

**JUDGMENT SHEET**  
**IN THE ISLAMABAD HIGH COURT, ISLAMABAD**  
**JUDICIAL DEPARTMENT**

W.P.No.3763 of 2017  
Senator Taj Haider and others  
**Versus**  
Government of Pakistan, through Secretary, Finance  
Division and others

<b>Date of Hearing:</b>	22.05.2018
<b>Petitioner by:</b>	Sardar Muhammad Latif Khan Khosa and Shahbaz Ali Khan Khosa, Rai Mudassar Iqbal and Syeda Naz Gul, Advocates
<b>Respondents by:</b>	Dr. Parvez Hassan and Asad Ahmad, Advocates for respondent No.2, Ms Makhdoom Ali Khan and Saad Mumtaz Hashmi, Advocate for respondent No.3, Mr. Rashid Hafeez, learned Deputy Attorney-General and Ms. Sitwat Jahangir, learned Asst. Attorney-General with Nadeem Arshad Section Officer Finance Division.

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**MIANGUL HASSAN AURANGZEB, J:-** The petitioners, who on the day of the filing of the instant petition were members of the Senate of Pakistan (“Senate”), impugn the appointment of Mr. Tariq Bajwa (respondent No.2) as Governor of the State Bank of Pakistan (“S.B.P.”).

2. The record shows that vide notification dated 07.07.2017, the President of Pakistan (“the President”) in exercise of his powers conferred by Section 10(3) of the State Bank of Pakistan Act, 1956 (“the S.B.P. Act”), appointed respondent No.2 as the Governor of the S.B.P. for a period of three years.

3. After the issuance of the said notification, 32 Senators signed a resolution recommending that respondent No.2 be immediately removed from his office on the ground that the letter and spirit of Section 10 of the S.B.P. Act, had been violated in making the said appointment. All the Senators who signed the said resolution were Members of the Opposition. The said resolution was received at the Senate Secretariat on 14.07.2017 and numbered as Resolution D.No.62-265/2017-Q. Apparently, the

said resolution was forwarded to the Chairman, Senate of Pakistan.

4. Vide letter dated 16.08.2017, the Senate Secretariat informed the Senators who had signed the said resolution that the Chairman, Senate, had held the resolution to be infructuous. Furthermore, it was stated that the appointment of Governor, S.B.P. was the exclusive domain of the Executive and, therefore, such resolutions could be construed as impinging upon the authority of one organ of the State.

5. On 12.09.2017, some of the Senators who had signed the said resolution requested the Chairman, Senate to reconsider the stance taken in the Senate Secretariat's letter dated 16.08.2017 about the appointment of Governor, S.B.P. The position taken by the Senators in the said letter was that the resolution had been adopted to ensure transparency in the management of S.B.P.'s affairs and to ensure its independence from bureaucratic clutches and mismanagement. This is where the correspondence between the Senate Secretariat and the Senators who had signed the said resolution ended.

6. The instant petition was filed by 23 out of the 32 Senators who had signed the said resolution. The relief prayed for in the petition is reproduced herein below:-

- "i) Declare the impugned appointment of respondent No.2 dated July 7, 2017 as unlawful and void ab-initio.*
- ii) Refrain the Respondent No.2 to perform duties and functions under the SBP Act with immediate effect.*
- iii) Order the return of emoluments/facilities/benefits enjoyed by Respondent No.2.*
- iv) Direct the Government to appoint new Governor State Bank following the constitutional process laid down by the Honorable Supreme Court in PLD 2016 SC 808 and criterion laid down in PLD 2012 Supreme Court 132 and other cases.*
- v) Any other relief, which this Court deems just and appropriate in the given circumstances along with costs to the petitioners."*

**CONTENTIONS OF THE LEARNED COUNSEL FOR the PETITIONERS:**

7. Sardar Shahbaz Ali Khan Khosa, learned counsel for the petitioners, after narrating the facts leading to the filing of the

instant petition, submitted that under Section 10(3) of the S.B.P. Act, the President has been empowered to appoint the Governor, S.B.P. for a term of three years and to determine his salary and the terms and conditions of his service; that under Section 10(1) of the S.B.P. Act, the Governor, S.B.P. is the Chief Executive Officer of S.B.P. and directs and controls the whole affairs of the S.B.P., on behalf of its Board of Directors; that the definition of a “bank” in Section 3(i)(b) of the Banks (Nationalization) Act, 1974 (“B.N. Act”) includes the S.B.P.; that Section 11(1)(2)(a) of the B.N. Act provides that a bank shall have a Board consisting of a President, who shall be its Chief Executive; that Section 11(3) of the B.N. Act provides *inter-alia* that the Chairman, President and other Members of the Board representing the Federal Government’s direct and indirect shareholding shall be appointed by the Federal Government in consultation with the State Bank; that the Governor, S.B.P. who is to be Chief Executive of S.B.P. could only be appointed by the Federal Government in terms of Section 11(3)(a) of the B.N. Act and not by the President; that in terms of the law laid down by the Hon’ble Supreme Court in the case of Mustafa Impex Vs. Government of Pakistan (PLD 2016 S.C. 808), respondent No.2’s appointment as Governor, S.B.P. could only have been made by the Federal Government i.e., the Federal Cabinet; that furthermore, Section 11(3) of the B.N. Act provides *inter-alia* that the President shall be appointed from amongst professional bankers whose names are included in the panel of bankers qualified to be appointed as Chairman, or President which panel shall be maintained by the S.B.P.; that since respondent No.2 was not a professional banker whose name was included in the panel of bankers maintained by the S.B.P., the impugned notification dated 07.07.2017 was violative of Section 11(3) of the B.N. Act; that since B.N. Act was enacted subsequent in time to the S.B.P. Act, in the event of a conflict in the provisions of the said two enactments, the provisions of the B.N. Act shall prevail and have overriding effect over provisions of the S.B.P.

