

IN THE HIGH COURT OF SINDH, KARACHI

Constitutional Petition No. D-7241 of 2015

Date	Order with Signature(s) of Judge(s)
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1. For hearing of CMA No.1332/2022 (OI R10)
2. For hearing of main case

**Date of hearing
and order:**

31.01.2022

Khawaja Shams-ul-Islam, advocate for the petitioners assisted by M/s Vaqas Nadeem, Mr. Khalid Iqbal and Mr. Muhammad Khoso, advocates
Malik Naeem Iqbal, advocate assisted by Mr. Muhammad Saleem Khaskheli, advocate for the interveners
Mr. Ali Safdar Depar, AAG

ORDER

Petitioners through the instant petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 ("**Constitution**") have called in question the vires of minutes of the meeting dated 11.04.2015, whereby the Administrative Committee of the High Court of Sindh has created the post of Junior Court Associate in BPS-16 without framing of the recruitment rules and/or amendment in rule, being ultra vires to the constitutional provisions and the law. In the alternative, the petitioners seek direction to the Administrative Committee to consider their candidature for promotion for the vacant post of Assistant Registrar/Reader (now Court Associate (BPS-18) in the under Rule 7(1) readwith Sr. No.11, Part-1 of the Schedule of the High Court Establishment Rules, 2006.

Before going ahead on the maintainability of the instant petition, at the outset, Khawaja Shams-ul-Islam learned Counsel for the petitioners has dispelled the impression that the administrative powers of this Court are unassailable through a writ petition within the meaning of Article 199 (1) (b) (ii) of the Constitution, 1973, on the premise that the Constitution confers judicial powers (jurisdiction) on the High Court only under Article 199; and, the administrative, consultative powers are conferred on the High Court under the service rules framed under Article 208 of the Constitution. Learned Counsel attempted to impress us on the analogy that the Officers of this Court are appointed by the Honorable Chief Justice or the Administration Committee under the Rules 2006; whereas the judicial powers (jurisdiction) conferred upon this Court is embedded in Article 199 itself; hence, both the powers are different and unparalleled. However learned Counsel, in principle, has submitted that Article 199(5) of the Constitution excludes a High Court from the definition of 'person', for the reason that High Court is defined under

Article 192 of the Constitution, on the premise that the provisions of Article 199(5) would bar a writ against a High Court if the issue is relatable to judicial order or judgment; whereas a writ may lie against an administrative order passed by the Honorable Chief Justice or the Administration Committee, involving any violation of the service Rules framed under Article 208 of the Constitution, causing infringement of the fundamental/service rights of the employees of the High Court; and/or citizen.

Learned counsel has pointed out that some of the petitioners, during the pendency of this petition, have passed away; and some of them have retired from service; this is due to apathy, this matter, since 2015, could not be decided by, either way, thus the petitioners are the most deserving, senior officers of this Court waiting for their due right of promotion and have now raised their voice of concern with the assertion that they have been deprived of their due promotion to the next rank as discussed supra; rather in their place a new post of Junior Court Associate was created and subsequently accommodated, without amending the service rules, 2006, thus the promotion of the petitioners has been blocked, which is against the basic spirit of the law. Learned counsel for the petitioners in support of his contentions, extensively read the judgments of the Hon'ble Supreme Court, rendered in the cases of *Malik Asad Ali & others v. Federation of Pakistan through Secretary, Law, Justice & Parliamentary Affairs, Islamabad & others*, **PLD 1998 SC 161**, *Abrar Hassan v. Government of Pakistan & another*, **PLD 1976 SC 315** and *Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan through Secretary & others*, **PLD 2010 SC** and argued with a vehemence that the Administrative Committee of this Court is not immune from Article 199 of the Constitution, thus appropriate direction could be issued to the Administrative Committee of this Court in the case of the exigency of service. Lastly, he submitted, with due reverence, that a five-member Bench of the Hon'ble Supreme Court in the case of *Gul Taiz Khan Marwat v. Registrar Peshawar High Court*, **PLD 2021 SC 391** could not overrule the decision rendered by the larger bench in number of the Honorable Supreme Court in the cases discussed supra.

