

Form No: HCJD/C-121

JUDGMENT SHEET.
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD.

Writ Petition No.01 of 2020

Farrukh Nawaz Bhatti.

Versus

Prime Minister of Pakistan, Prime Minister's Office, Islamabad and others.

Writ Petition No.1870 of 2020

Rana Iradat Shairf Khan.

Versus

Federation of Pakistan, through Secretary to Government of Pakistan in the Cabinet Division, Islamabad and others.

Petitioners By : Dr. G. M. Chaudhry, Advocate (in Writ Petition No.01 of 2020).
Barrister Mohsin Nawaz Ranjha, Barrister Omer Azad Malik, Mr. Usman Ahmad Ranjha, Mr. Khalid Mehmood Ranjha and Mr. Asim Awan, Advocates (in Writ Petition No.1870 of 2020).

Respondents By : Mr. Tariq Mehmood Khokhar, learned Additional Attorney-General.
Raja Khalid Mehmood Khan, learned Deputy Attorney-General.
Khawaja Imtiaz Ahmed, learned Deputy Attorney-General.
Mr. Saqlain Haider Awan, learned Assistant Attorney-General.
Mr. Muhammad Nadeem Khan Khakwani, learned Assistant Attorney-General.
Mr. Waleed Bin Usman, Advocate for respondent No.4 (in Writ Petition No.01 of 2020).
Raja Faisal Younas, Advocate for respondent No.6 (in Writ Petition No.01 of 2020).
Mr. Shahid Mehmood Khokhar, Advocate

for respondent No.8 (in Writ Petition No.01 of 2020).

Mr. Faisal Islam, Advocate for respondent No.14 (in Writ Petition No.01 of 2020).

Rana Zain Tahir, Special Prosecutor, National Accountability Bureau / respondent No.19 (in Writ Petition No.01 of 2020).

Date of Hearing : 09.09.2020

AAMER FAROOQ, J. - This judgment shall decide the instant petition as well as Writ Petition No.1870 of 2020, as common questions are involved.

2. The petitioner, in Writ Petition No.01 of 2020, has challenged the *vires* of Rule 4(6) of Rules of Business, 1973 being *ultra vires* to the Constitution of Islamic Republic of Pakistan, 1973 and consequentially the appointment of respondents No.3 to 18 as Special Assistants to the Prime Minister having the status of the Ministers of State or the Federal Ministers, as per the notifications of their appointments be set-aside. The petitioner also questioned the authority of law under which respondents No.3 to 18 have been appointed as Special Assistants to the Prime Minister having the status of Minister for State or the Federal Minister.

3. The petitioner, in Writ Petition No.1870 of 2020, has challenged the notification dated 25.04.2019, appointing respondent No.3 as Chairman of the Cabinet Committee on privatization and respondents No.4 and 5 as the Members of the referred Committee.

4. Learned counsel for the petitioner, in Writ Petition No.01 of 2020, *inter-alia*, contended that through various notifications respondents No.3 to 18

have been appointed as Advisors to the Prime Minister or Special Assistants to the Prime Minister. It was contended that under the Constitution of Pakistan, the Federal Government means the Prime Minister and the Federal Ministers. The business of the Government is to be conducted by the referred body as provided in Article 99 of the Constitution. It was submitted that the Federal Minister is the one, who is either a Member of National Assembly or the Senate and cannot be anyone else. It was submitted that in the referred backdrop, respondents No.3 to 18 though are Special Assistants to the Prime Minister or the Advisors to the Prime Minister but have been conferred status as Ministers for State or the Federal Ministers and they are participating in the meetings of the Cabinet, which is in violation of the spirit of the Constitution. It was further contended that in order to conduct business of the Government the Constitution provides framing of Rules, which accordingly was done and the Rules of Business, 1973 were framed. It was contended that under Rule 4(6), the Prime Minister has the power to appoint as many Special Assistants to the Prime Minister as he so pleases and conferred them the status according to his discretion. It was submitted that the referred rule is *ultra vires* to the Constitution of Pakistan as the Constitution only allows framing of Rules of Business for the purposes of effective running of the Government and affairs of Federation and not the Special Assistant to the Prime Minister. In support of his contentions, learned counsel placed reliance on cases reported as "*Messrs Mustafa Impex, Karachi and others. V/s The Government of Pakistan through Secretary Finance and others.*" (**PLD 2016 SC 808**), "*Fareed Ahmad A. Dayo Vs. Chief Minister, Sindh through Principal Secretary an 5 others*" (**PLD 2017 Sindh 214**). Reliance was also placed on cases reported as "*Tariq Aziz-ud-Din's Case*" (**2010 SCMR 1301**), "*Muhammad Yasin Vs. Federation of Pakistan through Secretary, Establishment Division, Islamabad and others*" (**PLD 2012 SC 132**).

