

JUDGMENT SHEET.
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD.

Writ Petition No.2408 of 2018

Afzal Khan Shinwari.
Vs
Federation of Pakistan, etc.

Petitioners By : Mr. Iftikhar Ahmad Bashir, Advocate.

Respondents By : Raja Inam Amin Minhas, Advocate.
Raja Khalid Mehmood Khan, learned
Deputy Attorney General. .
Ms. Rabeea Anwar, Joint Secretary,
Senate.

Date of hearing : 14.02.2019

AAMER FAROOQ, J. - The petitioner, in the instant petition, has challenged the role of respondent No.2 as acting President of Pakistan.

2. The necessary facts for disposal of the instant petition are that respondent No.2, namely Muhammad Sadiq Sanjrani is Chairman of the Senate. Under the Constitution of Islamic Republic of Pakistan, 1973 (***the Constitution***) Senate Chairman is to assume the position of acting President while the President is unable to perform his duties. The petitioner has challenged the assumption of the said role by respondent No.2 on the basis that respondent No.2 does not fulfill qualifications prescribed for the President in the Constitution.

3. Learned counsel for the petitioner, *inter alia*, contended that Article 41 of the Constitution of Islamic Republic of Pakistan, 1973 prescribes the qualification for a person to be eligible for election as the President; that under the referred Article a person cannot be President unless, *inter alia*, he is 45 years of age. It was contended that respondent No.2 is not 45 years old, hence is not qualified to be appointed as the President. It was submitted that since

respondent No.2 cannot be appointed as President he cannot be notified as acting President.

4. Learned Deputy Attorney General, *inter alia*, contended that the instant petition is not maintainable as it has been filed to defeat legislative intent. It was further submitted that the Courts are restrained from inquiring into motives of legislation. Reliance was placed on case reported " Fauji Foundation and another vs. Shamimur Rehman" (**PLD 1983 SC 457**). It was further submitted that since the petitioner is not an aggrieved person, hence the petition is not maintainable. On merits it was submitted that respondent No.2 only acts as acting President and not elected President; the qualifications essential for appointment of the President are not applicable to acting President; that under Article 49 only stop gap arrangement has been provided and under no circumstance Chairman of the Senate becomes President of the country on the regular basis. Learned Deputy Attorney General submitted that the controversy has already been raised before the Hon'ble Division Bench of the Balochistan, High Court in case reported as **"Jameel Ramzan Dehwar, Advocate vs. Sadiq Sanjrani and 03 others"** (**PLD 2018 Balochistan 67**). Learned Deputy Attorney General also took the Court through the debates of the National Assembly while framing the Constitution specifically to the effect that National Assembly chose not to prescribe qualifications for the acting President.

5. Learned counsel for the parties have been heard and documents placed on record examined with their able assistance.

6. As noted above, the petitioner has challenged the appointment of respondent No.2 as acting President on account of the fact that he is not 45 years old; hence does not qualify for appointment as the President. Article 41 of the Constitution creates the office of the President. For the sake of brevity, the referred Article is reproduced below:-

"41. (1) There shall be a President of Pakistan who shall be the Head of State and shall represent the unity of the Republic.

(2) A person shall not be qualified for election as President unless he is a Muslim of not less than forty-five years of age and is qualified to be elected as member of the National Assembly.

(3) The President ¹⁷[] shall be elected in accordance with the provisions of the Second Schedule by the members of an electoral college consisting of:***

(a) the members of both Houses; and

(b) the members of the Provincial Assemblies.

(4) Election to the office of President shall be held not earlier than sixty days and not later than thirty days before the expiration of the term of the President in office:

Provided that, if the election cannot be held within the period aforesaid because the National Assembly is dissolved, it shall be held within thirty days of the general election to the Assembly.

(5) An election to fill a vacancy in the office of President shall be held not later than thirty days from the occurrence of the vacancy:

Provided that, if the election cannot be held within the period aforesaid because the National Assembly is dissolved, it shall be held within thirty days of the general election to the Assembly.

(6) The validity of the election of the President shall not be called in question by or before any court or other authority".

7. The bare reading of the said Article ibid shows that no person is qualified for election as President unless he is a Muslim and not less than 45 years of age and is qualified to be elected as member of the National Assembly. In case of absence of the President, Chairman Senate or Speaker National Assembly acts and/or perform functions of the President under Article 49 of the Constitution. The said Article reads as follows:-

"49. (1) If the office of President becomes vacant by reason of death, resignation or removal of the President, the Chairman or, if he is unable to perform the functions of the office of President, the Speaker of the National Assembly shall act as President until a President is elected in accordance with clause (3) of Article 41.

