

# IN THE HIGH COURT OF SINDH, AT KARACHI

**Before :**

Mr. Justice Nadeem Akhtar

Mr. Justice Adnan-ul-Karim Memon

## Constitutional Petition No. D-6948 of 2019

### **Petitioners**

Anis Haroon & others

through:

Mr. Abdul Sattar Pirzada advocate  
assisted by Mr. Mamoon N.  
Chaudhry, advocate.

### **Respondents No.1 & 2**

Federation of Pakistan and

The Secretary, Ministry of

Foreign Affairs through:

Mr. Kashif Paracha, Additional  
Attorney General along with  
Muhammad Nishat Warsi, DAG.

### **Respondent No.3**

Munir Akram through:

Mr. Arshad M. Tayebaly, advocate  
assisted by Ms. Heer Memon,  
Advocate.

Dates of hearing:

25.11.2020, 08.12.2020,  
16.12.2020, 22.12.2020 and  
24.12.2020

Date of Decision:

12.01.2021

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## **J U D G M E N T**

**Adnan-ul-Karim Memon, J.** Through this petition, Petitioners have

sought following relief(s): -

1. Direct respondent No.3 to show under what authority of law he claims to hold the office of Ambassador / Permanent Representative of Pakistan to the United Nations, New York and on his failure to do so, issue a writ against him ;
2. Declare that the appointment letter bearing No. Estt. (I)-1/3/1995 dated 03.10.2019 (the "Impugned Letter") is illegal and has been issued without lawful authority ;
3. Declare that the appointment of respondent No.3 as the Ambassador / Permanent Representative of Pakistan to the United Nations, New York is unlawful, illegal and *void ab-initio*.

2. Petitioners have prayed for issuance of writ of quo warranto against respondent No.3 to vacate the office presently he is holding, *inter-alia*, on the ground that he is not qualified to hold the office and his appointment is hit by Article 199(1)(b)(ii) of the Constitution, 1973.

3. We asked learned counsel for the petitioners to satisfy this Court about maintainability of this petition on the ground that respondent No.3 was appointed as Ambassador / Permanent Representative of Pakistan to the United Nations, New York vide appointment letter bearing No. Estt. (I)-1/3/1995 dated 03.10.2019 under the Policy decision of the Government of Pakistan.

4. On the maintainability, Mr. Abdul Sattar Pirzada, learned counsel for the petitioners argued that respondent No.3 is holding the present post, which is in connection with the affairs of the Federation and is governed by section 14 of the Civil Servants, Act, 1973, and the rules framed thereunder, thus this petition is maintainable under Article 199 (I) (b) (ii) of the Constitution. In support of his contention, he relied upon the case of Watan Party & others V/S Federation of Pakistan and others, **PLD 2012 SC 292**. He next argued that the appointments are to be made in exercise of discretionary powers, such discretion must be employed in a structured and reasonable manner and in the public interest, which factum is lacking in the appointment of respondent No.3. He emphasized that the appointment of respondent No.3 by the Prime Minister is political, capricious and is based on favoritism, thus cannot be termed in the public interest, which is not legally sustainable. In support of his contention, he relied upon the case of Syed Mahmood Akhtar Naqvi and others V/S Federation of Pakistan and others, **PLD 2013 SC 195**. On merits, he argued that the appointment of respondent No.3 as Ambassador / Permanent Representative of Pakistan to the United Nations, New York is unconstitutional on the ground that the impugned appointment has been made by the incompetent person and the decision if any, has to be passed by the Cabinet i.e. Prime Minister and Federal Ministers, therefore the impugned appointment violates Article 91 of the Constitution of Islamic Republic of Pakistan 1973. Learned counsel in support of his contention has heavily relied upon the case of Messrs. Mustafa Impex, Karachi and others Vs. the Government of Pakistan and others **PLD 2016 SC 808**. He further argued that Section 14 of the Civil Servants Act, 1973, provides the mechanism for such appointments that a retired civil servant shall not be re-employed under the Federal Government unless such re-employment is necessary for the public interest and is made

