

HCJD/C-121
JUDGMENT SHEET

ISLAMABAD HIGH COURT
ISLAMABAD

W.P. No.1660/2015

NASEEM IQBAL
VERSUS
FEDERATION OF PAKISTAN, ETC.

Petitioner by : Mrs. Asma Jahangir, Advocates.
Respondents by : Dr. Tariq Hassan & Syed Buland Sohail, Advocates.
Mr Afnan Karim Kundi, Additional Attorney General.
M/s Shahzad Ali Rana & Muzaffar Ali Mirza, Advocates.
Mr. Ibrar Saeed, Law Officer SECP.
Date of Hearing : **30-05-2016.**

ATHAR MINALLAH J: Through this order, I shall decide the instant petition along with W.P.No.120 of 2015 as both raise the same questions of law and fact.

2. The petitioner has invoked the jurisdiction of this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (hereinafter referred to as the "***Constitution***") challenging the appointment of the respondent No.2, vide notifications dated 17-12-2014 and 19-12-2014, as a Commissioner and then Chairman respectively of the *Securities and Exchange Commission of Pakistan* (hereinafter referred to as the "***Commission***").

3. The relevant facts for the adjudication of the instant petitions are that the respondent No.2 was appointed as a Commissioner of the Commission vide notification dated 17-12-2014, and later as the Chairman vide notification dated 19-12-2014. The respondent No.2 was earlier appointed as a Commissioner

on 01-01-1999 for a period of two years and was reappointed for a second term w.e.f. 01-01-2001 to 31-12-2003. The respondent No.2 continued to serve the Commission as a Commissioner/Advisor till 31-05-2004.

4. Mrs. Asma Jahangir, Sr ASC, appeared on behalf of the petitioner and has contended that; the notifications dated 17-12-2014 and 19-12-2014 are in violation of the provisions of the Securities and Exchange Commission of Pakistan Act 1997 (hereinafter referred to as the "*Act of 1997*"); Section 5 read with section 7 of the Act of 1997 unambiguously provides that a Commissioner who has served for two terms cannot be appointed for a third term; the language of subsection 2 of Section 7 of the Act of 1997 is unambiguous in this regard; the expressions 'cumulative period of five years in the case of the Term A Commissioners' or 'six years in case of Term B Commissioners' reflects the legislative intent, and obviously bars the appointment of a Commissioner for a third term; Section 6 of the Act of 1997 bars the appointment of a Commissioner as a Chairman for more than two consecutive terms; Section 7 (2) expressly mentions that on the completion of two consecutive terms, Term A Commissioners shall cease to hold office; the third term is in violation of Section 7(2) of the Act of 1997; the appointment of respondent No.2 as a Commissioner for a third term is in violation of Section 7 read with section 5; reliance has been placed on the judgement of the august Supreme Court rendered in the "Bank of Punjab and another vs Haris Steel Industries (Pvt) Ltd and others"; "*PLD 2010 SC 1109*"; paragraph 56 of the said judgment of the august Supreme Court is attracted in the instant case; the respondent No.2 maneuvered his appointment by using his connections and, therefore, cannot be treated as a person of integrity; reliance has been placed on the observations recorded by the Secretary Finance, dated 18-03-2004, vide summary, a copy whereof has been attached with the petition at page 15 as Annexure-A.

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5. Dr Tariq Hassan, ASC, appearing on behalf of the respondent No.2, on the other hand, has argued that; the petition is not maintainable under Article 199 of the Constitution; the respondent No.2 had a meritorious career at the Commission and his previous appointment as a Commissioner was most beneficial for the development sector in Pakistan; the achievements of respondent No.2 have been acknowledged both within and outside Pakistan; it is manifestly clear from the professional profile of the respondent No.2 that he not only meets the requirements as prescribed under Section 5 of the Act of 1997, but was eligible to be appointed as a Commissioner despite having completed two terms almost a decade ago; there is no bar on the appointment for a third term; there is a distinction between 'reappointment' and 'appointment' in the context of section 7 of the Act of 1997; reappointment is an expression used in the context of extending term by another three years; reappointment does not require the initiation of a process which is mandatory in the case of an appointment; appointment in the context of section 7 means being appointed pursuant to a transparent competitive process for the selection of a suitable person; the continuation of a Commissioner for a second term through reappointment is made automatically, without being subject to the process of selection from amongst other eligible candidates; judgment of the august Supreme Court rendered in the case of "Bank of Punjab and another vs Haris Steel Industries (Pvt) Ltd and others, supra, is distinguishable; section 8 of the National Accountability Bureau Ordinance, 1999 is distinct from section 5 and 7 of the Act of 1997; the language used by the legislature in section 8 of the Ordinance of 1999 expressly bars the appointment of a Prosecutor General for a second term; a Commissioner already appointed can be reappointed for a second term consecutively but not for a third term; however, there is no bar or disqualification on being appointed for a third term, provided that the selection is made through a transparent and competitive process; reference was made to subsection 3 of section 12 in support of the

contention that when the legislature intends to bar reappointment or appointment then it expressly mentions the same.

