

Form No: HCJD/C-121.
JUDGEMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

WRIT PETITION NO. 529 OF 2021

Saleem Ahmed Jan.

Vs

Deputy Commissioner, Islamabad and others

PETITIONER BY: Raja Ghaneem Aabir Khan and Mr. Muhammad Ilyas Khan, Advocates

RESPONDENTS BY: Mr. Farrukh Shahzad Dall, Assistant Attorney General.
Mr. Shahryar Gondal, State Counsel.
Mr. Ansar Mehmood Kiani, Advocate for respondent No. 7
Mr. Almas Ali Jovinda, Legal Advisor, Federal Tax Ombudsman.
Mr. Saleem Akhtar, Senior Legal Advisor, Banking Mohtasib Pakistan.
Mr. Asim Shahbaz Malik, Senior Law Officer, Wafaqi Mohtasib's Secretariat.

DATE OF HEARING: 01.03.2023

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BABAR SATTAR, J.- The grievance of the petitioner is that by order dated 10.09.2020 the learned Federal Ombudsman for Protection against Harassment of Women ("**Ombudsman**"), in exercise of authority under section 5 read with section 11(b) of the Enforcement of Women's Property Rights Act, 2020 ("**Act of 2020**") ordered eviction of the petitioner on the basis of a complaint filed by respondent No.2 and further in exercise of authority under section 8 of the

Act of 2020 ordered recovery in the amount of Rs.1,140,000/- from the petitioner as unpaid rent.

2. While executing such order, the officials from the office of respondent No.1 seized the vehicle owned by the petitioner as well as four air conditioners installed at the property from which the petitioner was evicted by order dated 10.09.2020. The learned Ombudsman by order dated 22.10.2020 directed that in the event that the petitioner did not pay the amount of unpaid rent as determined by order dated 10.09.2020, the petitioner's vehicle was to be auctioned to recover such amount. The petitioner filed a representation against orders dated 10.09.2020 and 22.10.2020 before the President.

3. The President's secretariat issued notices to respondent No. 1 on 23.11.2020 and also invited attention to section 14(2) of the Federal Ombudsmen Institutional Reforms Act, 2013 (**"Act of 2013"**), pursuant to which an order of the Ombudsman against which a representation has been filed before the President stands suspended for a period of 60 days by operation of law.

4. Respondent No.1, nevertheless, in executing the order of the learned Ombudsman dated 22.10.2020, auctioned the vehicle to respondent No.7 on 29.12.2020 after being informed by the office of the Ombudsman that failure to do so will attract contempt of court proceedings, and consequently the vehicle was registered in the name of respondent No.7. The petitioner has impugned the actions of respondent No.1

and the Ombudsman for being without jurisdiction and has sought that the vehicle and air conditioners confiscated by respondent No.1 be returned to him.

5. In the interest of economy and in order not to overburden this judgment, while meaning no disrespect to the learned counsels who appeared and assisted the Court, the Court finds it appropriate not to serialize the arguments of the learned counsels in detail as their submissions will be dealt with in the opinion of the Court that is to follow. The arguments of the learned counsel for the petitioner detailed the factual aspect of the matter as did the arguments of the learned counsel for respondent No.7.

6. The learned State Counsel appearing on behalf of respondent No.1 argued that the Deputy Commissioner was acting under the direction of the Federal Ombudsman for protection against harassment of women at the workplace ("**Ombudsman**") who had threatened to proceed against the Deputy Commissioner in the exercise of the powers of contempt vested in the office of the Ombudsman. And consequently, he had no option but to oblige.

7. The learned counsels who appeared on behalf of the Ombudsmen as well as the learned Assistant Attorney General largely relied on the judgment rendered by the learned Sindh High Court in **Messrs Muslim Commercial Bank Ltd. Vs. Federation Of Pakistan through Director, (Legal-II), President's Secretariat and 2 others (2020 CLD 829)** and proffered arguments raised before the learned Sindh High

Court in support of the legality of the statute through which powers have been vested in the Ombudsmen. The crux of the arguments was that the office of the Ombudsman exercises quasi-judicial powers and there is no illegality in conferring on the Ombudsman the power to issue injunctive orders as well as the power to have the decision implemented. The counsels for the various ombudsmen as well as the learned Assistant Attorney General submitted that the Act of 2020 as well as the Act of 2013 are *intra vires* the Constitution.

8. The questions of law that emerge from the petition include the following:

- (i) What is the validity of the auction carried out by the Office of the Deputy Commissioner in view of section 14(2) of the Act of 2013?
- (ii) What law authorizes the Deputy Commissioner to auction the property of a citizen and under which framework of law can such auction be carried out in order to affect the recovery of an amount ordered by the Ombudsman in terms of section 8 of the Act of 2020?
- (iii) What authority is vested in the Ombudsman to order the confiscation and seizure of private property of a citizen to seek enforcement of its orders passed under section 8 of the Act of 2020?

9. After hearing arguments of the learned counsel for the parties, this court found that the following additional issues and questions of law also needed to be addressed to adjudicate the petition:

- (i) The determination of relationship between a landlord and a tenant is regulated within the Islamabad Capital Territory by Islamabad Rent Restriction Ordinance, 2001 and remedies are also provided against illegal dispossession of property under the Illegal Dispossession Act, 2005, within the realm of criminal law and also through filing of a suit for declaration and recovery within the realm of civil law. The illegal dispossession of property and regulation of relationship between landlord and tenant are therefore occupied fields wherein relevant laws provide for an adjudicatory mechanism. In the presence of such laws, can an alternative adjudicatory mechanism outside the domain of judicial hierarchy be provided in the form of the Act of 2020?
- (ii) The learned Ombudsman has been vested with powers for purposes of the Act of 2020 under section 3 of the Act read together with section 10 of the Act of 2013. The said provisions vest in the learned Ombudsman powers of a court to undertake investigation, adjudication, the power to implement its orders and decisions and the power to punish for its contempt as provided under the Contempt of Court Ordinance, 2003 (**"Contempt Ordinance"**). Can such powers be vested in the Ombudsman, who does not fall within the domain of the judicature, in view of the doctrine of separation of powers and Articles 175 and 203 of the Constitution as enumerated in **Govt. of Balochistan Vs. Azizullah Memon (PLD 1993 SC 341)**, **Government of Sindh Vs. Sharaf Faridi (PLD 1994 SC 105)** and **Mehram Ali Vs. Federation of Pakistan (PLD 1998 SC 1445)**?