Act; and that Section 2 of the B.N. Act gives the said Act an overriding effect over the S.B.P. Act.

8. Furthermore, it was submitted that respondent No.2's appointment was in violation of Article 48 of the Constitution; that it is an admitted position that the President did not appoint respondent No.2 on the advice of the Cabinet, or the Prime Minister; that the President could not exercise his powers, or functions under the S.B.P. Act without the advice of the Cabinet, or the Prime Minister in terms of Article 48 of the Constitution; that the matter regarding respondent No.2's appointment as Governor, S.B.P. should have been brought before the Cabinet in accordance with Rule 16(j) of the Rules of Business, 1973; that Rule 15-A of the Rules of Business, 1973, contains a non-obstante clause and requires a summary to be placed before the Prime Minister for rendering advice on any function to be performed, or any orders to be issued by the President; that at no material stage was any summary moved by the Cabinet Division, or the Finance Division for respondent No.2's appointment as Governor, S.B.P.; that the President is a creature of the Constitution and does not have any discretionary power under the Constitution, or any statute; that the only orders that the President can pass in his discretion are listed in Schedule-VI to the Rules of Business, 1973; and that these orders are confined to the orders for the appointment of the caretaker Prime Minister and the order for the dissolution of the National Assembly.

9. Learned counsel for the petitioners further submitted that the S.B.P. Act does not contain any eligibility criteria for the appointment of Governor, S.B.P.; that a person cannot be appointed as the Governor, S.B.P. unless he fulfills the criteria for the appointment of the President, or the Chief Executive of a bank prescribed in the B.N. Act; that even though the National Bank of Pakistan has its own Statute, its President is appointed under the provisions of the B.N. Act; that the post of the Governor, S.B.P. should have been advertised and only the person who emerged as the best of the best in a competitive process should have been

appointed against the said post; that it is ironic that the lower positions in the S.B.P. are required to be advertised but the Governor, S.B.P. is appointed on the whims and sweet will of the President; that the past practice of not advertising the post of Governor, S.B.P. ought to be done away with; and that the heads of state-owned banks in developed countries are appointed through a competitive process. Learned counsel for the petitioners prayed for the writ petition to be allowed in terms of the relief sought therein. In making his submissions, learned counsel for the petitioners relied on the cases of Syed Mushahid Shah Vs. Federal Investment Agency (2017 SCMR 1218), Zarka Muzammal Vs. Provincial Ombudsman (2016 YLR 1739), Habibullah Energy Limited Vs. WAPDA through Chairman (PLD 2014 S.C. 47), Muhammad Ashraf Tiwana Vs. Pakistan and others (2013 SCMR 1159), Ch. Nisar Ali Khan Vs. Federation of Pakistan (PLD 2013 S.C. 568), Sardar Muhammad Vs. Federation of Pakistan (PLD 2013 Lahore 343), M. Ashraf Azeem Vs. Federal Government of Pakistan (2013 PLC (C.S.) 1147), Dr. Altaf Hussain Vs. Federation of Pakistan (2013 PLC (C.S.) 1178), Muhammad Iqbal Khattak Vs. Federation of Pakistan (2011 PLC (C.S.) 65), Tariq Aziz-ud-Din's case (2010 SCMR 1301), Chief Secretary Punjab Vs. Abdul Raoof Dasti (2006 SCMR 1876) and Mushtaq Ahmed Mohal Vs. The Hon'ble Lahore High Court (1997 SCMR 1043).

**CONTENTIONS OF THE LEARNED COUNSEL FOR RESPONDENT NO.2 (MR. TARIQ BAJWA):**

10. On the other hand, Dr. Parvez Hassan, learned counsel for respondent No.2, submitted that the petitioners had failed to identify with particularity the arbitrariness, or capriciousness in the issuance of the impugned notification dated 07.07.2017; that respondent No.2's qualifications for appointment as Governor, S.B.P. had not been questioned in the petition; that the petitioners had not made any allegation as to favoritism in making the impugned appointment; that the prerequisites for filing a writ of *quo warranto* had not been satisfied in the instant case; that the

core ground taken in the petition was that the impugned appointment was not in accordance with the law laid down by the Hon'ble Supreme Court in the cases of Ghulam Rasool Vs. Government of Pakistan (PLD 2015 S.C. 6), Muhammad Ashraf Tiwana Vs. Pakistan (2013 SCMR 1159), Muhammad Yasin Vs. Federation of Pakistan (PLD 2012 S.C.132) and Chief Secretary Punjab Vs. Abdul Raoof Dasti (2006 SCMR 1876); that the said case law relied upon by the learned counsel for the petitioners is not relevant to the case at hand; that in Muhammad Yasin's case, a candidate who was alleged to have a fake degree, was selected for the position of Chairman, Oil and Gas Regulatory Authority; that in all the said cases, there was no procedure prescribed by law for making the relevant appointments; that all the said cases relate to appointments made by the Federal Government in statutory bodies; that the distinguishing feature in the case at hand is that the appointment of Governor, S.B.P. is made by the President; that none of the cases relied upon by the learned counsel for the petitioners pertain to appointments made by the President; and that the President's power to make the appointment of Governor, S.B.P. was not, in any manner, affected by the law laid down in the case of Mustafa Impex Vs. Government of Pakistan (supra).