6. Mr Afnan Karim Kundi, the learned Additional Attorney General, adopted the arguments advanced by the learned counsel for the respondent No.2 and in addition argued that; section 18 of the Act of 1997 provides for the disqualification of a Commissioner, and it does not include the ground of being disqualified from being appointed for a third term; the respondent No.2 was appointed as a Commissioner vide notification dated 17-12-2014 through a transparent process; the learned counsel for the petitioner has not challenged the appointment on the basis of the process being non transparent; the learned counsel for the petitioner has misinterpreted and misconstrued the provisions of the Act of 1997.

7. The learned counsels have been heard and the record perused with their able assistance.

8. The sole question raised by the learned counsel for the petitioner is that after holding the post for two terms a Commissioner cannot be appointed for a third term under the Act of 1997. It is, therefore, on the basis of this argument that the appointment of respondent no.2 has been challenged. Admittedly, the respondent no. 2 was appointed as a Commissioner on 01-01-1999 for the first time and he had completed the first term of two years, since he was selected as one of the Term A Commissioners. After completion of the first term of two years the respondent no.2 was reappointed w.e.f. 01-01-2001 for a second term of three years, which expired on 31-12-2003. It is also an admitted position that the

appointment of the respondent no.2 vide notification dated 17-12-2014 was in pursuance of a transparent competitive process and that he was selected along with two other Commissioners from amongst the eligible candidates who had applied in response to advertisements published in various daily newspapers. The appointment was therefore made despite him having served as a Commissioner for two terms as a Term A Commissioner. In order to answer the question as to whether a Commissioner can be appointed despite having completed two terms we need to examine the scheme and the relevant provisions of the Act of 1997. There is no cavil to the proposition that if the Act of 1997 bars an appointment of a Commissioner after having held the post for two terms then a subsequent appointment would be in violation of the statutory provisions and thus a nullity in law. Moreover, if that is the case then the later appointment as a Chairman would also be void, since the said appointment is made from amongst the Commissioners.

9. The Commission has been established under section 3 of the Act of 1997. The preamble of the Act of 1997 declares the object of the promulgation thereof as providing for the establishment of the Commission for the beneficial regulation of the capital markets, superintendence and control of corporate entities and for matters connected therewith and incidental thereto. The Chairman is defined in clause (d) of section 2 as meaning the Chairman of the Commission while the Commissioner is defined in clause (h) as meaning a Commissioner of the Commission and includes the Chairman thereof. Section 5 provides that the Commission shall consist of such number of Commissioners, including the Chairman, appointed by the Federal Government. It is further provided that the number of Commissioners is fixed by the Federal Government but such number cannot be less than five or more than seven. Sub section 1 of section 5 also specifies the qualifications for a person to be appointed as Commissioner i.e. he

or she shall be a person who is known for integrity, expertise, experience and eminence in any relevant field, including the securities market, law, accountancy, economics, finance, insurance and industry. Section 6 empowers the Federal Government to appoint one of the Commissioners to be the Chairman of the Commission. The legislature, in its wisdom, has expressly provided that no Commissioner can be appointed as a Chairman for more than two consecutive terms. As a consequence, a Commissioner who has been appointed as a Chairman and has held the post for two consecutive terms becomes ineligible to be appointed as such thereafter. As would be discussed later, this express restriction is crucial for the purposes of the question raised through the instant petition. It is implicit in the language used by the legislature in section 6 that though a person could be appointed as a Commissioner, despite having held the position for two consecutive terms, but the appointment as a Chairman would be barred. This would become obvious when section 6 is read with section 7. Sub section 1 of section 7 makes a distinction between two categories of Commissioners i.e. Term A Commissioners and Term B Commissioners. The distinction is in respect of the selection made from amongst the Commissioners for the purposes of the tenure of the initial term after appointment. The Term A Commissioners selected in accordance with the procedure provided in section 7(1) were to hold office for a period of two years while Term B Commissioners for three years. Sub section 1 of section 7 prescribed a mechanism for ensuring the continuity and rotation of the Commissioners pursuant to appointments made after the promulgation of the Act of 1997. However, it is to be noted that the legislature has expressly used the expression 'reappointment' in the context of a further term of three years after the first term has expired. It is, therefore, obvious that section 7(1) contemplates Term A Commissioners to hold office for a term of two years from the date of the initial appointment. The legislature has used such language so as to clearly distinguish each term from the other. It has been expressly provided that after holding the office for the initial period of two or three years, as the case may be,

the Commissioner shall retire on expiration of the said term. However, the Commissioner can be 'reappointed' for a further term of three years. The phrase 'further term of three years' in the context of 'reappointment' after expiration of the first term most obviously refers to continuation of holding the office for a consecutive period of two terms. The Commissioner, therefore, can be reappointed for a second term. The significance of reappointment would become obvious when sub sections 1 and 2 of section 7 are read conjunctively.