- (iii) The Act of 2020, while vesting in the learned Ombudsman the authority to issue declarations in relation to legal rights and obligations and pass orders that affect property rights of citizens guaranteed under Articles 23 and 24 of the Constitution and also the power to enforce such orders in terms of section 10 of the Act of 2013, neither prescribes the process to be adopted by the learned Ombudsman nor the process to be adopted while executing the orders of the learned Ombudsman. Do such powers fall foul of rights of citizens as guaranteed under Articles 9 and 10A of the Constitution to due process and access to justice, especially in view of the fact that there is no right of appeal provided against orders and decisions of the learned Ombudsman who has been vested with the authority to determine proprietary rights of citizens in relation to their private disputes?
- (iv) Does the mandatory framework for dispute resolution as prescribed under the Act of 2020 read together with powers vested in the Ombudsman under section 10 of the Act of 2013 constitute a parallel justice system?

10. The aforementioned questions involve the legality of the provisions of the Act of 2020 and the adjudication of the afore-titled writ petition rests on answering such questions. The petitioner has challenged the impugned orders passed by the learned Ombudsman on a jurisdictional basis. The underlying question relates to the vires of the Act of 2020 itself, submissions in relation to which have been made by the parties while arguing the matter. While the vires of the provisions of the

Act of 2020 have not been expressly challenged by framing appropriate grounds in the memo of the petition, arguments have been addressed at the bar by the learned counsel for the petitioner challenging provisions of the Act of 2020 for being ultra vires the Constitution.

11. It was settled by the august Supreme Court in **Sindh High Court Bar Association through Secretary Vs. Federation of Pakistan (PLD 2009 SC 789)** that questions of law that challenged the legal foundation on the basis of which subsequent orders are passed can be raised at any stage in judicial proceedings as there was no estoppel against the law. This was reiterated by the august Supreme Court in **Muhammad Hanif Abbasi Vs. Jahangir Khan Tareen (PLD 2018 SC 114)** and it was held that even collateral challenge to the vires of a legislative instrument could be brought before a court as there was no estoppel against the law and a "point of law can be allowed to be raised at any stage of the proceedings and no valid structure can be built upon a foundation of the law which is void ab initio", and that, "no rights and liabilities can be created on the basis of such law." In the instant matter the legality of the Act of 2020 under which jurisdiction has been assumed by the Ombudsman was challenged by the petitioners by making submissions at the bar. In view of the law laid down by the august Supreme Court in **Sindh High Court Bar Association** and **Muhammad Hanif Abbasi** this Court is satisfied that even if such grounds of challenge were not explicitly mentioned in the memo of the

petition, the Court can take cognizance of such legal grounds in determining the legality of the impugned orders.

12. Given that the questions identified in paras. 8 and 9 above related to interpretation of law and the Constitution, the Court issued notices to the learned Attorney General for Pakistan as well as the learned Advocate General Islamabad Capital Territory under Order XXVIIA of CPC. As the judgment of this court could have had a bearing on the powers of other Ombudsmen exercising authority pursuant to section 10 of the Act of 2013, the Court also issued notices to the Wafaqi Mohtasib of Pakistan, the Federal Tax Ombudsman, the Federal Insurance Ombudsman, the Federal Ombudsman for Protection against Harassment of Women at the Workplace and the Banking Ombudsman.

13. In order to answer the issues and questions flagged and framed by this Court there is need to reflect on the role of the judiciary within the scheme of separation of powers prescribed by the Constitution on the one hand, and the adoption of the office of the Ombudsman to deal with complaints of citizens as a means to resolving them in an economical and timely manner on the other.

14. Let us start with the separation of powers and the scope of judicial powers within our constitutional scheme. "Power tends to corrupt and absolute power corrupts absolutely", Lord Acton had said. The constitutional approach to preventing abuse of powers is manifest in the doctrine of separation of powers, which ensures that power is not concentrated in the

same set of hands. The principal functions of the State in a rule of law polity are therefore distributed amongst different institutions that are independent of one another. Such a constitutional scheme of division of labour is meant to act as a system of checks and balances to prevent the concentration of state authority or its abuse. Speaking of our constitutional scheme, A.K. Brohi observed in "The Fundamental Law of Pakistan" (pp. 17) that while we do not have absolute separation of powers as Montesquieu had imagined, we have "a well masked and clear-cut functional division in the business of the government..." And "the judiciary is, under the Constitution, completely independent of the executive." The need for judicial independence as a means to support democracy, uphold rule of law and enforce fundamental rights of citizens is hardly a contested notion. "Judicial independence is an essential component of any democracy and is crucial to separation of powers, the rule of law and human rights... judicial independence has a dual goal: to guarantee procedural fairness in the individual judicial process and to guarantee protection of democracy and its values", said Aharon Barak in *The Judge in a Democracy* (pp. 76/77; Princeton University Press, 2006). Lord Steyn of the House of Lords in "The case for a Supreme Court" (118 Law Quarterly Rev 382, 388 (2002)) wrote that, "the Judiciary can effectively fulfill its role only if the public has confidence that the courts, even if sometimes wrong, act wholly independently." In Syracuse draft Principles on the Independence of the Judiciary (cited in Judicial Independence: the Contemporary debate by Simon Shetreet and Jules

Deschenes Eds. 1985), the independence of judiciary was defined to mean the following:

"(1) That every judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of the law, without any improper influences, inducements, or pressures, direct or indirect, from any quarter or for any reason, and

(2) that the judiciary is independent of the executive and legislature, and has jurisdiction, directly, or by way of review, over all issues of a judicial nature."