11. Furthermore, it was submitted that under provisions of the S.B.P. Act., the President has been exclusively empowered to appoint as well as to remove the Governor, S.B.P., whereas under sections 9(2)(c) and 10(4) of the S.B.P. Act, the Directors on the Board and the Deputy Governors of the S.B.P., respectively, are to be appointed by the Federal Government; that by promulgating the State Bank of Pakistan (Amendment) Ordinance, 2002, the Legislature consciously took the power to appoint the Governor, S.B.P. away from the Federal Government and conferred it on the President; that although there is no requirement in the S.B.P. Act as to the qualifications for appointment as Governor S.B.P., Section 10(10) of the S.B.P. Act provides for the disqualifications for the said post; that respondent No.2 was eminently qualified

and not disqualified under Section 10(10) of the S.B.P. Act from being appointed as Governor, S.B.P.; and that respondent No.2 has an unblemished record of public service and has served on exalted positions related to finance and economy.

12. Learned counsel for respondent No.2 further submitted that indeed, under Article 90 of the Constitution, the Executive Authority of the Federation is to be exercised in the name of the President by the Federal Government, consisting of the Prime Minister and the Federal Ministers which are to act through the Prime Minister who is the Chief Executive of the Federation; that under Article 48 of the Constitution, the President, in the exercise of his functions, is required to act on and in accordance with the advice of the Cabinet, or the Prime Minister; that the conditionality of his acting under Article 48 is contingent on the power that he can exercise under the Constitution; that the powers and functions of the President conferred by a statute, as distinguished from the ones conferred by the Constitution, are not required to be exercised on the advice of the Cabinet, or the Prime Minister; and that in exercising a statutory power, the President is not bound to act on the advice of the Cabinet, or the Prime Minister. Learned counsel for respondent No.2 prayed for the writ petition to be dismissed.

**CONTENTIONS OF THE LEARNED COUNSEL FOR RESPONDENT NO.3 (STATE BANK OF PAKISTAN):**

13. Mr. Makhdoom Ali Khan, Advocate, learned counsel for respondent No.3, adopted the arguments advanced by learned counsel for respondent No.2 and further submitted that the laws made by the Legislature are policed by the Courts; that when the law does not cover a certain issue, such an omission cannot be supplied by the judiciary; that if the judiciary enters the domain of legislation, or policy making, there will be no space for the Legislature and the Executive to exercise their functions; that although executive authority is co-extensive with legislative authority but the former has to be exercised within the markers prescribed by the Legislature; that the Executive's role cannot be

exercised by the judiciary, or else we may have to say goodbye to the Executive; that writ jurisdiction exercised by this Court is regulated by Article 199 of the Constitution; that under Article 199(1)(ii) of the Constitution, the three essential requirements for the issuance of a writ of *quo warranto* are that (i) the High Court must have territorial jurisdiction over the matter, (ii) that the appointment challenged must be to a public office and (iii) that the office must be held under the authority of law; and that the relevant law in the instant case is the S.B.P. Act.

14. Furthermore, it was submitted that in the petition, there was no allegation as to violation of any provision of the S.B.P. Act in making the impugned appointment; that the petitioners' case was that the observations made by the Hon'ble Supreme Court in the judgments on which the learned counsel for the petitioners placed reliance on should be read into and applied in the case at hand; that there was no requirement in the S.B.P. Act for the post of Governor, S.B.P. to be advertised; that the petitioners being from the other side of the political divide had opposed respondent No.2's appointment; that the appointment of three Governors, S.B.P. made between 2008 and 2013 were exactly in the same manner as respondent No.2's appointment; that in the petition, there is no pleading as to respondent No.2 being tainted with any disqualification, or being bereft of ability for appointment as Governor, S.B.P.; and that there was no specific pleadings as to *malafide* in the writ petition; and that the petitioners had a collateral political purpose and had an axe to grind as regards the present government and, therefore, could not be termed as *pro bono publico*.

15. Learned counsel for respondent No.3 further submitted that the B.N. Act had no application in the appointment in question; that Section 54A of the S.B.P. Act as well as Section 2 of the B.N. Act contained non-obstante clauses but since Section 54A was inserted in the S.B.P. Act subsequent to the enactment of the B.N. Act, the provisions of the S.B.P. Act would prevail over those of the B.N. Act; that it is well settled that where two statutes have



non-obstante clauses, the statute later in time shall prevail; that even otherwise the S.B.P. Act being a special law will prevail over the B.N. Act which is a general law dealing with the management of a host of nationalized banks; and that the S.B.P. is not like any other commercial bank but is a regulator of banks in Pakistan.

