IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:
Mr. Justice Mian Shakirullah Jan
Mr. Justice Jawwad S. Khawaja
Mr. Justice Amir Hani Muslim

Civil Appeals Nos. 212 & 213 of 2011.
(Against the order dated 15.6.2009 passed by the High Court of Sindh at Karachi, in Const. Petitions Nos.D-2404/08 and D-38/09).

Province of Sindh thr. Chief Secretary & another. ... Appellants (In both cases)

VERSUS

Rasheed A. Rizvi & others. ... Respondents (In CA 212/11)
Abdul Haleem Siddiqui & others. ... Respondents (In CA 213/11)

(Civil Appeal No.212/2011)
For the appellant (s): Abdul Fateh Malik, A.G. Sindh
For the respondent-1: Rasheed A. Rizvi, Sr. ASC.
For the respondent-2: Anwar Mansoor Khan, Sr. ASC

(Civil Appeal No.213/2011)
For the appellant (s): Abdul Fateh Malik, A.G. Sindh
For the respondent-1: N.R.
For the respondent-2: Mr. Muhammad Waqar Rana. ASC

For the respondent-3: Abdul Rasool Memon, Registrar, High Court of Sindh.
(in both cases)

On Court's notice: Maulvi Anwar-ul-Haq, Attorney General of Pakistan
(On behalf of Federation)

Date of hearing: 16.2.2012

Judgment

Jawwad S. Khawaja, J.- These appeals raise issues concerning the manner in which judicial officers are appointed in the province of Sindh through initial recruitment. The appellants impugn the judgment of a five Member Bench of the High Court of Sindh dated 15.6.2009 that has set aside amendments made by the Sindh Government to the appointment mechanism For reasons elaborated in this opinion, we have dismissed these appeals and upheld the impugned judgment subject to a modification elaborated toward the end of this opinion.

THE PARTIES:

2. Before setting out the facts which have given rise to these two appeals, we may make a note of the parties involved in the controversy. There are two

appellants, namely the Province of Sindh and the Sindh Public Service Commission ("SPSC") who have filed both appeals. Rashid A. Rizvi, a member of the Sindh High Court Bar Association ("SHCBA") and the SHCBA are respectively respondents Nos. 1 and 2 in Civil Appeal No.212/2011 while Abdul Haleem Siddiqui Advocate who was a member of the Sindh Bar Council ("SBC") and the SBC are respectively respondents Nos. 1 and 2 in Civil Appeal No.213/2011.

THE FACTS:

3. The appointment of judicial officers in the District Judiciary in the province of Sindh is governed by the Sindh Judicial Service Rules, 1994 (the "1994 Rules"). Prior to the framing of these rules in 1994, judicial officers were inducted in the Sindh judicial service in accordance with rules of general application which were framed under section 26 of the Sindh Civil Servants Act, 1973. These were called the Sindh Civil Servants (Appointment, Promotion and Transfer) Rules 1974 (the "1974 Rules") and were applicable to the recruitment of civil servants including those inducted in the judicial service.

4. This position was changed radically by the 1994 Rules which were notified on 24.11.1994 vide notification No. SOR-I(S&GAD)2/3-93. The background and the reasons which led to the framing of the 1994 Rules have an important bearing on the outcome of this case. We will advert to these in detail, later in the opinion. For the present, it will suffice to note that the method of recruitment prescribed by the 1994 Rules departed from the earlier 1974 Rules in important particulars; the most relevant in the present context being the method of selection and appointment of Judges in the District Judiciary. While recruitments to the judicial service prior to 1994 were made by the Government of Sindh on the recommendation of the SPSC, Rule 5 of the 1994 Rules stipulated that appointments to the judicial service would thenceforth be made on the recommendation of the Provincial Selection Board. The Provincial Selection Board was defined in Rule 2(e) to mean *"the Administrative Committee of the High Court or a Committee of not less than three High Court Judges specially constituted for the purposes of these rules by the Full Court"*. The Rules also provided for other matters including promotions, seniority, transfer and discipline.

However, the present controversy before us is confined to the method of appointment of judicial officers.

5. The Government of Sindh, vide Notification No. SOR-I(5GA&CD)2-3/9, dated 4.12.2008 (the "impugned Notification"), again gave the SPSC a significant and over-bearing role in the recruitment of Judges in the Sindh judicial service. This has been done by stipulating in Rule 5 that recruitments to the posts of Civil Judges and Judicial Magistrates shall be made by initial appointment through the SPSC on the requisition of the High Court of Sindh.