(2) When the President, by reason of absence from Pakistan or any other cause, is unable to perform his functions, the Chairman or, if he too is absent or unable to perform the functions of the office of the President, the Speaker of the National Assembly shall perform the functions of President until the President returns to Pakistan or, as the case may be, resumes his functions."

8. The bare reading of the Article shows that if the office of President becomes vacant by reason of death, resignation or removal of the President, or the President, by reason of absence from Pakistan or any other cause, is unable to perform his functions, the Chairman or, if he too is absent or unable to perform the functions of the office of the President, the Speaker of the National Assembly shall perform the functions of President until the President returns to Pakistan or, resumes his functions, or a President is elected under Article 41(3) of the Constitution. The conjunctive reading of Article 41 & 49 of the Constitution shows that where office of the President is vacant or the President is unable to perform functions due to any reason, the Chairman Senate or Speaker National Assembly is to perform duties as acting President. The said arrangement is only temporary in nature as a stop gap arrangement until the President resumes his duties or is re-elected.

9. It is an admitted position that eligibility criteria for appointment as Chairman Senate or Speaker National Assembly is provided in the Constitution in terms of their age and/or the other attributes. Any person who is elected as a Senator or Member of National Assembly can be elected as Chairman Senate or Speaker National Assembly. The official report of debates of the National Assembly of Pakistan for making of the Constitution was placed on record, which specifically shows that an amendment in the proposed Constitution was suggested spelling out the eligibility/qualification for the Chairman Senate and/or Speaker National Assembly but same was not carried. The relevant portion of the questions and answers is reproduced below:-

مولانا عبدالحق [اکوڑہ خٹک]: گزارش یہ ہے کہ وہ ہر صورت میں مسلمان ہوگا مسلمان کے اوپر ہمارا ذہنی لحاظ سے پورا اعتبار ہے۔ ان کا قائم مقام اگر چند گھنٹوں کے لئے بھی کوئی غیر مسلم ہوگا تو وہ ہمارے رازوں کو دوسرے ملکوں میں پہنچا دے گا۔ اگر وہ پانچ منٹ کے لئے بھی ہوگا تو وہ ملک کے مفاد میں ہی رہے گا۔

جناب سپیکر: یہ اسمبلی میں پیش ہو چکی ہے اب اس کو دوبارہ نہیں پیش کیا جاسکتا۔ آپ نے اس پر ترمیم بھی دی ہے اور آپ کی کوشش برابر ظاہر ہے اور آپ مسلسل کوشش کر رہے ہیں اور اس پر اب تقریر کرنے کا فائدہ نہیں ہے۔

مولوی مفتی محمود: سوال یہ ہے اور ہم یہ چاہتے ہیں کہ ہم پوری دیانتداری کے ساتھ اس آئین میں قوم کو مطمئن کرسکیں۔ جب ہم نے آئینی سمجھوتے میں وضاحت کے ساتھ یہ بات تسلیم کر لی ہے کہ پاکستان کا صدر مسلمان ہوگا۔ اس کے بعد آئینی کمیٹی نے وزیراعظم کے مسلمان ہونے کی شرط بھی منظور کر لی ہے تو میں سمجھتا ہوں کہ صدر خواہ ایک دن کے لئے ہو چھ مہینے کے لئے ہو تین مہینے کے لئے ہو اس کے لئے مسلمان ہونے کی شرط لازمی ہے۔ اگر اسپیکر یا چیئرمین کسی وقت بھی خواہ چند دن کے لئے اس کو صدر بنانا ہو تو اس کے لئے بھی وہ شرط لازمی ہے۔ جو صدر کے لئے ہونا چاہیے۔ اس لئے میں سمجھتا ہوں کہ یہ ترمیم ایسی نہیں ہے جو ایسی خطرناک ہو۔ اور جو انہیں قبول کرنے پر آمادہ نہ کرسکے۔ میں سمجھتا ہوں کہ اس ترمیم کو اگر اس ایوان میں پورے اتفاق کے ساتھ قبول کر لیا جائے تو اس سے وقار اور بڑھ جائے گا کم نہیں ہوگا۔