10. Subsection 2 of section 7 provides that at the end of each term, i.e. initial or further or at the end of the cumulative period of five years in the case of the Term A Commissioners, or six years in the case of the Term B Commissioners, the relevant number of Commissioners shall cease to hold office, and any vacancy thus arising shall in each case be filled by the appointment of the requisite number of qualified persons as Commissioners. The reference is to three distinct terms, firstly, the initial term which, as already noted, may be two or three years, depending on the category of the Commissioner, secondly, the further term of three years after reappointment and lastly, at the end of the respective cumulative periods of five or six years as the case may be. This distinction has been made to emphasise the point that on the expiry of each term, or at the end of the respective cumulative periods, the Commissioner would cease to hold office thus giving rise to a vacancy. Before discussing the second limb of section 7(2) i.e. how the vacancy is to be filled it would be beneficial to read the first limb with sub section 1 of section 7. A plain reading would show that a Commissioner has an initial fixed term of two or three years, as the case may be. After expiry of the first term a Commissioner retires but may be 'reappointed' for a further term of three years. Consequent upon expiry of the two terms i.e. a cumulative period of five years in the case of a Term A Commissioner and six years for a Term B Commissioner the same person would cease to hold office and cannot be

reappointed. It has been expressly provided that the vacancy arising shall be filled by the appointment of qualified persons. The legislature, in its wisdom, has clearly drawn a distinction between 'reappointment' and 'appointment'. The expression 'reappointment' has been specifically used in the context of filling the vacancy arising between the initial and further term. After the completion of two terms 'reappointment' is barred and it is in this context that reference has been made to the respective cumulative periods of five or six years, as the case may be. If, therefore, a Commissioner is either not reappointed upon expiry of the initial term, or the cumulative period pursuant to reappointment for a second term has ended, then in both the eventualities the vacancy is to be filled by the appointment of a qualified person.

11. Before the distinction between 'reappointment' and 'appointment' is further elaborated in order to discover the legislative intent, it would be relevant to refer to the judgment of the august Supreme Court rendered in the case of "Muhammad Ashraf Tiwana and others vs Pakistan and others" 2013 SCMR 1159. The facts and circumstances of the case relating to the said judgment of the august Supreme Court were that the selection and appointment of the Chairman of the Commission had been challenged under Article 184(3) of the Constitution. The august Supreme Court highlighted the importance of the Commission as a regulatory authority and laid down the principles and law regarding appointment of the Commissioners and the Chairman under the Act of 1997. The august Supreme Court observed and held as follows:-

"The Federal Government, however, has not absolute and unbridled powers in this behalf. It is constrained by the aforesaid requirements of the Act. We have come a long way from the days of the whimsicality of kings and Caesars, such as Caligula who could

conceive of appointing his horse Incitatus as Consul of Rome. The element of subjectivity and discretion of the Government has been severely limited by the legal requirement that an appointee must be a person having integrity, expertise, eminence etc. This requirement imposes a duty on the Federal Government to put in place a process which ensures that the requirements of the law are met. As will be seen below, no attempt appears to have been made by the Federal Government to ensure compliance of section 5 and 6 of the Act.”

It was further held as follows:-

“It is obvious that if the requirements of section 5(1) are to be adhered to, there has to be a process which ensures that the widest possible pool of qualified candidates is available to the Federal Government. From this pool, through a transparent selection process, appointments can be made. In our judgment in the case of Muhammad Yasin supra, we had set out a three pronged test for appointments to public office: “(a) whether an objective selection procedure was prescribed; (b) if such a selection procedure was made, did it have a reasonable nexus with the object of the whole exercise, i.e. selection of the sort of candidate envisaged in [the law]; (c) if such a reasonable selection procedure was indeed prescribed, was it adopted and followed with rigour, objectivity, transparency and due diligence to ensure obedience to the law.” A comparison of the provisions of the OGRA statute and the Act can

prove useful. The relevant provision of the OGRA ordinance, 2002 is set out in section 3(4). It stipulates “the Chairman shall be and eminent professional of known integrity and competence with a minimum of twenty years of related experience in law, business etc.... .” These stipulations are very similar to those of the Act. It should be clear from this juxtaposition that the most qualified appointee can only be identified if a process similar to the one set out in the case of Muhammad Yasin supra in followed.”