On merits, learned counsel referred to rule 4 of the Sindh High Court Rules 2006; and, submitted that though the power to create or abolish, upgrade and downgrade a post, temporary or permanent in PBS-16 and above, vests in the Honourable Chief Justice of this Court, however that is subject to the concurrence of the Administration Committee. In this regard he referred to the minutes of the meeting held on 11.4.2015 of the Administrative Committee of High Court of Sindh; and, extensively read the paragraphs, as well as a representation made by the petitioners to the learned Registrar of this Court concerning their promotion against the post of Assistant Registrar / Reader (BPS-18) and other ancillary issues, cropped up in the intervening

period; and, reiterated his point of view on the aforesaid contentions, with strong words that after approval of minutes as discussed supra, the Rules 2006 ought to have been amended under rule 3(2) of Rules 2006, but the same has not yet been made as provided under Rule 19, thus the creation of the post in BPS-16 is a nullity in the eyes of law. Besides that some of the candidates were lacking the basic qualification for the subject post as provided under Rule 6, learned counsel referred to the schedule attached with the rules and submitted that the post of Senior Court Associate in BPS-16 is not available therefore, this post cannot be presumed to be available till it is brought in the schedule by making certain amendment in the rules. Finally, he has submitted that his only intention is to pray for sending the case of the petitioners to the Administrative Committee for consideration of the promotion under the law on the premise that they have been performing their duties in BPS-16, however, due to the creation of the post of Junior Court Associate in BPS-16, their promotion in next rank i.e. Assistant Registrar/Reader (now Court Associate) (BPS-18) under the Rules 2006 has been blocked, as such the matter needs to be taken care of by this Court under Article 199 of the Constitution, in the larger interest of justice. He finally submitted that this Court has vast powers to issue a writ of quo warranto/mandamus against the creation of the post of Junior Court Associate in BPS-16 by way of administrative decision without amending the rules, thus the appointment of incumbents on the aforesaid posts could be called in question under the writ of quo warranto on the premise that they are holding the public post without lawful authority in violation of Article 199 (1) (b) (ii) of the Constitution, 1973, besides that this Court can save the career of the petitioners by remitting the matter to the competent authority of this Court to consider the case of the petitioners for further promotion under law.

On the contrary, Malik Naeem Iqbal, learned Counsel, representing the interveners has placed reliance upon the unreported order dated 29.10.2021 passed by the Hon'ble Supreme Court in the case of Arbab Imtiaz Khan v. Mudassir Zawar & others passed in Civil Appeals No.37-K to 48-K of 2019 and submitted that the question of maintainability of a constitutional/writ petition before this Court against the administrative orders passed by an Administrative Committee or the Honorable Chief Justice of this Court is not maintainable. He further submitted that this Court under Article 199 of the Constitution cannot direct the Administrative Committee to decide either way so far as the case of the petitioners for promotion is concerned. He also emphasized that even the writ of quo warranto under Article 199 of the Constitution is not available with this Court on the aforesaid analogy so far as the administrative decisions of the High Courts are concerned. He lastly submitted that petitioners are employees of this Court and are not civil servants and if appointment has been made in violation of any provision of law, the concerned Services Tribunal having jurisdiction is the appropriate

forum to challenge it. Besides that if a colleague is allowed to challenge another colleague's appointment, there would be no end to this; and, there will be anarchy in the Service structure. In support of his contentions, he relied upon the decision of the Honorable Supreme Court in the case of Dr. Azeem ur Rehman v. Government of Sindh, 2004 SCMR 1299.

Mr. Ali Safdar Depar, learned AAG, representing the Registrar of this Court, referred to the comments filed on his behalf and opposed the request of the petitioners, and submitted that in principle, these are internal affairs of Administration Committee of this Court, and if there are infirmities, as pointed out that no full Court meeting has taken place to confer powers by the judges of this Court to Honorable Chief Justice on the subject issue, which are curable under the Rules-2006.

We have heard the learned counsel for the parties, learned Assistant Advocate General Sindh, and have also gone through the case record.

