

ORDER SHEET
THE HIGH COURT OF SINDH KARACHI

Suit No. 1634 of 2009

DATE

ORDER WITH SIGNATURE OF JUDGE

30-03-2022

Mr. Imran Taj, Advocate for the Plaintiffs.

Mr. Haris Rashid Khan, Advocate for Defendant No.3.

Adnan Iqbal Chaudhry J. - Mr. Khawaja Shamul Islam, counsel for the Plaintiffs in this suit has moved this CMA No. 5391/2022 with the prayer that I should recuse myself from hearing cases in which he appears as counsel. He has averred that I am biased against him for having decided certain cases against him in which he appeared as counsel. To that end he has narrated certain events which he believes, or at least would like the reader to believe, show my bias against him. In other words, Mr. Shamsul Islam alleges that I have decided against a litigant because such litigant was being represented by him. Since the allegation is serious and strikes at my impartiality, a characteristic that defines a Judge and his oath, I am compelled to respond.

2. To allege bias, Mr. Shamsul Islam has referred to the fact that in the year 2014 when I was an Advocate of this Court, I was party to a complaint made by the Sindh High Court Bar Association to the Chief Justice of this Court to take action against Mr. Shamsul Islam for committing contempt of court when he had verbally abused a Judge this Court who was hearing his matter and had then assaulted the Advocate who tried to intervene. It is a fact, as borne from the documents annexed with his application, that fifty [50] Advocates including myself had signed such complaint. Since I was one of the eye-witnesses of the incident, I was also requested by the Bar Association to give an affidavit narrating the incident, which I did as an officer of the Court. The case is reported as *Abid S. Zuberi v.*

Khawaja Shams-ul-Islam (PLD 2016 Sindh 618). The judgment notes that the Advocates who had moved the complaint had done so only out of desire to preserve the dignity of the Court. The case culminated when Mr. Shamsul Islam tendered an unconditional apology to the Court and was admonished for his actions. That was the end of the matter as far as I was concerned.

3. The above incident took place in 2014, much before I donned the gown in 2018. Soon thereafter, Mr. Shamsul Islam, Advocate, appeared in my chamber and requested me to recuse myself from his cases given the facts narrated above. I told him that I had no reason to do so as I held no personal grudge against him. Since then, Mr. Shamsul Islam Advocate has been regularly appearing before me without demur. He is a regular practitioner at the principal seat of the High Court and must have appeared before me a hundred times. However, to allege bias he has cited only four [4] orders where I decided against the party he represented. There may be others, and all subject to appeal. Nonetheless, while all those orders will speak for themselves, a search conducted by my staff into our data-base shows that I have also passed the following orders in favor of a party represented by Mr. Shamsul Islam Advocate:

- (i) Judgment dated 24-12-2018 in C.P. No.D-2304/2018 (2019 CLD 853);
- (ii) Order dated 30-05-2018 in Suit No. Nil/2018, Al Ghazi Builders v. Province of Sindh;
- (iii) Orders dated 18-04-2019 and 17-03-2020 in Suit No. 719/2019;
- (iv) Order dated 06-07-2019 in Suit No. 1762/2018 (2020 CLCN 20);
- (v) Order dated 21-11-2019 in Cr. Appeal No. 578/2018;
- (vi) Order dated 04-02-2021 in Suit No. 270/2021.

4. Given the above orders, I do not see how Mr. Shamsul Islam can allege that I am biased against him. I have always given him a patient hearing and passed orders, as I endeavor do in all cases before me, to the best of knowledge and ability and with complete impartiality. Where the case presented by the counsel merited relief,

I extended the same; and where it did not, I declined. It is as simple as that.