6. The respondents were aggrieved of the amendments made in the Sindh Judicial Service Rules, 1994, through the impugned Notification. They, therefore, challenged the constitutional validity of the said Notification before the High Court. It was their case that these amendments were violative of the constitutional imperative requiring separation of the Judiciary from the Executive and thus adversely affected the independence of the Judiciary. The respondents, therefore, prayed that the impugned Notification be struck down on the ground that the same was *ultra vires* the Constitution and in particular, was inconsistent with Articles 4, 9, 14, 175 and 203 of the Constitution. For ease of reference, we can state here the relevant parts of the latter two articles. Article 175(3) of the Constitution commands that "*[t]he Judiciary shall be separated progressively from the Executive within fourteen years from the commencing day,*" and Article 203 states that "*each High Court shall supervise and control all courts subordinate to it.*"

7. According to the respondents, the conferment of the power of selection on the SPSC and the power of appointment on the Government, coupled with the withdrawal of power from the Provincial Selection Board amounted to an unconstitutional encroachment on the independence of the judiciary. The case of the Province, however, was that the amendments did not adversely affect the independence of the Judiciary or its separation from the Executive. The appellants and the respondents, both reaffirm before us, their respective positions taken in the Sindh High Court.

THE ISSUES:

8. The controversy between the parties is thus greatly narrowed down in view of the above. If indeed the amendments in the 1994 Rules and the consequent elimination of the High Court from the process of selecting and appointing judicial officers amounts to negation of the separation of the Judiciary from the Executive or if it constitutes an encroachment on the independence of the judiciary, then the impugned Notification would have to be struck down and the judgment of the Sindh High Court will be affirmed. In other words, the question before us is quite straightforward: has the impugned Notification contravened the constitutional provisions requiring the independence of the judiciary and its separation from the executive? A consideration of established precedent, as well as the historical perspective in which the original 1994 Rules were framed, brings us to answer this question in the affirmative. We shall presently explain both these grounds on the basis of which, the appeals have been dismissed.

(a) The Link between Independence of the Judiciary and the Process of Appointment of Judges:

9. Our constitutional courts have consistently held that the process of appointments to the judiciary must be carefully scrutinized through the lens of constitutional principles such as the principle of separation of powers. In the Al-Jehad Trust case, this Court stated with reference to appointment of judges of the superior judiciary "*...that the independence of the judiciary is inextricably linked and connected with the process of appointment of judges and the security of their tenure and other terms and conditions*." (PLD 1996 SC 324, 429) Although this was said in the context of appointment to the High Court, the principle applies with equal force to all judicial appointments, including those in the District Judiciary. Accordingly, the dictum laid down in the Al-Jehad case was soon reaffirmed by this Court in the case of *Mehram Ali & Others v. Federation of Pakistan* (PLD 1998 SC 1445, 1474) and *Sh. Liaquat Hussain v. Federation of Pakistan* (PLD 1999 SC 504, 658), both cases which concerned the District judiciary. The aforesaid dictum has also been recently reiterated in *Sindh High Court Bar Association v. Federation of Pakistan* (PLD 2010 SC 879, 1182) and *Munir Hussain Bhatti v. Federation of Pakistan* (PLD 2011 SC 407). In

the latter case, the Court, after examining the case law, concluded that "*it is an undisputed tenet of our Constitutional scheme that in matters of appointment, security of tenure and removal of Judges the independence of the Judiciary should remain fully secured.*" (PLD 2011 SC 407, 467)

10. The aforesaid principle would in itself be enough to bring us to the conclusion that the impugned Notification, which takes away the power of selection from the High Court and gives it to the SPSC does not meet Constitutional standards which have, by now become part of our jurisprudence. The method of making appointments of judicial officers attempted through the impugned Notification has the effect of negating the independence of the judiciary and the separation of powers envisaged in Articles 175 and 203 of the Constitution because the High Court is neither involved in the selection of Judges nor in their appointment. The former function is meant to be performed by the SPSC and the latter by the Sindh Government.

(b) Reading the 1994 Rules in their Historical Backdrop.

