

Form No: HCJD/C

JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Case No: Intra Court Appeal No.156 of 2015

Federation of Pakistan and another
Vs.
Saeed Ahmed Khan etc.

Appellants by: Mr. Afnan Karim Kundi, Additional
Attorney-General & Jehangir Khan
Jadoon, Standing Counsel.
Respondents by: Mr. Babar Sattar, Advocate.
Mr. M. Nazir Malik, Director (Law)
M/o P. & NR.

Date of Decision: 13.04.2015.

AAMER FAROOQ, J.- The present appeal is directed against the judgment dated 10.03.2015 passed by the learned Single Judge in Chamber in Writ Petition No.485 of 2015 whereby the Constitutional petition filed by respondent No.1 was accepted and notification dated 11.02.2015 issued by the appellants sending him on forced leave was declared to be without lawful authority.

2. Respondent No.1 is Chairman Oil & Gas Regulatory Authority (the Authority) and was appointed on the said post vide notification dated 13.04.2012 by the Federal Government under clause-a of subsection (8) of section 3 of Oil & Gas Regulatory Authority Ordinance, 2002 (OGRA Ordinance, 2002). Following the petroleum shortage crises in January 2015 the Prime Minister constituted an Inquiry Committee to inquire into the matter and hold the persons responsible for the referred crises. The Committee held respondent No.1 responsible and therefore, on the basis of same respondent No.1 was sent on forced leave and an acting Chairman was appointed vide notification dated 11.02.2015 and inquiry was referred to Federal Public Service Commission for investigating the alleged misconduct on part of respondent No.1 by failing to perform his duties. Respondent No.1 challenged the abovementioned notification by way of Constitutional petition (Writ Petition No.485/2015) which was accepted by the learned Single Judge in Chamber vide the impugned judgment.

3. Learned Additional Attorney-General *inter alia* submitted that the appellants have the power to send respondent No.1 on forced leave under section 16 of West Pakistan, General Clauses Act, 1897. Learned Attorney-General conceded that under OGRA Ordinance, 2002 there is no specific provision which allows the Federal Government to suspend or send Chairman or any other Member on forced leave, however, submitted that by virtue of section 16 *ibid* there is no need for a specific enactment in this regard. Learned Additional Attorney-General placed reliance on two cases from Indian jurisdiction titled *Bhup Narayan Jha v. State of Bihar and Others* (1985 ILLJ 49 Patna) and *Prof. Ram Avtar Yadav v. Union of India & Another* (W.P.(C) No.2075/2010). It was further contended that the Federal Government is also authorized to appoint any person on acting or current charge basis. In response to a query by this Court regarding the composition of the Authority at the moment and the Members working in this behalf, learned Additional Attorney-General submitted that the seats that are vacant have been filled by way of acting /current charge basis given to the Federal Secretaries. The learned Additional Attorney-General emphasized that there is imperative need to send respondent No.1 on forced leave inasmuch as it is likely that he shall tamper with the inquiry proceedings, if he is allowed to attend the office, therefore, for an impartial and fair inquiry respondent No.1 should remain on forced leave and during such time the seat is to be filled by a person holding an acting/current charge.

4. Learned counsel for respondent No.1 *inter alia* submitted that in the scheme of law i.e. OGRA Ordinance, 2002 there is no provision which allows Federal Government to send a Member or Chairman on forced leave. It was further contended that in the referred law there is no provision, as well which provides for appointing a person on the current/acting charge basis. Learned counsel emphasized that the Authority is an Autonomous Body and the very concept of creation of such a body was that it should perform its functioning as provided under the law in an independent fashion without interference by the Federal Government.