5. Learned counsel for the petitioner, in Writ Petition No.1870 of 2020, *inter-alia*, contended that Article 92 provides for conduct of business of affairs of the Federal Government, which is to be done by the Prime Minister and the Federal Ministers constituting the Cabinet. It was submitted that the only a Federal Minister can be a Member of the Committee of the Cabinet on any issue and a person, who is not a Federal Minister cannot be a Member as such. It was pointed out that though under the Constitution there can be five Advisors to the Prime Minister, who may be conferred status of Federal Minister but they are not part of Cabinet. Learned counsel pointed out that respondents No.4 to 6 have been appointed as the Advisors to the Prime Minister with the status of the Federal Ministers and have been attending the meetings of the Cabinet and through the impugned notification dated 25.04.2019, have been appointed as Chairman and Members of the Cabinet Committee on privatization, which is against the mandate of the law. It was further submitted that an Advisor or an Assistant to the Prime Minister does not have any executive authority and his/their sole task is to assist the Prime Minister. In support of his contentions, learned counsel placed reliance on cases reported as "*Abdul Majeed Zafar and others. Vs. Governor of the Punjab through Chief Secretary and others.*" **(2007 SCMR 330)** as well as "*Ch. Zahoor Ellahi's Case*" **(PLD 1973 SC 383)**.

6. Learned Additional Attorney General responding to the arguments addressed by learned counsel for the petitioner, in Writ Petition No.01 of 2020, *inter-alia*, contended that the term Special Assistant to the Prime Minister was never part of the Government of India Acts 1833, 1853, 1858 and/or 1935 as well as the Constitutions of 1956 and 1962, however, the term was introduced by the first time in 1973 Constitution. In Article 260 of the Constitution which provides that the term "service of Pakistan" includes Special Assistant to the Prime Minister. In this behalf, learned Additional Attorney General pointed out

that amendment was made in 1973 Constitution through Constitution (Sixth Amendment) Act, 1976, whereby Article 260 of the Constitution was amended. Learned Additional Attorney General further pointed out that the concept of appointment of Special Assistant to the Prime Minister and in particular the appointment of Syed Zulfiqar Abbas Bukhari as Special Assistant to the Prime Minister for Overseas Pakistanis was questioned and examined by the Hon'ble Supreme Court of Pakistan in Constitution Petition No.63 of 2018 and was upheld vide judgment dated 26.12.2018. It was further highlighted that in two recent judgments of this Court, the Hon'ble Chief Justice has also dilated upon the concept of Special Assistant to the Prime Minister and Advisor to the Prime Minister and has held that such posts are valid within the mandate of law. Learned Additional Attorney General placed on record the judgments of this Court in cases titled "*Syed Pervaiz Zahoor Vs. The Prime Minister of Pakistan, etc.*" (**Writ Petition No.2304 of 2020**) and "*Malik Munsif Awan Advocate Vs. Federation of Pakistan, etc.*" (**Writ Petition No.2058 of 2020**).

7. Learned Deputy Attorney General appearing in Writ Petition No.1870 of 2020, *inter-alia*, contended that Rule 17 of the Rules of Business, 1973 provides for functioning of the Cabinet and Rule 17(2) provides for formation of the Committees of Cabinet. In this behalf, it was pointed out that under Rule 17(2) *ibid*, the Prime Minister can appoint any person as Member of the Cabinet, who need not be a Member of National Assembly or the Senate but has to be a Federal Minister or have a status of the Federal Minister. It was contended that it is precisely for the said reasons that the decisions of Committee of Cabinet are to be rectified by the Cabinet.

8. Arguments advanced by learned counsel for the parties have been heard and the documents placed on record examined with their able assistance.

9. Before advertizing to the arguments addressed by learned counsel for the parties and rendering findings on the same, it is appropriate that the prayers made in both the petitions and the relief sought be reproduced. In Writ Petition No.01 of 2020, the petitioner seeks the following prayer:-

“In view of the above, it is respectfully prayed that appropriate writs may graciously be issued to the following effect:-

- a) That the Rule 4(6) of the Rules of Business, 1973, is ultra vires to the Constitution and the law, illegal, coram non judice and being such is liable to be set aside ab initio and be set aside in the interest of constitutionalism in the country and for the Rule of Law and Good Governance.*
- b) That the Rule 4(6) of the Rules of Business, 1973, being ultra vires to the Constitution and the law, under which authority of the law and the Constitution of the Islamic Republic of Pakistan the Respondent Nos.3 to 18 are holding their respective offices as the Special Assistants to the Prime Minister (SAPM) with the status of Ministers of the State or the federal Ministers (most of) in terms of different Notifications and as per List available on official websites (Annex-A) or under any other notification, which is not available in public domain.*
- c) That under which authority of the law and the Constitution of the Islamic Republic of Pakistan, the respondent No.1 is empowered to appoint the Respondent Nos.3 to 18 and confer the status of the Minister of the State or the Federal Minister (as the case may be) to any person including the Respondent Nos. 3 to 18 as contained in different Notifications or as per List (Annex-A) entitling the Respondent Nos. 3 to 18 for their salaries, allowances, perks, privileges, etc., burdening the public exchequer and cash starved as well as debt-ridden economy of the Islamic Republic of Pakistan when there are also the Federal Ministers or the Ministers of the State for the same purposes and subjects when most of the Respondent Nos. 3 to 18 are not possessing any specialization in the respective areas assigned to them except close relations or influence to the*