15. The judicial review (i) of statutory law to determine whether or not such law is or is not repugnant to the Constitution, and (ii) of executive action on grounds of illegality, irrationality or procedural impropriety, springs from the concept of separation of powers and the authority vested in an independent judiciary by the Constitution to discharge the function of interpreting the Constitution as well as the laws framed thereunder. Laurence H. Tribe in American Constitutional law (The Foundation Press, 1988) explains the significance of **Marbury Vs. Madison (5 U.S. (1 Cranch) 137 (1803))** as being "the first case in which the Supreme Court asserted that a federal court has the power to refuse to give effect to congressional legislation if it is inconsistent with the court's interpretation of the Constitution." US Chief Justice Marshall had ruled in **Marbury** that "an act of the legislature, repugnant to the Constitution, is void.... It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each

other, the courts must decide on the operation of each... If then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution and not such ordinary act, must govern the case to which they both apply." In **Marbury** is rooted the doctrine of judicial review of legislative acts as well as that of *ultra vires*.

16. All authority flows from the Constitution and all institutions created by it—the legislature, the executive and the judiciary—must function within the limits prescribed for them by the Constitution. The debate around whether it is the legislature or the judiciary that is superior is rather superfluous. In a polity governed by a written constitution, all power flows from the constitution being the fundamental law. And such constitution while determining the respective scope of authority of the institutions it creates incorporates the doctrine of limited powers by design. The legislature is sovereign for it is vested with the power to write laws and also amend the Constitution, which is the supreme law. The judiciary is final for it is vested with the authority to declare what the law and the Constitution mean and how they are to be enforced. In this scheme, the matter of interpretation and enforcement of the law and the Constitution falls within the province of the judiciary. It, therefore, falls upon the courts to determine and declare what the institutional limits prescribed by the Constitution are and when an institution transgresses them. It is while determining such limits that the judiciary often exercises self-restraint and stays its hands in various matters where it is asked to intervene, if it comes to the

conclusion that a decision on the matter has been placed by the Constitution within the realm of another institution.

17. With **Marbury** the doctrine of judicial review exercised to scrutinize the vires of ordinary legislation became the judicial tool to preserve the supremacy of the Constitution. In exercise of judicial review powers the Federal Courts of United States review legislative actions that are deemed repugnant to the Constitution. In contrast, in United Kingdom, judicial review has come to be seen as the review of executive actions, given that there is no written English Constitution and up until recently (i.e. prior to the evolution of human rights jurisprudence with UK being part of the European Community), there existed no source of law higher than the laws passed by Parliament against which the legality of subsidiary legislation could be adjudged. The jurisprudence that has taken root in Pakistan is inspired by common law jurisdictions that have a written constitution when it comes to judicial review of legislation, and from English law when it comes to judicial review of executive acts. In Pakistan, the power of the court to undertake judicial review of legislation that falls foul of the fundamental rights of citizens is rooted in Article 8 of the Constitution. Likewise, Article 199 of the Constitution vests in the High Court the power to undertake judicial review of actions of the executive that are deemed to be illegal, irrational and procedurally improper.

18. A written constitution is often a largely procedural document that contains the bare essentials to guide the functioning of the State and is unlike a very detailed substantive

law or procedural code, which is why courts have to rely on the concept of implied, incidental and ancillary powers to fill in the gaps as and when required, based on the decipherable intent of the lawmaker. The concept of implied powers was introduced in **McCulloch v. Maryland (17 U.S. 316 (1819))** while drawing a distinction between federal and state powers. It was noted that, "a constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of a prolixity of a legal code, and could scarcely be embraced by the human mind... its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves."

19. The concept of implied incidental powers in the context of separation of powers has been explained in Willoughby's "The Constitutional Law of the United States" and reproduced by Brohi in "The Fundamental Law of Pakistan" (pp. 176) to mean that, "a department may constitutionally exercise any power, whatever its essential nature, which has, by the Constitution been delegated to it, but that it may not exercise powers not so constitutionally granted, which, from their essential nature, do not fall within its division of governmental function, unless such powers are properly incidental to the performance by it of its own appropriate functions..." In this context, within our constitutional structure, only such powers can be implied to have been vested in an institution, which are

not repugnant to the scheme of separation of powers that constitutes a salient feature of our Constitution. The doctrine of ancillary or incidental powers is a milder version of the concept of implied powers. In the context of our legal scheme, Brohi argued that, "there must be for this doctrine to apply such a necessary connection between the expressed power and the power claimed to be implied that it could validly be said that the implied power is such as might reasonably be assumed to be incidental to the execution of the express power..." In other words, the power to be implied must be incidental to the main purpose of the thing to be done. And the thing to be done must fall within the domain of the institution in view of the scheme of distribution of powers delineated by the Constitution.

20. The next obvious question that arises is, what is the judicial power that within our scheme of separation of powers can be vested only in the Judiciary? Judicial power was explained in **Huddart, parker and Co. V. Moorehead (1909) 8 CLR 330, 357** to mean, "the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty, or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action." This definition was relied upon by the august Supreme Court in **Sheikh Riaz-ul-Haq Vs. Federation of Pakistan (PLD 2013 SC 501)**.

