

JUDGMENT SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

Writ Petition No.4776 of 2016.

Mohammad Waqas Malik, Advocate High Court.

Vs.

Islamabad Bar Council through Secretary & two others.

Petitioner's by. M/s Riaz Hanif Rahi & M. Asif Gujjar,
Advocates.

Respondent's by. M/s Raja Aleem Abbasi, Qazi Rafee-ud-
Din Babar, Syed Wajid Hussain Gillani,
Haroon-ur-Rashid, Faiz Ahmad Anjum
Jandran and Tariq Mehmood Jahangiri,
Advocates.

Date of Decision. 18.01.2017.

**** * * * ****

AAMER FAROOQ, J.- Through the instant petition the petitioner assails order dated 17.12.2016 intimated to him on 21.12.2016 and seeks direction for adaptation of the Constitution of Lahore High Court Bar Association, Rawalpindi as well as declaration that the Islamabad High Court Bar Association is not subservient to Islamabad Bar Council.

02. The facts relevant for the present petition are that the petitioner is the Secretary of Islamabad High Court Bar Association. In connection with some communications made with Islamabad Bar Council vide letter dated 21.06.2016 he used his designation as Secretary General, Islamabad High Court Bar Association. Islamabad Bar Council/respondent No.1 in its meeting

held on 25.06.2016 resolved that the petitioner should use his designation as Secretary, Islamabad High Court Bar Association instead of Secretary General, Islamabad High Court Association as provided in Rule 175(H) of Pakistan Legal Practitioners and Bar Councils Rules, 1976. Subsequently on 22.10.2016 it was again resolved by the Islamabad Bar Council that since the petitioner is persistently mentioning himself as Secretary General, Islamabad High Court Bar Association instead of Secretary, Islamabad High Court Bar Association, therefore, he may be issued a 'Show Cause Notice' to explain within ten (10) days as to why his case should not be referred to Disciplinary Committee of the Council (***hereinafter called the Committee***). In pursuance of the referred resolution a 'Show Cause Notice' was issued to the petitioner. Subsequently, the matter was also referred to the Committee. The referred Committee vide order dated 17.12.2016 required the petitioner not to use the designation as Secretary General and to remove all the plates displaying as such.

03. Learned counsel for the petitioner, inter alia, submitted that the impugned order is coram-non-judice and without lawful authority and the matter has been decided without providing an opportunity of hearing to the petitioner. It was further contended that there is no bar in using the designation as Secretary General instead of Secretary; that the impugned order is in violation of the principles of natural justice as well as Article 10-A of the Constitution.

04. The learned counsel for respondents raised preliminary objections regarding maintainability of the petition. In this behalf it was contended that the rules under which the Islamabad Bar Council operates are non-statutory; that under section 13(2) of Legal Practitioners and Bar Councils Act, 1973 the petitioner has the remedy of appeal; that the resolution dated 25.06.2016 requiring the petitioner to remove the plates displaying

designation of Secretary General has attained finality as no appeal was preferred against it and even the present petition does not impugn the same. The learned counsel for the respondents has drawn attention of the Court to various provisions of law governing the relationship of Advocate with the Bar Council and the superintendence exercised by the Bar Councils over the Bar Association. In this behalf the structure of the Bar Council was highlighted which is provided in Section 3 of the Legal Practitioners and Bar Councils Act, 1973. Under Section 56 *ibid*, Islamabad Bar Council can make rules on different subjects which includes, *inter alia*, the Constitution, functions of any Committee as well as procedure to be followed by a Tribunal in inquiries relating to misconduct of an Advocate and recognition and de-recognition of a Bar Association. It was also contended that under Section 41(4-A) a Bar Council on its own accord can refer the case of misconduct to its Disciplinary Committee. The learned counsel also contended that under Punjab Rules of Business of Bar Associations Memorandum of Associations (which were duly adopted by the Islamabad Bar Council) the function of the Bar Council is to supervise the Bar Association(s). In this behalf the learned counsel also referred to Pakistan Legal Practitioners and Bar Councils Rules, 1976 whereby only one High Court Bar Association for Islamabad Capital Territory has been provided and under Rule 175(h) the post provided for the Bar Association is, *inter alia*, Secretary. Similar provision was referred to under Rule 17 of Punjab Rules of Business of Bar Association Memorandum of Association. The learned counsel also contended that under Punjab Legal Practitioners and Bar Councils Rules, 1974 (adopted by the Islamabad Bar Council) the recognition of a Bar Association is to be made by the Bar Council. In this behalf it was pointed out that previously recognition was granted to Islamabad High Court Bar Association by the Punjab Bar Council and now provisional recognition has been issued by respondent No.1. On the basis

thereof it was contended that the designation used in the charter/application submitted is of Secretary and not Secretary General.