with the prior approval of the authority next above the appointing authority, provided further that, where the appointing authority is the President, such re-employment may be ordered with the approval of the President. He maintained that in the present case the Federal Cabinet was/is the competent authority and not the Prime Minister alone, thus the appointment of respondent No.3 against the aforesaid position is unconstitutional and prohibited under Section 14 (I) of the Act, 1973. In his support, he relied upon Suo Moto Case No.24 of 2010, **2014 SCMR 484** and Suo Moto Case No.16 of 2011. He continued with his submissions and argued that the impugned appointment suffers from serious legal infirmities since respondent No.3 has been appointed as an Ambassador in violation of Article 199 (I) (b) (ii) of the Constitution as well as law and dicta laid down by the Honorable Supreme Court in the case of Mustafa Impex as discussed supra. He emphasized that the impugned appointment is against the office memorandums and instructions provided in Estacode. He stressed that the appointment on contract basis, after retirement from service, is not allowed to be continued in terms of Section 14 of the Civil Servants Act, 1973 and the Policy, unless the conditions specified therein are adhered/satisfied. Lastly, he prayed for allowing the instant petition.

5. Mr. Kashif Paracha, learned Additional Attorney General for Pakistan has raised the question of maintainability of this petition on the grounds that the post of Permanent Representative of Pakistan to the United Nations is an Ambassadorial level post being "Head of the Mission" as per Vienna Convention on Diplomatic Relations 1961. As per Article 1 of the Vienna Convention 1961, "Head of the Mission" is the person charged by the sending State with duty of acting in that capacity ; that a career or non-career Head of Mission can be appointed by the Prime Minister, who is the competent authority under Rule 15(1)(g)(h) of Rules of Business, 1973, and Schedule V-A (Foreign Affairs Division) to appoint the Heads of Pakistan Mission abroad. Furthermore, for any post of BS-20 Grade and above, the Competent Authority is the Prime Minister. He next argued that non-career "Head of Mission" is appointed by the Prime Minister in Pakistan Missions abroad, which may include key and vital Pakistan Missions such as the United Nations. Such appointments are contractual ; and, such appointees on contractual basis are not Civil Servants, but fall under the "Service of Pakistan" as defined in Article 260(1) of the Constitution of Pakistan. He further argued that as per Clause 7 of the Contract Act, where there is no provision in the Contract for any matter, Government Servant Conduct Rules and Civil Services Regulations shall apply. He relied upon the case of Abida Hussain V/S Tribunal for NA 69, Jhang-IV and 2 others,

**PLD 1994 SC 60** in support of the above contention. He asserted that respondent No.3 has had a distinguished diplomatic career and his contribution to the field of diplomacy being undisputed, is internationally recognized. Before his retirement in 2008, among other diplomatic assignments in Geneva (1995-2020) and Brussels (1988-1992), he had served with distinction as Permanent Representative of Pakistan to the United Nations from 2002 to 2008. During this period, he twice served as President of the UN Security Council and was also President United Nations Economic and Social Council (ECOSOC), which are two major organs of the United Nations. He argued that Pakistan has been benefitting from his rich experience, expertise, knowledge and vast experience in the multi fora, for the projection of the Kashmir cause and other vital issues of national interest including security interests at the international level ; that the appointment of respondent No.3 as Permanent Representative of Pakistan to the United Nations, New York, is made on merit by the competent authority i.e. the Prime Minister; and, given his vast multilateral experience and international ingress, his appointment was made in public and national interest. He further argued that his appointment was made on the contractual basis utilizing the available quota of non-career Head of Missions. On the issue of reemployment, he argued that as it is not reemployment against a promotional vacancy, it has not caused any prejudice or damage to promotion prospects of career Foreign Service of Pakistan (FSP) officers. He lastly argued that the instant petition may be dismissed on the grounds that since such appointments are the matter of policy and the superior Courts have shown restraint in policy matters. Learned Additional Attorney General for Pakistan has supported the appointment of respondent No.3 and prayed for dismissal of this petition. In support of his contentions, he relied upon the cases of Masudul Hassan V/S Khadim Hussain and another, **PLD 1963 SC 203**, Ahmad Faraz V/S Government of Pakistan through Secretary, Establishment Division, Islamabad and 2 others, **1991 PLC (C.S.) 407**, Gul Muhammad Hajano V/S Federation of Pakistan and others, **2000 PLC (C.S.) 46**, Suo Moto Case No.24 of 2010 **2015 PLC (C.S.) 73**, Dr. Ali Bat Khan V/S Federation of Pakistan through Secretary, Establishment Division and others, **2019 PLC (C.S.) 1391**, Zaheer Ahmed Sheikh V/S Azad Government of the State of Jammu and Kashmir through Chief Secretary and 5 others, **2014 PLC (C.S.) 56**, Syed Ali Shah V/S Abdul Saghir Khan Sherwani and others, **PLD 1990 SC 505**, Azra Jamali and others V/S Federation of Pakistan through Secretary M/o Commerce and another, **2017 PLC (C.S.) 533**.

