

Form No: HCJD/C-121.

JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD

JUDICIAL DEPARTMENT

W.P. No. 2304 of 2020

Syed Pervaiz Zahoor

Vs

The Prime Minister of Pakistan, etc.

PETITIONER BY: Mr Amanullah Kanrani, Advocate.

DATE OF HEARING: 25-08-2020.

ATHAR MINALLAH, CJ.-The petitioner is an enrolled Advocate of the Supreme Court of Pakistan. He has invoked the jurisdiction of this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 seeking multiple prayers. In essence, the petitioner has challenged the appointment of respondent no.3 i.e. Mirza Shahzad Akbar as Adviser, vide notification dated 22.07.2020, and as Chairman of the Assets Recovery Unit, Government of Pakistan. The petitioner has also asserted in his petition that respondent no.3 is illegally exercising executive powers and that, allegedly, through abuse of his authority he is influencing the National Accountability Bureau (hereinafter referred to as the "**Bureau**") and other investigating agencies. It is not the case of the petitioner that he has been harmed by the exercise of executive authority by

respondent no. 3 nor that his fundamental rights have been violated. There is no material attached with the petition in support of this assertion except that reliance has been placed on judgment, dated 17.08.2020, passed by the learned High Court of Sindh in Constitutional Petition No.D-3404 of 2020, wherein adverse observations have been recorded regarding the conduct and role of respondent no.3. It has been stated in paragraph 8 of the memorandum of the petition that an objection was raised before the august Supreme Court regarding the appointment of respondent no.3 as Chairman of the Assets Recovery Unit and the detailed judgment in the matter is awaited.

2. The learned counsel for the petitioner has been heard at length. He has argued that, as an Adviser, respondent no.3 is bereft of jurisdiction to exercise executive powers. It has been further argued that respondent no.3 is abusing his authority by interfering in matters which fall within the exclusive domain of the Bureau. It is the case of the petitioner that the appointment of respondent no.3 as Chairman of the Assets Recovery Unit is illegal, void, without lawful authority and jurisdiction. The learned counsel has stressed that respondent no.3 is not competent to attend the meetings of the Federal Cabinet nor the proceedings of the Majlis-e-Shoora (Parliament).

3. The learned counsel for the petitioner has been heard and the record perused with his able assistance.

4. The petitioner has raised two distinct questions. He has challenged the appointment of respondent no.3 as an Adviser vide notification, dated 22.07.2020 and as Chairman of the Assets Recovery Unit and simultaneously he has raised objections regarding his role and conduct in the context of accountability and investigation agencies. The petitioner has not placed on record a copy of the notification of appointment of respondent no.3 as Chairman, Assets Recovery Unit. Nonetheless, it is an admitted position that the appointment and conduct of respondent no.3 as Chairman of the Assets Recovery Unit was challenged before the august Supreme Court in a matter and the detailed judgment is awaited. It is, therefore, obvious that propriety requires this Court to exercise restraint to the extent of the aforementioned appointment. This order is thus confined to the appointment and conduct of the respondent as an Advisor.

5. The President is empowered under Article 93 of the Constitution of the Islamic Republic of Pakistan, 1973 to appoint, on the advice of the Prime Minister, not more than five Advisers. The President determines the terms and conditions of a person appointed as an Adviser. Sub article (2) of Article 93 provides that Article 57 shall apply to an Adviser. The latter, therefore, has a right to speak and otherwise take part in the proceedings of either House of the Majlis-e-Shoora (Parliament) but is not entitled to vote. The exercise of the executive authority of the Federation and its modalities are regulated under the Rules of Business, 1973 (hereinafter referred to as

the "**Rules of 1973**), which have been made pursuant to powers conferred under Articles 90 and 99 of the Constitution. The said rules are binding and anything done in violation thereof is void and ultra vires as was the case before the august Supreme Court wherein judgment titled "Khan Muhammad vs. Chief Secretary, Government of Baluchistan Quetta and others", **2018 SCMR 1411** was rendered. In the case titled "Mustafa Impex Karachi and others vs. The Government of Pakistan through Secretary Finance, Islamabad and others", **PLD 2016 SC 808** the apex Court has held that the authority of the Rules of 1973 flows from the Constitution, therefore, following the scheme prescribed therein is mandatory and binding and failure would lead to an order or action lacking any legal validity. The organization of a Division or a Ministry, as the case may be, has been described under Rule 4 of Part-A of the Rules of 1973. It provides that each Division or Ministry shall consist of a Secretary to Government and of such other officials subordinate to him as the Government may determine. The expressions "Division" and "Ministry" are defined in clauses (vi) and (xiv) of rule 2 of the Rules of 1973. 'Minister' is defined under clause (xiii) of rule 2 and it neither includes an 'Adviser' nor a 'Special Assistant'. Appointing an Adviser with the status of a Minister does not empower him/her to act or function as a Minister or to perform functions under the Rules of 1973. The Rules of 1973 explicitly declare the Secretary to be the official head of the Division/Ministry and responsible for its efficient administration, discipline and proper conduct of business. 'Business' has been