11. The historical context in which the 1994 Rules were framed makes the point clearer. It should be recalled that the 1994 Rules were framed in the wake and as a result of judgments by the Sindh High Court and the Supreme Court. Consistent with established precedent the role constitutionally envisaged for the High Courts in the judicial appointments process cannot lawfully be substituted by the SPSC because that would go against the concept of an independent judiciary separate, in a real sense, from the Executive. Particularly important are the two *Sharaf Faridi* cases: *Sharaf Faridi v. Federation of Islamic Republic of Pakistan* (PLD 1989 Karachi 404) and the appeal against the aforesaid decision reported as *Government of Sindh v. Sharaf Faridi* (PLD 1994 SC 105). In these cases, firstly the High Court and then the Supreme Court defined the implications of the constitutional provisions dealing with independence of the Judiciary and its separation from the Executive. The relevant extracts from these cases have been reproduced in the impugned judgment. Some may usefully be reiterated at this point. In the cited case the High Court held that "*the supervision and control over the judiciary vested in the High Court*

under Article 203 of the Constitution, keeping in view Article 175, is exclusive in nature,…any … notification empowering any executive functionary to have … control over the subordinate judiciary will be violative of above Article 203 of the Constitution. Besides it will militate against the concept of separation of powers and independence of judiciary…"

In appeal, the Supreme Court re-affirmed the constitutional imperative by observing that "*separation of the Executive from the Judiciary was an obligation cast . . . by the Constitution and this obligation could not be willed away or avoided. It had, willy nilly to be carried into effect despite all the difficulties."* The context of the case was the separation of the executive magistracy (and its control by the Executive), from the judicial function, but the lines of such separation were clearly delineated. These pronouncements were unambiguous and provide the norms to be adhered to in the appointment process for the District Judiciary.

12. The Court gave a well defined meaning and outlined the scope of the separation of powers and judicial independence mentioned in our Constitution. It is in the backdrop of the judicial pronouncements referred to above, and the interpretation of the Constitution made therein, that the 1994 Rules for the recruitment of judicial officers were framed. The 1994 Rules must therefore be analysed in the same context. As has been noted earlier, the original 1974 Rules of general application were applicable to the recruitment of judicial officers also. The judgments of the Sindh High Court and of this Court in the case of Sharaf Faridi were the direct cause for making changes in the 1974 Rules and for framing the 1994 Rules. This is evident from the judgment of this Court in 1994 wherein steps taken by the Government of Sindh have been noted and it has also been observed that *"Rules for appointment and transfer etc. of judicial officers have been drafted and are likely to be approved by the High Court soon."* It was in fact, during the pendency of the case before this Court that the Provinces including Sindh initiated the process of separating the Judiciary from the Executive. The Sindh Government also modified the 1974 Rules and in addition, framed the 1994 Rules which include Rules 4 and 5 relating to the selection and appointment of Judges in the District Judiciary. The Rules adverted to by this Court in Sharaf Faridi's case are in fact, the 1994 Rules as is

evident from the correspondence on record between the Sindh Government and the High Court in 1993-94. In any event, the fact that the 1994 Rules emerged in the background of the two Sharaf Faridi cases is uncontested before us. Even the Province of Sindh, acknowledges it. The learned Advocate General has specifically stated in his written submissions that "…*the required notification[s] were issued in terms of the judgment passed by the Larger Bench of the Honourable High Court of Sindh"* in the case of Sharaf Faridi (para 4 (f), Synopsis on behalf of the Province of Sindh).

13. The changes made by the 1994 Rules to the process of appointment of judges are, therefore, to be considered a contemporaneous statutory exposition of Articles 175 and 203 of the Constitution and the interpretation given to these in the *Sharaf Faridi* cases. Being contemporaneous, this exposition enjoys a great deal of sanctity and cannot lightly be set aside in favour of a materially different expression. The value attached to such contemporaneous exposition is well-settled in our jurisprudence. An accepted authority on the interpretation of statutes notes this in no uncertain terms: "*… the best exposition of a statute or any other document is that which it has received from contemporary authority. Where this has been given by enactment or judicial decision, it is of course to be accepted as conclusive*." (Maxwell on the Interpretation of Statutes, 11th Ed. (Sweet and Maxwell Limited: 1962), p. 296, Chapter 11). In Hakim Khan's case, this Court inferred such a relationship between the Preamble encapsulating the Objectives Resolution and the 1973 Constitution, the latter being a contemporaneous exposition of the former. The Court stated: "…*after the adoption of the Objectives Resolution on 12th March, 1949, the Constitution-makers were expected to draft such provisions for the Constitution which were to conform to its directives and the ideals enunciated by them in the Objectives Resolution and in the case of any deviation from these directives … the Constituent Assembly… [itself] would [have] take[n] the necessary remedial steps … to ensure compliance with the principles laid down in the Objectives Resolution*." *Hakim Khan and Others Vs. Govt. of Pakistan and others* (PLD 1992 Supreme Court 595, 619). In the present case, we are brought to the conclusion that the structural features of the 1994 Rules were a contemporaneous exposition of judicial pronouncements about Articles 175 and 203 in the *Sharaf Faridi* cases.