16. Learned counsel for respondent No.3 further submitted that under Article 48 of the Constitution, the President is required to act on the advice of the Prime Minister, or the Cabinet only in the discharge of his Constitutional functions as opposed to the exercise of powers expressly conferred on him by a statute; that the Legislature was at liberty to have enacted Section 10(3) of the S.B.P. Act in such a way as to obligate the President to appoint the Governor, S.B.P. on the advice of the Prime Minister, or the Cabinet; that the President has been made the appointer of the Governor, S.B.P. by virtue of a specific conferment of that authority by Section 10(3) of the S.B.P. Act; and that the impugned appointment does not suffer from any legal infirmity. Learned counsel for respondent No.3 prayed for the writ petition to be dismissed.

**CONTENTIONS OF THE LEARNED DEPUTY ATTORNEY-GENERAL:**

17. Mr. Rashid Hafeez, learned Deputy Attorney-General, submitted that the instant petition was not maintainable; that the petitioners had approached this Court with soiled hands; that the instant petition was filed after the petitioners failed to achieve their goal on two occasions before the Senate of Pakistan; that the instant petition is politically motivated and aimed at harassing respondent No.2; that the President in appointing respondent No.2 as Governor, S.B.P. has exercised his discretion in good faith; that respondent No.2 has impeccable credentials and was qualified in every respect to be appointed as Governor, S.B.P.; that the power to appoint the Governor, S.B.P. vests in the President and not in the Federal Government; that till date, out of the 19 Governors, S.B.P., 07 were civil servants, 01 was a civil servant-cum-economist, 03 were economists, 07 were bankers

and 01 was a chartered accountant; that until 2002, the Governor, S.B.P. was appointed by the Federal Government, whereas after 2002, the said appointment was made by the President; that the B.N. Act has no application in the Governor, S.B.P.'s appointment; that there is no reason to read into the statute and interpret Section 10(3) of the S.B.P. Act in such a way as to make the appointment of the Governor, S.B.P. through a competitive process mandatory; that indeed, under Article 48 of the Constitution, the President, in exercise of functions under the Constitution, is bound by the advice of the Cabinet and the Prime Minister; and that as regards the exercise of powers by the President conferred by a statute, the President need not act on the advice of the Cabinet, or the Prime Minister. Learned Deputy Attorney-General prayed for the writ petition to be dismissed.

**CONTENTIONS OF THE LEARNED COUNSEL FOR THE PETITIONERS IN REJOINDER:**

18. Learned counsel for the petitioners rejoined with the well prepared brief on the subject and submitted that through the Constitution (Eighteenth Amendment) Act, 2010, enacted on 19.04.2010, many of the President's Constitutional powers were taken away and conferred on the Federal Government; that under Article 90 of the Constitution, the executive authority of the Federation is to be exercised in the name of the President by the Federal Government; that the appointment of the Governor, S.B.P. is an executive act which should have been performed by the Federal Government; that the impugned appointment was made by the President in exercise of the executive authority of the Federation under Article 90 read with Article 97 of the Constitution; that although the provisions of the S.B.P. Act do not mandate for the post of Governor, S.B.P. to be advertised, it was the President's obligation to have appointed the best of the best person against the said post; and that the only way this purpose could have been achieved was if the said post had been advertised.

19. I have heard the contentions of the learned counsel for the contesting parties as well as the learned Deputy Attorney-General and have perused the record with their able assistance.

20. The facts leading to the filing of the instant petition have been set out in sufficient detail in paragraphs 2 to 6 above and need not be recapitulated.

21. The impugned notification dated 07.07.2017 issued by the Finance Division (Government of Pakistan) shows that respondent No.2 was appointed as the Governor, S.B.P. for a period of three years by the President in exercise of his powers under Section 10(3) of the S.B.P. Act.

22. Prior to the enactment of the State Bank of Pakistan (Amendment) Ordinance, 2002, the power to appoint the Governor, S.B.P. vested in the Federal Government. Section 10(3) of the S.B.P. Act was amended by the said Ordinance. By virtue of the said amendment, the power to appoint the Governor, S.B.P. was taken away from the Federal Government and conferred on the President. Section 10(3) of S.B.P. Act in its present form reads as follows:-

*“(3) Subject to sub-section (11), the Governor shall be appointed by the President for a term of three years, and on such salary and terms and conditions of service as the President may determine, except that neither the salary of the Governor nor his other terms and conditions of services shall be varied to his disadvantage after his appointment:*

*Provided that the Governor be eligible for re-appointment for another term of three years:*

*Provided further that no person shall hold the office of the Governor after attaining the age of sixty-five years.”*  
(Emphasis added)

23. The petitioners seek the issuance of a writ of *quo warranto* against the appointment of respondent No.2 as Governor, S.B.P. In essence, the petitioners’ case is that respondent No.2 was not selected through a competitive process and that the said appointment is violative of the provisions of the S.B.P. Act, Rules of Business, 1973, the B.N. Act and the Constitution of Pakistan.

