**1994 M L D 2382**

**[Supreme Court (A J & K)]**

**Present: Sardar Said Muhammad Khan, C.J., Basharat Ahmad Shaikh and Muhammad Yunus Surakhvi, JJ**

**AZAD GOVERNMENT OF THE STATE OF JAMMU AND KASHMIR through its Chief Secretary, Muzaffarabad and 10 others---Appellants**

**versus**

**Sahibzada ISHAQ ZAFAR, EX-SPEAKER AJ&K LEGISLATIVE ASSEMBLY and 38 others---Respondents**

Civil Appeal No.45 of 1994, decided on 16th August, 1994.

(On appeal from the order of the High Court dated 29-12-1993 in Writ petition No .127 of 1993).

S.M. Zafar and Muhammad Hanif Khan, Advocates for Appellants. Rafique Mahmood Khan and Muhammad Ibrahim Zia, Advocates for Respondent No. 1.

Date of hearing: 23th June, 1994.

**JUDGMENT**

**SARDAR SAID MUHAMMAD KHAN, C.J.**---This appeal has been preferred against the order of the High Court dated 29-12-1993, whereby the writ petition filed by respondent No.1 (hereinafter to be called as the respondent), was admitted for regular hearing.

The brief facts of the case are that the elections to the Azad Jammu and Kashmir Legislative Assembly (hereinafter shall be called the Assembly) were held on 29th June, 1991. The process of elections was completed on 24th July, 1991 and the Legislative Assembly met in pursuance of section 13 of the Azad Jammu and Kashmir Interim Constitution Act, 1974 (hereinafter shall be called as the Constitution Act) which lays down that unless the Assembly is summoned earlier, it shall meet on thirtieth day of general elections for electing the Speaker of the Assembly and the Prime Minister. Consequently, elections to the Assembly were completed and it met on 29-7-1991. Sahibzada Ishaq War, respondent, was the Speaker of the previous Assembly but as Sardar Muhammad Abdul Qayyum Khan, the then President, had resigned from the office of President so as to contest the election to the Assembly,

Sahibzada Ishaq Zafar became the President by operation of relevant Constitutional provision. Thus, he held the office of President of Azad Jammu and Kashmir as well as that of Speaker of the Assembly from 19th July, 1991 till 29-7-1991, when new Speaker was elected by the subsequent Assembly. Meanwhile, Sardar Muhammad Abdul Qayyum Khan, in his capacity as President, passed an order on 16th July, 1991 whereby he nominated Raja Zulqarnain Khan, one of the newly elected members of the Assembly, for administering oath to the newly elected members and the Speaker in pursuance of section 23 of the Constitution Act read with Rule 5 of the Azad Jammu and Kashmir Assembly Rules, 1975. Consequently, the newly elected members and the Speaker were administered oath by Raja Zulqarnain Khan and not by the respondent. Sahibzada Ishaq Zafar filed a writ petition on 10th December, 1993 which was subsequently amended wherein he alleged that under the relevant provisions of the Constitution Act only he was competent to administer oath to the newly elected members and the Speaker but despite the fact that he was available on the relevant date at Muzaffarabad, for administering oath and was willing to do the needful, oath. was administered to the members and the Speaker by Raja Zulqarnain who was not competent to do so. Thus, the respondent alleged that the elections of the appellants and the pro forma respondents as Speaker, Prime Minister and Ministers being violative of law were null and void as the order of President dated 16-7-1991, whereby Raja Zulqarnain was appointed to administer oath was without lawful. authority. Consequently, the respondent prayed for a writ of quo warranto against the appellants and the concerned pro forma respondents to show under what authority of law they were holding the respective offices indicated in the writ petition. The Full Bench of the High Court, after hearing preliminary arguments on behalf of the petitioner-respondent, admitted the writ petition for regular hearing observing that following Constitutional points were of vital importance and needed consideration in regular hearing:---

"(i) That the oath of office is to be taken by elected members of the Assembly. Unless, such oath is taken, a member is incompetent and unqualified to sit in the session of the Assembly or vote or to do any act or commit to do as prescribed in the Interim Constitution Act, 1974. The oath of office is to be administered by the Speaker of the Assembly as postulated under Rule 5 of the Rules of Procedure of the Legislative Assembly, framed under the provisions of the Interim Constitution Act, 1974. By virtue of Rule 5, it was enjoined that-the oath of office to the members of the Assembly shall be administered by the Speaker and in his absence, by a nominee of the President.