5. Mr. Shamsul Islam has then referred to certain other instances perceived by him as bias. In para 3 of his application he alleges that on 13-04-2019 I made him wait for two hours outside my chamber before recusing in his personal case (Suit No. 675/2019) after giving audience to Mr. Faisal Siddiqi Advocate who appeared for the other side in that case. However, the very documents Mr. Shamsul Islam has filed to make that averment belie him. The order-sheet of Suit No. 675/2019 shows that it came up before me on 13-04-2019 as a fresh case in which notice had yet to issue. Therefore, it is absurd to say that Mr. Faisal Siddiqi Advocate or any other counsel from the other side appeared in that case on that day. The order-sheet also shows that Mr. Shamsul Islam was not even present when the case was taken up, and it was his Associate, Mr. Imran Taj Advocate, who appeared for the plaintiff. The order records that I had recused myself in that case because I had remained counsel for one of the parties. It is indeed intriguing that on the one hand Mr. Shamsul Islam says that I have been biased against him throughout and should have recused myself from all his cases, and on the other hand he complains when I recused myself in one of his cases where I had represented a party as counsel.

6. In para-8 of his application, Mr. Shamsul Islam alleges that I am hearing a criminal appeal in which Mr. Faisal Siddiqi Advocate is appearing, who is 'not before me' as he and I were partners in a law firm. But again, the documents filed by Mr. Shamsul Islam to make that allegation show that Mr. Faisal Siddiqi Advocate has not even signed the vakalatnama in that appeal, and that, thus far the appeal has not even proceeded before me, rather when it came up before me on 10.03.2022 it was Mr. Saad Fayyaz Advocate who appeared for the appellant and was adjourned as Mr. Shamsul Islam was reported to be busy before another Bench.

7. In para-9 of the application, the counsel alleges that though my board for the Original Side had been discharged on 24.03.2022 as I was in a Division Bench for that day, but still by way of some design I took up Suit No. 1264/2008 in which Mr. Shamsul Islam appears as counsel. That again is a reckless misstatement. On 24.03.2022, even though I was called to fill in for a Judge in a Division Bench, my board for the Original Side was never discharged as per the administrative order of the Hon'ble Chief Justice, and therefore I took up that board after the Division Bench.

8. The fact that seems to have triggered this application is that the last two orders passed by me in cases in which Mr. Shamsul Islam appeared as counsel went against the party he was representing. On 22-03-2022, when he had last appeared before me he was visibly upset and aggressive and stated that I should not be hearing his cases. I responded by saying that he is free to move an application.

9. Apparently, for Mr. Shamsul Islam, scandalizing a Judge is 'all in a days work'. It is common knowledge that he resorts to such tactics when a case goes against him. For that he has been issued notices of contempt at least thrice by Judges of this Court, and each time the Court refrained from action because he apologized. Two of the matters are reported cases. Three [03] sitting Judges of this Court have already recused themselves from his cases. For the same reason he was also 'not before' four [4] other Judges of this Court who are now retired. He may be the only counsel in the history of the Sindh High Court with that distinction. I am not inclined to take the same course especially after he has cast aspersions on my impartiality and integrity and resultantly on this institution. In doing so, I draw inspiration from the following observations of Justice Jawwad S. Khawaja in the case of *Independent Media Corporation v. Federation of Pakistan* (PLD 2014 SC 650) where he declined to recuse himself from a case in the face of a perception being created that he was related to a party to the case:

“10. In the above context, it may be useful to record that all litigants at times make attempts to avoid hearing before certain Benches but at times such attempts are not well intentioned. There may even be attempts to intimidate or malign judges or institutions of the State and thereby, to undermine such individuals or institutions.

