IN THE HIGH COURT OF SINDH, AT KARACHI

Present:
Muhammad Ali Mazhar and
Yousuf Ali Sayeed, JJ

Constitutional Petition No. D-2259 of 2020

Petitioners	:	(1) Nisar Ahmed Tarar, (2) M. Rehman Ghous and (3) Ali Wahid (Raj Ali Kunwar), represented by Khawaja Shams-Ul-Islam, Advocate.
Respondent No.1	:	Federation of Pakistan, through Secretary, Ministry of Law & Justice, represented by Kafil Ahmed Abbasi, DAG.
Respondent No.2	:	Nemo.
Respondent No.3	:	High Court of Sindh, through its Registrar, represented by Abdul Razzak, MIT-II.
Respondent No.4	:	National Accountability Bureau, through its Chairman, represented by Riaz Alam Khan, Special Prosecutor.
Dates of hearing	:	09.09.20, 29.09.20, 02.11.20, 16.11.20 and 23.11.20.

JUDGMENT

YOUSUF ALI SAYEED, J - Professing to be aggrieved by the appointment of the Respondent No.2 as Judge of the Accountability Court No. III, the Petitioner, all of whom are legal practitioners, have invoked the jurisdiction of this Court under Article 199 of the Constitution so as to essentially assail the Notification dated 24.03.2020 (the "**Impugned Notification**") issued by the Ministry of Law and Justice, Government of Pakistan (the "**Ministry**) in that regard in the following terms:

"**GOVERNMENT OF PAKISTAN**
MINISTRY OF LAW AND JUSTICE
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Islamabad, the 24 March, 2020

NOTIFICATION

No.F.3(15)/2015-A.V.- In exercise of powers conferred by section 5(g) and (h) of National Accountability Ordinance, 1999 (XVlI of 1999), the President of Islamic Republic of Pakistan has been pleased to appoint following District and Sessions Judges as Judges, Accountability Courts, Karachi on deputation basis In their own pay and scales from the date they assume the charge of the posts as under:-

S.#	Name of Judge	Name of Court	Period of appointment
1.	Ms. Sher Bano Karim, D&SJ	Re-appointed as Judge, Accountability Court-III, Karachi	Till the date of her superannuation i.e. 17.01.2022 or until further orders
2.	Mr. Abdul Ghani Soomro, D&SJ	Appointed as Judge, Accountability Court-I, Karachi	03 years or till further orders

2. The appointment of the above Judges shall be governed by the relevant provisions of the aforesaid Ordinance and terms and conditions prescribed in the Law and Justice Division's letters No. 1(2)/2000-A.V dated 26.09.2001 and 15.12.2001.

(Muhammad Kamran
Section Officer (A.V)"

2. The case set up by the Petitioners as against the Impugned Notification and appointment of the Respondent No.2 proceeds along quite unique lines, and those of the grounds as were raised through the Petition and then pressed at the time of hearing can succinctly be summarized as follows:

(a) The Ministry had made the appointment under duress and in the absence of consultation, as envisaged under S.5(g) of the National Accountability Ordinance, 1999 (the "**Ordinance**"), having been driven to do so by virtue of (i) the reappointment of the Respondent No.2 having already been conveyed prior to the Subject Notification in terms of a letter dated 27.07.2019 addressed to the Secretary of the Ministry by the Registrar of this Court, intimating him thereof and requesting issuance of a notification

to that effect at the earliest, and (ii) Orders that had been made by a learned Division Bench of this Court in C.P. Nos. D-6899 of 2019 and 317 of 2020 (the "**Subject Petitions**"), particularly an Order made on 10.03.2002, which, per the Petitioners, had directed such appointment and then commenced proceedings in contempt to ensure the same, as had initially been resisted through the Ministry's letter dated 21.02.2020, but given way to capitulation through issuance of the Impugned Notification in the wake of the contempt proceedings that were pending at the time.