14. These features highlighting the change brought about by the 1994 Rules may now be closely examined to get a better idea of the meaning of Articles 175 and 203. As has been noted above, prior to the 1994 Rules, judicial officers in Sindh were appointed by the Provincial Government on recommendations made by the Sindh Public Service Commission. The High Court had no say in the process. It is as an undisputed consequence of the Sharaf Faridi cases that changes were brought about in the process of appointments to the Sindh judicial service. The fundamental change that the 1994 Rules brought about, was that the High Court of Sindh was made a key institution having a crucial role in the appointment of judges. The 1994 Rules, in draft form, were before the Supreme Court and were noted with satisfaction as is clear from the report of the case (at p.113). The 1994 Rules, it may be seen, made express stipulation that the Provincial Selection Board which was comprised of Judges of the High Court of Sindh would select the judicial officers for appointment to the judicial service and the Government would make their formal appointments in accordance with Rule 4 of the 1994 Rules. No appointments to the Sindh judicial service were, therefore, possible under the 1994 Rules unless recommended by the Provincial Selection Board comprising exclusively of Judges of the Sindh High Court. This background which was part of the defining precedent in the case of Sharaf Faridi has been elaborately referred to and commented upon in the impugned judgment.

15. The foregoing discussion makes it clear that the dispensation envisaged in the 1974 Rules did not meet the constitutional benchmark for the independence of the Judiciary and its separation from the Executive. This standard was satisfied only by the above-mentioned structural change, brought about through the 1994 Rules. It only follows from this that anything which reverses this fundamental change by making judicial appointments the exclusive preserve of the Sindh Government and the SPSC, would amount to a violation of the constitutional imperative. The impugned Notification dated 4.12.2008 is unconstitutional for precisely this reason. It reverts the process of appointing judicial officers in Sindh (in essential particulars), to the situation which was prevalent prior to 1994. In this

dispensation, the government makes appointments while the selection is done through the SPSC. The High Court has been left with no role in the selection and appointment of Judges in the Sindh judicial service. The High Court can, at most, trigger the process of appointment by making a requisition, but the Court itself has no say either in the selection of judicial officers for recruitment in the judicial service or in their appointment. We have no hesitation in following precedent and in adhering to the constitutional principles enunciated therein. As a consequence, we hold that the impugned Notification dated 4.12.2008 and the amendments made thereby in the 1994 Rules, are *ultra vires* the Constitution and of no legal effect. The said Notification and the amendments thereby made have rightly been struck down on this ground by the High Court of Sindh.

16. This does not imply that every province is obliged to adopt a uniform method for the selection and appointment of judicial officers. It is a hallmark of our federal Constitution that each federating unit is free to carve out its own policy and practice in such matters. 'Parity' between the federating units as urged by the learned Advocate General, Sindh is not required and would be contrary to the federal nature of our Constitution. The only requirement is that the policy and practice adopted by each Province must conform to constitutional imperatives elaborated in Articles 175 and 203 and the relevant precedents - which demand, *inter alia*, that the High Courts must retain a significant degree of 'control' over the appointment and selection process of judicial officers.

EXECUTIVE AUTHORITY : **TRICHOTOMY:**

17. With great respect for the learning and erudition of the learned five member Bench of the High Court, we do wish to differ with certain observations and findings relating to the "past performance" of the SPSC given by the learned Bench. In para 35 of the impugned judgment, the Court has cited certain comments filed by the Government of Sindh and a report prepared by Mr. Justice Faisal Arab, to conclude that these "*speak[] volumes about the mismanagement and mal-practices prevalent in the said Commission.*" The High Court has also stated its opinion that "*… experience show [that the SPSC] has remained under the influence of the Executive and on*

several occasions successfully given results as per their expectations or to say the least, on considerations other than merits" (para 66). At the end of the judgment, the High Court felt it necessary to go beyond the plea of the petitioner's counsel and record its finding that the impugned Notification was not just *mala fide* in law, but also *mala fide* in fact (para. 87). With due respect to the learned Judges, these observations and conclusions raise some fundamental constitutional questions, *inter alia,* as to the scope of judicial review of administrative action and the constitutionally mandated trichotomy of state functions. That the SPSC is an executive body is quite enough to show that it cannot, under our constitutional scheme, be vested with the exclusive power to select judicial officers. Moreso, when the Government (as per Rule 4) is obliged to appoint the persons so selected. The observations of the High Court adverted to above, however, go beyond this principle and can be seen as blurring the separation of powers.