Primarily, the issue in hand has already been dealt with elaboratively by the Honourable Supreme Court in the case of Gul Taiz Khan Marwat supra. For convenience sake, an excerpt of paragraphs 19 and 20 are reproduced as under:-

"19. We differ with the view taken in the said judgment in the meaning, interpretation, scope, extent and interplay of Articles 199 and 208 of the Constitution. Keeping in view Articles 176, 192, 199 and 208 of the Constitution, and upon a harmonious interpretation thereof, in our humble opinion, no distinction whatsoever has been made between the various functions of the Supreme Court and High Courts in the Constitution and the wording is clear, straightforward and unambiguous in this regard. There is no sound basis on which Judges acting in their judicial capacity fall within the definition of 'person' and Judges acting in their administrative, executive or consultative capacity do not fall within such definition. In essence, the definitions of a High Court and Supreme Court provided in Articles 192 and 176 supra respectively are being split into two when the Constitution itself does not disclose such intention. It is expressly or by implication a settled rule of interpretation of constitutional provisions that the doctrine of casus omisus does not apply to the same and nothing can be "read into" the Constitution. If the framers of the Constitution had intended there to be such a distinction, the language of the Constitution, particularly Article 199 supra, would have been very different. Therefore to bifurcate the functions on the basis of something which is manifestly absent is tantamount to reading something into the Constitution which we are not willing to do. In our opinion, strict and faithful adherence to the words of the Constitution, specially so where the words are simple, clear and unambiguous is the rule. Any effort to supply perceived omissions in the Constitution being subjective can have disastrous consequences. Furthermore, the powers exercisable under the rules framed pursuant to Article 208 supra form a part and parcel of the functioning of the superior Courts. In other words, the power under Article 208 supra would not be there but for the existence of the superior Courts. This 'but for' test, as mentioned by the learned Attorney General, is pivotal in determining whether or not a particular act or function carried out by a Judge is immune to challenge under the writ jurisdiction under Article 199 supra. This test is employed by Courts in various jurisdictions to establish causation particularly in criminal and tort law - but for the defendant's actions, would the harm have occurred? If the answer to this question is yes, then causation is not established. Similarly in the instant matter, but for the person's appointment as a Judge (thereby constituting a part of a High Court or the Supreme Court under Articles 192 and 176 supra respectively), would the function in issue be exercised? If the answer to this question is yes, then such function would not be immune to challenge under Article 199 supra. In this case with respect to the administrative, executive or consultative acts or orders in question, the answer to the "but for" test is an unqualified no, therefore such acts or orders would in our opinion be protected by Article 199(5) of the Constitution and thereby be immune to challenge under the writ jurisdiction of the High Court.

20. It is in this context that the ratio of the cases of Abrar Hassan supra and Malik Asad Ali supra, heavily relied on by the learned counsel for the

appellants/petitioners and the learned Advocate General of Sindh, ought to be understood. The case of Abrar Hassan supra involved an appeal from the order of a Division Bench of the High Court of Sindh and Baluchistan, Karachi dismissing a constitution petition filed by the Appellant, Abrar Hassan, challenging the appointment of Mr. Justice Abdul Kadir Shaikh, a Supreme Court Judge, as the Chief Justice of the High Court of Sindh and Baluchistan. Though the learned High Court discussed the merits of the case, it dismissed the constitution petition as being not maintainable against the Chief Justice of the High Court. A four member bench of this Court ultimately dismissed the appeal, although split equally in terms of reasoning. The moot point in Abrar Hassan's case supra was whether a writ of quo warranto was maintainable against the Chief Justice of a High Court. As noted by Justice Salahuddin Ahmad in Abrar Hassan's case supra, "The present petition does not seek any writ against the act or order of a Judge of a High Court as a Court, but questions his authority or right to act as such Judge..." An interpretation of Abrar Hassan's case supra was very aptly provided in Malik Asad Ali's case supra in which a ten member bench of this Court delivered a detailed judgment in three constitution petitions filed before this Court challenging the appointment of Mr. Justice Sajjad Ali Shah as the Chief Justice of Pakistan which were ultimately allowed. Justice Saiduzzaman Siddiqui in Malik Asad Ali's case supra observed that while there was unanimity in the views of all the four learned members of the bench in the case of Abrar Hassan supra that the appointment of a Judge of a superior Court could be brought under challenge before a Court, it was the exact nature of proceedings which can be filed to challenge such appointment that was in question and on which the learned members of the Bench were equally divided. Chief Justice Yaqub Ali and Justice Anwarul Haq were of the view that a writ petition under Article 199 supra could not be filed to question the appointment of a Judge of a superior Court keeping in mind the bar contained in sub-Article (5) thereof, however it could be collaterally challenged in properly constituted proceedings. Whereas Justice Salahuddin Ahmad and Justice Muhammad Gul held that proceedings in the nature of quo warranto could be filed against the Judge of a superior Court under Article 199 of the Constitution to challenge the legality of his appointment. It, was in this context that Justice Salahuddin Ahmad and Justice Muhammad Gul had drawn a distinction between the judicial acts and orders of a Judge and his private acts and it is in respect of the latter that he would not enjoy immunity and be subject to the laws of the land like every other citizen, hence the oft-quoted example of a Judge illegally confining his domestic servant for misbehavior. To put it differently, but for the person's appointment as a Judge, would the domestic servant have been illegally confined? The answer is obviously yes, as it has nothing to do with the official capacity of the Judge rather has nexus to his person. Thus, such an act would not enjoy any immunity under the law and the Judge would be subject to the laws of the land as would any other citizen. Therefore, the fact that the ten member bench in Malik Asad Ali's case supra adopted the viewpoint of Justice Salahuddin Ahmad and Justice Muhammad Gul over that of Chief Justice Yaqub Ali and Justice Anwarul Haq does not turn on anything, because the precise question as to whether the executive, administrative or consultative acts or orders of the Chief Justices or Judges of a High Court can be challenged through a writ petition was neither in issue nor examined in any detailed or meaningful manner in either case."