6. Mr. Arshad M. Tayebaly, learned counsel representing respondent No.3, has supported the stance of learned Additional Attorney General for Pakistan and raised the similar question of maintainability of the instant petition. He while arguing the matter referred to Section 14 of The Civil Servants Act, 1973, Rules 15(a)(g) of Part C and 16 as well as Schedule V-A of the Rules of Business, 1973, and urged that the appointment of respondent No.3 does not suffer from any inherent defect. It was submitted that Article 90 was not at all attracted in the present dispute as the matter was not with regard to the exercise of executive authority by the Federation. Thus, according to the learned counsel, the reliance sought to be placed on Mustafa Impex case by the petitioners was somewhat misplaced on the premise that the Rules of Business, 1973, mandates that the making of an important policy or a departure from such policy cannot take place unless and until approval in this regard is obtained from the Prime Minister. Hence, decisions of the making of an important policy or a departure therefrom stand on a higher pedestal from the ordinary business transacted by the government under the Rules of Business, 1973. He relied upon the case of Tariq Aziz-ud-Din 2010 SCMR 1301, and argued that the Hon'ble Supreme Court has emphasized that due weight was required to be given to Rules of Business, 1973, which had a Constitutional sanction and further argued that Rules of Business are based on public policy and designed to safeguard State interests effectively and to act in consonance with these Rules is a clear duty cast on all the Divisions and Ministries of the Federal Government. He, therefore, prayed for dismissal of the instant petition.

7. Learned counsel for the petitioners exercised the right of reply and submitted that the ratio decidendi of Mustafa Impex is that where a power is conferred by the statute on the "Federal Government" then such power can only be exercised by the Federal Cabinet and no one else i.e. Prime Minister as has been done so in the present case. Learned counsel further argued that the mere fact that the petitioners belong to certain class cannot be considered as a disqualification to file a writ of quo-warranto for the reason that the main averments are about the ineligibility of respondent No.3 and violation of the law. He averred that the essential grounds for issuing the writ of quo-warranto are that holder of the post does not possess the prescribed qualification ; the appointing authority is not competent to make such appointment and that the procedure prescribed by law has not been followed ; and in this regard, the burden of proof is on the appointee who has to demonstrate that his / her appointment is in accordance with law

and rules. He refuted the claim of respondent No.3 that he was appointed on merit and that the petitioners do not have to be aggrieved parties to file such a writ ; and, the unlawful holding of public office can be called in question by anyone at any time. He emphasized that a Constitutional petition in the nature of a writ of quo-warranto is maintainable under Article 199 of the Constitution against a holder of a public office if she/he is/was disqualified or does not possess or has lost his/her qualification to hold the office in question. In support of his contentions, he relied upon the cases of Contempt proceedings against Chief Secretary, Sindh and others, **2013 SCMR 1752**, M/s Motilal Padampat Sugar Mills Co. Ltd. V/S the State of Utar Pradesh and others, **AIR 1979 SC 621**, Syeda Abida Hussain V/S Tribunal for N.A.69, Jhang-IV and 2 others, **PLD 1994 Supreme Court 60**, Dr. Shahzad Niazi V/S Election Appellate Tribunal and 3 others, **PLD 2018 Lahore 748**, Mirpurkhas Sugar Mills Limited and 16 others V/S Province of Sindh through Chief Secretary and 7 others, **2020 CLC 232**, Muhammad Bachal Memon and others V/S Syed Tanveer Hussain Shah and others, **2015 PLC (C.S.) 767**.