Mr. Abdul Hafeez Pirzada: **This point will keep on coming in respect of Prime Minister also. The suggestion is not as simple as my honourable friend, Mufti, Mahmood, would like us to believe. The thing does not stop at Chairman and the Speaker. In case of Prime Minister there is a provision that in the event of his death a Minister of the Federal Government will take over. If we accept the principle, that means that every Federal Minister is capable of taking over in the event of the Prime Minister's death and the Prime Minister must be a Muslim. Therefore, we will have to go to such an extent that we have to make it possible for any person to accept a Muslim In principle, we cannot accept this. Let us leave it to the august House After all Muslims are going to be the overwhelming majority in this House when the House is elected. Let there prevail a good sense. The House will elect proper and suitable persons as Speaker and the Deputy Speaker. They should not insist because it will involve us in so many implications and that we will have to put a ban on the minorities in all other posts.*

Malik Mohammad Akhtar: **My point is that soon after Pakistan was made the Father of the Nation in his address to the first Constituent Assembly assured the minorities and mentioned that henceforth there will be one Pakistani nation. We have been sticking to the principle that head of the State shall necessarily be a Muslim. Now, Sir, the question is that it has been provided in all our constitutional documents that the minorities will have due safeguards. And, Sir, in this very Article 63(1) it is mentioned that after the Senate has been duly constituted, it shall, at its first meeting and to the exclusion of any other business, elect from amongst its members a Chairman and a Deputy Chairman.*

Sir, the question is that this is the privilege of all the members of this House to elect any person who is a member of this House to the Office of Chairman and Deputy Chairman. Sir, I don't consider that there is any justification, any democratic principle, any principle which will be the negation of the principle laid down by the father of the Nation in his very first speech and these gentlemen on the other side are constantly trying to split up the Pakistani nation. Of course, it is an Islamic country and we have provided that the Head of the State which is to be elected will be a Muslim.

10. This Court in order to decide the intention of the legislature can look into Parliamentary debates. Reliance is placed on **"Zahoor Ahmed vs. The State" (PLD 2007 Lahore 231)**, **"District Bar Association vs. Federation of Pakistan" (PLD 2015 SC 401)**, **"Pepper (Inspector of Taxes) vs. Hart" (1993 SCMR 1019; [(1992) 3 WLR 1032]** and **"Mohammad Mubeen us Salam vs. Federation of Pakistan" (PLD 2006 SC 602)**. In **1993 SCMR 1019**, the House of Lords opined as under:-

"Statute law consists of the words that Parliament has enacted. It is for the Courts to construe those words and it is the Court's duty in so doing to give effect to the intention of Parliament in using those words. It is an inescapable fact that, despite all the care taken in passing legislation, some statutory provisions when applied to the circumstances under consideration in any specific case are found to be ambiguous. Why in such a case should the Courts blind themselves to a clear indication of what Parliament intended in using those words? The Court cannot attach a meaning to words which they cannot bear, but if the words are capable of bearing more than one meaning why should not Parliament's true intention be enforced rather than thwarted. The Courts can now look at white papers and official reports for the purpose of finding the mischief sought to be corrected, although not at draft clauses or proposals for the remedying of such mischief. A ministerial statement made in Parliament is an equally authoritative source of such information: why should the Courts be cut off from this source of information as to the mischief aimed at? In any event, the distinction between looking at reports to identify the mischief aimed at but not to find the intention of Parliament in enacting the legislation is highly artificial. The conclusion, therefore, is that parliamentary material can be used as an aid to the construction of statute where: (i) legislation is ambiguous or obscure, or leads to an absurdity; (ii) the material relied upon consists of one or more statements by a Minister or other prompter of the Bill together if necessary with such other parliamentary material as is necessary to understand such statements and their effect; (iii) the statements relied upon are clear."

"The ever increasing volume of legislation must inevitably result in ambiguities of statutory language which are not perceived at the time the legislation is enacted. The object of the Court in interpreting legislation is to give effect, so far as the language permits, to the intention of the legislature. If the language proves to be ambiguous there is no sound reason not to consult Hansard (official record of parliamentary debates in U.K.) to see if there is a clear statement of the meaning that the words are intended to carry. The days have long passed when the Courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The Courts now adopt a purposive approach which seeks to

give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted. Why then cut ourselves off from the one source in which may be found an authoritative statement of the intention with which the legislation is placed before Parliament."

The above debates show that while framing the Constitution the Assembly was mindful of the fact that a person appointed as a Chairman Senate might be a Non-Muslim and might have to act as President, in absence of regular incumbent, but decided to leave the issue open and did not make an amendment (under Article 41 of the Constitution in order to contest election for President a person has to be a Muslim).