(ii) In the present case, it was alleged that the petitioner was the sitting speaker of the Assembly in the light of the provisions of section 29(g) of the Interim Constitution Act, 1974. Under the Constitution and Rules framed thereunder, it was privilege of the petitioner to administer oath to the elected members of the Assembly. A nominee of the President could administer oath provided the Speaker (the petitioner) was not present or available for such purpose. It was alleged that the petitioner was very much present and available to administer oath but, over and above his authority, the President nominated respondent No.9 to administer oath which,. according to the petitioner, was violative of the provisions of the Constitution as well as rules of procedure applicable to the proceedings, of the Assembly.

(iii) It was explained that the petitioner enjoyed his dual capacity at the relevant date of administration of oath as by the time, the sitting President had already resigned, in order to contest the election against a seat of the Assembly. Thus, the petitioner enjoyed dual capacity as Speaker as well as President, by virtue of provisions' of the Interim Constitution Act. The notifications issued in that respect were also appended with the petition.

(iv) It was explained that the petitioner could not assail the sittings and right of exercise of votes of the respondents earlier as the notification whereby respondent No.9 was authorised to conduct oath of office, was kept confidential. Moreover, the respondents engaged the petitioner in private negotiations in due 'course of time, to rectify the error.

(v) It is-on the record. that the. respondents, the elected members of the Assembly, after the election and administration of impugned oath of office, adverted to elect the Speaker, Deputy Speaker, Prime Minister, President and the members of the Council. All these actions could be performed - under the provisions of the Interim Constitution Act provided the members of the Assembly duly took oath of office as provided under the provisions of section 23, in the manner laid .down under the Schedule of the Interim Constitution Act, .1974.

We have heard the counsel for the parties and perused the record. It has been contended by Mr. - S.M. Zafar, Advocate, appearing on behalf of the appellants, that the order of the High Court is not sustainable because it was not legally mandatory for the President to nominate Raja Zulqarnain Khan for

administering oath on 29th July, 1991 when the oath was to be administered to the members. He maintained that such a nomination could be made by the President at any time, specially so when he apprehended from the conduct of the respondent that he would be reluctant to perform his Constitutional obligation of administering oath. The learned counsel maintained that even if it is assumed that the respondent was present at Muzaffarabad but was not present in the House at the relevant time, the requisite oath could be administered by the nominee of the President. The learned counsel had maintained that there was sufficient material available for the President to reach the conclusion that the respondent, after defeat of his party in the general elections, would not administer oath to the members of Assembly and, thus, a Constitutional crisis would be created. The learned counsel referred to Press Statements issued by the office-bearers of the People's Party and the respondent to substantiate his contentions: He particularly 'stressed that the petitioner-respondent in his capacity as President, had made a reference to the Supreme Court and also sought 'stay order for restraining the Assembly to meet on 29th July, 1991; and that these circumstances were clearly indicative of the fact that apprehensions .pf appellant No.2 that respondent would riot perform his Constitutional obligations were well founded. The learned counsel has referred to the relevant cuttings of newspapers, the order of this Court declining to issue the stay order in reference for restraining the Assembly from holding its session and concluded that under these circumstances the mere, fact that the nomination of Raja Zulqarnain for administering the oath was made by the President on 16-7-1991 is of no significance and in any case it was not violative of any law. The learned counsel further submitted that even if it is' assumed for the sake of argument that the administration of oath was in any way legally defective, that did not debar the members of the Assembly from participating in the proceedings held on 29-7-1991 and voting in the election of the Speaker and the Prime Minister. According to the learned counsel, under subsection (3) of section 23 of the Constitution Act, a member has to only pay Rs.200 as fine for each day if he sits in the Assembly and votes while he is not qualified to do so and he fails to take an oath, he would lose his seat under section 25(c).of the Constitution Act after expiry of ninety days reckoned from the date of election, provided the date is not extended by the Speaker; he further submitted that under section 30(c) of the Constitution 'Act, the proceedings of the Assembly would not be invalidated on the ground that some person who was not entitled to take part in the proceedings of the Assembly did so and voted. It has also been contended that in any case the provisions regarding the administration of oath under section 23 read with rule 5 of the Legislative Assembly Rules are merely directory and not mandatory and, thus, any violation in that regard would not