Prime Minister or being his favorites or having special personal relations, whatsoever.

- d) *That to declare the appointments of the Respondent Nos. 3 to 18 and conferring upon them the status of the Ministers of the State and the Federal Ministers (as the case may be) vide Notification and the List (Annex-A) as illegal, ultra vires to the law and the Constitution and exercise of the power by the Respondent No.1 being the void ab initio, coram non judice, mala fide and misuse of discretionary powers only to cause loss to the national exchequer and illegal gain to the Respondent Nos.3 to 18 and to set aside the same ab initio.*
- e) *That to declare the actions, decisions or exercise of any power under any law as well as receipt of any financial benefit including their salaries, allowances, perks, privileges, etc., as illegal, void ab initio and illegal gain and direct for recovery of such salaries, allowances, perks and privileges, etc., from the Respondent Nos. 3 to 18 as the arrears of land revenue.*
- f) *That to declare the action of the Respondent Nos. 1 and 2 in violation of Articles 3, 4, 5, 8, 18, 25, 27, 91, 92 as well as any other provision of the Constitution of the Islamic Republic of Pakistan as well as the law and cognizable under section 9 of the National Accountability Ordinance, 1999 (Ordinance No.XVIII of 1999) as well as any other law regarding misuse of official authority and public office in force for the time being and further to direct for initiation of necessary criminal prosecution, etc.*
- g) *That to declare that the Respondent No.1 and 2 had exercised their powers in violation of the law, rules and the Constitution of the Islamic Republic of Pakistan as well as principles laid down by the Honourable Supreme Court of Pakistan in 1996 SCMR 1349 [In re : Abdul Jabbar Memon and Others] and PLD 2017 Sindh 214 [Fareed Ahmed A. Dayo v. Chief Minister Sindh], etc., as the appointments of the Respondent Nos.3 to 18 have been made without proper publicity, transparency, merit, competitiveness and specialization, etc., as well as the result of favoritism and nepotism in violation of the Oath of the Respondent No.1.*

- h) That to declare that the Respondent No.1 in collusion with the Respondent No.2 has misused official power and discretion as well as the public office in violation of principles laid down by the Honourable Supreme Court of Pakistan in cases cited as 2010 SCMR 1301 [Tariq Aziz-ud-Din's Case]; Corruption of Hajj Arrangements' Case (Suo Moto Case No.24 of 2010); and PLD 2012 SC 132 [Muhammad Yasin v. Federation of Pakistan i.e. Chairman OGRA's Case], etc., only to allow illegal financial gain and misuse of public authority in violation of the law, rules and the Constitution of the Islamic Republic of Pakistan against the principles regarding exercise of discretion.*
- i) That to restrain the Respondent Nos. 3 to 18 from performance of any type of official functions or exercise of any official power under any law, rule or the Constitution or pretend them as the Ministers of State as provided in Articles 91 and 92 of the Constitution of the Islamic Republic of Pakistan, and*
- j) That to direct the Respondent No.19 to investigate and inquire the acts of the Respondent Nos.1 to 18 in terms of section 9 of the National Accountability Ordinance, 1999 (Ordinance No.XVIII of 1999) or any other law, etc., relevant on the subject of misuse of power and discretion.*

Any other favorable relief may also graciously be granted to the Petitioner as may be deemed just and proper in the facts and circumstances of the case.”

In Writ Petition No.1870 of 2020, the petitioner seeks the following relief:-

“In the above-mentioned facts, circumstances, and legal grounds advanced, this Honourable Court is requested to kindly issue appropriate writ by:-

- i. Declaring that the impugned notification No.F.5/6/2018-com. dated 25th April, 2019 is void, illegal, unlawful, malafide and ultra-vires to Constitutional provisions and set-aside the same*

Any other relief that this Honourable Court deems fit may also be granted in favour of the Petitioner in larger interest of the public.”

The business of the Federal Government is to be conducted through Cabinet/Federal Government as provided in Articles 91 and 92 of the Constitution. The referred provisions are reproduced below:-

[91. The Cabinet.—(1) There shall be a Cabinet of Ministers, with the Prime Minister at its head, to aid and advise the President in the exercise of his functions.