(b) That as per the Roster, the learned Division Bench which made the Order dated 10.03.2020 in the Subject Petitions had been assigned "All confirmation cases. All regular criminal cases/ Appeals. All regular NAB Cases/ Appeals. Missing Persons/ detention cases and harassment matters and ECL matters", hence could not exercise *suo moto* power for purpose of Section 5A of the Ordinance, and as the scope of the Subject Petitions was confined to a plea for the grant of bail, the aforementioned Order was beyond the ambit and purview of those proceedings, hence the Impugned Notification, having been issued on the direction of the learned Division Bench ought to be set aside.

(c) That the Ordinance does not authorize reappointment of a particular judge, hence the Order of the learned Division Bench reflects judicial bias and the Impugned Notification ought to therefore be set aside.

(d) That as per the requirement of the Ordinance, there should be meaningful consultation for appointment of a Judge of the Accountability Court, however the same was lacking in the present case as the Respondent No.1 issued the impugned notification for re-appointment and extension of Respondent No.2 till superannuation (i.e. 17.01.2022) under duress of contempt proceedings.

(e) The Petitioners, cumulatively have rights under Article 19-A of the Constitution to find out whether effective consultation took place between the Honorable Chief Justice of this Court and the president of Pakistan through the Ministry of Law.

(f) The appointment violates the provisions of the Ordinance as it is apparent from Sections 5A and 5(g) and (h) that the concept of reappointment of a Judge is alien thereto, and it has been specified that the tenure is of 3 years.

(g) That in terms of Section 6 of the Ordinance, the tenure of the Chairman NAB has been specified as being for a non-extendable four years, with the tenures of the Deputy Chairman and Prosecutor General also being curtailed in each case to a non-extendable term for a period of three years in terms of Section s 7 and 8A(ii) of the Ordinance, hence an extension could not be given to the Respondent No.2 by virtue of the Impugned Notification on the basis of the Order dated 10.3.2020 made in the Subject Petitions.

3. In that context, it has been prayed that this Court be pleased to:

"(i) Declare that the impugned Notification dated 24.3.2020 issued by Respondent No.1 at the behest/ direction of Respondent No.3 for re-appointment and extension of Respondent No.2 is in gross violation of the language of Section 5(g)(i) as well as Sections 6,7 and 8 of NAO, 1999 as well as independence of judiciary in terms of Article 175 of the Constitution of Pakistan, Articles 4, 5, 6, 8,9 10-A and 25 of the Constitution of Pakistan, therefore, is totally void ab initio, without any lawful authority and liable to be set aside. Consequently, respondent No.1 shall be directed to issue a fresh Notification for appointment of any other Judge amongst senior Sessions Judge from the Province of Sindh for Accountability Court at Karachi without further loss of time after consultation with the Hon'ble Chief Justice of Sindh High Court.

(ii) Declare that the letter dated 23.10.2019 issued by Respondent No.3 to the Secretary, Ministry of Law and Justice, on the recommendation of the Hon'ble Chief Justice of this Hon'ble Court to extend the tenure of respondent No.2 and re-appoint her as Judge of Accountability Court in violative of Section 5(g) of NAO, 1999 as well as the Independence of Judiciary as held by the Hon'ble Supreme Court of Pakistan, hence liable to be set aside.

(iii) Declare that the recommendation of the Hon'ble Chief Justice of Sindh High Court which was communicated to Respondent No.1 by Respondent No.3's letter dated 23.10.2019 for recommending Respondent No.2's extension is violative of the independence of judiciary as well as Article 175 of the Constitution of Pakistan as well as Section 5(g), 5A of NAO, 1999 as well as Articles 4,5,6,8,9, 10-A and 25 of the Constitution of Pakistan and also doctrine of intelligible differentia.