adversely affect the proceedings of the Assembly taken on 29th July, 1991. In alternative, .the learned counsel maintained that even if it is assumed that the proceedings of the Assembly which took place on 29th July, 1991 suffer from any legal infirmity, such proceedings cannot be called in question in any Court in view of the provisions contained in section 34 of the Constitution Act because the validity of any proceedings of the Assembly or, Council or their joint sitting cannot be questioned in any Court; he submitted that the authority of a member in whom powers are vested for regulation of proceedings of the Assembly or Council etc. are also immune from challenge in any Court. The learned counsel vehemently argued that the matter which falls within the purview of 'internal proceedings' of the Assembly cannot be made subject of challenge before any Court including the High Court. The learned counsel further maintained that a writ of quo warranto cannot be issued as a matter of routine. The learned counsel also contended that the impugned order is not sustainable because the petitioner-respondent came up with the writ petition after expiry of a period of two years of the elections of appellants and concerned pro forma respondents. He maintained that the writ petition should have been dismissed in limine because the respondent acquiesced with the proceedings which took place on 29th July, 1991 and, thus, he was estopped from challenging the said proceedings after the expiry of a period of two years. The learned counsel has also submitted that even this Court has interfered in a number of cases at admission stage in the writ proceedings and, thus, it cannot be said that the present appeal being against an interim order or for that matter the order which is not final, was' not competent.. In support of his contentions, the learned counsel has relied upon a case reported as Kh. Noor-ul-Ameen v. Sardar Muhammad Abdul Qayyum Khan 1991 MLD 2658 wherein the proceedings of the Assembly were challenged by one Kh. Noor-ulAmeen and the writ petition was dismissed by the High Court in limine and an appeal was filed which was dismissed by this Court on merits. The learned counsel has cited following authorities in support of his contentions, referred to above:--- . .

In Sardar Muhammad Ibrahim Khan v. Azad Jammu and Kashmir Government PLD 1990 SC (AJ&K) 23, it was held that special power conferred by subsection (12) of section 42 of the Azad Jammu and Kashmir. Interim Constitution Act, 1974, can be exercised even in case of an interlocutory order, if the circumstances of the case so warranted. It was further observed that leave may be granted even in case of an interlocutory order because the word order' appearing in subsection (12) of section 42 of the Interim Constitution Act is not qualified by the word 'final'.

In case reported as Wasi Zafar v. Speaker, Provincial Assembly PLD 1990 Lah. 401, it was observed that the procedure adopted for conducting proceedings of the Assembly cannot be scrutinized by the High Court in exercise of its writ jurisdiction. It was observed that the presentation of two budgets; i.e., annual and supplementary, at the same time and in the same session was not violative of the Constitution or Rules and that even otherwise the procedure adopted in passing the Budget cannot be scrutinized by the Court in exercise of Constitutional jurisdiction. It was also opined that no matter relating to the regulation of the procedure of conducting of business or maintenance of order in Assembly can be brought under review of the Court by filing a writ petition.

In case reported as Syed Manzoor Hussain Gillani v. Sain Mullah 1992 MLD 2424, leave to consider as to whether the High Court was justified to issue rule nisi in view of the circumstances of the case was granted by this Court. .

'In Azizur Rehman Choudhary v. M. Nasiruddin PLD 1965 SC 236, it was observed that quo warranto should not be issued as a matter of routine and conduct and motive of the applicant are to be considered.