(2) The National Assembly shall meet on the twenty-first day following the day on which a general election to the Assembly is held, unless sooner summoned by the President.

(3) After the election of the Speaker and the Deputy Speaker, the National Assembly shall, to the exclusion of any other business, proceed to elect without debate one of its Muslim members to be the Prime Minister.

(4) The Prime Minister shall be elected by the votes of the majority of the total membership of the National Assembly:

Provided that, if no member secures such majority in the first poll, a second poll shall be held between the members who secure the two highest numbers of votes in the first poll and the member who secures a majority of votes of the members present and voting shall be declared to have been elected as Prime Minister:

Provided further that, if the number of votes secured by two or more members securing the highest number of votes is equal, further poll shall be held between them until one of them secures a majority of votes of the members present and voting.

(5) The member elected under clause (4) shall be called upon by the President to assume the office of Prime Minister and he shall, before entering upon the office, make before the President oath in the form set out in the Third Schedule:

Provided that there shall be no restriction on the number of terms for the office of the Prime Minister.

(6) The Cabinet, together with the Ministers of State, shall be collectively responsible to the Senate and the National Assembly.

(7) The Prime Minister shall hold office during the pleasure of the President, but the President shall not exercise his powers under this clause unless he is satisfied that the Prime Minister does not command the confidence of the majority of the members of the National Assembly, in which case he shall summon the National Assembly and require the Prime Minister to obtain a vote of confidence from the Assembly.

(8) The Prime Minister may, by writing under his hand addressed to the President, resign his office.

(9) A Minister who for any period of six consecutive months is not a member of the National Assembly shall, at the expiration of that period, cease to be a Minister and shall not before the dissolution of that Assembly be again appointed a Minister unless he is elected a member of that Assembly:

Provided that nothing contained in this clause shall apply to a Minister who is member of the Senate.

(10) Nothing contained in this Article shall be construed as disqualifying the Prime Minister or any other Minister or a Minister of State for continuing in office during any period during which the National Assembly stands dissolved, or as preventing the appointment of any person as Prime Minister or other Minister or a Minister of State during any such period.]”

“92. Federal Ministers and Ministers of State.—(1) Subject to clauses [(9) and (10)] of Article 91, the President shall appoint Federal Ministers and Ministers of State from amongst the members of Majlis-e-Shoora (Parliament) on the advice of the Prime Minister:

Provided that the number of Federal Ministers and Ministers of State who are members of the Senate shall not at any time exceed one-fourth of the number of Federal Ministers 2[:]

3[Provided further that the total strength of the Cabinet, including Ministers of State, shall not exceed eleven percent of the total membership of Majlis-e-Shoora (Parliament):

Provided also that the aforesaid amendment shall be effective from the next general election held after the commencement of the Constitution (Eighteenth Amendment) Act, 2010.]

(2) Before entering upon office, a Federal Minister or Minister of State shall make before the President oath in the form set out in the Third Schedule.

(3) A Federal Minister or Minister of State may, by writing under his hand addressed to the President, resign his office or may be removed from office by the President on the advice of the Prime Minister.]”

10. The Hon’ble Supreme Court of Pakistan in a recent judgment reported as *"Messrs Mustafa Impex, Karachi and others. V/s The Government of Pakistan through Secretary Finance and others."* **(PLD 2016 SC 808)** dilated upon the concept of Federal Government and held that the same means the Prime Minister and the Ministers collectively. The Constitution in Article 93 provides for appointment of the Advisor to the Prime Minister, which can be maximum five in number. However, the post of Special Assistant to the Prime Minister is not provided *per se* in the Constitution. The Rules of Business have been framed under Article 99 of the Constitution and Rule 4(6) of Rules of Business, 1973 provides for the appointment of Special Assistants to the Prime

Minister. There is no cap on the number of Special Assistants to the Prime Minister that can be appointed by the Prime Minister and he can confer upon them such status as he deems appropriate. The relevant rule is for the sake of convenience reproduced below:-

“4 Organization of Divisions.....(6) There may be a Special Assistant or Special Assistants to the Prime Minister with such status and functions as may be determined by the Prime Minister”.