21. How the exercise of judicial power involves a certain institutional process has been described by William A. Robson in Justice and Administrative Law (3rd Edition, pp. 36) as follows:

"The process involves the application of a body of rules or principles by the technique of a particular psychological method; the whole decision-making taking place within a framework possessing recognizable institutional features. The body of rules or principles is the law; the psychological method consists in the application of what may be called the judicial mind; and the institutional framework is the court system. The entire process, in which the three are used in combination, is denoted by the expression, 'justice according to law'."

22. A judge is a neutral arbiter of the law by virtue of his independence from his peers and from other branches of the government i.e. the executive and the legislature. In the exercise of his authority, he is bound by the Constitution, relevant statutes, relevant case law under the stare decisis principle, and technical rules of interpretation of law. In short, a judge is not free to decide cases as he pleases. While being an interpreter and enforcer of the law, he is also a creation of the law. Judicial power entails the power to interpret the law in relation to the facts of the dispute before the Court to render a binding decision, and comes along with the power to enforce such decision. The authority to interpret the law, the authority to render binding decisions regarding rights and obligations of citizens, and the authority to enforce binding decisions are quintessential judicial functions. The function of interpreting the law, rendering binding decisions, affecting the rights of citizens or imposing penalties on them and the powers to enforce such

decisions cannot be vested in legislative committees or executive functionaries or usurped by executive authorities claiming to exercise quasi-judicial powers.

23. Within our scheme of adjudication of disputes there are tribunals that render decisions after hearing parties and such decisions are then subject to an appeal before a court. But such tribunals are not courts and they have no coercive powers to enforce their decisions. The decisions rendered by such tribunals, whether as administrative bodies or as regulators, are subject to scrutiny by courts. The only exception to the rules that administrative and regulatory tribunals do not share judicial powers with courts to render binding decisions is where the Constitution itself makes an exception within the overall scheme of separation of powers by vesting such authority in tribunals constituted under Article 212 or Article 225 of the Constitution. The offices of Ombudsmen created under various statutes are not tribunals envisaged by the Constitution or constituted under constitutional provisions and the scope of the exception created by the Constitution itself therefore requires no further analysis for our present purposes.

24. The next issue to be considered is whether exercise of judicial powers by quasi-judicial bodies and tribunals promote consistency, certainty and predictability, which are essential features of a rule of law regime. "Decided cases are anchors of the law", Francis Bacon had said. In *The Law of Judicial Precedent*, Bryan A. Garner (Thomas Reuters, 2016, pp.5/pp.16) states that, "the legal doctrine commanding deference to

precedent derives its shorthand Latin name, *stare decisis*, from the maxim *stare decisis et non quæta movere*—to stand by things decided and not disturbed settled points.” The author quotes Oliver Wendell Holmes who wrote in “Holdsworth’s English Law” (Collected Legal Papers; pp 285, 290; (1920) that, “imitation of the past, until we have clear reasons for change, no more needs justification than appetite. It is the form of the inevitable to be accepted until we have a clear vision of what different thing we want.”

25. The distinction between the desire for conservation and the need for change feeds jurisprudential evolution. “The law must be stable, yet it cannot stand still”, Roscoe Pound had said. The doctrine of *stare decisis* is how common law strikes a balance between continuity and change, cognizant of the fact that predictability is a key feature of rule of law. After all who can contest that the citizen must know the rules on the basis of which he or she is expected to order his/her life? The rule of *stare decisis* is rooted in Articles 189 and 201 of the Constitution. Brohi argued in the Fundamental Law of Pakistan (pp16) that:

“every case of first impression decided by the judge in its turn introduces an element of security in the administration and practice of the law and the Constitution, in so far as it thereafter becomes a precedent, which could control the interpretation and application of parallel cases that might come before the courts of law... If the government is to be government of laws and not of men, the laws must be made, and after they are made, since they are not

self-enforcing, there must be some organ of the sovereign power within the state to which could be assigned the duty of enforcing them... the judges who interpret the Supreme Law of the land have a duty cast upon them of applying that law consistently with the letter and spirit of the Constitution under which they themselves have been appointed and to maintain which they have to take that oath of office which has been prescribed by the framers of the Constitution as a condition precedent for the assumption of such a high and responsible office.”

26. In order to understand the scheme of the Constitution, which does not allow sharing of judicial powers with the executive or the legislature, there is a need to understand the interpretive process that underlies the judicial method that produces binding decisions that then become part of the law to be followed. The Constitution does not vest in civil courts (including the High Court) the jurisdiction to issue declaratory judgments merely to enunciate the law as an academic matter. The jurisdiction vested in the court is for purposes of adjudication of disputes and it is while discharging such adjudicatory function that law gets enunciated, jurisprudence evolves and principles of law are laid down, to be followed in the future, pursuant to the doctrine of stare decisis. This scheme is built into the Constitution under Articles 189 and 201 of the Constitution. Further, Article 203 grants High Courts supervisory jurisdiction over subordinate courts, which forms part of the design of the judicial institution as set up by the Constitution.

27. This judicial control and oversight of all courts and tribunals that exercise judicial powers and dispense judicial

functions is a salient feature of the Constitution that is often referred to as the independence of the judiciary within the larger framework of separation of powers. In other words, any forum exercising judicial powers and dispensing judicial functions falls within the exclusive domain of the judiciary and is independent of the authority and power exercised by other constitutional pillars of the state i.e. the executive and the legislature. A clear separation between the executive and the judiciary did not exist in 1973 at the time of adoption of the Constitution, which is why Article 175(3) provided that such separation was to be brought about within a period of five years (which period was subsequently extended to fourteen years and has since elapsed). Thus, at present, any executive authority exercising judicial power is anathema to the Constitution.