5. The Authority is a statutory body created by and under OGRA Ordinance, 2002. It has been established under section 3 of OGRA Ordinance, 2002 which provides for its constitution as well as manner of appointing the persons who shall comprise the

Authority. In this behalf for the sake of brevity section 3 is reproduced below and is as follows:

3. Establishment of Authority: (1) *The Federal Government hereby establishes a regulatory authority, which shall be known as the Oil and Gas Regulatory Authority.*

(2) *Subject to the provisions of this Ordinance, the Authority shall be independent in the performance of its functions. The Authority shall be a body corporate, having perpetual succession and a common seal, with power, subject to the provisions of this Ordinance, to enter into contracts, acquire and hold property, both movable and immovable, and to sue and be sued in its name.*

(3) *The Authority shall consist of a Chairman and three additional Members out of whom one shall be designated as Member Gas, one Member as Member Oil and one Member as Member Finance.*

(4) *The Chairman shall be an eminent professional of known integrity and competence with a minimum of twenty years of related experience in law, business, engineering, finance, accounting, economics or petroleum technology.*

(5) *The Member Oil shall be a person who holds an appropriate degree in the relevant field and is an experienced, eminent professional of known integrity and competence with a minimum of twenty years of related experience in the field of oil, including the transportation thereof.*

(6) *The Member Gas shall be a person who holds an appropriate degree in the relevant field and is an experienced, eminent professional of known integrity and competence with a minimum of twenty years of related experience in the field of natural gas, including the transmission and distribution thereof.*

(7) *The Member Finance shall be a person who holds an appropriate degree in the relevant field and is an experienced, eminent professional of known integrity and competence with a minimum of twenty years of related experience in the field of corporate finance or accounting.*

(8) *Subject to sub-section (9), -*

(a) *the Chairman shall be appointed by the Federal Government for an initial term of four years and shall be eligible for reappointment for a similar term;*

(b) *the Member Oil and Member Gas shall be appointed by the Federal Government for initial terms*

of three years and shall be eligible for reappointment for a term of four years;

(c) the Member Finance shall be appointed by the Federal Government for an initial term of two years and shall be eligible for reappointment for a term of four years.

9) The Chairman and the other Members shall retire on attaining the age of sixty-five years.

(10) In case of a vacancy occurring due to the death, resignation, retirement or removal of any Member, the Federal Government shall appoint another qualified person within a period not exceeding three months from the date the vacancy occurred.

(11) Any Member may resign from his office by writing under his hand addressed to the Federal Government. The Federal Government may remove a Member from his office if, on an inquiry by the Federal Public Service Commission, he is found unable, to perform the functions of his office due to mental or physical disability, or to have committed misconduct.

(12) Any Member may serve a maximum of two terms.

(13) The Federal Government shall designate one of the Members as Vice-Chairman, who shall act as Chairman at any time during which the Chairman for any reason is incapable of exercising the Chairman's powers or performing the Chairman's duties and when so acting, the Vice-Chairman shall exercise the power and perform the duties imposed on the Chairman by this Ordinance."

6. The very purpose for creation of the authority was to promote competition and bring in investment by regulation of petroleum products and protecting the public and private rights and interests. The plain reading of the preamble to OGRA Ordinance, 2002 clarifies the intent of the legislature regarding the purpose for which the authority was created. The preamble of OGRA Ordinance, 2002 is as follows:

"Whereas it is expedient to foster competition, increase private investment and ownership in the midstream and downstream petroleum industry, protect public interest while respecting individual rights and provide effective and efficient regulations and for matters connected therewith or incidental thereto;

AND WHEREAS the President is satisfied that circumstances exist which render it necessary to take immediate action ;

Now, *THEREFORE*, in pursuance of the Proclamation of Emergency of the fourteenth day of October, 1999, and the Provisional Constitution Order No. 1 of 1999, read with the Provisional Constitution (Amendment) Order No. 9 of 1999, and in exercise of all powers enabling him in that behalf, the President of the Islamic Republic of Pakistan is pleased to make and promulgate the following Ordinance."

