion from Duty". The relevant instruction appears at page 452 of ESTACODE compiled by the Cabinet Division Islamabad in the year, 2000. It will be appropriate to reproduce the relevant instructions:--

"Resignation of temporary Government servant-subsection (3) of section 11 of the Civil Servants Act, 1973 makes the services of a civil servant subject to the provision of subsection (2) liable to termination of fourteen days' notice or pay in lieu thereof. Cases have come to the notice of the Establishment Division in which a civil servant who intends to resign from service gives 14 days' notice or deposits 14 days' pay in lieu thereof. After expiry of the notice period or having deposited 14 days' pay in lieu thereof he absent himself from office without waiting for acceptance of his resignation. This is against the rules. There is no provision in the Civil Servants Act, 1973 whereunder a civil servant whether permanent or temporary who wants to terminate his employment is required to give or can give 14 days notice or forfeit his pay to Government in lie thereof.

A civil servant, permanent or temporary, who wishes to terminate his appointment, should submit his resignation in writing. The resignation shall not become effective unless it is accepted to the competent authority. Till such time the resignation is accepted, the civil servant concerned continues to be in service and cannot absent himself from his duties without proper leave. The position in this regard is already explained in the Establishment Division O.M. No.1/34/57- MS, dated the 12th November, 1957, read with O.M. of even number, dated the 9th May, 1958."

16. From a bare perusal of the above instruction it is crystal clear that on mere tendering/submitted of resignation the services of Government/Civil Servant would not come to an end and the same has to be accepted for its effectiveness by the competent authority. It also reveals that till such time as the resignation is accepted by the competent authority, the Civil/Government servant would continue to be in Government service and would be under an obligation to perform his duties. In case he fails or omits to perform his duties without prior authorisation or leave, he would be deemed to be an absentee rendering himself liable for disciplinary proceedings under the appropriate law and rules. In view of the clear, express and unambiguous language used in instructions at serial No.13 of the Esta Code there can be no doubt that the resignation tendered/submitted by a civil servant does not become effective/operative

unless it is accepted by the competent authority and till such time the resignation is accepted the government/civil servant shall be deemed to be in the service. It will not be out of place to mention here that the above instruction was issued by the Authority, which is competent to amend, modify or alter the laws/rules relating to the terms and conditions of the civil servants, and such instructions would have same force as statutory rules. To substantiate the above proposition, reliance is placed on the judgment of this Court in the case of the Province of West Pakistan and other v. Ch. Din Muhammad and others (PLD 1964 SC 29).

17. Great emphasis was laid by Mr. Kamran Murtaza on the judgment of this Court in the case of Chairman Pakistan Space and Upper Atmosphere Research Commission (SPARCO), Karachi and another v. Ahmad Mumtaz Mustehsan and another (supra) to substantiate his contention that the resignation of the appellant would be deemed to have been accepted immediately on its tender which would have removed the above disability of the appellant. From a perusal of the judgment it may be noted that this Court made an observation that the authority competent to accept resignation was under an obligation to process the same within the stipulated period. It was not pronounced that on failure to do so it would become effective or operative without an order of acceptance. The case-law relied upon by Mr. Kamran Murtaza is of no assistance to him.

18. Syed Iftikhar Hussain Gillani, Senior Advocate Supreme Court vehemently controverted the above objection of the appellant and submitted that service of the appellant had not come to an end merely on submission of the resignation and he would be deemed to be in the service unless and until such acceptance was made by the competent authority. In support of his above contention he has placed reliance on the case of Moti Ram v. Param Dev and another (1993 SCMR 2137). This is a case from the Indian Jurisdiction and was decided by the Supreme Court of India. In the aforesaid case Supreme Court of India has considered in depth the question whether the resignation would be effective or accepted from the date it was tendered/submitted or that it requires acceptance by the competent authority for its effectiveness. In deciding the above question the Supreme Court of India observed that the act of relinquishment of office or its acceptance or otherwise is dependent on the nature of the office/post held by the incumbent and the act of relinquishment may take different forms or assume a unilateral or bilateral character depending on the nature of the office and the conditions governing it. If the act of relinquishment is of unilateral character it comes into effect which such act indicating the intention to relinquish the office is communicated to the competent authority. In which case the competent authority is not required to take any action and the relinquishment would be effective from the date of such communication. It was further observed that if the act of relinquishment is of a bilateral character, the communication of the intention to relinquish, by itself would not be sufficient to result in relinquishment of the office and some action is required to be taken on the communication of intention to relinquish e.g. acceptance of the said request to relinquish the office and in such a case the relinquishment does not become effective or operative till such action is taken. It was further observed that the question whether relinquishment of an office is unilateral or bilateral in character would depend upon the nature of the office and the conditions governing it. In this connection it pronounced that the holders of offices of President, Vice-President, Deputy Chairman

of Rajya Sabha, Speaker and Deputy Speaker of Lok Sabha, Judges of the Supreme Court and the High Courts etc. appointed under the Constitution of India would relinquish their offices merely by tendering their resignations and acceptance of the resignation was not required. The case of the Government/Civil Servant or contractual employee was found to stand on a different footing and the act of resignation and the relinquishment by the incumbent would be of a bilateral character requiring acceptance of the same by the employer or the competent authority for its effectiveness. It will be appropriate to reproduce the relevant portion from the judgment as under:

"As pointed out by this Court, resignation means the spontaneous relinquishment of one's own right and in relation to an office, it connotes the act of giving up or relinquishing the office. It has been held that in the general juristic sense, in order to constitute a complete and operative resignation there must be the intention to give up or relinquish the office and the concomitant act of its relinquishment. It has also been observed that the act of relinquishment may take different forms or assume a unilateral or bilateral character, depending on the nature of the office and the conditions governing it. (See: *Union of India v. Gopal Chandra Misra* (1978) 3 SCR 12 at p.21: AIR 1978 SC 694 at pp. 699-700). If the act of relinquishment is of unilateral character, the office is communicated to the competent authority. The authority to whom the act of relinquishment is communicated is not required to take any action and the relinquishment takes effect from the date of such communication where the resignation is intended to operate in praesenti. A resignation may also be 'prospective' to be operative from a future date and in that event it would take effect from the date indicated therein and not from the date of communication. In cases where the act of relinquishment is of a bilateral character, the communication of the intention to relinquish, by itself, would not be sufficient to result in relinquishment of the office and some action is required to be taken on such communication of the intention to relinquish, e.g., acceptance of the said request to relinquish the office, and in such a case the relinquishment does not become effective or operative till such action is taken. As to whether the act of relinquishment of an office is unilateral or bilateral in character would depend upon the nature of the office and the conditions governing it.

Under the constitution of India there are various offices which can be relinquished by unilateral act of the holder of the office and acceptance of resignation is not required e.g. President (Article 56(a)), Vice-President (Article 67(a)), Deputy Chairman of Rajya Sabha (Article 90(b)), Speaker and Deputy Speaker of Lok Sabha (Article 94(b)), Judge of the Supreme Court (Article 124(2)(a)), Judge of the High Court (Article 217(1)(a)). As regards member of either House of Parliament or a member of a House of Legislature of a State, originally, the position was that he could resign his office by unilateral act and the acceptance of resignation was not required. The requirement of acceptance of such resignation was introduced in Article 101(3)(b) and 190(3)(b) by the Constitution (Thirty- Third Amendment) Act, 1974. Similarly in Company Law, a director of a company is entitled to relinquish his office at any time he pleases by proper notice to the company and acceptance of the resignation is not required. See *Glossop v. Glossop* (1907) 2 Ch. 370, Halsbury's Laws of England, 4th Edn. Vol. 7, p. 316, para, 536.

A contract of employment, however, stands on a different footing wherein the act of relinquishment is of bilateral character and resignation of an employee is effective only on acceptance of the same by the employer. Insofar as Government employees are concerned, there are specific provision in the Service Rules, which required acceptance of the resignation before it becomes effective."

19. The appointments of government/civil servants are made and governed by the provisions of Civil Servants Act, the Rules made thereunder the terms and conditions agreed by the parties incorporated in the appointment letter/notification. In the circumstances, there can be no denial of the fact that the service of a government/civil servant is a result of mutual agreement between him and the government. The employment/service being the result of a bilateral agreement between him and the government, a unilateral action of the Civil/government servant to relinquish his right in relation to an office/post would not be operative or effective unless accepted by the competent authority. It has not been denied by the appellant that resignation tendered by him which was communicated to the competent authority on 3-11-1999 was accepted on 13-11-2003, therefore he continued to be a government/civil servant till 13-11-2003. The question whether resignation tendered by a government/civil servant requires acceptance by the competent authority for becoming effective/operative was examined by this Court in Civil Appeal Nos. 1374, 1375 and 1672 of 2003 decided on 31-3-2005 wherein it was pronounced that acceptance of resignation, tendered by a civil servant, by the competent authority was an essential requirement for its effectiveness and till such time as it is accepted or approved the civil servant would continue to be in service. It was further held resignation would be effective from the date of its acceptance and not from a back date. It will be beneficial to reproduce the relevant portion from the cited judgment as under:

"The argument that at the time of filing nomination papers i.e. 9-8-2002 to 20-8- 2002 he was no longer in the service of the Company is belied by the record. Admittedly the termination order of appellant's service, dated 7-12-1998 was set aside by Federal Service Tribunal, vide order, dated 13-10-2000. The statement of Bank account of the appellant tendered in evidence before the Election Tribunal shows that he had been receiving salary as well. Appellant Muhammad Naseem Turyali himself placed on record a copy of his resignation, dated 9-11-2002 wherein he prayed that his resignation be accepted is indicative of the fact that he was very much in service. Furthermore vide judgment, dated 28-3-2001 in the Appeal filed by the Company against the judgment of the Federal Service Tribunal, (reinstating the appellant) this Court while upholding the judgment of the said Tribunal had directed the Company to absorb the appellant. This would further show that he was in the service when nomination papers were tiled. An attempt was made to avoid the disqualification by procuring a letter from the Company, dated 25th of March, 2003 (Exh.P/10) vide which it was conveyed to the appellant Muhammad Naseem Turyali "On your request dated 25th March, 2003, we hereby conform that your Training stands terminated with effect from 7- 12-1998 and after that SSGCL has no concern with you". This novel approach to give effect to appellant's resignation from a back date cannot be countenanced in law."

19-A. Mr. Kamran Murtaz, learned Advocate Supreme Court further contended that even if assuming for the sake of arguments that condition of acceptance of resignation tendered by a civil/government servant was necessary for its becoming effective and operative and the appellant continued to be in government service till such time as his resignation was accepted, the fact is that resignation was acceptance by the competent authority with effect from 1-12-1999 as would appear from the undated order but purported to have been made on 13-11-2003. Mr. Kamran Murtaza, Advocate Supreme Court was asked to show us any provision of law or rule whereby executive/departmental authority, has been authorized or empowered to pass orders with retrospective effect in view of the settled principle that the executive/departmental authority has no powers to pass orders with retrospective effect. He was unable to refer us to any provisions of law or rules. On the contrary Syed Iftikhar Hussain Gillani, Senior Advocate Supreme Court appearing on behalf of the respondent No.1 referred us to the case of Noor Muhammad v. The Member Election Commission, Punjab and others (1985 SCMR 1178) wherein this Court while examining the legality of an order of removal from service which was made operative retrospectively categorically pronounced that no executive/departmental authority was vested with such powers unless expressly empowered in that behalf by the rules. It was further held that order of dismissal/removal would take effect only from the date it was passed. He also referred us to the case of Noor Muhammad v. Muhammad Abdullah and seven others (1984 SCMR 1578) wherein a similar view was taken by this Court observing that irrespective of the fact whether the government/competent authority was legally empowered to remove him from service with retrospective effect, the fact was that no order of his dismissal or removal was in existence on the day of election and obviously on that day he was in government service. The above observation is applicable on all fours to the facts and circumstances of this case. According to the appellant's own admission his resignation was accepted on 13-11-2003, there was no order of acceptance of resignation before that date, he continued to be in government service at the time of filing nomination paper as well as on the date of election i.e. 12-10-2002. He was, thus, not qualified and eligible to contest the election for a seat in the Balochistan Provincial Assembly. It may be mentioned here that according to respondent No.1 appellant had tendered his resignation from service on 1-12-2001 with effect from 1st January, 2002, which was, duly accepted and such facts were incorporated in his service book, (the copy of relevant page of which appears at page 73 of the paper book). Mr. Kamran Murtaza had vehemently denied the factum of tender of resignation, dated 1-12-2001 and submitted that it was a forged and fabricated document. He further submitted that even if assuming for the sake of arguments that any such resignation was tendered by the appellant and was accepted as claimed by respondent No.1, the same is of no legal effect as it was accepted by an authority who was not competent to accept the resignation of the appellant. In this context it may be observed that no useful purpose will be served by entering into this controversy as the same would have no bearing whatsoever on the decision of this case in view of the clear and unambiguous admission of the appellant that he had tendered resignation vide his application, dated 1-11-1999 which was accepted on 13-11-2003 though with retrospective effect i.e. from 1-11-1999.

20. Mr. Kamran Murtaza, Advocate Supreme Court submitted that assuming for the sake of argument that the resignation of the appellant was accepted on 13-11-2003 and

not earlier as stated in the order, dated 13-11-2003, the disqualification came to an end as he ceased to be a government servant and his election as member of Balochistan Provincial Assembly became lawful after 13-11-2003. This contention is without any substance. The requirement for contesting election to a seat in the Assembly for a government servant is that period of two years should lapse after his retirement/resignation for becoming eligible to contest the election. The relevant dates for completion of two years are the dates of retirement/resignation and filing of nomination papers. Appellant's resignation having been accepted on 13-11-2003, he was a government servant at the time of filing of nomination paper and on the date of polling, thus was disqualified from contesting the election and his election was rightly declared void by the High Court. For the above proposition reliance is placed on the judgment of this Court in the case of Muhammad Ayub v. Abdullah Khan (PLD 2004 SC 479).

22. For the foregoing facts, reasons and discussion this appeal is found to be without any merit. By a short order of even date, it was dismissed with no orders as to costs for reasons to be recorded later. The above are the reasons of our short order.

M.H./H-13/S Appeal dismissed.

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