28. Montesquieu in "The Spirit of Law" (1748) argued that there "is no liberty if the power of judging is not separated from the legislative and executive." It was held by the august Supreme Court in **Fauji Foundation Vs. Shamimur Rehman (PLD 1983 SC 457)** that separation of power cannot be a basis for striking down a legislative instrument as it cannot be said that judicial power is 'constitutionalized' in courts alone. This view however did not age well. In **Government of Sindh Vs. Sharaf Faridi (PLD 1994 SC 105)** directions were issued to bifurcate magistracy into executive and judicial magistrates and to place the latter under the control of the High Courts. In **Government of Balochistan Vs. Azizullah Memon (PLD 1993 SC 341)** Criminal Law (Special Provisions) Ordinance, 1968, vesting jurisdiction in executive functionaries to take

cognizance of and try scheduled offences was struck down for being violative of Article 175 of the Constitution.

29. In **Sheikh Liaquat Hussain Vs. Federation (PLD 1999 SC 504)**, Pakistan Armed Forces (Acting in Aid of Civil Power) Ordinance, 1998, was declared to be void and unconstitutional for seeking to establish military courts, which could not be treated as "courts" or vested with judicial power. In his opinion Chief Justice Ajmal Mian observed that, "we must look to the scheme of the Constitution which is based on the principle of trichotomy of power, meaning thereby that the power is divided between the executive, the legislature and the judiciary. Each of these three limbs of the State enjoys complete independence in their own sphere." Likewise, Justice Saiduzzaman Siddiqui held that, "creation of courts outside the control and supervision of the Supreme Court or the High Courts, therefore, not only militates against independence of judiciary but it also negates the principle of trichotomy of power which is the basic feature of the Constitution."

30. In **Mehram Ali Vs. Federation of Pakistan (PLD 1998 SC 1445)** various provisions of the Anti-Terrorism Act, 1997, were found *ultra vires* Article 175 read together with Article 203 of the Constitution. It was held, inter alia, that the Constitution did not envisage conferring judicial power on a tribunal that did not fall within the supervisory control of the High Courts. And that security of tenure of a judge was an essential requirement to preserve the independence of the Judiciary. In **Sheikh Riazul Haq Vs. Federation of Pakistan**

(PLD 2013 SC 501) provisions of the Service Tribunals Act were declared unconstitutional on the application of the principle of separation of powers and it was directed that the appointment of a judicial member of such tribunal was to be made in consultation with the Chief Justice.

31. What emerges from the above discussion is the following:

(i) The power to adjudicate disputes involving the rights and obligations of citizens, imposing penalties upon citizens, the power to issue binding decision in such matters, and the power to use the coercive authority of the State to enforce such decisions are quintessential judicial functions that entail the exercise of judicial power.

(2) Judicial power cannot be conferred on executive functionaries or legislative bodies, and within the scheme of separation of powers that forms a salient feature of our Constitution, judicial power is to be exercised by the judiciary that is independent of the executive and legislative branches of the State.

(3) Articles 175 and 203 envisage that a tribunal exercising judicial powers must fall within the overall supervision and control of High Courts, with tribunals constituted under Articles 212 and 225 of the Constitution being the only exceptions to the rule.

(4) In order to uphold the right of citizens to be meted out justice in accordance with the law, the appointment process and terms and conditions of service of those exercising judicial powers must be such that they are afforded security of tenure and can discharge their adjudicatory functions while being

independent of their peers as well as other branches of the State.

32. It is within this overall scheme of the Constitution that the question of legality of provisions of the Act of 2013 that vested powers in the Ombudsman to issue injunctions, to enforce their orders and to wield contempt powers came before the learned Lahore high Court in **United Bank Limited Vs. Federation of Pakistan (PLD 2018 Lahore 322)**. The learned Lahore High Court through a comprehensive judgment declared sections 10, 11, 12 and 15 of the Act of 2013 *ultra vires* the Constitution. In **United Bank Limited** the question of legality of the provisions of Act of 2013 had arisen in the context of exercise of the authority by the Banking Mohtasib. This Court agrees with the reasoning of and the conclusions drawn by the learned Lahore High Court.

33. A similar question was adjudicated by the learned Sindh High Court in **Muslim Commercial Bank Ltd. Vs. Federation of Pakistan (2020 CLD 829)**. The learned Sindh High Court found section 10(2) of the Act of 2013, which vested powers in the Ombudsman to seek the enforcement of decisions, *intra vires* Articles 175 and 203 of the Constitution. But it found section 12, which vests power in the Ombudsman to punish for contempt in accordance the Contempt of Court Ordinance, 2003, *ultra vires* Article 204 of the Constitution. This Court is in agreement with the learned Sindh High Court to the extent of its declaration that section 12 of the Act of 2013 is *ultra vires* Article 204 of the Constitution. But this court, with respect, does not

agree with the opinion of the learned Sindh High Court in relation to the legality of section 10(2) of the Act of 2013.

34. The preamble of the Constitution states that, "the independence of the judiciary shall be fully secured" and Article 175(3) of the Constitution obliges the State to ensure that the judiciary is fully separated from the executive in a time-bound manner, with the obvious implication that the judiciary must remain separate from the executive and independent of it after the expiry of such period. Article 4(2)(c) of the Constitution provides that, "no person shall be compelled to do that which the law does not require him to do." The definition of the State under Article 7 does not include the courts. Article 8(2) then prohibits the State from making any law which takes away or abridges the rights guaranteed to the citizens by the Constitution. Under the scheme of the Constitution, the judiciary is the machinery for enforcement of the fundamental rights of citizens. Article 9 of the Constitution guarantees the right to life, which has been interpreted as including the right of a citizen to freely access justice. Article 10A provides that, "for the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process." The adjudication of civil rights and obligations and the imposition of any penalty requires exercise of judicial powers and amounts to discharging judicial functions. For our present purposes Articles 175(2) and (3) are relevant which state the following:

175(2). *No court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law.*

(3) *The Judiciary shall be separated progressively from the executive within fourteen from the commencing day.*

35. Articles 189 and 201 of the Constitution hold, respectively, that decisions of the Supreme Court are binding on all courts, and decisions of High Courts are binding on all courts subordinate to them. Article 203 provides that each High Court shall supervise and control all courts subordinate to it and Article 204 of the Constitution vests in the Supreme Court and High Courts the power to punish for contempt. This scheme makes it evident that the judiciary is the constitutional machinery for enforcement of fundamental rights of citizens, and in order to discharge such functions effectively the preamble declares that the independence of the Judiciary is to be fully secured. The Constitution guarantees the fundamental rights of citizens, and within such guaranteed rights is included the right to access justice, and the right to a fair trial and due process in the determination of civil rights and obligations of a citizen as well as in attributing criminal liability and imposing a punishment on a citizen.