In case reported as Dr. Kamal Hussain v. Muhammad Sirajul Islam PLD 1969 SC 42, it was held that although under Legal Practitioners and Bar Councils Act, the meeting convened for the. purpose of election of members of the Provincial Bar Councils was to be presided by the Advocate-General but instead it was presided by . a senior member of Bar Council functioning as ex-officio Chairman. The election was held valid because the participation of the ex-officio Chairman of the Council for the proceedings did not affect the elections and also because no objection was taken by any party, during the election to the validity of assignment of Mr. Jan-e-Alam to act as Chairman of the Council during the proceedings:

In Syed Ali Raza Asad Abidi v. Ghulam Ishaq Khan, President of Pakistan PLD 1991 Lah. 420, it was held that principle of laches in case of writ of quo warranto will generally not apply to it but cannot be ignored its application if attending circumstances are such which militate against the bona fides of the petitioner.

In Syed Manzoor Hussain Gillani v. Sain Mullah, Advocate PLD 1993 SC (AJ&K) 12, it was observed that the principle of laches is not directly applicable in case of quo warranto but its relevant test to see bona fides of the relator, especially so when the relator is not aspirant to the office which he intends to get vacated.

In case reported as State' of Punjab v. Satya Pal Dang AIR 1969 SC 903, it was observed that the provision of Article 199(4) of the Indian Constitution was not mandatory but was directory in nature. It was observed that in absence-of the Speaker, Deputy Speaker acts as Speaker under Article 199(4). He can effectively certify money bill under Article 199(4) though the aforesaid Article envisages that only Speaker of the Assembly shall certify such a bill. It was held that the provisions under Article 199(4) could not be viewed mandatory: It was opined that if the Constitution saw the necessity of providing a Deputy Speaker to act as Speaker during the latter's absence or to perform the office of the Speaker when the office of the Speaker is vacant, it stands to reason that the Constitution could never have reposed a power of mere certification absolutely in the Speaker and the Speaker alone. It was further observed that the distinction between the mandatory and directory provisions is that in a mandatory .provision there is implied prohibition to do the act in any other manner while in a directory provision substantial compliance is considered sufficient. In those cases where strict compliance is indicated to be a condition precedent to the validity of the act itself, the neglect to perform it is fatal but in cases where although a public duty is imposed and the manner of performance is also indicated in imperative language, the provision is usually regarded as merely directory when general injustice or inconvenience results to others and they have no control over those exercising the duty. It was further opined that in view of Article 212, clause (1) the validity of any proceedings in Legislature of a State shall not be called in question on the ground of alleged irregularity of the procedure.

In case reported as Zulfikar Ali Bhutto v. The State PLD 1978 SC 40, the point involved was as to whether the Chief Justice of the High Court, after being appointed as Election Commissioner for a limited period for holding elections, could continue to function as Chief J4stice of the High Court. It was resolved that the temporary appointment of Chief Justice of the High Court as Election Commissioner would not debar him to continue as Chief Justice. The question as to whether it was necessary for the Acting Chief Justice to take oath, as such, was not resolved. However, it was held that the appointment of Acting Chief Justice was not invalidated because he had taken modified oath prescribed by the President and not .under the Constitution. It was opined that in the prevailing circumstances of the country, the appointment of the Acting Chief, Justice who was administered oath under the relevant proclamation issued by the President, would not render his appointment as Acting Chief Justice as invalid. The question as to whether it was necessary for the Acting Chief Justice to be administered oath or not was left undecided because the point was otherwise resolved.

In Anand Bihari Mishra v. Ram Sahay AIR 1952 Madhya Bharat 31, the point involved was that the Speaker of the Legislative Assembly who had not taken oath as prescribed under Article 188 of the Indian Constitution was debarred from acting as Speaker. One of the members of the Bench Shinde, J. opined that as Mr. Ram Sahay, Speaker of the Assembly, had taken oath under the Interim Legislative Assembly Act, 1949, he could validly continue to act as Speaker even after the commencement of Indian Constitution. Thus, it was opined that mere fact that instead of taking oath under Constitution as member, he took oath by uttering the word 'Speaker' would not debar him to act as Speaker. It was further observed that even if it is held that oath was not taken in requisite form, no rule for information in the nature of quo warranto be issued because under the relevant provisions of the Constitution, the Government had been given discretion to declare his seat vacant. However, the learned member of the Bench, Dixit, J., observed that had the question been raised as to whether Shri Ram Sahay retained the status of the Speaker under Article 325 of the Constitution, it would have been the duty of this Court to decide the matter. It was observed in para. 46 of the judgment as under:---