7. The Hon'ble Supreme Court of Pakistan in case titled *Muhammad Yasin v. Federation of Pakistan etc.* (PLD 2012 SC 132) elaborately and lucidly emphasized the purpose for which the authority was created and intention of legislature in this regard. The relevant passages from the abovementioned judgment are as follows:

"15. Here we may note that it lies within the domain of the Executive to determine policy and for the Legislature to enact laws to implement such policy as long as such policy or legislation is not violative of the Constitution and the rights guaranteed thereunder. In line with the recognized constitutional principle of trichotomy of powers, therefore, it is not for this Court to go into the merits or demerits of such Government policy. However, once the legislature entrusts regulators such as OGRA with State power, making them responsible for the governance of critical sectors of the national economy, then it should be clear that regulators incur important constitutional and legal obligations to the people of Pakistan. The Ordinance makes this connection obvious when it declares that it is meant to "protect the public interest", to "[respect] individual rights" and to "provide effective and efficient regulation". Therefore, on the basis of the Ordinance, the public can demand that regulators be diligent while protecting the public interest and that their functionaries meet the standards and eligibility criteria prescribed for them by law. Also, once the Legislature has laid down qualifications which senior regulatory functionaries must have, the public is entitled to invoke the jurisdiction of Courts to ensure adherence to the law. This is the larger historical context in which the Legislature has enacted a series of laws to govern the most important Federal regulatory agencies impacting the life of the people of Pakistan. This context helps the Court in interpreting relevant statutes such as the Ordinance.

23. The provisions that the Legislature has made for ensuring regulatory autonomy are a reflection of accumulated economic wisdom based on empirical study. Here we can cite just one pertinent example from contemporary literature on regulatory economics pointing to the rationale and text of the Ordinance. In her article "Effectiveness of

*Regulatory Structure in the Power Sector of Pakistan", Afia Malik, a research economist at the Pakistan Institute of Development Economics, Islamabad, identifies "regulatory autonomy" as the foremost indicator of good regulatory governance. "Regulatory autonomy" refers to the regulator's ability to resist the pressure of 'regulatory capture' and pressures from economic and political interest groups. Amongst the key dangers to watch out for, according to the author, are "[u]ndue interference and influence of the government" which the author says hamper "independent functioning, which in turn affects the consumers as well as producers." Also, A.R. Kamal, one of Pakistan's renowned development economists has similarly highlighted the importance of effective checks, cautioning against the danger of compromising the autonomy of regulatory institutions. **He warns:** "[s]ince there is a cycle where the regulatory agencies over time degenerate into protecting the organizations which they are supposed to regulate, checks and balances must be put in place so that persons in responsible positions in these bodies are not corrupted." **He further emphasises that** "regulatory authorities must be given autonomy so that their decisions gain credibility; and checks and balances should be so formulated that they cannot indulge in corrupt practices." The legislature has taken stock of these concerns and made a number of provisions noted above for such "checks and balances". One such provision viz. the appointment process, is the key subject of discussion in this opinion."*

8. Keeping in view the focus and emphasis on the autonomy of the Authority the legislature provided for appointment of the Chairman of the Authority under Clause-a to subsection (8) of section 3 of OGRA Ordinance, 2002. In so far as the removal of the Chairman or any Member is concerned, the relevant provision is subsection (11) to section 3 *ibid*. Under the referred subsection Chairman may resign from his service or can be terminated by Federal Government if on the inquiry conducted by the Federal Public Service Commission, he is found to be guilty of misconduct. There is no provision in the referred law regarding suspension or sending the Chairman on forced leave. Learned Additional Attorney-General in support of his contention that the Federal Government is empowered to send the Chairman on forced leave has placed reliance on section 16 of the General Clauses Act, 1897. The relevant section is as under:

“Where, by any (Central Act) or Regulation, a power to make any appointment is conferred, then, unless a different intention appears, the authority having (for the time being) power to make the appointment shall also have power to suspend or dismiss any person appointed (whether by itself or any other authority) in exercise of that power.”