Rule 4(6) of the Rules of Business, 1973 came under challenge before this Court in case titled *"Malik Munsif Awan Advocate Vs. Federation of Pakistan, etc."* **(Writ Petition No.2058 of 2020)**, the Hon'ble Chief Justice of this Court, vide order dated 30.07.2020 dismissed the petition. It was observed as follows:-

3. *The Rules of 1973 have been made and duly notified by the Federal Government in exercise of powers vested under Articles 90 and 99 of the Constitution of the Islamic Republic of Pakistan, 1973 [hereinafter referred to as the "Constitution"]. Sub Article 3 of Article 99 empowers the Federal Government to make rules for the allocation and transaction of its business. It is pursuant to the said powers that the Federal Government has made the Rules of 1973 and has described the "Organization of Divisions" in Rule 4 ibid. Sub Rule 6 of Rule 4 enables the Prime Minister to appoint Special Assistant or Special Assistants and to determine their status and functions.*

4. *The Rules of 1973, particularly Rule 4(6) are not in conflict with the provisions of the Constitution. Special Assistants are not members of the Federal Cabinet. Moreover, they are distinct from Advisors appointed by the President on the advice of the Prime Minister under Article 93(1) of the Constitution. The Prime Minister is the Chief executive of one of the most important organs of the State and has to perform multiple/complex functions. A person elected as Prime Minister is answerable to the people of Pakistan and the Majilis-e-Shoora (Parliament). The onerous role of the Prime Minister described under the Constitution cannot be performed by the latter alone. In order to enable the Prime Minister to transact business of the Executive organ of the State, the latter ought to have the freedom to appoint officials or other persons for assistance. Rule 4(6) is one of such modes whereby the Prime Minister has been empowered to appoint Special Assistants. There is no restriction*

regarding the number of Special Assistants that can be appointed by the Prime Minister.”

11. The learned counsel for the petitioner, in Writ Petition No.01 of 2020, placed reliance on decision of the Division Bench of Hon'ble Sindh High Court in case titled "*Fareed A. Ahmad Dayo Vs. Chief Minister Sindh*" (**PLD 2017 Sindh 214**) to argue that the appointment of a Special Assistant to the Prime Minister is against the mandate of the Constitution. It is observed with reverence that the instant decision is not applicable to the instant case inasmuch as the provision for appointment of Advisor of Chief Minister especially Sindh is completely different from the way the Federal Government works. Since the law governing the Federal Government and/or Provincial Governments is different, the reliance cannot be placed on the said judgment of the Hon'ble Sindh High Court. The decision of this Court regarding the *vires* of Rule 4(6) and the appointment of the Special Assistant to the Prime Minister is very specific and categoric and nothing was pointed out to indicate that the same is in violation of the spirit of the Constitution. In view of the above judgment and within the frame work of the Constitution and the law, it is reiterated that the Special Assistant to the Prime Minister can be conferred any status as the Prime Minister so desires at his discretion but the conferring of the status would not make the Special Assistant to the Prime Minister a person of that designation. Special Assistants to the Prime Minister, whose appointments are under challenge in present petition have been conferred with the status of Ministers of State but the said designation does not make the Special Assistants as Ministers of State and by virtue of the notifications they are only to have this status for the purposes of perks and privileges. The Special Assistants to the Prime Minister enjoying the status of Ministers for State are by no means Members of the Cabinet as they are not elected persons and/or Federal Ministers. The Hon'ble Supreme Court of Pakistan in case reported as "*Lahore Development Authority through D.G. and others Vs.*

Ms. Imrana Tiwana and others” (2015 SCMR 1739) laid down the parameters/principles for challenging the *vires* of statutes or delegated legislation. The august Apex Court held as follows:-

“Following are the principles which must be applied and considered by the court when striking down or declaring a legislative enactment as void or unconstitutional:

- (i) There was a presumption in favour of constitutionality and a law must not be declared unconstitutional unless the statute was placed next to the Constitution and no way could be found in reconciling the two;*
- (ii) Where more than one interpretation was possible, one of which would make the law valid and the other void, the Court must prefer the interpretation which favoured validity;*
- (iii) A statute must never be declared unconstitutional unless its invalidity was beyond reasonable doubt. A reasonable doubt must be resolved in favour of the statute being valid;*
- (iv) Court should abstain from deciding a Constitutional question, if a case could be decided on other or narrower grounds;*
- (v) Court should not decide a larger Constitutional question than was necessary for the determination of the case;*
- (vi) Court should not declare a statute unconstitutional on the ground that it violated the spirit of the Constitution unless it also violated the letter of the Constitution;*
- (vii) Court was not concerned with the wisdom or prudence of the legislation but only with its Constitutionality;*
- (viii) Court should not strike down statutes on principles of republican or democratic government unless those principles were placed beyond legislative encroachment by the Constitution; and*
- (ix) Mala fides should not be attributed to the Legislature.”*

On the touchstone of the above principles, Rule 4(6) *ibid* is not *ultra vires* to the Article 99 of the Constitution.