(iv) Declare that the post of the Judge Accountability Court is an ex-cadre post in connection with the affairs of the Federation, therefore, after completion of her tenure, the Respondent No.2 should not have been re-appointed and her period should not have been extended which is in complete violation of the principle of law as laid down by the Hon'ble Supreme Court of Pakistan as well as trichotomy of power assigned to the Executive in terms of the Constitution as the tenure of other office holders i.e. Chairman, NAB, Deputy Chairman, NAB and Prosecutor General, NAB is non-extendable, therefore, applying the same principle of doctrine of intelligible differentia the office of the Judge Accountability Court has to be treated at par with the aforesaid offices of Chairman, NAB, Deputy Chairman, NAB and Prosecutor General, NAB, which are non–extendable.

(v) Direct Respondents No. 1 and 3 to appoint any Sessions Judge of the choice of the Hon'ble Chief Justice of Sindh High Court, who never served as a Judge of Accountability Court.

(vi) Mandatory injunction by suspending the impugned notification dated 24.03.2020 to the extent of "re-appointment" of the Respondent No. 2 during the pendency of these proceedings.

(vii) Restrain the Respondent No. 2 from acting as a Judge Accountability Court No. 3 and proceeding with the cases.

(viii) Costs of the petition

(ix) Any other relief as deemed appropriate by this Honorable Court."

4. Counsel representing the Petitioners submitted his arguments along the very lines of the grounds summarized herein above, and otherwise pointed out that the letter dated 27.07.2019 addressed to the Secretary of the Ministry by the Registrar of this Court had been replied to through a letter dated 21.02.2020. Inviting attention to that letter, it was contended that the Ministry had thereby shown its resistance to the extension and reappointment of the Respondent No.2 while citing the principle of consultation encapsulated in the Judgment of the Honourable Supreme Court in the case reported as Mehram Ali and others v. Federation of Pakistan and others PLD 1998 SC 1445. It was submitted that in the presence of a large number of other Sessions Judges serving in the Province of Sindh, including the judicial officers referred to by the Ministry in its letter dated 21.02.2020, there was no call to grant an extension to or reappoint the Respondent No.2, and it was argued that the Respondent No.1 had been forced to make the reappointment by virtue of the proceedings in the Subject Petitions, which, per the Petitioners, militated against the concept of meaningful consultation and constituted a violation of Sections 5(g), 6, 7 and 8 of the Ordinance.

5. Conversely, the MIT-II of this Court and the learned Special Prosecutor questioned the maintainability of the Petition, submitting that Article 199 of the Constitution could not be invoked so as to question the consultations of the Honourable Chief Justice in view of the bar set out in Article 199(5), and the proceedings of another bench could certainly not be examined by way of judicial review. Reliance was placed on the judgment of the Honourable Supreme Court in a bunch of cases, with the lead case being CA 353-355/2010, titled Gul Taiz Khan Marwat v. The Registrar, Peshawar High Court, Peshawar & others.

6. Furthermore, it was submitted that the Petition had been filed with mala fide intent in an endeavour to discredit a judicial officer and the Petitioners very conception of the matter, including the pith and substance of Section 5(g) of the Ordinance was fundamentally flawed as the restrictions imposed in respect of other offices under the Ordinance could not be read in thereto.

7. The learned DAG was also heard, and defended the Impugned Notification while denying the contention that consultation had been lacking. He too questioned the maintainability of the Petition on the same score as the MIT-II and learned Special Prosecutor and submitted that the same warranted dismissal.

8. Having heard and considered the arguments advanced in light of the material placed on record, we would turn firstly to the aspect of maintainability.

