IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT: MR. JUSTICE MIAN SAQIB NISAR, HCJ
MR. JUSTICE UMAR ATA BANDIAL
MR. JUSTICE IJAZ UL AHSAN

CIVIL APPEAL NO.1703 OF 2013
(Against the judgment dated 31.5.2013 of the High Court of Sindh, Karachi passed in Const.P.No.D-1365/2012)

Shahid Anwar Bajwa

...Appellant(s)

VERSUS

S.M. Asif and others

...Respondent(s)

For the appellant(s): Mr. Shahid Anwar Bajwa, ASC (in person)
Mr. M. S. Khattak, AOR

For the respondent(s): Not represented

On Court's notice: Mr. Muhammad Waqar Rana, Addl.A.G.P.

Date of hearing: 25.1.2018

ORDER

MIAN SAQIB NISAR, CJ.- In this appeal with the leave of the Court dated 16.12.2013, the key issue involved is whether the appellant, who is a retired Judge of the High Court of Sindh, is entitled to practice before the same High Court.

2. The facts of the case are that the appellant was appointed as an Additional Judge of the High Court of Sindh *vide* Notification dated 24.9.2009. Thereafter, he was appointed as a Judge of the said Court under Article 193 *vide* Notification dated 17.9.2011. He served as a Judge of the said Court till his retirement w.e.f. 4.10.2012. Thereafter, he represented a party in a petition filed before the said High Court as a counsel, wherein an objection was raised to the effect that being an ex-Judge of the same High Court he could not appear as a counsel before that Court. This issue was decided against the

appellant and while interpreting the provisions of Article 207 of the Constitution it was categorically held by the Court through the impugned judgment that he is debarred from appearing before the High Court of Sindh.

3. Leave in this case has been granted in the following terms:-

> *"The petitioner remained a permanent judge of the High Court of Sindh and retired on 04.10.2012 upon attaining the age of superannuation. He filed power of attorney to represent a party in a constitution petition before the High Court of Sindh. A primary question arose as to whether there existed a constitutional bar disallowing a retired judge of a High Court to plead before the same Court. The petitioner pleaded his own case and a Division Bench of the High Court of Sindh held that the constitution does not allow the petitioner to plead before the same Court where he had served as a permanent judge.*
>
> *2. The relevant provision barring a retired judge of a High Court to plead before the certain Courts are incorporated in Article 207 of the Constitution which reads:-*
>
> > *"207. Judge not to hold office of profit, etc. (1) A Judge of the Supreme Court or of a High Court shall not-*
> >
> > *(a)* ……
> >
> > *(b)* ……
> >
> > *(3) A person who has held office as a permanent Judge-*
> >
> > *(a) of the Supreme Court, shall not plead or act in any court or before any authority in Pakistan;*
> >
> > *(b) of a High Court, shall not plead or act in any Court or before any authority within its jurisdiction; and*
> >
> > *(c)* ……"

> *3. The petitioner had pleaded before the High Court and had argued before us that there was a clear bar against a permanent judge of a High Court to plead before that Court under Article 166(3) of the 1956 Constitution and by the change brought about in the corresponding Article 207 of the 1973 Constitution the bar relates only to Courts subordinate to the High Court where the Judge had served. Article 166(3) of 1956 Constitution reads:-*
>
> > *"A person who has held office as a permanent judge of a High Court shall not plead or act before that court or any court or authority within its jurisdiction."*
>
> *4. Since the question raised in this petition is one of first impression and requires interpretation of Article 207 of the Constitution regarding constitutional bar on retired permanent judge of a High Court to plead before the same Court leave to appeal is granted."*

4. The appellant in person, has referred to the provisions of Article 207(3)(b) of the Constitution of 1973 as well as Article 166(3) of the Constitution of 1956, which for the purposes of facility of reference are reproduced below:-

> **Article 207(3)(b)**
>
> *"A person who has held office as a permanent judge - of a High Court, shall not plead or act in any court or before any authority within its jurisdiction."*
>
> **Article 166(3)**
>
> *"A person who has held office as a permanent judge of a High Court shall not plead or act before that court or any court or authority within its jurisdiction."*