36. Article 175(2) clarifies that the Constitution does not endorse the doctrine of implied powers and a court is only vested with such jurisdiction as is conferred by law. By necessary implication, just as courts explicitly vested with judicial powers cannot claim inherent powers, administrative

bodies or tribunals created to exercise quasi-judicial powers also cannot claim or assume to possess inherent or implied powers. As has already been noted in the discussion above, there can only be recognition of ancillary or incidental powers where such power is incidental to the performance of functions duly conferred by the Constitution and the law within the overall scheme of separation of power.

37. It is by virtue of Articles 189 and 201 of the Constitution that the rule of law regime under the Constitution acquires consistency, certainty and predictability. In the event that the complaints and disputes are settled by quasi-judicial bodies, the decisions of such bodies are not legal precedents and have no binding character. While such bodies being public authorities would be obliged to act in a just, fair and reasonable manner pursuant to section 24A of the General Clause Act, 1897, their decisions are not covered by the doctrine of stare decisis. The courts while exercising adjudicatory authority are bound by the interpretative method already highlighted above. In doing so they are bound by principles of interpretation of law that comes along with the power to interpret the law and they are bound by the decisions of the Supreme Court under Article 189 of the Constitution as well as their own prior decisions under Article 201 of the Constitution (as explained in Multiline Associates v. Ardeshir Cowasjee and 2 others (PLD 1995 SC 423)). What the courts do while exercising judicial powers through the judicial method is to determine the legal rights of citizens in disputes that come up for adjudication. The Courts are barred from taking into account any other considerations, such

as policy decisions and concerns, which are deemed to be extraneous to the adjudicatory process.

38. An administrative body on the other hand is guided by policy considerations. Such body is not vested with the judicial power to interpret the law or render a binding enforceable decision backed by the coercive authority of the state. The power to render a binding decision ought not be confused with the otherwise desirable policy goal of promoting alternative dispute resolution methods (such as mediation for example that also promises timely and economical resolution of disputes). The option to avail alternative dispute resolution mechanisms is optional. The legitimacy of alternative dispute resolution mechanisms is rooted in the consent granted by parties to opt for such method. The outcomes are enforceable by virtue of such consent and not due to the threat of coercive use of State power that backs the enforcement of the law. Further, the outcomes are guided by interests of the parties as opposed to strict enforcement of their legal rights. While citizens can be encouraged to resolve their disputes amicably or through use of alternative dispute resolution mechanisms and techniques as a matter of state policy, they cannot be forced to opt for such mechanisms as the right to access justice and to have disputes adjudicated in accordance with law is a fundamental right guaranteed by the Constitution.

39. Another problem that arises while considering the exercise of judicial powers by administrative bodies and tribunals is that of design. The independence of the judiciary as a feature

of the Constitution is not meant to be wielded as a tool for the preservation of the judiciary's bailiwick, but to uphold and protect the rights of citizens. The design of the judicature is such that it affords judges independence from their peers as well as from the coordinate branches of the State. This independence is essential to enable them to adjudicate the rights of citizens that come before them without taking into account considerations of fear or favour. The check against incorrect or wrongful exercise of authority by the judge is provided within of the scheme of remedies such as appeal, revision and review within the judiciary hierarchy. Article 203 of the Constitution vests in the High Court control and supervision over subordinate courts. To allow an administrative body to exercise judicial power and discharge judicial functions places at risk the rights of citizens, whose rights and obligations are being adjudicated by a body that is not vested with the requisite independence, is not bound by the judicial method, does not fall within the control or supervision of a High Court, and against the wrongful decision of which the citizen is not afforded effective judicial remedies.

40. The key question before us is whether the Ombudsman can exercise judicial powers. Before we consider the provisions of the Act of 2020 and the Act of 2013, let us recall the concept underlying the office of the Ombudsman. The history of the institution need not be detailed here. Suffice it to say that we have borrowed the concept from Scandinavia where it has been used effectively by the executive to curtail maladministration through a process of peer review. The Ombudsman, conceptually, is a part of the executive and is vested with

authority by the executive to review the exercise of authority by executive functionaries and determine whether or not such exercise amounts to maladministration. Where an act or omission does amount to maladministration, the Ombudsman makes a recommendation to the relevant executive authority and as a matter of propriety, policy and practice the recommendation is given effect. There are two things to note here. One, that the Ombudsman exercises authority as part of the executive branch over other state functionaries, who also form part of the executive. Two, in exercising scrutiny over the manner in which executive authority has been exercised, the Ombudsman as a functionary of the state attempts to address the complaint that a citizen has against the State and not against any other citizen. The culmination of such process takes the form of a recommendation and is enforced by the executive in the form of a self-corrective action where one functionary within the executive (i.e. the Ombudsman) reviews the exercise of authority by another functionary within the executive and makes a recommendation for corrective action, which is abided by as a matter of policy.