24. The only power conferred on the President under the provisions of the S.B.P. Act is the power to appoint and remove

the Governor, S.B.P. The S.B.P. Act confers a range of powers on the Federal Government. For instance, under Section 10(3A), the power to appoint an Acting Governor, S.B.P. lies with the Federal Government; under Section 10(4), the Deputy Governors of the S.B.P. are to be appointed by the Federal Government; under Section 9(2)(c), eight Directors on the Board of S.B.P. are to be appointed by the Federal Government; under Section 9B(1)(vi), the power to appoint two eminent macro, or monetary economists with proven record of research and teaching on the Monetary and Fiscal Policies Co-ordination Board has been conferred on the Federal Government; and under Section 9D(1)(d), three external members on the Establishment of Monetary Policy Committee are to be appointed by the Federal Government on the recommendations of the Board of Directors of S.B.P. Given the fact that specific powers have been conferred by the S.B.P. Act on the Federal Government, it cannot be held that the power to appoint and remove the Governor, S.B.P. having been conferred on the President, are also to be exercised by the Federal Government. Holding otherwise would render the amendment brought about in Section 10(3) of the S.B.P. Act through the State Bank of Pakistan (Amendment) Ordinance, 2002, an exercise in futility. It would also amount to attributing absolute redundancy to the term "*President*" inserted in Section 10(3) of the S.B.P. Act through the said Ordinance.

25. It is evident from the bare reading of Section 10(3) of the S.B.P. Act that the exclusive and absolute authority to appoint the Governor, S.B.P. vests with the President. No role has been assigned to the Federal Government in the appointment of the Governor, S.B.P. There is no doubt as to the clear legislative intent in this regard. Where the Legislature intended to give the Federal Government the power to make appointments in the S.B.P., it clearly did so through the provisions referred to herein above. The only power that the Federal Government can exercise with respect to the Governor, S.B.P. is to grant him leave under Section 10(11) of the S.B.P. Act.

26. As regards the petitioners' stand that the President could not have made respondent No.2's appointment without an advice in this regard from the Cabinet, or the Prime Minister in terms of Article 48(1) of the Constitution, in the case at hand, it is an admitted position that respondent No.2's appointment as Governor, S.B.P. was not made by the President on the advice of the Cabinet, or the Prime Minister. The said Article 48(1) provides that in exercise of his functions, the President shall act on and in accordance with the advice of the Cabinet, or the Prime Minister, whereas Article 91(1) of the Constitution provides that there shall be a Cabinet of Ministers with the Prime Minister as its head to aid and advice the President in the exercise of his functions. The term "*exercise of his functions*" in the said articles is relatable to the functions that the President exercises under specific provisions of the Constitution, as opposed to the powers conferred upon him by statutes. When the President appoints the Governor, S.B.P. under Section 10(3) of the S.B.P. Act, it is not in exercise of his functions under the Constitution but as a *persona designata*. The appointment of a Governor, S.B.P. is not a Constitutional function of the President. Section 10(3) of the S.B.P. Act does not obligate the President to make the said appointment on the advice of the Prime Minister, or the Cabinet. Therefore, the President was under no obligation to have sought the advice of the Cabinet, or the Prime Minister before making the impugned appointment. The absence of an advice from the Prime Minister, or the Cabinet to appoint respondent No.2 as the Governor, S.B.P. would not render the impugned appointment made by the President in exercise of the powers conferred on him under Section 10(3) of the S.B.P. Act, unlawful in any manner.

27. In making the impugned appointment, the President did not perform his functions, or act in exercise of the powers available to him as the President under the Constitution. The President in appointing the Governor, S.B.P. was exercising his statutory power conferred and controlled by the S.B.P. Act. There is a distinction in the Constitutional functions and the statutory power

of the President. Where the President performs his Constitutional functions, he is bound by the advice of the Cabinet, or the Prime Minister under Article 48(1) of the Constitution. In the case of Mustafa Impex Vs. Government of Pakistan (PLD 2016 S.C. 808), the argument that the definition of the Federal Government should be considered to be the President along with the Cabinet headed by the Prime Minister, was spurned by the Hon'ble Supreme Court in the following terms:-

*“54. We are unable to agree with him. Article 90 states categorically what the Federal Government is; it consists of the Prime Minister and the Federal Ministers (i.e. the Cabinet) and not the President who is not mentioned therein (we note, in passing, the similarity with Articles 176 and 192 which respectively define the Supreme Court and the High Court as consisting of the Chief Justice and judges). We are unaware of any principle of constitutional interpretation which would allow us to construe Article 41 and Article 48, on the basis of a presumed intention, so as to override the explicit provisions of Article 90. Neither article purports to do so. The concept of the President being the Head of State should not be confused with the completely different concept of the Head of Government and nor should the two offices be conflated. Article 48 merely stipulates that, in the discharge of his functions, the President is mandated to act on, and in accordance with, the advice of the Cabinet or the Prime Minister. This article relates to the performance of the constitutional functions of the President by making it binding on him to follow the advice of the Cabinet. This is by no means the same as asserting that, by doing so, he becomes a part of the Federal Government. He is not. He is the Head of State. There are many functions of state which are discharged by different organs without their becoming part of the Federal Government.”*