On the basis of the omission of the words "that Court", which were present in Article 166(3) of the Constitution of 1956 but were omitted in Article 207(3)(b) of the Constitution of 1973, he argued that the significance of such omission could notbe ignored. Through such

deliberate omission by the legislature, the bar of appearance has been restricted to the Courts sub-ordinate to the High Court in which a person has served as a Judge, but there is no longer a bar against appearance before the same High Court. In support of his contentions, reliance has been placed upon the judgments reported as **Government of Pakistan Vs. Syed Akhlaque Hussain and another (PLD 1965 SC 527)**, **M/s Haider Automobile Ltd. Vs. Pakistan (PLD 1969 SC 623)**, **AL-Jehad Trust through Raeesul ah 45 Mujahideen Habib-ul-Wahabb-ul-Khairi and others Vs. Federation of Pakistan and others (PLD 1996 SC 324)**, **Lahore Development Authority through D.G. and others Vs. Ms. Imrana Tiwana and others (2015 SCMR 1739)** and **M/s Mustafa Impex, Karachi and others Vs. The Government of Pakistan through Secretary Finance, Islamabad and others (PLD 2016 SC 808).** It is also argued that the case-law, on which reliance has been placed by the learned High Court, while passing the impugned judgment, did not relate to the Constitution of 1973 but to the Constitution of 1962, therefore, these judgments have no relevance to the facts and circumstances of the present case.

5. It is to be noted that the same arguments were raised before the High Court, but after considering the relevant provisions of both the 1973 and the 1962 Constitutions as well as the relevant judgments and other material from our jurisdiction as also from foreign jurisdictions, the learned Division Bench rejected the same. It was held by the Court that the bar on a person who has been a permanent Judge of a High Court as contained under Article 207(3)b) of the Constitution is not limited only to the courts which are under the administrative control of a High Court but it also includes the High Court.

6. The judgment of the High Court is well reasoned and cogent. However, it is appropriate to consider the relevant constitutional/statutory history of the restriction on the ex-Judge(s) of the superior Courts to practice before the same Court. The restriction was first introduced in 1956 in the shape of Article 166(3) of the 1956 of Constitution, however, such restriction ceased to exist in the year 1958 when the Constitution of 1956 was abrogated. Thereafter, the restriction was re-introduced by the Retired Judges (Legal Practice) Order, 1962 *(Order of 1962)*, but the same was limited to such Judges who were removed from service; however, a retired Judge retained the right to practice before the same High Court. In the Constitution of 1962, there was no provision imposing any such restriction on a permanent Judge of the High Court after his retirement or removal, however, by means of the Legal Practice (Disqualifications) Ordinance, 1964, the Order of 1962 was repealed and the bar was re-introduced. Ultimately, the restriction was again introduced in the form of Article 207(3)(b) of the Constitution of 1973. Thereafter, the Ordinance of 1964 was also repealed as the issue had already been dealt with by the Constitution itself. In this regard it is to be noted that the validity of the Ordinance of 1964 was challenged on the ground of being violative of fundamental rights. The Full Bench of the High Court in the case of Syed Akhlaque Hussain Advocate *(Writ Petition No. 217 of 1964)* held that the provisions of the said Ordinance offended against Fundamental Right, namely, the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business, but on appeal, this Court *vide* the majority judgment reported as **Pakistan v. Syed Akhlaque Hussain (PLD 1965 SC 527)** held that the Ordinance of 1964 did not violate any of the Fundamental Rights of citizens embodied in the Constitution. The issue was again considered by this

Court in **M/S Haider Automobile's case** (supra) wherein it was held as under: -