41. This scheme was largely adopted in the Establishment of the Office of Wafaqi Mohtasib (Ombudsman) Order, 1983 ("**Order**"), which provided in section 9(1)(a) that where a matter is *sub judice* before a court, the Ombudsman would not assume jurisdiction. The powers vested in the Ombudsman under section 10 of the Order were for purposes of undertaking effective investigation. And the opinion formed by the Ombudsman took the form of a recommendation for

implementation under section 11 of the Order. The sanction that followed in the event that such recommendation was not implemented by an executive functionary, was the inclusion of a report of defiance within the personal file of such functionary. The powers vested in the Ombudsman under section 14 of the Order that included powers of a civil court related largely to the conduct of an effective investigation, which function ordinarily falls within the domain of the executive and not the judiciary. The only power over and above what has been described above was the power to punish for contempt provided under section 16 of the Order. This deviation might have been caused by the fact that a retired judge was envisaged to be the Ombudsman.

42. It appears that over time the design of the remedy to be afforded by the office of the Ombudsman evolved in Pakistan. With the promulgation of the Act of 2010 and the Act of 2020, Ombudsmen emerged as an alternative to the judicial process with judicial powers being vested in such offices under the relevant statutes. The scheme of the Protection Against Harassment of Women at the Workplace Act, 2010, in the context of the instant matter does not necessarily concern this Court. The only point to be made is that it allows the Ombudsman to pass binding decisions with regard to civil rights and obligations of citizens as well impose penalties in matters that constitute disputes inter se citizens and not in relation to complaints by citizens against executive functionaries of the state. What emerges from the manner in which the powers of Ombudsmen have evolved since the adoption of the concept in 1983 up until the promulgation of the Act of 2020 is that the

distinguishing features of the remedy (i.e. settlement of complaints by citizens against the State, settlement through an informal process resulting in a recommendation and not a binding decision, and enforcement of the recommendation as a matter of executive policy as opposed to a matter of legal right) have been lost sight of. The Act of 2020 when read together with provisions of the Act of 2013 set up the Ombudsman as a court exercising judicial powers and discharging judicial functions in disputes arising between private citizens and not between a citizen and the State, and result in issuance of binding decisions along with vesting enforcement powers in the Ombudsman as well as the power of contempt to punish anyone who refuses to abide by such binding decision. It appears that in its zeal to protect rights of women in relation to property matters (which on its own is a valid, desirable and legitimate state objective one must hasten to add), the legislature has attempted to provide for a remedy before the Ombudsman appointed under the Act of 2010, which entails adjudication of property rights of citizens guaranteed under Articles 23 and 24 of the Constitution, in a manner and through a procedure that is not in consonance with the guarantees provided under Article 10A of the Constitution.

43. While vesting judicial power and the judicial functions in the office of the Ombudsman in breach of the scheme of separation of powers and Articles 175, 203 and 204 of the Constitution, the preamble of the Act of 2020 states the following:

"WHEREAS it is expedient to Provide for the protection of the rights of ownership and possession of properties

owned by women, ensuring that such rights are not violated by means of harassment, coercion, force or fraud”

Under section 3 of the Act of 2020, the powers of the Ombudsman under the Act of 2010 have been incorporated by reference, which include the powers to investigate as well as the power to convict for contempt. Section 4 of the Act of 2020 empowers the Ombudsman to even initiate action on a suo motu basis. In the event that the Ombudsman concludes that a property dispute between a woman and another citizen does not require detailed probe, a summary order can be passed immediately. Under section 5 the Ombudsman can order the delivery of the possession and transfer of ownership of title to the complainant. The Ombudsman can order the police to provide assistance and direct the Deputy Commissioner to file a compliance report within seven days. In the event that the Ombudsman itself concludes that the matter requires in-depth inquiry and investigation or recording of evidence, the matter is to be referred to the civil court. Section 7 is even more interesting as it provides that even in a *sub judice* matter, notwithstanding the sub judice doctrine, the Ombudsman as a member of the executive can initiate an inquiry and investigation and if the Ombudsman concludes that the matter is appropriate for adjudication by the Ombudsman, he/she can ask the court to terminate judicial proceedings and let the Ombudsman take charge of the matter. Under section 8 the Ombudsman can grant loss of rent after determining the same. Under section 9, the Ombudsman can order the Deputy Commissioner to execute

his/her orders. Section 11 creates a bar prohibiting courts from interfering with a matter that falls within the jurisdiction of the Ombudsman.

44. Likewise, section 10 of the Act of 2013 vests power in the Ombudsman to grant injunctions as well as the power to implement recommendations, orders and decisions. Section 11 of the Act of 2013 creates the power to grant temporary injunction for sixty days. Section 12 of the Act of 2013 vests in the Ombudsman the power to punish for contempt pursuant to the provisions of the Contempt Ordinance.

45. It is evident from the aforementioned provisions that the Act of 2020 vests in the Ombudsman the power to adjudicate civil rights and obligations of citizens against one another, pass summary judgments of a binding nature and/or judgments after hearing the parties and having an investigation conducted by the Deputy Commissioner to issue binding orders, and then have such binding orders executed by the district administration with the assistance of coercive force employed by police authorities. In the event that a person disregards the order or decision, such person is liable to be punished under the provision of the Contempt Ordinance, which entails a punishment of up to six months in jail. These are all judicial powers. The exercise of functions under the Act of 2020 amounts to exercise of judicial functions to the extent that a complaint involves adjudication of rights of private citizens to property, which amounts to adjudication of civil rights and obligations of citizens, and results in imposition of penalties, the rendering of

binding decisions and orders, and the use of coercive powers to enforce such decisions and orders along with the powers to punish a person not abiding by such decisions and order under the contempt powers available to courts pursuant to the Contempt Ordinance, read with Article 204 of the Constitution.

46. Article 204(1) of the Constitution defines court as the Supreme Court or a High Court. It is Article 204(2) that vests power in the court to punish for contempt of court. The actions that constitute contempt are listed under Article 204 of the Constitution. But Article 204(2)(d) also makes punishable "any other thing, which by law, constitutes contempt of court.". Article 204(3) provides that the exercise of the power that conferred on a court under Article 204 may be regulated by law. The Contempt Ordinance is such law which while providing for the manner of exercise of contempt power also defines other acts that constitute contempt of court for purposes of Article 204(2)(d) of the Constitution.