**(Emphasis added)**

28. Now coming to the petitioners' plea that the matter regarding respondent No.2's appointment as Governor, S.B.P. should have been brought before the Cabinet in accordance with Rules 16(j) read with Rule 15-A of the Rules of Business, 1973, suffice it to say that after holding that the impugned appointment is not rendered unlawful due to an absence of an advice from the Prime Minister, or the Cabinet, the said plea is reduced to a matter of an academic nature only. Be that as it may, the Rules of Business, 1973, made by the Federal Government in exercise of the powers conferred by Articles 90 and 99 of the Constitution, have been held to be based on public policy and designed to effectively safeguard the State's interests to act in consonance

with these Rules is clearly a duty cast on all the Divisions and Ministries of the Federal Government. The superior Courts have, time and again, emphasized that due weight was required to be given to these Rules. Reference in this regard may be made to the cases of Tariq Aziz-ud-Din (2010 SCMR 1301), Federal Government of the Islamic Republic of Pakistan Vs. General (R) Pervez Musharaf (2014 P.Cr.LJ 684) and Amin Jan Vs. Director General, T&T (PLD 1985 Lahore 81). In the case of Sardar Muhammad Vs. Federation of Pakistan, (PLD 2013 Lahore 343), it has been held as follows:-

*“43. Adherence to the rule of law, in general, and to the Rules of Business, in particular, in conducting its business determines the quality of governance of the government in power. Rules of Business flow out of the Constitution, and are the sinews of a workable government. Besides providing a departmental organogram of a workable democracy, these Rules are a fine weave of democratic principles including: participatory engagement, written and reasoned dialogue, divergence of opinion, open and transparent deliberations, etc. These Rules of Business besides providing a procedural manual for the Federal Government to conduct its business also act as constraints on governmental power.”*

29. Rule 16(j) requires cases involving vital political, economic and administrative policies to be brought before the Cabinet, whereas Rule 15-A reads as follows:-

**15-A. Reference to the President.--***(1) Notwithstanding the provisions made in these rules, where in terms of any provision of the Constitution any function is to be performed or any orders have to be issued by the President or his specific approval is required, the Division concerned shall incorporate a paragraph to this effect in the summary entitled as "Summary for the Prime Minister". The Prime Minister shall render his advice and submit the case to the President. After the President has seen and approved the case, it shall be returned to the Prime Minister. The cases to which this sub-rule applies are enumerated in Schedule V-B.*

*(2) Notwithstanding the provisions made in these rules, where in terms of any provisions of the Constitution, any function is to be performed or any orders have to be issued by the President in his discretion, the Division concerned shall submit the case to the President through the Prime Minister in the form of a self-contained, concise and objective summary entitled as "Summary for the President" stating the relevant facts and points for decision prepared on the same lines as prescribed in these rules for a Summary for the Cabinet, except that only one copy will be required which may not be printed. This procedure will not, however, be applicable where the President has conveyed the*

*decision to the Prime Minister for issuing orders in respect of cases in his discretion. The cases to which this sub-rule applies are enumerated in Schedule VI.*

*(3) The cases and papers referred to in Schedule VII shall be submitted to the President for his information."*

**(Emphasis added)**

30. A read of Rule 15-A of the Rules of Business, 1973, would show that the requirement of a summary to be routed through the concerned Division to the Cabinet, or the Prime Minister for rendering advice to the President is restricted and circumscribed for those functions that have to be performed, or orders that have to be issued by the President under the Constitution only. This is implicit in the adoption of the words *"where in terms of any provision of the Constitution, any function is to be performed or any orders have to be issued by the President"*. As mentioned above, the appointment of the Governor, S.B.P. is not one of the functions to be performed, or orders to be passed by the President under the Constitution. Therefore, I am of the view that the procedure prescribed in Rule 15-A *ibid* was not to be followed as regards the appointment of the Governor, S.B.P. by the President.

31. It may also be mentioned that Rule 15-A clarifies that the cases to which said Rule applies are enumerated in Schedules V-B and VI to the said Rules. The said Schedules make no mention regarding the appointment of a Governor, S.B.P. to be made by the President. Schedule V-B lists a range of appointments required to be made by the President, whereas Schedule VI is restricted to the orders made by the President in his discretion for the appointment of the caretaker Prime Minister under Article 224(1A) of the Constitution and for the dissolution of the National Assembly under Article 58(2) of the Constitution.

32. As for the petitioners' plea that respondent No.2's appointment was in contravention of Section 11(3) of the B.N. Act, true, the definition of a *"bank"* in Section 3(i)(b) of the said Act includes the S.B.P. but it is an admitted position that the S.B.P. is not a nationalized bank. The preamble of the B.N. Act shows that



the said Act was enacted for the specific purpose of the nationalization of banking business in Pakistan. Although Section 3(6) of the B.N. Act separately defines the S.B.P., several provisions of the B.N. Act do not apply to the S.B.P. since they deal with the transfer and vesting of the ownership of the banks that have been nationalized; the sale of the shares of such banks; the compensation payable to the owners of the nationalized banks; the dissolution of the Pakistan Banking Council; and the transfer of its functions to the S.B.P. The S.B.P. Act being a special statute enacted to provide for the constitution of the S.B.P. in order to regulate the monetary and credit system of Pakistan and to foster its growth in the best national interests with the view to securing monetary stability and fuller utilization of the country's productive resources, cannot be overridden by the provisions of the B.N. Act which provide generally for the nationalization of banking business in Pakistan. It is a well settled rule of statutory interpretation that in the case of a conflict between the provisions of a general law and a special law, the latter will prevail. Reference in this regard may be made to the law laid down by the Hon'ble Supreme Court in the cases of Gulshan Textile Mills Ltd. Vs. Soneri Bank Limited (PLD 2018 S.C. 322), State Life Insurance Corporation of Pakistan Vs. Mst. Sardar Begum (2017 SCMR 999), Syed Mushahid Shah Vs. Federal Investment Agency (2017 SCMR 1218) and Capt. Retd. Nayyar Islam Vs. Judge Accountability Court No.III (2012 SCMR 669).