12. The august Apex Court also in a fairly recent pronouncement in case titled *"Muhammad Adil Chatta and another Vs. Federation of Pakistan through Secretary, Cabinet Division, Islamabad & others."* (**Constitution Petition No.63 of 2018**) examined the issue of Special Assistants to the Prime Minister

and Advisors, wherein the appointment of Syed Zulfiqar Abbas Bukhari as Special Assistant to the Prime Minister for Overseas Pakistanis and Human Resource Development was challenged on the ground that he is a dual national. The Hon'ble Supreme Court of Pakistan observed as follows: -

9. *We have heard the learned counsel for the parties and carefully examined the record. At the very outset, the learned counsel for the petitioners has candidly conceded that Respondent No.3 despite being a dual national is not disqualified from holding the post of Special Assistant to the Prime Minister and that the disqualifications mentioned in Articles 62 & 63 read with a large number of judgments of this Court are not attracted to the case of Respondent No.3. He is neither a Parliamentary nor a person in the 'Service of Pakistan'. These two categories may contain some restrictions on dual nationals to hold certain positions. Further, the recent judgment of this Court regarding dual nationality mentioned above has elaborately and comprehensively clarified the situation. We are therefore in no manner of doubt that Respondent No.3 is not disqualified on that score from being appointed or holding the post of Special Assistant to the Prime Minister. We are fully cognizant of the fact that the scheme of the Constitution envisages a Parliamentary Democracy in which the business of the Government is run by the Prime Minister and his Cabinet consisting of Federal Ministers and Ministers of State who must be elected representatives of the people of Pakistan. However, admittedly, Respondent No.3 is not a Minister, and he is not required to be a Parliamentary in order to be appointed as a Special Assistant to the Prime Minister. The post of Special Assistant to the Prime Minister is neither the creation of the Constitution nor can it be termed as a Constitutional post. At the same time, the said post is not alien to the Constitution in view of the fact that it is specifically mentioned in Article 260 of the Constitution. In the said definition, amongst other positions to which the Prime Minister has the discretion to make appointments, the post of Special Assistant is also mentioned. It has however specifically been excluded from the definition of the positions which would be deemed to be in the 'Service of Pakistan'.*

10. *Article 99(3) of the Constitution confers on the Federal Government the powers to make rules for allocation and transaction of its business. It is in exercise of these powers that the Rules of Business, 1973 have been framed in order to facilitate the Prime Minister to run the business of the Government. The subject of Overseas Pakistanis and Human Resource Development has been dealt within Entry No.2 of Schedule-II of Rules of Business, 1973. We have been informed that the said Ministry is headed by the Prime Minister. Entry No.27 of the Second Schedule elaborately spells out the matters*

which are dealt with by the said Ministry/Division. Further, Rule 4(6) of the Rules of Business, 1973 provides as follows:-

“4 Organization of Divisions.....(6) There may be a Special Assistant or Special Assistants to the Prime Minister with such status and functions as may be determined by the Prime Minister”.

It is in exercise of said powers that the Prime Minister has appointed Respondent No.3 as his Special Assistant for exercising all or any of the functions in performance of his duties as the Minister for Overseas Pakistanis and Human Resource Development. Further, it has categorically been stated by the learned counsel for Respondent No.3 that the said Respondent is neither a Federal or State Minister nor is he exercising such powers. In fact, he is acting in an advisory capacity to the Prime Minister and is exercising only such powers as have been granted to him in accordance with law and in terms of Entry No.27 of the Rules of Business, 1973 relating to the affairs of Overseas Pakistanis and Human Resource Development Division.

12. The answer to these questions have adequately been provided by Respondent No.3. It has been stated that Respondent No.3 holds the office of Special Assistant to the Prime Minister pursuant to notification No.2-8/2018-Min-I, dated 17.09.2018. In terms of Rule 4(6) of the Rules of Business, 1973 read with Sr. No.1A of Schedule-VA of the said rules, the Prime Minister of Pakistan has the power and authority to appoint a Special Assistant and determine his status. As such, there is no illegality in conferring on him the status of a Minister of State. Having crossed this hurdle, it was for the petitioners to show, either that the Respondent No.3 suffered from any disqualification, as alleged by them in terms of Articles 62 & 63 of the Constitution or that he a blot of any nature on his name of the nature mentioned in Articles 62 and 63 of the Constitution or was under a cloud that was so blatant as to require interference by this Court as it may prick the judicial conscience of this Court. The petitioners have not been able to establish that Respondent No.3 suffers from a disqualification under Articles 62 & 63 of the Constitution and in fact have candidly admitted that Respondent No.3 is not disqualified under the said Articles. This is on account of the fact that he is neither a Parliamentarian nor a Federal Minister. Further, despite being granted time and opportunity they have not been able to establish that the Respondent has any blot or cloud that may furnish basis for this Court to examine the case of the Respondent any further. It was for the petitioners to satisfy this Court that the appointment of Respondent No.3 as a Special Assistant and grant of status of a Minister of State by the Prime Minister was tarnished by favoritism and cronyism. Other than oral assertions and unsubstantiated allegations nothing has been placed on record to support this assertion. We also find merit in the argument of

learned counsel for Respondent No.3 that unless specific grounds are asserted and established justifying interference in exercise of discretion by the Prime Minister in making appointments against positions which have been left to the discretion of the Prime Minister by the Constitution, this Court should be slow in interfering in such appointments unless the exercise of discretionary powers by the Prime Minister is blatantly arbitrary, fanciful, unlawful or ex facie violative of the settled principles of exercise of discretion.