11. The Hon'ble Division Bench of Balochistan, High Court in case reported as "***Jameel Ramzan Dehwar, Advocate vs. Sadiq Sanjrani and 03 others***" (PLD 2018 Balochistan 67) has already decided the instant issue. The relevant part of the judgment is reproduced below and as follows:-

"It was case of the petitioner that the election for Chairman of the Senate was held on 12th March 2018, while respondent No. 1 Sadiq Sanjrani was declared as Returned Candidate, thus elected as Chairman of the Senate, and hold the post. That one of the duties of the Chairman of the Senate is to hold the office of the President of Pakistan in his absence, and to perform the duties till his return. That the qualifications to be elected as the President of Pakistan as contained in Article 41, sub-Article (2) of the Constitution of Islamic Republic of Pakistan 1973 (The Constitution) that he must be a Muslim, and not less than forty five (45) years of age, and also qualified to be elected as a member of the National Assembly. It was his case that Article 49 sub-Article (2) of the Constitution, the Chairman of the Senate has to hold the office of the President in the eventualities as described, but the respondent No. 1 failed to meet the criteria, as he was born on 14th April 1978, and by now 39 years old, thus not qualified to act as President of Pakistan. That this disability to perform the duties would not only create a serious constitutional defect, but also seriously prejudice the country, and the national interest. That this serious violation of the Constitution was overlooked when the Notification of respondent No. 1, to be elected as Chairman of the Senate was issued, thus of no legal effect.

The term Chairman defined in Article 260 of the Constitution, with the meaning the Chairman of the Senate, and except in Article 49 of the Constitution, includes a person acting as a Chairman of the Senate.

Article 59 of the Constitution deals with the Senate, and contained the procedure for appointment of members of the Senate. While Article 60 of the Constitution is with election of offices of Chairman and Deputy Chairman of the Senate. Re-production would be beneficial:

"60. (1) After the Senate has been duly constituted, it shall, at its first meeting and to the exclusion of any other business, elect from amongst its members a Chairman and a Deputy Chairman and, so often as the Office of Chairman or Deputy Chairman becomes vacant, the Senate shall elect another member as Chairman or, as the case may be, Deputy Chairman.

(2) The term of office of the Chairman or Deputy Chairman shall be three years from the day on which he enters upon his office."

While Article 62 contained the qualifications for member of the Parliament, the National Assembly and the Senate. While Sub-Article (1) clause (c) of the Article pertained to the requirements to be fulfilled by a person to qualify to be elected or chosen as member of Senate. Reproduction of clause (c) would be beneficial for better understanding of the issue. It reads as under:

"(c) he is, in the case of the Senate, not less than thirty years of age and is enrolled as a voter in any area in a Province or, as the case may be, the Federal Capital or the Federally Administered Tribal Areas, from where he seeks membership; "

For better understanding of the issue that a member if not qualify the age required to be elected as President whether could he be elected as Chairman of the Senate? The referred to provisions of the Constitution are to be read co-jointly, not in isolation. The Articles 60 and 62 of the Constitution if read co-jointly the only logical inference which could have been drawn that a person apart from other qualifications might not be less than thirty years of age to be qualified to be elected as Member of the Senate. While a Chairman or a Deputy Chairman of the Senate have to be elected from amongst its members. No age to elect as Chairman or Deputy Chairman is separately described in any other Article of the Constitution.

As far the President is concerned, Article 41 of the Constitution stipulates the qualifications of a person to be elected as President. While sub-Article (2) of the Article 41 of the Constitution described the limit of age, it reads as under:

"(2) A person shall not be qualified for election as President unless he is a Muslim of not less than forty-five years of age and is qualified to be elected as member of the National Assembly."

While Article 49 of the Constitution is to meet with the requirement to continue the office of the President in his absence for the stated reasons. The Article reproduced for better understanding:

"49. (1) If the office of President becomes vacant by reason of death, resignation or removal of the President, the Chairman or, if he is unable to perform the functions of the office of President, the Speaker of the National Assembly shall act as President until a President is elected in accordance with clause (3) of Article 41.

(2) When the President, by reason of absence from Pakistan or any other cause, is unable to perform his functions, the Chairman or, if he too is absent or unable to perform the functions of the office of the President, the Speaker of the National Assembly shall perform the functions of President until the President returns to Pakistan or, as the case may be, resumes his functions."

Plain reading of the referred to Articles shows that there is no mention of the age of a person to act as President while holding offices of the Chairman or the Speaker as the case may be in the given circumstances.