33. Section 11 of the B.N. Act contains general provisions pertaining to the management of Banks. Section 11(1)(a) provides that a President of a bank shall be its Chief Executive, whereas Section 11(3)(a) provides that the Chairman, the President and other members of the Board shall be appointed by the Federal Government in consultation with the S.B.P. for a term of three years on such terms and conditions as may be fixed by a general meeting of the bank. The proviso to Section 11(3)(a) provides that the Chairman and the President shall be appointed from amongst professional bankers whose names are included in a panel of

bankers qualified to be the Chairman, or the President which panel shall be determined, maintained and varied, from time to time, by the S.B.P. The petitioners' case is that since respondent No.2 was neither a professional banker nor was his name included in the panel of bankers qualified to be appointed as a President of a bank, his appointment was in contravention of the proviso to Section 11(3)(a) of the B.N. Act and, therefore, unlawful.

34. For this Court to hold that the Governor, S.B.P. could only have been appointed under Section 11(3)(a) of the B.N. Act by the Federal Government (and not by the President) and that too only if he is a professional banker and his name is included in the list of panel of bankers maintained by the S.B.P. and qualified to be appointed as the President of a bank, it would have to perforce ignore the mandate under Section 10(3) of the S.B.P. Act. True, the B.N. Act was enacted subsequent in time to the S.B.P. Act but as mentioned above, Section 10(3) of the S.B.P. Act was amended through an Ordinance promulgated in the year 2002 so as to take away the power to appoint the Governor, S.B.P. from the Federal Government and confer the same on the President. If the petitioners' argument is to be accepted, this Court would also have to altogether ignore the amendment in Section 10(3) of the S.B.P. Act brought about by the said Ordinance. The Parliament could not be expected to have been ignorant of Section 11(3)(a) of the B.N. Act when the said Ordinance was promulgated in 2002. Since this Court cannot render the said amendment brought about in Section 10(3) of the S.B.P. Act redundant, the petitioners' plea on this score fails. It is well settled that a redundancy cannot be attributed to statutory provisions. Reference in this regard may be made to the law laid down by the Hon'ble Supreme Court in the cases of Qaiser Javed Malik Vs. Pervaiz Hameed (2009 SCMR 846), Aftab Shahban Mirani Vs. Muhammad Ibrahim (PLD 2008 S.C. 779), Shoukat Baig Vs. Shahid Jameel (PLD 2005 S.C. 530), Collector of Sales Tax and Central Excise Vs. Mega Tech. (Pvt.) Ltd. (2005 SCMR 1166), Hafiz Abdul Waheed Vs. Mrs. Asma Jehangir (PLD 2004 S.C. 219), D.G. Khan Cement Company

Limited Vs. Federation of Pakistan (2004 SCMR 456) and M. Aslam Khaki Vs. Muhammad Hashim (PLD 2000 S.C. 225).

35. Emphasis was laid by the learned counsel for the petitioners on the overriding effect of the provisions of the B.N. Act over other statutes by virtue of Section 2 of the B.N. Act. which provides that the provisions of the said Act shall have effect notwithstanding anything contained in any other law for the time being in force, or in any agreement, contract, award, memorandum, or articles of association, or other instruments. A non-obstante clause like the one in Section 2 of the B.N. Act is generally used in a statute with a view to give the statute an overriding effect in case of conflict with any other law. However, Section 54A of the S.B.P. Act also contains a non-obstante clause which is almost in the same terms as the one in Section 2 of the B.N. Act. Section 54A was inserted in the S.B.P. Act through the State Bank of Pakistan (Amendment) Ordinance, 1980. The promulgation of the said Ordinance was subsequent in time to the enactment of the B.N. Act. Since Section 54A of the S.B.P. Act reflects the latest intent of the legislature, it overrides the non-obstante clause in Section 2 of the B.N. Act. In the case of Syed Mushahid Shah Vs. Federal Investment Agency (2017 SCMR 1218), it has been held *inter-alia* that where two non-obstante clauses exist, the one enacted later in time shall prevail. Therefore, it is held that by virtue of the non-obstante clause in Section 2 of the B.N. Act, neither is the President divested of the power to appoint the Governor, S.B.P. under Section 10(3) of the S.B.P. Act nor would the Federal Government have the power to make such an appointment under Section 11(3)(a) of the B.N. Act.

36. It is an admitted position that ever since the promulgation of the State Bank of Pakistan (Amendment) Ordinance, 2002, all Governors of the S.B.P. have been appointed in the same manner as respondent No.2. Appointments in the same manner were made during the period when a few of the petitioners were part of the Executive. Even if Section 10(3) of the S.B.P. Act was susceptible to interpretation in more than one way, since it had

been consistently interpreted in a particular way which is not, in any manner, repugnant to the mandate of the said provision, respondent No.2's appointment cannot be held to be unlawful. Departmental practice is a principle well enshrined in our jurisprudence. Reference in this regard may be made to the law laid down by the Hon'ble Supreme Court in the cases of State Bank of Pakistan Vs. Franklin Credit (2010 SCMR 121), Hashwani Hotels Vs. Federation of Pakistan (PLD 1997 S.C. 315) and Nazir Ahmed Vs. Pakistan (PLD 1970 S.C. 453).