JUDICIAL REVIEW:

18. In the exercise of its jurisdiction under Article 199 of the Constitution, the High Court was called upon only to judge the legal and constitutional validity of the impugned Notification. Passing judgment on the competence or good faith of the SPSC or over the SPSC's performance as an institution, past or present we say with respect, was not called for in this case. By passing these remarks, the Court has risked tainting the institutional credibility of SPSC on the basis of specific or unspecified incidents adverted to by the High Court, which would be amenable to correction through judicial review. Such taint in turn, creates far-reaching repercussions effecting well settled constitutional principles. When a forum no less lofty than a five member Bench of the High Court puts it in writing that the Commission is blighted by "*mismanagement and mal-practices"* and makes appointments on "*considerations other than merits,"* then it is only natural that innumerable professionals who are regularly examined by the SPSC, be they teachers, doctors, accountants, revenue officers etc, would flock to the courts seeking to get the decisions of SPSC overturned based on the authority of a full Bench of the High Court. Such a situation would be both inconsistent with

precedent and constitutionally questionable, given the doctrine of separation of powers which requires that the three organs of the State are considered coordinate and co-equal.

19. The SPSC, it should be noted is an executive authority and a singularly important institution. It was created by the Sindh Public Service Commission Act, 1989 (XI of 1989), an act passed in exercise of powers specifically conferred by the Constitution. The institutional importance of a Public Service Commission becomes clearer when we notice that such Commissions have been specifically mentioned in all of Pakistan's Constitutions. Article 242 of the 1973 Constitution stipulates that the *…Provincial Assembly of a Province in relation to affairs of a Province, may, by law, provide for the establishment and constitution of a Public Service Commission… (2) A Public Service Commission shall perform such functions as may be prescribed by law.*"

20. The SPSC, to which certain functions of the Provincial Government of Sindh have by law been delegated under Article 138 of the Constitution, has correctly been deemed by the High Court as an executive authority. It is clearly performing an executive function and for this very reason, it cannot be given the task of making appointments to the Judicature. It may, however, be noted that while it remains a part of the Executive branch, for the effective discharge of its duties, it has been provided a certain degree of autonomy from the political executive. Where such autonomy is unlawfully impinged upon by the Executive in a given situation, the remedy lies in rectifying the specific situation under Article 199 of the Constitution, rather than declaring an Executive body to be incompetent or to be acting *mala fide*.

21. The SPSC as specifically envisaged in the Constitution and the SPSC Act has the backing and mandate of Article 242 of the Constitution. The High Court undoubtedly has the power to exercise judicial review over specific selections / recommendations made by SPSC. Such review, however, will have to be situation specific and secondly, will need to meet the well settled criteria justifying such review. An illegal decision taken by the SPSC while selecting District Attorneys or Prosecutors for the Sindh Government can thus easily be set-aside by the High Court in exercise of powers of judicial review vested in it under Article

199 of the Constitution. A specific selection or set of selections can also be reviewed judicially on the ground of malice in fact, if there is sufficient material to establish such malice. However, in view of the constitutional principle of trichotomy of powers, a High Court would not be in a position to negate the powers of an executive body such as SPSC which, as noted above, has the backing of an enactment passed by the provincial legislature in accordance with Article 242 of the Constitution. We, therefore, are of the opinion, that the general observations, comments and conclusions drawn in respect of SPSC by the High Court were not appropriate or necessary in the facts and circumstances of the present appeals. We have felt the necessity of reiterating the constitutional structure of separation of powers between the Executive, the Judiciary and the Legislature to ensure that the selections / recommendations, past and future, made by the SPSC are not subjected to litigation and judicial review on the basis of the observations and conclusions made by a five member Bench of the Sindh High Court. This does not, in any manner, restrict the case-specific power of judicial review vested in the High Court under Article 199 of the Constitution and to examine the actions of the SPSC.

22. For the foregoing reasons, while these appeals have been dismissed for the reasons noted above, certain remarks and observations made by the High Court in respect of the SPSC have not been affirmed.

Judge

Judge

Judge

Islamabad.
A. Rehman.

Announced on **9.5.2012**.

Approved for reporting.