In view of the foregoing, we find that a five-member Bench of the Hon'ble Supreme Court in the case of Gul Taiz Khan Marwat (supra) has decided the question of maintainability of a Constitutional Petition under Article 199 of the Constitution against the administrative orders passed by an Administrative Committee or the Honorable Chief Justice of High Court. Besides that, all the legal grounds raised by the learned Counsel for the petitioners in the present petition have already been set at naught by the Honorable Supreme Court in the aforesaid decisions as such this Court cannot further dilate upon the issue more.

So far as the other points raised by the learned Counsel for the petitioners are concerned, suffice it to say, Article 208 of the Constitution, 1973 empowers the High Court with the approval of the Governor concerned, to frame Rules providing for appointment by the Court of officers and servants of the Court and their terms and condition of employment. This Court in exercise of such powers has made "High Court Establishment (Appointment and Condition of Service) Rules, 2006, Gazetted on 18-11-2006. In terms of Rule 15 thereof, the

Administration Committee either itself or may delegate such authority upon any other Judge to exercise the power of Provincial Government. Honorable Chief Justice is further empowered to create posts in the exercise of such power, as discussed supra, read with the power conferred by the Finance Department through notification. Besides that the creation of post or otherwise is prerogative of the Honorable Chief Justice of this Court under Article 208 of the Constitution read with enabling laws.

Principally, this Court has jurisdiction under Article 199 (1)(c) to issue directions to any person, including Government, however, this Court under Article 199(5) of the Constitution cannot ask the Honorable Chief Justice or the Administrative Committee of this Court to carry out the function by either way on the administrative side as the Hon'ble Supreme Court has provided complete protection to the administrative decisions of the Honorable Chief Justice and the Administrative Committees constituted by the Hon'ble Chief Justice, thus this petition is not maintainable. In principle, the Honorable Chief Justice of this Court has power and authority to fix the terms and conditions and remuneration of the servants and staff of the High Court establishment and even create any post under the law.

At this stage, the learned AAG pointed out that the provisions of rule 19 of Rules 2006 are merely discretionary and not mandatory as is evident from the use of the word "may" therein. He also assisted on the point of the amendment and referred to rule 3(2) of the Rules, 2006, and submitted that no time frame has been provided in the law, thus it could be construed to be not mandatory.