8. We have heard the learned counsel for the parties and perused the material available on record and the case-law cited at the bar.

9. The important questions which require determination are:

- i) Whether the post of Permanent Representative of Pakistan to the United Nations is to be filled amongst the career foreign service officers or eminent personalities from business, media, law, and other areas on a contract basis ;
- ii) Whether the Prime Minister of Pakistan is the competent authority under Rule 15(1)(g)(h) of the Rules of Business, 1973 or the Federal Cabinet under Article 90 of the Constitution of Pakistan to make such appointment ; and,
- iii) Whether appointments on a contract basis are prohibited under or contrary to Section 14 of the Civil Servants Act, 1973, and the Policy unless the conditions specified therein are satisfied?

10. To address the first proposition, we have noticed that the post of Permanent Representative of Pakistan to the United Nations, New York, fell vacant upon resignation tendered by Ms. Maleeha Lodhi on 30.9.2019, and in her place respondent No.3 namely Munir Akram was appointed vide appointment letter dated 03.10.2019. During arguments, Mr. Arshad M. Tayebaly learned counsel for respondent No.3 informed that the Permanent Representative of Pakistan to the United Nations is the diplomatic position representing Pakistan on all platforms of the United Nations (UN) in New

York City. Apart from the Pakistan Mission to the UN in New York, there is another Pakistan Mission based at the UNO office in Geneva, Switzerland; and, the mission is usually headed by a career foreign service officer, but has historically been led by eminent personalities from business, media, law and other areas. It is urged that the current holder of the position is respondent No.3, as he had a distinguished diplomatic career and his contribution in the field of diplomacy were/are internationally recognized.

11. Coming to the issue in hand, a bare reading of the afore-quoted prayers would indicate that the issues raised in the instant Constitutional petition and the prayer made are relatable to matters of Foreign Policy, Diplomatic Missions and security of the country. Such issues are neither justiciable nor they fall within the judicial domain for interference under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973. Our view is supported by the decision rendered by the Hon'ble Supreme Court in the case of Wukla Mahaz Barai Tahfaz-e-Dastoor V/S Federation of Pakistan and another **2014 SCMR 111**. The Hon'ble Supreme Court has held that "Any such interference by the Courts would be violative of one of the foundational principles of the Constitution, which envisages a trichotomy of powers between the Legislature, Executive and Judiciary."

12. In view of the foregoing factual as well as the legal position of the case, since, this is a policy decision and under the Foreign Policy, this Court has no jurisdiction to examine the policy decision of the Government of Pakistan for the simple reason that the power to prescribe or modify the criteria for issuing the letter of appointment against the post of Permanent Representative of Pakistan to the United Nations, New York, vests in the Federal Government according to Article 90 of the Constitution of Pakistan. The said Article vests exclusive power in the Executive to not only recognize the aforesaid position etc., based on the security of the country under the Acts / Ordinances and Rules framed thereunder but also the Cabinet / Competent Authority is well within its right to prescribe criteria under Article 90 of the Constitution of Pakistan. Responsibility of fixing criteria of recognizing the appointment of Permanent Representative of Pakistan to any foreign Government primarily is the responsibility of the Executive Branch of the State subject to the law. It is also settled law that Courts ordinarily refrain from interfering in the foreign policy-making domain of the Executive. On the aforesaid proposition, we are fortified with the decision rendered by the Hon'ble Apex Court in the case of Ghulam Rasool V/S Government of Pakistan & others, **PLD 2015 SC 6**.

13. Adverting to the point raised by learned counsel for the petitioners that the appointment of respondent No.3 on the aforesaid position was not made on merit by the competent authority, in public and national interest. Primarily, the present petition relates to the service of the respondent No.3, who admittedly, is not Civil Servant as defined under Section 2(1)(b)(ii) of Civil Servants Act 1973, but a simple contract employee in terms of his contract letter dated 03.10.2019. *Prima-facie* this cannot be termed as reemployment just after retirement from Civil Service against a promotional vacancy, as portrayed by the petitioners, as it has not caused any prejudice or damage to promotion prospects of the career of FSP officers.