13. *It may be pertinent to mention here that we have repeatedly held that the Constitution does not envisage unstructured, uncontrolled and arbitrary discretion being conferred on any State functionary or holder of a public office. Even if discretion has been conferred, the same has to be exercised honestly, fairly and transparently. Further, it has to meet the benchmark of being structured in the interest of uniformity, evenhandedness, probity and fairness. It is only if the exercise of discretion meets the above criteria that this Court refrains from interfering and scrutinizing executive actions on the principle of trichotomy of powers. However, at the same time, this Court as guardian of the Constitution, the fundamental rights of the people and the sole interpreter of the Constitution has a constitutional obligation to ensure that the Constitution is read, interpreted and observed in its true letter and spirit. This has to be in accordance with the wishes and aspirations of the people of Pakistan as enshrined in the Constitution and as interpreted by this Court from time to time. Further, no fetter can be placed on the power of this Court to examine and scrutinize executive actions to determine their legality and adherence to the Constitution. This Court has however settled its own benchmarks and parameters to exercise its powers in a structured, uniform and consistent manner.”*

It was observed by the august Apex Court that since no criteria is provided in any law for the credentials or the qualifications of Special Assistant to the Prime Minister, hence the Federal Government should look into the matter.

13. In so far as Writ Petition No.1870 of 2020 is concerned, as noted above, the same challenges notification dated 25.04.2019.

14. In the preceding paragraphs, it has been discussed that the affairs of Federal Government is conducted by the Prime Minister and the Ministers collectively as provided in Article 92 of the Constitution of Islamic Republic of Pakistan, 1973. A person is eligible to be appointed as a Federal Minister or

Minister of State, if he is either a Member of National Assembly or Senate (subject to restriction of Members as provided in proviso to Article 92 of the Constitution) and where he is not a Member of National Assembly for six consecutive months, he ceases to be a Federal Minister (Article 91(9) of the Constitution). The Constitution provides for appointment of Advisors to the Prime Minister and under the scheme as envisaged in the Constitution, there can be maximum of five Advisors to the Prime Minister. The Advisor to the Prime Minister is not a Member of either House but can address the House; he/she cannot participate in the voting process of the either House. The constitutional history of the post of Advisor to the Prime Minister was traced by the Division Bench of Hon'ble Sindh High Court in case reported as "*Ahmad Yousaf Ali Rizvi and others Vs. Munawar Ali Butt and others.*" (**PLD 2000 Karachi 333**) and it was observed as follows:-

9. The Constitutional history on the subject may be relevant and useful for the purpose. The National Assembly of Pakistan that gave the Constitution of Islamic Republic of Pakistan in 1973, appointed a Constitution Committee by a resolution, in April, 1972, to prepare and draft a permanent Constitution. The Committee submitted its report, alongwith the draft, giving outlines of the basic structure of the Constitution. It envisaged a Parliamentary system based on elected representatives of the people and a trichotomy of powers for Legislature, Judicature and the Executive. However, the Committee used the term Government for the Executive and it was carried on to the Constitution. The report provided that the executive authority of the Province shall be exercised by the Provincial Government consisting of the Chief Minister and the Provincial Ministers. It, thus, excluded any other appointee, like Adviser, from the meanings of Provincial Government. Accordingly, the original Constitution passed in 1973, did not recognize an Adviser, both at Federal as well as Provincial level.

10. The concept was introduced only through the Constitution (Sixth Amendment) Act, 1976, whereby 'Adviser to the Prime Minister' and Adviser to a Chief Minister' were inserted in Article 260 in the definition of service of Pakistan". Yet nothing was provided in the Constitution to authorise appointment of such an Adviser.

11. In 1985, through the Revival of the Constitution of 1973 Order (P.O. 14 of 1985) extensive amendments and substitutions were made in the Constitution. The Article relating to the Federal Government and the Provincial Governments were substituted and that introduced present Article 93 providing for the appointment of five Advisers at the Federal level. No corresponding provision was, however, made for the Provinces.

12. Insertion of an express provision for appointment of Advisers at the Federal level means that such an express provision was necessary to authorise such appointment. As an essential corollary, therefore omission of such a B provision in the case of provinces would mean a prohibition and inability in . . . , respect of appointment of an Adviser. An adviser like that provided for in Article 93, cannot therefore be appointed in the Provinces.