37. In the writ petition, respondent No.2's credentials and ability for appointment as Governor, S.B.P. has not been questioned. In the learned counsel for the petitioners' submissions in rejoinder, it was not disputed that respondent No.2 had remained Secretary, Finance, Government of Pakistan; Secretary, Economic Affairs Division, Government of Pakistan; Secretary, Revenue, Government of Pakistan; Secretary, Finance, Government of Punjab; Guest lecturer on finance/economy at the National Defence University, National School of Public Policy, Senior Management Courses, etc.; panelist in discussions organized by the World Bank, the International Monetary Fund and the Islamic Development Bank; Director on the Board of the S.B.P.; Member on the Board of the Bank of Punjab and Pakistan China Investment Company; Chairman, Policy Board of the Securities and Exchange Commission of Pakistan; Controller General of Prices, Pakistan; Chief Executive Officer of National Productivity Organization; Head of Pakistan Trade Office in Los Angeles, etc. Having already held that the Governor, S.B.P. need not be a professional banker, or on the panel of bankers maintained by the S.B.P. for appointment as President of a bank, I do not see how respondent No.2's credentials were in any way wanting for his appointment as Governor, S.B.P. It is not disputed that respondent No.2 did not suffer from any of the disqualifications enumerated in Section 10(10) of the S.B.P. Act for appointment as Governor, S.B.P.

38. As regards the allegation made by the petitioners that the impugned appointment process was in colourful exercise of

discretion, whimsical, capricious, or lacking transparency, the same is not supported by any specific particulars in the pleadings as well as in the arguments of the learned counsel for the petitioners. Such an allegation is akin to an allegation of *malafides* which ought not to be taken into consideration unless supported by material particulars in the pleadings. It is trite law that malice is to be pleaded with particularity and proved beyond reasonable doubt. Reference in this regard may be made to the cases of Dr. Akhtar Hassan Khan Vs. Federation of Pakistan (2012 SCMR 455) and Federation of Pakistan Vs. Saeed Ahmed Khan (PLD 1974 S.C. 151).

39. There was nothing preventing the President to have made the appointment of a Governor, S.B.P. after a competitive process. However, since the statute in question did not obligate the President to make the said appointment through a competitive process, or to advertise the said post, respondent No.2's appointment cannot be held to be unlawful. Indeed, the desirability of the petitioners, or even of this Court to make appointments to high offices such as the Governor, S.B.P. through a competitive process is not enough to strike down respondent No.2's appointment for there has been no violation of the S.B.P. Act in making the said appointment. If the petitioners feel so strongly about this, they being Parliamentarians ought to initiate a legislative process to amend the S.B.P. Act so as to provide for a criteria for the appointment of the Governor, S.B.P. and for such an appointment to be made through a competitive process. Since presently no requirement to advertise the post of the Governor, S.B.P. has been stipulated in Section 10(3) of the S.B.P. Act, this Court cannot supply *casus omissus*. Reference in this regard may be made to the law laid down by the Hon'ble Supreme Court in the cases of Federation of Pakistan Vs. Durrani Ceramics (2014 SCMR 1630), Nadeem Ahmed Advocate Vs. Federation of Pakistan (2013 SCMR 1062), Zain Yar Khan Vs. The Chief Engineer (1998 SCMR 2419) and Muhammad Ismail Vs. The State (PLD 1969 S.C. 241).

40. Much emphasis was placed by the learned counsel for the petitioners on the judgment in the case of Muhammad Iqbal Khattak Vs. Federation of Pakistan (2010 CLD 1572), in which this Court set-aside the appointment of a respondent as the President, Zarai Taraqati Bank Limited, in exercise of its jurisdiction under Article 199 of the Constitution. A read of the said judgment shows that the same is distinguishable from the case at hand inasmuch as in the said case the respondent's appointment was assailed on the ground that he did not have the required qualifications for the said post. The respondent in the said case had no experience in banking and his past experience was confined to the sugar industry. The respondent did not have any degree in banking, finance, economics, or business administration and did not meet the "*fit and proper test*" in terms of qualifications and experience laid down by the S.B.P. which had refused to clear, or approve his appointment. As mentioned above, in the case at hand, the petitioners have not questioned respondent No.2's qualifications, or experience necessary for appointment as Governor, S.B.P.

41. In view of the above, I hold that respondent No.2's appointment as Governor, S.B.P. cannot be held to have been made without the authority of law, or in other words, contrary to the relevant statutory provisions. Therefore, the essential pre-requisite for the issuance of a writ of *quo warranto* is not satisfied. Consequently, this petition is dismissed with no order as to costs.

(MIANGUL HASSAN AURANGZEB)  
JUDGE

ANNOUNCED IN AN OPEN COURT ON 17/07/2018.

(JUDGE)

Qamar Khan\*

**APPROVED FOR REPORTING**

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