11. It is in this context that two instances can be referred to by us. When I, (Jawwad S. Khawaja, J.) was a Judge of the High Court, I received a letter stating therein that I had illicit relations with women folk of the opposite party. The said letter was circulated by me amongst the lawyers of the parties. The person who purportedly wrote this letter was summoned in Court on the following day. She appeared in Court. Her demeanor in Court depicted that she was a simple village woman. She admitted that she wrote the said letter. When asked why she did so, she replied that she did not want the case to be heard by me and was advised by a worldly-wise man in the village to write the letter to me and as a consequence the case would be ordered to be placed before some other Bench. **This approach is unfortunate but is prevalent in our society. Judges cannot be tricked by such tactics. If they succumb to such tactics they will thereby empower litigants and enable them to control fixation of cases and constitution of Benches.**

12. There is another instance relating to a commercial matter in which a letter was received by me. This letter was purportedly from one of the parties to the case. In the letter it was stated that I had been a lawyer for one of the parties and was, therefore, biased in favour of the opposite side. This letter was also circulated amongst the lawyers of the parties at which point the party who was purported to have written the letter stood up in Court and stated that he had not written the letter and in fact he would want the same Bench headed by me to hear the case.

13. **These instances show that there can be reasons, other than those that meet the eye, which may motivate a remark or comment. If judges do not deal firmly with such remarks (where unfounded) this may encourage unscrupulous or uninformed elements into saying things which may erode the standing, respect and credibility of the Court.** The hearings of this case at intervals today is significant. **Courts are not to succumb to any remark, defamatory or otherwise. It is the conscience of the Judge himself which must determine his decision to sit on a Bench or not.”**

10. The tactic deployed by Mr. Shamsul Islam by way of the instant application is nothing new, viz. to first make scandalizing remarks against a Judge and then to point to those very

remarks/allegations to say that the Judge is biased. This very tactic was exposed by the Supreme Court in the case of *General (R.) Parvez Musharraf v. Nadeem Ahmed Advocate* (PLD 2014 SC 585) where, again Justice Jawwad S. Khawaja noted that:

“6. Judges, it may be noted, do encounter allegations of bias and also receive criticism some of which may be expressed in civil language while others may be through hate speech or outright vilification based on malice. In either event, the Judge by training does not allow such vilification to cloud his judgment in a judicial matter. Even extremely derogatory language used against Judges does not, by itself create bias, as is evident from the negligible number of contempt cases based on scandalisation of Judges, (none leading to a sentence) cited in the case titled *Baz Muhammad Kakar v. Federation of Pakistan* (PLD 2012 SC 923). Courts, therefore, cannot decide questions of perceived bias by accepting the individual and personal views of an aggrieved petitioner and thus recuse from a case. It was pointed out to Mr. Pirzada, Senior Advocate Supreme Court that if a subjective perception of bias could be made a basis for recusal of a Judge merely because the petitioner had done things or had taken unconstitutional steps against the former Chief Justice, it would be very simple for any litigant not wanting his case to be heard by a particular Judge to start hurling abuses at such Judge and thereafter to claim that the Judge was biased against him. For litigants and their Advocates it is important to bear this in mind while urging 'perception of bias' against a Judge.”

11. In the same context, while declining a motion to recuse, Justice Scalia of the United States Supreme Court had observed in *Cheney v. U.S. District Court for D.C.*, 541 U.S. 913 (2004) that “A decision whether a Judge’s impartiality can ‘reasonably be questioned’ is to be made in light of the facts as they existed, and not as they were surmised or reported.”

12. It is settled that it is for the Judge himself to determine whether to recuse from a case or not. The case-law discussed above discourages recusal where it is apparent that the perception of bias is being created by a litigant or a counsel to divert a case from a Bench which he perceives as unfavorable or to a Bench which he perceives as more favorable. To succumb to such tactics would not only send the message that Judges can be cowed into submission by

such tactics, it would also erode public confidence in the Courts and at the same time it would increase the work load of the Bench to whom the case is passed on to.

13. My conscious is clear. Regardless of who the counsel is, I have, and will continue to decide the rights of the parties before me with impartiality “and that, in all circumstances, I will do right to all manner of people, according to law, without fear or favor, affection or ill- will”, which is the oath that I have taken. If Mr. Shamsul Islam feels that he may not be able to deliver to his client on the merits of the case, it is for him to withdraw his vakalatnama and not for me to recuse. The request to recuse is denied. CMA No. 5391/2022 is dismissed.

JUDGE