9. The plain reading of the section shows that it provides that where under any statute or law power of appointment is given to an authority the referred Authority also has the power to suspend or terminate the employee. In order to understand the scope and purport of the said section the two judgments relied upon by the learned Additional Attorney-General are instructive. In the case reported as 1985 ILLT 49 Patna *supra*, the Patna High Court observed as follows:

“It seems to be undisputed that the concept of suspension during departmental proceeding has only the larger objective of ensuring a free and fair conduct of the enquiry that is either pending or is to follow. In this context, the fact that the suspension order is interlocutory interim in nature can be perhaps be hardly denied. The service rules invariably, if not inflexibly, provide for a subsistence allowance during the period and the delinquent official retains his lien on the post during the continuation of the departmental proceeding. This mellows the rigour of the order of suspension and in the event of the enquiry resulting in favour of the official, he would be invariably entitled to the revoking of the order of suspension and the reinstatement to the post with all the benefits of service and salary, (sometimes even without having worked during the said period), as may be provided in the rules. There is thus finally or irrevocability attaching to an order of suspension, which, as already noticed, retains its character or being interim or interlocutory, in nature.

10. *The object and purposes of placing a public servant under suspension during or in contemplation of a disciplinary proceeding may be manifold and do not call for any exhaustive enumeration. However, its salient features are well known and may call for a passing notice. Where serious allegations of misconduct are imputed against an official, the service interest renders it undesirable to allow him to continue in the post where he was functioning. In case where the authority deems a further and deeper investigation into the same as necessary, it becomes somewhat imperative to remove the official concerned from the spheres of his activities, as it may be necessary to find out facts from people working under him or to take into possession documents and materials which would be in his custody. Usually, if not invariably, it would become embarrassing and inopportune both for the delinquent official concerned as well as the inquiring authority to do so, while such official was present at the spot and holding his official position as such. It was*

sought to be contended that such a situation may be avoided by merely transferring the official. However, it would be for the authority concerned to decide whether such an official, against whom, *prima facie* serious imputations have been leveled, should at all be allowed to function anywhere else. If it so decides, then suspension during the pendency or in contemplation of an inquiry might well become inevitable. It seems to be a fallacy to assume that suspension is necessarily and wholly related to the gravity of the charge. Indeed, it may have to be ordered to facilitate free investigation and collection of evidence. Just as criminal procedure is intended to subserve the basic cause of a free and faire trial, similarly, suspension, as an interim measure in aid of disciplinary proceeding, is directed to the larger purpose of a free and fair inquiry. It would thus seem that the power of suspension is not only necessary, but indeed a salutary power, if reasonably exercised either during the pendency or in contemplation of a disciplinary proceeding.

11. It appears to me that the primary underlying argument raised on behalf of the writ petitioner is an argument of fear. Learned counsel's contention returned repeatedly to the point that in one case the authority concerned may choose to suspend and in another it may not. The basic apprehension here is that of abuse or misuse of the provision. It is well settled that merely because a provision conferring a power can be misused or abused is no reason for either voiding it or holding it as unconstitutional. Indeed, it seems impossible to conceive of any power which cannot be put to misuse, and this attribute seems inherent to the very concept of power. Merely because a discretion is vested by the rule in the authority for either suspending or not, would, in my view, render it reasonable and far from being unconstitutional on that score. It any inflexible rule where to be laid down that a delinquent official in certain circumstances must be suspended, it might well work hardship in a particular case. Therefore, in a somewhat sensitive filed the vesting of discretion in that authority is inevitable and the same cannot be confined to a procrustean bed. As has already been noticed, suspension is not inflexibly related to the gravity of the departmental misconduct, but might be necessitated by a host of other factors, which defy enumeration. Therefore, the vesting of a reasonable discretion in the authority is inherent to the situation and no reason appears to either necessarily distrust the same or to presume that the power will necessarily be misused. The presumption in the eye of law is that high officials vested with powers would exercise the same fairly and reasonably and not indeed to the contrary."

Similarly, the Division Bench of Delhi High Court in the case of *Prof. Ram Avtar Yadav v. Union of India* and another observed as follows:

"In view of section 16 of the Act of 1897 even if there was no statutory recognition to such a power, the same is inherent as an employer would have an inherent right to suspend or dismiss any employee or a

statutory authority. As also noticed by the Tribunal in S.R. Twarei Vs District Board, Agra & Anr."

