

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI

Suit No.664 of 2008

Date	Order with signature of Judge
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For Final Arguments.

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24.05.2021

Mr. Ikram Ahmed Ansari, advocate for the Plaintiff.
Mr. Rasheed A. Rizvi, advocate for the Defendant.
Mr. Salahuddin Ahmed, advocate for Mr. Rasheed A. Rizvi,
advocate.

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NAZAR AKBAR, J. - In response to the objection raised by Mr. Ikram Ahmed Ansari, advocate on **18.5.2021** and incorporated in the said order, Mr. Salahuddin Ahmed, advocate has filed power on behalf of Mr. Rasheed A. Rizvi, advocate. Though today, he only wants to file power, however, on query from the bench, he is kind enough to briefly submit that he would, amongst other, rely on the interpretation of **clause 3(b)** of **Article 270AA**, of the Constitution read with the **Chief Executive's Order 5 of 2000** published on **30.3.2000** pursuant to the infamous Provisional Constitutional Order No.1 of 1999 (**PCO No.1 of 1999**) and a reported judgment in the case of Hon'ble Mr. Justice (Retired) Shahid Anwar Bajwa (**PLD 2018 SC 337**).

2. The relevant **clause (3)(b)** of Article 270AA of the Constitution of 1973 introduced by 18th Amendment in the Constitution on **20.4.2010** is reproduced below:-

(3) Notwithstanding anything contained in the Constitution or clause (1), or judgment of any court including the Supreme Court or a High Court.—

(a).....
.....
.....
.....

(b) Judges of the Supreme Court, High Courts and Federal Shariat Court who not having been given or taken oath under the Oath of Office of (Judges) Order, 2000 (I of 2000), and ceased to hold the office of a Judge shall, **for the purpose of pensionary benefits only, be deemed to have continued to hold office under the Constitution till their date of superannuation.**

3. The Chief Executive's **Order 5 of 2000** published on **30.3.2000** was in respect of the Judges of High Courts who ceased to continue to hold office of Judges of High Court in pursuance of **Article 3** of the **Oath of Office (Judges) Order, 2000**. The relevant portion with particular reference to the retirement and pension of Judges in **Article 4** of the said Chief Executive's Order 5 of 2000 is reproduced below:-

4. **Retirement and pension, etc.**—A Judge who was not administered oath and ceased to continue to hold office of a Judge of High Court in terms of Article 3 of the Oath (Judges) Order, 2000 (C.E.O. No.1 of 2000), shall

(a) if he has rendered service as such Judge for less than five years, be eligible to plead or act as an Advocate in any Court or before any authority including the High Court in which he had served as such Judge; and

(b) in case such Judge has rendered service as a Judge for five years or more be deemed to have retired from his office on attaining the age of sixty-two years **for the purpose of pension and shall be entitled to receive full pension and all benefits calculated on that basis:**

4. The Chief Executive's **Order 5 of 2000** deals with two categories of Judges of High Court at the time of promulgation of the said Order 5 of 2000. In category **(a)** are Judges who have not completed five years of service as a judge of High Court and in category **(b)** are Judges who have qualified to receive pension on account of length of service as judge of High Court. Apparently the effect of **sub-clause (b)** of **Clause (3)** of **Article 270AA** of the Constitution is that the judges falling in category **(a)** of the Order 5 of 2000 have been shifted to or merged in category **(b)** of the judges and

prima facie on receiving pensionary benefit in terms of **clause 3(b)** of **Article 270AA** of the Constitution like the judges of category (b) in the **Order 5 of 2000** they are also hit by **Article 207(3)(b)** of the Constitution. Therefore, once a simple question whether Mr. Rasheed A. Rizvi is receiving pensionary benefit or not when answered by Mr. Salahuddin Ahmed in affirmative, there is hardly any controversy left except interpretation of the relevant Articles of Constitution like **Article 207(3)(b)** and **Article 270AA(3)(b)** and effect of these Articles of Constitution on the Judges who were allowed by the Chief Executive Order 5 of 2000 to act and plead before the same High Court in derogation to **Article 207(3)(b)** of the Constitution.