9. In that regard, it merits consideration that the Petitioners have essentially sought to question the propriety of the proceedings undertaken by another learned Bench of this Court in the Subject Petition by submitting that they transgressed their mandate and the steps taken amounted to duress that undermined and negated the element of consultation. We would not dignify such an assertion by embarking on a dissection of the Orders made in the Subject Petitions, especially as it is well settled that the proceedings of another Bench of this Court are not amenable to scrutiny under Article 199 of the Constitution. Suffice it to say, that the Petitioners contention that the learned Division Bench specifically directed that the appointment of the Respondent No.2 be made and then commenced proceedings in contempt to ensure its attainment is completely misconceived. Furthermore, as to point of consultation, it is paradoxical

that the plea raised in that regard by the Petitioners is that the appointing authority was deprived of meaningful consultation in the making of the appointment. This contention has not only been categorically denied on behalf of the Respondent No.1 by the learned DAG, but is even otherwise misconceived, for as it stands, the consultation required in terms of S. 5(g) of the Ordinance is that of the Honourable Chief Justice of the concerned High Court rather than that of the appointing authority itself.

10. Moreover, such consultative acts also do not admit to scrutiny under Article 199, as per the Judgment of the Honourable Supreme Court in the case of Gul Taiz Khan Marwat (Supra). Indeed, the specific point for consideration in that matter was whether the executive, administrative or consultative actions of the Chief Justices or Judges of a High Court were amenable to the constitutional jurisdiction of a High Court. After examining the scope of Article 199 of the Constitution, particularly sub-article (5), as well as Articles 176 and 192, the Apex Court revisited its earlier judgment in the case of Ch. Muhammad Akram v. Registrar, Islamabad High Court and others PLD 2016 SC 961, which had involved a challenge under Article 184(3) of the Constitution to various appointments, absorptions and transfers made by the Administration Committee of the Islamabad High Court on the ground that the same were in violation of the relevant Services Rules. Whilst it had *inter alia* been concluded in that case that notwithstanding sub-article (5), a writ could lie under Article 199 against an administrative/consultative/ executive order passed by the Chief Justice or the Administration Committee involving any violation of the Rules framed under Article 208 that caused an infringement of the fundamental rights of a citizen, the Apex Court specifically departed from that earlier view in the following terms:

“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 omissus* 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.

> In light of the foregoing, with respect to Article 199 of the Constitution read as a whole and bearing in mind the specific bar contained in sub-Article (5) thereof, we find that the framers did not intend that the remedy of a writ be available against a High Court or the Supreme Court as mentioned above in this opinion. It cannot be assumed that there must necessarily be a right of appeal in cases involving administrative, executive or consultative acts or orders of the Judges or Chief Justice of a High Court or the Supreme Court, which right must have been expressly mentioned in clear and unequivocal terms in the Constitution if that was the intention and no inference can be drawn from Article 199 *supra* that a writ petition against the aforesaid orders is competent. For the foregoing reasons, we find that the judgment rendered in *Ch. Muhammad* Akram's case *supra* needs to be revisited and is hereby overruled."

11. The aforementioned precedent makes it evident that the present Petition is not maintainable to the extent that it seeks to assail the process and proceedings on the ground of lack of consultation.

12. Turning to the contention that the appointment of the Respondent No.2 offends the Ordinance, the argument raised on that note is that Judges of the Accountability Court cannot be reappointed and their term also cannot be extended. This argument is based, not on a reading of the relevant Sections of the Ordinance pertaining to the appointment of a Judge (i.e. Section 5(g) and (h) read with Section 5A), but on the assertion that as Sections 6, 7 and 8 of the Ordinance each specify that the prescribed periods for which the Chairman, Deputy Chairman and Prosecutor General NAB respectively may be appointed thereunder is non-extendable, such a restriction ought to apply *mutatis mutandis* in respect of the appointment of a Judge of the Accountability Court and the absence of such a restriction amounted to an omission which ought to filled by reading in the same to the extent of the relevant statutory provisions. This contention too is patently flawed, as it is not for the Court to invade the legislative field by readily inferring and supplying the *casus omissus*.

13. As such, it transpires that the grounds raised are misconceived, hence the Petition fails and is dismissed accordingly.

JUDGE

JUDGE

Karachi
Dated _____