defined as meaning 'all work done by the Federal Government'. The Secretary is the principal accounting officer of his/her Division/Ministry. Sub-rule (6) of Rule 4 empowers the Prime Minister to appoint a Special Assistant or Special Assistants in the organization of a Division/Ministry and with such status and functions as the latter may determine. The Special Assistant or Special Assistants in a Division or Ministry are not one of its officials. For the purposes of the executive business, the Secretary and officials subordinate to the latter have a pivotal and exclusive role. The policy is, however, formulated and decisions in this regard fall exclusively within the domain of the Prime Minister and the Minister holding the portfolio. The distinction between policy matters and its implementation has been clearly defined. An Adviser has no role either in policy matters of a Division or Ministry nor its execution and running the business of the Federal Government in terms of the Rules of 1973. Part-D of the Rules of 1973, read with Articles 90 (2) and 91, unambiguously shows that an Adviser is not part of the Federal Cabinet nor entitled to attend its meetings, except when the Prime Minister requires his/her attendance and, that too, by special invitation as has been provided in the proviso to rule 20 (1A) of Part-D of the Rules of 1973. The manner in which the business of a Division or a Ministry is required to be transacted has been described in rule 5 of Part-A of the Rules of 1973. It explicitly provides that important policy decisions cannot be taken except with the approval of the Prime Minister and that it is the duty of a Minister to assist the Prime Minister in the

formulation of policy. Sub rule (5) of Rule 5 provides that, subject to sub-rule (1), the Minister shall be responsible for policy concerning his/her Division. Sub rule (6) provides in unambiguous language that no officer other than a Secretary, Additional Secretary or Joint Secretary shall take the initiative in approaching a Minister in connection with the official business. Rule 6 of Part-A of the Rules of 1973 declares that the Cabinet shall collectively be responsible for the advice tendered to, or the executive orders issued in the name of the President, whether by an individual Minister or as a result of a decision by the Cabinet. It is important to note that Rule 55 of the Rules of 1973 prescribes guidelines and procedure for the protection and communication of official information. Rule 55(4) provides that only Ministers and Secretaries, and such officers as may be authorized, shall act as official spokespersons of the Government. As a corollary, the aforementioned rule would be breached if an Adviser or an authority not specified therein is authorized to act as an official spokesperson. The relevant provisions of the Constitution and the Rules of 1973 are unambiguous regarding the status and role of an Adviser in the context of the business of the executive organ of the State. An Adviser is not a member of the Federal Cabinet nor entitled to attend its meetings except when required to do so by the Prime Minister and, that too, pursuant to a special invitation. An Adviser can speak and attend the proceedings of the Majlis-e-Shoora (Parliament) but cannot vote. The business of the executive authority and the manner in which it is to be exercised

is governed under the Rules of 1973, which does not contemplate the role of an Adviser. An Adviser cannot interfere or in any manner influence the executive authority, working or functioning of a Division/Ministry nor its policy matters. This scheme is obviously based on the foundational principle of the Constitution that the 'State shall exercise its powers and authority through the chosen representatives of the people'. The petitioner has not placed on record any material in order to ascertain whether, as an Adviser, respondent no. 3 may have breached the provisions of the Constitution or the Rules of 1973. Suffice it to mention, any act of respondent no. 3 in breach of the Constitutional provisions and the Rules of 1973 will be void, without lawful authority and jurisdiction. Moreover, as head of a Division/Ministry, it is the duty of every Secretary to ensure that business is conducted and functions performed strictly in accordance with the scheme of the Rules of 1973 and that no one is allowed to interfere in breach thereof.

6. It is noted that the Bureau has been established under the National Accountability Bureau Ordinance, 1999 (hereinafter referred to as the "**Ordinance of 1999**"). An Adviser appointed under Article 93 of the Constitution does not have any power whatsoever to, directly or indirectly, instruct, dictate or in any other manner interfere with the powers conferred in the Bureau under the Ordinance of 1999. Likewise, the Federal Investigation Agency has been established under the Federal Investigation Agency Act 1974. The latter statute also does not empower an Adviser to interfere in the matters of

the Agency, whether directly or indirectly. Any interference in breach of the Act of 1973 will definitely be void and an abuse of the Adviser's office.

7. The petitioner has not placed on record any material in support of his contention that respondent no.3 may have interfered with the matters which exclusively fall within the domain of the Bureau under the Ordinance of 1999 or the Agency under the Act of 1973. There is also nothing on record to indicate that the rights of the petitioner have been prejudiced by an act of respondent no.3 so as to treat him as an aggrieved person for the purposes of Article 199 of the Constitution. With humility and reverence, the observations recorded by the learned High Court of Sindh in its judgment, dated 17.08.2020, are not enough for admitting this petition. The Prime Minister may tender advice to the President to appoint not more than five Advisers. The tendering of advice under Article 93 of the Constitution is within the exclusive discretion of the Prime Minister and in this regard no eligibility criterion has been prescribed. It is the exclusive prerogative of the Prime Minister to choose the person for rendering him advice and thus tendering advice regarding appointing the latter as an Adviser. A Court cannot substitute its own opinion with that of the Prime Minister and the matter thus falls outside the ambit of justiciability. As highlighted in the judgment of the learned High Court of Sindh, titled "Fareed Ahmed A.Dayo vs. Chief Minister Sindh through Principal Secretary and 5 others", **PLD 2017 Karachi 214**, an Adviser is a person who merely gives advice

in a particular field. An Adviser, therefore, cannot be given nor can the latter exercise powers or perform functions in derogation of the mandatory scheme of the Rules of 1973 read with the provisions of the Constitution. As already noted above, the objection regarding respondent no.3's appointment as Chairman of the Assets Recovery Unit cannot be considered because it had been raised before the august Supreme Court and the detailed judgment in the matter is awaited. No case at this stage is made out for issuance of a writ of quo warranto in relation to the appointment of respondent no.3 as an Adviser because neither has a relevant ground been raised nor has material been placed on record for admitting the petition to regular hearing.

8. For the above reasons, the petition is disposed of with the expectation that respondent no.3 will advise the Prime Minister having regard to the status of an Adviser envisaged under the Constitution, read with the scheme of governance prescribed under the Rules of 1973.

CHIEF JUSTICE

Asif Mughal.

Approved for reporting

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