> "I do not, however, feel able to concur in the view that this Court cannot, on any ground enquire into the legality of the continuance of the opponent Shri Ram .Sahay in the office of Speaker. To the other grounds on which the petitioner challenges' the continuance of the opponent in the office of Speaker, the analogy of the British House of Commons being the sole Judge of determining the question whether any person who claims to be the Speaker, is so, cannot, in my opinion, even remotely be applied. It is obvious that the objections to the validity of any person holding the office of Speaker. in the form in which they have been raised here, can never arise in England. If the jurisdiction of the English Courts to determine matters challenging the legality .of any person in the office of Speaker of the House of Commons is excluded it is because of the limits imposed by the law of their Constitution, on the various institutions of Government and thus upon the extent to which the Courts are required to control the Parliament which is supreme. To my mind, the objections raised by the petitioner as to the legality of the continuance of Shri Ram Sahay in the office of Speaker under Article 385 of the Constitution is not one relating to the 'internal affairs of-the Assembly. The question at issue was no doubt, raised by the petitioner in the Assembly by way of a point of order. But the determination of the matter by the House or the Speaker is not conclusive. The question

> raised is of declaring the status of a person on the interpretation of the Constitution. Under our Constitution, it is the duty of this Court faithfully to expound and give effect to it according to its own terms. The claim, therefore, that it is not the function of this Court to declare whether under the Constitution Shri Ram Sahay has or has not the status of the Speaker of the Madhya Bharat Legislative Assembly, being one opposed to the first principles of the Constitution, must be rejected." .

In case reported as Ram Dubey v. The Government of the State of Madhya Bharat AIR 1952 Madhya Bharat 57, the question as to whether Ram Sahay could act as Speaker was again raised before the Full Bench which confirmed the view taken by the Division. Bench in case reported as Anand Bihari Mishra v. Ram Sahay AIR 1952 Madhya Bharat 31, referred to above.

The arguments advanced by the learned counsel for the appellants were strenuously opposed by Sardar Rafique Mahmood Khan, Advocate, appearing on behalf of respondent No. 1. He has contended that there is no question of laches or acquiescence in case of writ of quo warranto. The learned counsel has submitted that in fact the petitioner had some negotiations with appellant No.2 for a political settlement which ultimately failed and the writ petition was filed. According to the learned counsel for the respondent, even if there would have been no explanation for delay, that would not be fatal because in case of a writ of quo warranto, delay is no ground to refuse the writ. The learned counsel has controverted the contention of the learned counsel for the appellants that there was any legal justification on 16th July, 1991 for the appellant No.2 to appoint Raja Zulqarnain for administering oath. The learned counsel for the respondent maintained that the respondent was not only available at Muzaffarabad on the relevant date but was willing to administer requisite oath. He has referred to an affidavit sworn by Sahibzada Ishaq Zafar wherein he was deposed that on 29th July, 1991 he was present at Muzaffarabad in the office of President but he was not contacted to administer any oath. The learned counsel has also controverted the submissions made by the learned counsel for the appellants that the provisions of section 23 of the Constitution Act are merely directory and not mandatory in nature. The -learned counsel has submitted that combined reading of sections 23 and 25 of the Constitution Act makes it crystal clear that a member of Assembly is debarred from taking part in the proceedings of the Assembly without the administration of oath by a competent person; because the aforesaid, provisions envisage penalties including losing the seat. He has laid stress on the point as to how the President came to the conclusion on 16th July, 1991 that the respondent would

be reluctant to administer oath on 29-7-1991. The learned counsel submitted that the relevant date for the purpose of availability of respondent and his willingness to administer oath was 29th July, 1991 when the Assembly was to meet and not any earlier date: He has also submitted that a person other than the Speaker can be nominated only if the Speaker is absen