14. The second limb of the argument is that respondent No.3 was appointed as an officer in the Foreign Service cadre in the year 1969. He attained the age of superannuation in the year 2008 and after retirement from service he was reemployed / appointed as Ambassador vide appointment order dated 03.10.2019 against Section 14(I) of the Civil Servants Act, 1973 ("the Act, 1973"). Suffice it to say that his services were hired on contract, based on his experience and expertise in foreign services, by utilizing the available quota of non-career Head of Missions. As we have already held in the preceding paragraph that this is not the reemployment of a just-retired officer of the Government of Pakistan and is merely a contractual assignment/appointment, therefore, Section 14(I) of the Civil Servants Act, 1973 is not attracted in the matter.

15. The third limb of the argument is that only the Federal Cabinet is competent to make an appointment for the subject post and not the Prime Minister of Pakistan. This assertion of the petitioners is wholly misconceived for the reason that under Rule 15(1)(g)(h) of the Rules of Business, 1973, and Article 90 of the Constitution of Pakistan, the Prime Minister is also the competent authority. The cases reported as **PLD 2016 SC 808** (Mustafa Impex case) and **PLD 2020 SC 52** (*Jurists Foundation V/S Federal Government*) are distinguishable on the premise that the case of Mustafa Impex was related to Rule 16 of the Rules of Business 1973 and the Hon'ble Supreme Court declared Rule 16(2) as ultra vires but made no reference to other relevant Rules of Business or Rules related to the instant case. In addition to the above, Rules of Business 1973 are framed under Article 90 and 99 of the Constitution of Pakistan. In Rule 15(I)(g)(h) and Schedule V-A of Rules of Business, it is the discretion of the competent authority / Prime Minister based on the summary placed after deliberation as per Rule 15(2) of the Rules of Business 1973. Furthermore, in the case of Mustafa Impex, the Hon'ble Supreme Court did not strike down Rule 15 of the Rules



of Business 1973 nor the petitioners have challenged Rule 15 of the Rules of Business being ultra vires to the Constitution of Pakistan, 1973. Moreover, the issue in the case of Mustafa Impex was concerning the non-issuance of notification by the Federal Government. In the instant case, it is not the Federal Government, it is the Prime Minister, who is the competent authority. The case of Jurists Foundation is also distinguishable on the ground that it was a constitutional appointment, which required amendment in the Army Act, 1952, hence, required legislation which falls in the business of the Cabinet under Rule 16(a) of Rule of Business, 1973. In the instant case, neither amendment in law is required nor is a constitutional post an issue. The said case is distinguishable also for the reason that no permission existed for extension of tenure of Chief of Army Staff and it required amendment in law, hence the Cabinet's approval was required for amendment in such a situation. The subject issue is quite different from that of the cases discussed supra.

16. Likewise, the other case law cited by the learned counsel for the Petitioners is also distinguishable from the facts and circumstances of the present case. The Petitioners failed to point out any malice on the part of the official respondents or infringement of their rights. Furthermore, in absence of any malafide or illegality, the Competent Authority's decision for the selection of Respondent No.3 against the aforesaid position cannot interfere within the constitutional jurisdiction of this Court.

17. In the light of facts and law discussed above, the appointment of respondent No.3 does not seem to suffer from any inherent defect under the law, besides the Petitioners have also failed to point out any legal flaw in the process relating to the appointment of the respondent No.3, warranting interference by this Court in Constitutional Jurisdiction.

18. As a result of the foregoing discussion, we are of the view that there is no illegality, infirmity, or material irregularity in the impugned letter bearing No. Estt. (I)-1/3/1995 dated 03.10.2019 issued by respondent No.1. Consequently, the instant Constitutional Petition appears to be wholly misconceived is hereby dismissed along with all pending application(s) with no order as to costs.

**JUDGE**

**JUDGE**