“The office of the Chairman, it seems, has had a considerable say in the matter despite the express provisions of section 5 of the Act which requires the Federal Government to make a selection based on the criteria set out therein. It should be clear that these practices are highly arbitrary, subjective and improper. Indeed, the standards of diligence and objectivity observed here fall well short of the minimum standards required by section 5, and elaborately identified in precedents of this Court, including Muhammad Yasin’s case.”

“Furthermore, in view of the requirements of section 5, there is a need to devise a proper mechanism for targeting and attracting a pool of qualified potential appointees. Randomly entertaining CVs, with or without the backing of political patrons or seeking nominations from arbitrarily selected consultees do not

meet this requirement. The requirement can be achieved through a number of different means, be it by open advertisement, or through the auspices of talent scouts who have the needed expertise and who ensure confidentiality to applicants or through any other sufficiently transparent and inclusive process.”

12. The above principles and law have been enunciated in the context of making an 'appointment' of the Commissioners under section 5 of the Act of 1997. The above principles and law are attracted when an appointment is to be made and not when the Federal Government has to take a decision as to whether or not to 'reappoint' a Commissioner after the first term has expired. The expression 'reappointed' would become redundant and lose its significance if it was to be interpreted at par with an 'appointment' and thus made subject to a fresh process elucidated in the judgment of Mohammad Ashraf Tiwana supra. Appointment refers to an act of appointment while reappointment to the act of reappointing. Reappointment implicitly envisages continuity without resorting to the process made mandatory for the purposes of appointment, and it is in this context that the legislature has explicitly referred to the respective cumulative periods. It is, therefore, obvious that a person appointed as a Commissioner pursuant to the selection process, succinctly described by the august Supreme Court in the judgment of Mohammad Ashraf Tiwana supra, can only be reappointed once for a consecutive second term. On expiry of the second consecutive term the vacancy is to be filled by appointment through the laid down process. The question, therefore, arises whether the person who has ceased to hold the office of the Commissioner is barred from participating in the process initiated to fill the vacancy either on account of not having been reappointed on expiry of the initial term or the cumulative period of two terms has ended. The combined

reading of sections 5, 6 and 7 shows that there is no clog on a person who has ceased to hold the office of a Commissioner to participate in the process initiated to fill the vacancy, and to be appointed if found to be the most qualified from amongst the eligible candidates. An interpretation to the contrary would be reading into the provisions of sections 5 and 6 of the Act of 1997 something not provided therein. Moreover, many expressions used in section 7 would be rendered redundant. It is settled law that redundancy cannot be attributed to the legislature, nor can the Courts read into a statute something not provided therein. It is, therefore, held that a Commissioner cannot be reappointed after the respective cumulative periods of two terms has ended, while there is no bar if such a person is appointed pursuant to participating in the process for selection of the most qualified person in the light of the principles and law elucidated in the judgment of Mohammad Ashraf Tiwana *supra*.

13. The case titled "Government of Punjab vs Haris Steel Industries (Pvt) Ltd and another" *supra* is distinguishable insofar as the facts and circumstances in the instant petition are concerned. The said judgment was in the context of section 8 of the National Accountability Bureau Ordinance, 1999. The language of section 8 unambiguously provides that a Prosecutor General can only be appointed for a non-extendable one term only. This is not the case in the context of the language of section 7 of the Act of 1997. A Commissioner having been reappointed once cannot be reappointed for a third consecutive term. However, as already held, it would be straining the language used by the legislature in section 7(2) of the Act of 1997 to read into it a bar or a clog on the appointment of a person as a Commissioner who has already completed two terms.

14. In the instant case the respondent No. 2 had admittedly completed two consecutive terms as a Term A Commissioner. The Federal Government selected three persons to be appointed as Commissioners, including the respondent No. 2, through a transparent process initiated and completed in the year 2014. It was not a case of reappointment but an appointment of the respondent No. 2 and the other two Commissioners in accordance with the principles and law enunciated by the august Supreme Court and discussed above. It is not the case of the petitioners that the process through which the respondent no. 2 was selected and consequently appointed as a Commissioner vide notification dated 17-12-2014 was in violation of the principles and law elucidated in the judgment of Mohammad Ashraf Tiwana supra, or that he had held the post of a Chairman for two consecutive terms.

15. For what has been stated above, the instant petition alongwith W.P.No. 120 of 2015 are without merit and are, therefore, accordingly dismissed.

(ATHAR MINALLAH)
JUDGE

Announced in the open Court on 07-06-2016.

JUDGE

Approved for reporting