13. It may however, be noted that the Adviser provided for in Article 93 is not the same as Adviser to Prime Minister or Adviser, to Chief Minister mentioned in Article 260. There are two different categories. When they were excluded from the definition of Service of Pakistan. Under the scheme of the Constitution the functions of the Adviser appointed under Article 93, are limited to the Houses of Parliament. They are not included in the Federal Government as it was defined by the Constitution 'Committee to be consisting of the Prime Minister and the Federal Ministers. Moreover, to give powers of Ministers to an unelected Adviser, would be against the concert of elected Government envisaged by the Constitution

14. Mention of Adviser to Chief Minister in Article 260 of the Constitution means that an Adviser to Chief Minister can be appointed but the appointment can only be made on the authority given by an appropriate law viz., an enactment or a temporary substitute under Article 128 of the Constitution. But even if an Adviser to Chief Minister is appointed in exercise of Powers conferred by an enactment he cannot be given powers and functions of a minister as he is not a member of the Cabinet and it will be contrary to the scheme of the Constitution.

15. Under Article 139(3) of the Constitution, the Governor has been empowered to make rules for the allocation and transaction of the business of the Provincial Government. These rules cannot include Power of any appointment because it is beyond the scope of the purpose that is merely allocation and transaction of the business of the Provincial Government." Insertion of rule 6 was, obviously, on the basis of ill-advice and misconceived recommendation. Rule 6 of the Government of Sindh Rules of Business, 1986 being beyond the powers of the Governor conferred by Article 139(3) of the Constitution is ultra vires, void ab initio and of no legal effect. Accordingly, the appointment of the respondent No.1 was invalid and without lawful authority. Consequently, the impugned orders passed by this respondent are

without lawful authority and of do legal effect. Petition is, accordingly, allowed to the extent and the matter is remanded to the respondent No.2 for proceedings and decision according to law.

Likewise, in a recent case before this Court where appointment of one of the Advisors of the Prime Minister was challenged, this Court examined the law. In case titled "*Syed Pervaiz Zahoor V/s Prime Minister of Pakistan, etc.*" (**Writ Petition No.2304 of 2020**), the Hon'ble Chief Justice of this Court observed as follows:-

“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."*

15. Rule 17 of the Rules of Business, 1973 provides for conducting business of the Cabinet and Sub Rule 2 *ibid* regarding the formation of the sub-committees. In this behalf, under Sub Rule 2 of Rule 17, Prime Minister may appoint any Member of the Cabinet as Member of Committee of the Cabinet. Learned Deputy Attorney General vehemently argued that any Member means any person can be appointed as a Member of the Committee, however, we are

unable to agree with this argument of the learned Deputy Attorney General as it seems to be in violation of the Constitution and the law inasmuch as if it was to be inferred or held that though a non-elected person cannot be a Member of the Cabinet yet he can be a Member of the Committee of the Cabinet and even can chair the same, it would be in negation of the Constitution of Islamic Republic of Pakistan, 1973. Undoubtedly, on special requests, persons can be called in by the Committee but no person can be the Chairman or a Member of the Committee of the Cabinet, who is not a Member of the Cabinet. The conferment of status of Federal Minister to an Advisor is again only for the purpose of perks and privileges and the conferment does not make a person/advisor as a Federal Minister.

16. The upshot of the above discussion of the law is that Rule 4(6) of the Rules of Business, 1973, which provides for appointment of Special Assistant to the Prime Minister is not in violation of any provision of the Constitution, however, the Special Assistant to the Prime Minister is not a Minister of State or a Federal Minister but only enjoys the status for the purposes of perks and privileges. He cannot address the parliament nor has any executive authority vested in him. He also is not a Member of the Cabinet and cannot take part in the proceedings of the same.

17. The Advisor to the Prime Minister is a constitutional post, there can be maximum of five Advisors to the Prime Minister and again the conferring of status of Federal Minister on the Advisor to the Prime Minister is only for the purposes of perks and privileges and does not make the Advisor a Federal Minister as such. An Advisor to the Prime Minister is not Member of the Cabinet and cannot participate in the proceedings, hence he can also not be a Member or even chair the Committee of the Cabinet. He can address the parliament but cannot participate in the voting process.

18. For what has been stated above, Writ Petition No.01 of 2020 is without merit and is accordingly **dismissed**. However, Writ Petition No.1870 of 2020 is **allowed** and notification dated 25.04.2019 appointing respondents No.4 to 6 as Chairman and Members of the Committee of Cabinet on privatization is **set-aside**.

(GHULAM AZAM QAMBRANI)
JUDGE

(AAMER FAROOQ)
JUDGE

Announced in Open Court this day of December, 2020.

JUDGE

JUDGE

M. Zaheer Janjua

Approved for Reporting.

Uploaded By: Engr. Umer Rasheed Dar