The cumulative effect of the referred to Articles would be that a person qualified to be elected as President, must not be less than forty-five (45) years of age, apart from other qualifications as described. While to deal with the situation when the office of the President is vacant due to his absence for the stated reasons, the Chairman of the Senate shall occupy the office and perform the duties till re-election or return as the case may be. To further meet with the situation the Speaker of the National Assembly is marked as an alternate. Article 49 of the Constitution while dealing with alternate of the President to act in his absence for the stated reasons, provided no limit of age except the reasons of vacation of office and the alternate to fill it (Office) by designation of the posts i.e. the Chairman of the Senate and the Speaker of the National Assembly. None of the Articles of the Constitution described age of the persons who shall hold the offices of the Chairman of the Senate and the Speaker of the National Assembly, who are to be elected from amongst its members irrespective of the age. Article 62 (1) clause (b) of the Constitution stipulates the age of a person qualified to be elected as member of National Assembly as not less than twenty-five (25) years, while Article 62 (1) clause (c) describe the age of a person qualified to be appointed as Member of the Senate as not less than thirty (30) years of age apart from other qualifications. In view of the language as used in Article 49 of the Constitution, the age of Chairman of the Senate or of the Speaker of the of the National Assembly not a pre-requisite, nor a condition to act as the President of the Country in stated circumstances."

12. The above judgment of the Balochistan High Court aptly discussed the relevant law and has come to the right conclusion that respondent No.2 is not barred from assuming the role of acting President even though he is still not yet 45 years old. To my mind the Hon'ble Division Bench in case reported as **"Jameel Ramzan Dehwar, Advocate vs. Sadiq Sanjrani and 03 others"** (PLD 2018 Balochistan 67) has correctly interpreted the Constitution and there is nothing available on record or otherwise which could persuade me to arrive at a different conclusion. Framers of the Constitution chose the Chairman

Senate or Speaker National Assembly to be the acting President by virtue of their designation. If the referred persons have validly been elected as Senate Chairman or Speaker National Assembly inasmuch as were qualified to be elected as such, they can be appointed as acting President. The Hon'ble Supreme Court of Pakistan in Suo Moto case No. 8 of 2018 held that redundancy could not be attributed to the framers of the Constitution. In **"Shahid Nabi Malik vs. Chief Election Commissioner" (PLD 1997 SC 32)** the august Apex Court propounded the principles regarding interpretation of Constitution. It was observed as follows:-

"While interpreting a Constitutional provision it must be remembered that, a Constitution unlike a statute cannot be changed or amended frequently. A document of such a basic nature is not merely the imprisonment of past but is also alive to the future aspiration and need of the nation. Therefore, while interpreting a Constitutional document it must be read and considered as a whole to discover the true intention of its framers. It is for these reasons that no redundancy, surplusage, absurdity inconsistency can be attributed to the framers of the Constitution. The principle of harmonious interpretation provides that the Court while literally interpreting a provision of the Constitution notices apparent inconsistency as a result of such construction with another provision of the Constitution on the same subject, it may not follow the grammatical and literal construction of the words and adopt a construction which would harmonise the two apparently conflicting provisions and, make their working purposeful and in accordance with the intention of Legislature.

Where the language of a statute, in its ordinary meaning and grammatical construction leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence.

The normal rule of interpretation is that the words used by the Legislature are generally a safe guide to its intention. No principle of interpretation of statutes is more firmly settled than the rule that the Court must deduce the intention of Parliament from the words used in Act. What is true of the interpretation of an ordinary statute is not anytheless true in the case of Constitutional provisions, and the same rule applies equally to both. But if the words of an instrument are ambiguous in the sense that they can reasonably bear more than one meaning, that is to say, if the words are semantically ambiguous, or if a provision, if read literally, is patently incompatible with the other provisions of that instrument, the Court would be justified in construing the words in a manner which will make the particular

provision purposeful. That, in essence, is the rule of harmonious construction."

13. Likewise in "***Pir Sabir Shah vs. Federation of Pakistan***" (PLD ***1994 SC 738***) the august Apex Court held that Constitution is to be interpreted in a manner, which may harmonize its various provisions or may not render any provision inoperative or redundant. To hold that respondent No.2 though is Senate Chairman but cannot be appointed as acting President because he is not eligible to be appointed as such would amount to negate Article 49 ibid and make the same redundant which, as noted above, cannot be done.

14. In view of above, the instant petition is without merit and is accordingly ***dismissed***.

(AAMER FAROOQ)
JUDGE

Announced in Open Court on 15.04.2019.

JUDGE

Shakeel Afzal/.

Approved for reporting