It also appears from the record that prescribed qualification to the post of Junior Court Associate has been duly prescribed vide minutes of the meeting dated 11th April 2015. An excerpt of the minutes of the meeting are reproduced as under:

"02/2015(AC) To consider the question of the creation of forty (40) posts of Junior Court Associates in BPS-16 and change of nomenclature of posts of Readers, Assistants, Senior Clerks, and Junior Clerks;

The agenda item was thoroughly discussed and all the pros and cons of the matter were discussed at length. The present and proposed nomenclature along with the basic pay scale of post were also discussed. Thus it was unanimously resolved that in order to streamline the process of proper working of this Court, the nomenclature of the followings posts and mode of appointment may be changed henceforth so as to improve the work and efficiency of the staff

Present Nomenclature of Post	Proposed Nomenclature of Post	Grade	Proposed Mode of appointment
Junior Clerk	Junior Office Associate	BPS-11	By promotion from amongst Sub-office Associates (BPS-7) who have completed three years of service on such post on seniority cum fitness.
Senior Clerk	Office Associate	BPS-13	By promotion of Junior Court Associates (BPS-11) who have completed three years of service on such post on seniority cum fitness

			basis.
Assistants	Senior Office Associate	BPS-15	By promotion from amongst Office Associates (BPS-13) who have completed three years of service on such post on seniority cum fitness basis.
Readers	Court Associate	BPS-18	By promotion from amongst Senior Translators (BPS-17), or Junior Court Associates (BPS-16) who have completed three years of service in such post on seniority-cum-fitness basis or by transfer from officers of equivalent scale.

It was also unanimously resolved that in order to enhance the pace of official work and remove impediments, the below mentioned posts, prescribing criteria of appointment against each, be created with immediate effect and in the public interest;

Nomenclature of Post	Grade 16	Proposed Mode of appointment & Qualification
Junior Court Associate	BPS-16	<p>Fifty percent of vacancies would be filled up by way of initial appointment amongst from persons holding domicile and permanent residence of the province of Sindh and qualifications equivalent to Post Graduation/MBA and LLB.</p> <p>Typing Speed 40 words per minute</p> <p>Computer Literate and possessing experience of two years.</p> <p>Age Limite: 21 to 30</p> <p style="text-align: center;">AND</p> <p>Fifty percent by promotion amongst from Senior office Associates (BPS-15) who have completed ten years of clean and satisfactory service in High Court of Sindh and are possessing above mentioned qualifications, except age, have passed the prescribed examination/Written test.</p>

It was also unanimously resolved that initially forty (40) posts of Junior Court Associates (BPS-16) may be created with above mode of appointment. Owing to the acute shortage of competent staff, the process of appointment be started without delay. However, the amendment regarding insertion of the above newly created posts and change of nomenclature of existing posts in the schedule of the Sindh High Court Establishment (Appointment & Conditions of Service) Rules, 2006 be made after obtaining approval in a Full Court Judges meeting.”

During the hearing, we have been informed that the posts of Readers and Assistant Registrars are cadre posts; and, the same are required to be filled under prevalent rules and the guidelines contained in the minutes of the meeting of the Administrative Committee of this Court.

We have gone through the rule position of the case, which explicitly shows that the initial appointment to a post is made in terms of proviso of Rules 8(1)(2) of Rules 2006 by a Selection Board, comprising of Hon’ble Judges of this Court.

In this case, the petitioners’ right to be considered for promotion has not been denied to them yet. In our view, to qualify for the promotion, the least that is expected of an employee is to have an unblemished record, have the requisite length of service, subject to the availability of the vacancy.

This is settled law that an employee found not fit for promotion cannot be placed at par with the other employees, and his / her case has to be treated differently. While considering an employee for promotion his / her entire service record has to be taken into consideration and if a promotion denies him / her promotion, such denial would not be illegal or unjustified under the service jurisprudence.

Before parting with this order, in the best interest of justice, we deem it appropriate to suggest that the Registrar of this Court may intervene in the matter and the genuine cases of the serving petitioners for promotion in the next rank, may be placed before the learned Administrative Committee for appropriate orders, however, that proposition is subject to all just exceptions as provided under the law and having no binding effect upon the Administrative Committee; and, it is their sole discretion to look into the genuine request of the petitioners if the cases of the petitioners are based on merit so far as their length of service, eligibility, and availability of vacancies are concerned.

In the light of the ratio of the judgment of the Hon'ble Supreme Court of Pakistan in the case of Gul Taiz Khan Marwat (supra), this petition is not maintainable and liable to be dismissed. Resultantly, the captioned petition is dismissed along with the pending application(s), with no order as to costs.

JUDGE

JUDGE