47. The power to punish for contempt is part of the mechanism created by the Constitution for enforcement of the law and the fundamental rights guaranteed by it. It is a tool to protect the independence of the judiciary and to ensure that those exercising judicial powers are able to discharge their function without being influenced by considerations of fear or favour. Any provision of a statute pursuant to which such judicial power is vested in an administrative body or tribunal that forms part of the executive would fall foul Article 204 of the Constitution. This Court therefore agrees with both the learned

Lahore High Court's opinion in **United Bank Limited Vs. Federation of Pakistan (PLD 2018 Lahore 322)** as well as the learned Sindh High Court's opinion in **Muslim Commercial Bank Ltd. Vs. Federation of Pakistan (2020 CLD 829)** that section 12 of the Act of 2013 is *ultra vires* the Constitution and the power to punish for contempt cannot be wielded by the Ombudsman.

48. The power to punish for contempt results in a conviction and a citizen can only be convicted through the exercise of judicial power. Such power is to be exercised in accordance with Article 10A of the Constitution and the adjudication required for purposes of imposition of a criminal penalty can only be undertaken by a court and not an administrative body exercising quasi-judicial authority. The power to punish for contempt of court is part of the enforcement mechanism to enable courts to implement the binding orders that they pass and judgments they render. Vesting such power in the Ombudsman is nurtured by the misconception that an Ombudsman while being part of the executive can render binding decisions and wield the coercive and penal powers of the State to enforce them.

49. A dispute regarding the ownership and possession of property, even when involving the rights of a woman, entails adjudication of legal rights and obligations which can only be undertaken by a court exercising judicial powers in compliance with the requirement of Article 10A of the Constitution. It is only a court and not a quasi-judicial authority that can issue binding

decisions determining civil rights of citizens or imposing penalties on them. And it is only courts that can seek the enforcement of their decisions through exercise of the coercive authority of the State.

50. The only question that remains is whether by applying the doctrine of severability, can provisions of the Act of 2020 be saved such that the Ombudsman can continue to exercise authority under the Act of 2020 in a legal manner? It is this Court's opinion that the Act of 2020 is unconstitutional in its very conception. The disputes that have been made subject matter of the Act of 2020 are disputes in relation to the ownership or possession of movable or immovable property. The adjudication of such disputes requires determination of civil rights and obligations of private citizens, which in turn requires determination of facts and interpretation and application of law. The law as it stands provides remedies for seeking enforcement of property rights, including, inter alia, under the Specific Relief Act, 1877, the Illegal Dispossession Act, 2005, as well as through declaratory suits filed under provisions of Civil Procedure Court, 1908. Creating a remedy for adjudication of such disputes before the Ombudsman amounts to carving-out a certain subject-matter from within the domain of judiciary and placing it within the domain of the executive. And further allowing the Ombudsman to exercise judicial power to adjudicate such disputes in a manner that does not qualify as affording the parties to the dispute a fair trial and due process.

51. In view of the above, this Court finds the following:

- (i) Sections 3, 4, 5, 6, 7, 8, 9 and 11 of the Act of 2020 and sections 10(ii) and 12 of the Act of 2013 are ultra vires Articles 8, 9, 10A, 23, 24, 175, 202, 203 and 204 of the Constitution and void ab initio. And once such provisions are declared unconstitutional, there is nothing that remains within the Act of 2020 that can be preserved to enable the Ombudsman to continue to discharge any useful function under the Act of 2020 in a constitutional manner.
- (ii) All matters already decided by the Ombudsman pursuant to provisions of the Act of 2020 against which no representations have been filed before the President and all matters in which representations have been filed and decided, such that the matters have attained finality will be treated as past and closed transactions.
- (iii) All matters (i) which are pending before the Ombudsman pursuant to the Act of 2020, and (ii) in which the decisions of the Ombudsman have been challenged through representations filed before the President and which representations have yet to be decided, shall be returned to the complainants who filed complaints before the Ombudsman, while issuing notice to the contesting party. The complainants shall be free to initiate legal proceedings in relation to their complaints before courts of competent jurisdiction, if so advised.
- (iv) The manner in which the auction of the petitioner's vehicle has been undertaken by the Office of the Deputy Commissioner is devoid of legal authority and shall stand annulled. The

Office of the Excise and Taxation Department shall revert the title of the vehicle in the name of the petitioner. The vehicle shall be returned by respondent No.7 to the petitioner subject to the petitioner paying respondent No.7 an amount of Rs.1.21 million, which was the amount paid by respondent No.7 as consideration for the vehicle and further paid by the Office of the Deputy Commissioner to respondent No. 2. As the record, together with arguments of the learned counsel for the parties, establishes that the petitioner was in wrongful possession of the property of respondent No.2, the amount generated by the auction of the vehicle paid by the office of the Deputy Commissioner to respondent No.2 in lieu of rent for possession of respondent No.2's property by the petitioner shall also be treated as a past and closed transaction on grounds of equity. The Office of the Deputy Commissioner shall also hand over to the petitioner forthwith any other electronic devices such as air conditioners owned by the Petitioner and taken into possession by the Office of the Deputy Commissioner pursuant to orders and directions of the learned Ombudsman.

52. The petition is **allowed** in the above terms.

53. Let the office send a copy of this judgment to Secretary, Ministry of Law and Justice, Islamabad, for compliance by the Federal Government as well as for information in order to consider introduction of appropriate amendments to the various statutes pursuant to which powers and functions

have been conferred on Ombudsmen to bring such laws within the framework of the Constitution.

(BABAR SATTAR)
JUDGE

Approved for Reporting.

Saeed.

Uncertified