> *"The right to practice the profession of law is a right available subject to a system of licensing under the Bar Councils Act or under the powers of the High Court under its Letters Patent and of the Supreme Court under its own rules and a person seeking to practise has to obtain a licence in that behalf upon satisfying the Licencing Authority that he fulfils the qualifications laid down and has paid the fees prescribed for that purpose. He is also subject to the disciplinary control of the Courts and the tribunals in which he practises or at any rate was, until the coming into force of the Legal Practitioners and Bar Councils Act, 1965. Under the latter disciplinary control has to a large extent, been transferred to the Bar Councils but the right is nevertheless, not an uncontrolled or absolute right. Nor could it in the very nature of things be. Such regulatory provisions are not and can never be considered to be violative of the Fundamental Right to carry on a trade or profession. The question then is as to whether Ordinance No.II of 1964 did impose any bar which went beyond regulation of the profession. The impugned Ordinance did not prevent, it will be observed, a retired Judge of the High Court from doing chamber practice, that is, advising clients in Chambers or practising in the jurisdiction of a High Court of which he was not a Judge or practising in the Supreme Court. Similarly although a retired Judge or Chief Justice of the Supreme Court was prohibited from practising before any Court or tribunal in Pakistan, his right to do Chamber practice remained unaffected. The Ordinance No.II of 1964 did not, therefore, introduce any total prohibition but it only restricted the forums before which a retired Judge could practise, in the interest of maintaining the independence of the judiciary; preserving the dignity of a person who had held such a High Office and preventing embarrassment both to him and to the Judges before whom he was otherwise likely to appear. Such a restriction was not, in the circumstances, in my opinion, violative of the said Fundamental Right No. 8 and, therefore,*

> *the question of the Ordinance being void did not at all arise. I am in this respect, in agreement with Cornelius, C. J. Fazle-Akbar, Yaqoob Ali and Abdus Sattar, JJ. with their opinions in this regard in the case of Government of Pakistan v. Syed Akhlaque Hussain and another."*

7. The rule that a retired Judge is not entitled to appear as a counsel before a Court of equal or lower jurisdiction to the one in which he sat in his capacity as a Judge is found all across the common law world, including England, Canada, India, several US states, Jamaica, Trinidad and Tobago. Reference in this regard may be made to Section 75 of the Courts and Legal Services Act 1990 of UK, which provides a bar on a Judge as under: -

> **75. Judges etc. barred from legal practice.** No person holding as a full-time appointment any of the offices listed in Schedule 11 shall: -
>
> (a) provide any advocacy or litigation services (in any jurisdiction);
>
> (b) provide any conveyancing or probate services;
>
> (ba) carry on any notarial activities (within the meaning of the Legal Services Act 2007);
>
> (c) practise as a barrister, solicitor, public notary, licensed conveyancer or licensed CLC practitioner, or be indirectly concerned in any such practice;
>
> (d) practise as an advocate or solicitor in Scotland, or be indirectly concerned in any such practice; or
>
> (e) act for any remuneration to himself as an arbitrator or umpire.

Schedule 11 includes the Judges of the Supreme Court, Lord Justices of Appeal, Puisne Judge of the High Court, Circuit Judges, District Judges, etc. The outline Conditions of Appointment and Terms of Service of High Court Judge in UK also provides such restrictions, i.e. "*A High Court Judge shall not practise as a barrister or solicitor or be indirectly concerned in any such practice (S.75 Courts and Legal*

Services Act 1990). ... Any offer of appointment is therefore made on the understanding that appointees will not return to practice". Similarly, Article 220 of the Indian Constitution imposes restriction on legal practice after being a permanent Judge, i.e., "*No person who has held office as a permanent Judge of a High Court ... shall plead or act in any court or before any authority in India except the Supreme Court and the other High Courts*". In the light of the above it is clear that in the common law jurisdictions the intention of the legislature has always been to impose a bar on ex-Judges of the superior Courts to appear as counsel before the same Court or the Courts/forums subordinate to that Court.

8. In this backdrop, we shall consider the relevant provisions of the Constitution of 1962 as well as 1973. Article 166(3) of the Constitution of 1962 provided that "*A person who has held office as a permanent judge of a High Court shall not plead or act* ***before that court or any court or authority within its jurisdiction***"; whereas, Article 207(3)(b) of the Constitution of 1973 provides that "*A person who has held office as a permanent judge of a High Court, shall not plead or act* ***in any court or before any authority within its jurisdiction****".* A plain reading of two provisions makes it abundantly clear that not only the words "that Court" been omitted, as relied upon by the appellant, but also the word "before" has been replaced with the word "in", thus, the whole construction of the provision has been changed. Thus, it can safely be held that by the omission of word "that Court" the intention of the legislature is not to allow the ex-Judge of a High Court to appear as a counsel before that Court. 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.

9. These are the reasons for our short order of even date, whereby the instant appeal is dismissed.

CHIEF JUSTICE

JUDGE

JUDGE

Islamabad, the
25th of January, 2018
Approved For Reporting
Waqas Naseer