5. Mr. Salahuddin Ahmed, Advocate has also referred to following observation of the Hon'ble Supreme Court in the case of *Shahid Anwar Bajwa ..Vs.. S.M. Asif and others (PLD 2018 SC 337* relevant page 343):-

In order to ascertain the real intention of the legislature, it is necessary to keep in mind the provisions of **Article 207(3)(a) *ibid***, which provides that “A person who has held office as a permanent judge of the Supreme Court, shall not plead or act in any Court or before any authority in Pakistan”, **Thus, from this provision the intention of the legislature is clear that a ban has been imposed on a Judge not only to appear before the courts/forums subordinate to that Court but also from the court where he acted as a permanent judge.** This fact further receives support from the fact that when two permanent Judges of the High Court of Sindh i.e. **Mr. Rasheed A. Rizvi** and **Mr. Mushtaq Ahmed Memon**, were removed from their office by virtue of the Oath of Office (Judges) Order, 1999, **considering that they were restricted to act and plead before the said High Court being permanent Judges, special permission was given to them by means of the Chief Executive's Order No.5 of 2000.** (Emphasis is provided)

The Hon'ble Supreme Court, too, in the case of Mr. Shahid Anwer Bajwa has clarified that the Chief Executive's Order 5 of 2000 was a “Special Permission” granted by the Chief Executive *considering that*

they (Judges of less than five years of service) *were restricted to act and plead before the said High Court being **permanent Judges*** (since they were not entitled to pensionary benefit). The only purpose and intention of promulgation of Chief Executive's Order No.5 of 2000 as interpreted by the Hon'ble Supreme Court was to compensate those Judges who were not qualified to avail pensionary benefits and they were **permanent judges** of this High Court. Ironically, the same Chief Executive who has issued **PCO-1 of 1999** and **Oath (Judges) Order 2000** (C.E.O No.1 of 2000) has given "Special Permission" to those who were adversely affected by Oath (Judges) Order 2000. It may be mentioned here that when the Hon'ble Supreme Court has dismissed the case of Mr. Bajwa by order dated **25.01.2018**, despite insertion of **Article 270AA(3)(b)** in the Constitution way back on **20.4.2010** Mr. Rasheed A. Rizvi has not opted for pensionary benefits and, therefore, he continued to be in the category **(a)** of the Judges in terms of **Article 4** of the Chief Executive **Order 5 of 2000** discussed in para-4 above. But today as stated by Mr. Salahuddin Ahmed, advocate he is receiving pension from the budget allocated for the retired judges of High Court. This was the distinguishing feature in the case of Mr. Bajwa which has been noted by the Hon'ble Supreme Court without commenting on the legality of the Chief Executive Order 5 of 2000 which was issued in continuation of the power acquired by him at his own under **PCO-1 of 1999**. Be that as it may, the issue precisely is about the effect of "pensionary benefit" for the **permanent Judge** of this Court with 5 years' service as a Judge on attaining the age of superannuation and the constitutional restriction on the **permanent judges** of High Court to practice as an advocate in the same High Court in terms of **Article 207(3)(b)** of the Constitution which reads as follows:-

207. Judge not to hold office of profit, etc.-

- (1)
- (2)
- (3) A person who has held office as a permanent Judge--
 - (a)
 - (b) of a High Court, shall not plead or act in any court or before any authority within its jurisdiction; and