10. Learned counsel for respondent No.1 in opposing the contentions of Learned Additional Attorney-General has placed reliance on the decision of the Hon'ble Supreme Court of Pakistan in Constitutional Petition No.21/2007 titled *Chief Justice of Pakistan, Mr. Justice Iftikhar Muhammad Chaudhry v. The President of Pakistan through the Secretary and others*, wherein the Hon'ble Supreme Court of Pakistan held that even a peon could not be suspended or sent on forced leave in exercising of any such assumed inheritance powers by any authority. The Hon'ble Supreme Court of Pakistan distinguished the judgment cited in the referred case on behalf of the Federal Government in support that the Chief Justice could be suspended and observed that all the cases relied upon by the Federation pertain to civil servants and therefore, are not relevant.

11. In the present case while embarking upon interpretation of law with respect to the power of the Federal Government for sending respondent No.1 on forced leave, the abovementioned observations by the Hon'ble Supreme Court regarding the autonomy of the Authority are to be kept in view. Admittedly, there is no specific power with the Federation of Pakistan for sending respondent No.1 i.e. Chairman of the Authority on forced leave. Similarly section 16 is categorical and unequivocal that where there is no specific power given to any authority for removal or suspension section 16 is attracted and the appointing authority shall have inherent power to suspend or terminate the employee. The legislature was mindful of the purpose of the Authority and keeping in view the same gave the power to Federal Government to terminate the Chairman only if there is a recommendation to the effect by Federal Public Service Commission which is to hold an inquiry for the referred purpose.

12. In view of the situation, we are of the opinion that in case the Federal Government wished to send the Chairman on forced leave or suspend the incumbent, the same procedure is to be adopted i.e. an application to the effect has to be moved to the Federal Public Service Commission and only on its recommendations the Federal Government may exercise the power. Since the order of suspension or forced leave is interim in nature, therefore, there is no requirement for an inquiry to be held in this behalf, however, the Commission while recommending the suspension or declining the same has to

give reasons for its opinion as provided in section 24-A of the General Clauses Act, 1897.

13. In so far as the appointment of any person on acting charge basis is concerned, there is no provision either in section 3 *ibid* or OGRA Ordinance, 2002 to the effect. Learned Additional Attorney-General submitted that this power can be inferred from subsection (10) of section 3 which provides that in case of vacancies occurring due to death, resignation, retirement or removal of any Member, the Federal Government shall appoint another person within a time not exceeding three months from the date of vacancies. Learned Additional Attorney-General emphasized that since the appointment is to be made within three months, therefore, by implication the Federal Government has the power to appoint any person to fill any vacancies for the said period of three months and that can be done on acting charge basis as is the practice with the other departments. We are unable to agree with the referred argument by learned Additional Attorney-General inasmuch as the Authority is an independent body exercising the powers and performing functions independent of any control on part of the Federal Government. In case such power albeit by implication is given to the Federal Government then the very purpose for creation of such like bodies whose main function is to act as regulator shall be defeated. The legislature if, it so desired that casual vacancies could be filled by appointment made on acting charge basis it could have specially provided such power to the Federal Government. As in the case of suspension there is no ancillary provision of law which provides for exercising the power to appoint any Member/Chairman on acting charge basis, by implication. Even in the case of Chairman under subsection (13) to section 3 *ibid* the Federal Government is to appoint from the Members a Vice Chairman who is to exercise the powers of Chairman in case the latter is unavailable or is incapable of exercising the powers of Chairman. The fact that no Vice Chairman has been appointed by the Federal Government the scheme of law does not envisage such a situation and therefore, does not provide for the same. It is reiterated that since the Authority is an independent body and is a regulator, therefore, the sanctity of its independence has to be kept in view, therefore, in law there is no provision for appointing any person on acting or current charge basis except as provided in subsection (13) of section 3 *ibid*.

14. In view of foregoing reasons, we find no merit in the appeal and the same is dismissed.

(ATHAR MINALLAH)
JUDGE

(AAMER FAROOQ)
JUDGE

Approved for reporting.