Whether **Article 207(3)(b)** of the Constitution mean that pensionary benefit for a permanent Judge are such that he should be restricted from joining his parent Bar Council for practicing Law on reaching superannuation (i.e. 62 years) though everyone else has no restriction of age for practicing law. It may be mentioned here that in most of the countries across the common law world the age of Judge for holding the office is either lifelong or 70 years and above not just 62 years. To be exact the age limit for a Judge to hold the office in USA is equivalent to life span, in Canada is 75 years, in U.K., Jamaica, Trinidad and Tobago is 70 years. Is it not harsh treatment to the permanent Judges on their retirement just at 62 years of age to deprive them from practicing Law? Does it not violate their freedom to practice a profession otherwise not prohibited through any specific regulation in line with the proviso to **Article 18** of the Constitution? In this context, it would be appropriate to know the value of the so-called pensionary benefit provided to permanent Judge who has served for more than five years as Judge and faces restriction imposed on him contained in **Article 207(3)(b)** of the Constitution. Therefore, the Budget branch is directed to place on record the pensionary benefits extended to Mr. Justice (Retired) Rasheed A. Rizvi to assess possible losses he would suffer in case the mandate of **Article 207(3)(b)** is extended to him, like any other permanent Judge

on his retirement. Is **Article 207(3)(b)** of the Constitution is an award/recognition of the services rendered by Judges of High Court or in reality it is penalty for sacrificing one's freedom of movement on appointment as Judge of High Court.

6. In view of the contentions of Mr. Salahuddin Ahmed, Advocate and in the background of the above discussion, the following fundamental questions of public importance have emerged:-

- i. Whether the benefit of Chief Executive Order-5 of 2000 for the Judges in category (a) in the said order can be continued even after **20.4.2010** the date of amendment in **Article 270AA** and insertion of **clause (3)(b)** of the Constitution?
- ii. What is the effect of insertion of **clause 3(b)** to the **Article 270AA** of the Constitution on the Judges to whom benefit of "special permission" was extended by Chief Executive Order-5 of 2000 on account of being removed from the office of a Judge of High Court before completion of 5 years period of service to qualify for pensionary benefit as a Judge of High Court?
- iii. Whether **clause 3(b)** of **Article 270AA** of the Constitution can be interpreted to create another class of permanent Judges who on attaining the age of superannuation can be entitled for pensionary benefits and shall not be hit by the provisions of **Article 207(3)(b)** of the Constitution whereas other permanent Judges on attaining the age of superannuation can be restrained to act and plead in the same Court? If yes, what is its' effect?
- iv. Whether after the 18th Amendment on insertion of **clause (3)(b)** of **Article 270AA** of the Constitution if one permanent Judge on retirement for attaining the age of superannuation is allowed to act and plead in any Court including the one in which he was a Judge and any other permanent Judge with five years' service on retirement at

superannuation age, if not allowed to act and plead in any Court including the one in which he was a permanent Judge, would it be violative of **Article 25** of the Constitution or not?

- v. Whether **clause (3)** of **Article 270** of the Constitution itself is discriminatory and is in conflict with **Article 18** of the Constitution and/or otherwise after 18th Amendment it is not applicable to the judges who retire on attaining the age of superannuation after serving as a Judge for five years or more since **Article 18** of the Constitution does not impose any restriction to carry on the profession on attaining 62 years (superannuation)?
- vi. Whether **sub-clause 3** of **Article 207** is in conflict with the fundamental right guaranteed under **Article 18** of the Constitution since it curtails freedom of profession of a permanent Judge after retirement from the service as a Judge though no such restriction is imposed on anyone else and there is no age limit for practice in the field of Law and as such entire clause (3) of the Article 270 of the Constitution is liable to be struck down being subservient to the fundamental rights guaranteed to the citizen of Pakistan including permanent Judge?

7. The above are pure constitutional questions and the learned counsel in terms of **Order XXVIA** of CPC has rightly suggested that notice may be given to Attorney General of Pakistan. Order accordingly.

Copy of this order be faxed to office of Attorney General for Pakistan and also provided to the Additional Attorney General, at Karachi.

To come up on **31.05.2021**.

JUDGE