05. In response to the arguments raised by the learned counsel for respondents regarding the maintainability, learned counsel for the petitioners submitted that the rules are statutory and that recently in case titled "Mohammad Shoaib Shaheen vs. Pakistan Bar Council", matter has been decided on merits by a Division Bench of this Court.

06. The petitioner, in the instant petition, is aggrieved of an order passed by respondent No.3 which is a Committee of respondent No.1. The core question before this Court regarding maintainability of the petition is whether respondent No.1 is a person performing the functions of Federation, Province or a Local Body as enshrined in Article 199 of the Constitution. Under the referred Article this Court on an application of any aggrieved party can make an appropriate order against a person performing functions in connection with the affairs of the Federation, Province or a Local Authority. For the ease of convenience Article 199 (1) of the Constitution is reproduced below:

"199. Jurisdiction of High Court.—(1) Subject to the Constitution, a High Court may, if it is satisfied that no other adequate remedy is provided by law:

(a) on the application of any aggrieved party, make an order—(i) directing a person performing, within the territorial jurisdiction of the Court, functions in connection with the affairs of the Federation, a Province or a local authority, to refrain from doing anything he is not permitted by law to do, or to do anything he is required by law to do; or(ii) declaring that any act done or proceeding taken within the territorial jurisdiction of the Court by a person performing functions in connection with the affairs of the Federation, a Province or a local authority has been

done or taken without lawful authority and is of no legal effect; or

(b) on the application of any person, make an order —(i) directing that a person in custody within the territorial jurisdiction of the Court be brought before it so that the Court may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner; or(ii) requiring a person within the territorial jurisdiction of the Court holding or purporting to hold a public office to show under what authority of law he claims to hold that office; or

(c) on the application of any aggrieved person, make an order giving such directions to any person or authority, including any Government exercising any power or performing any function in, or in relation to, any territory within the jurisdiction of that Court as may be appropriate for the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II.”

07. The test laid down by the Hon’ble Supreme Court of Pakistan in various pronouncements regarding concept of person performing functions with respect to the affairs of Federation etc. is termed as the function test. In case titled “Pakistan International Airline Corporation and others vs. Tanveer-ur-Rehman” (PLD 2010 SC 676) the August Apex Court laid down the following law on the subject:

“12. Now let us see what is meant by the expression ‘performing functions in connection with the affairs of the Federation’. The expression clearly connotes governmental or State functions involving an element of exercise of public power. The functions may be the traditional police functions of the State, involving the maintenance of law and order or they may be functions concerning economic development, social welfare, education, public utility services and other State enterprises of an industrial or commercial nature. Generally, these functions are to be performed by persons or agencies directly appointed,

controlled and financed by the State; either by Federation or a Provincial Government. On the other hand, private organizations or persons, as distinguished from Government or Semi Government agencies and functionaries, cannot be regarded as a person performing functions in connection with the affairs of the Federation or a Province, simply for the reason that their activities are regulated by laws made by the State. The primary test must always be:

(i) whether the functions entrusted to the organization or person concerned are indeed functions of the State involving some exercise of sovereign or public power;

(ii) whether the control of the organization vests in a substantial manner in the hands of Government; and

(iii) whether the bulk of funds is provided by the State.

If these conditions are fulfilled, then the person, including a body politic or body corporate, may indeed be regarded as a person performing functions in connection with the affairs of the Federation or a Province, otherwise not. [see *Salahuddin v. Frontier Sugar Mills & Distillery Ltd.* (PLD 1975 SC 244)].

13. Now we have to see whether the functions entrusted to the appellant-corporation are indeed functions of the State involving some exercise of sovereign or public power. The expression 'sovereign power' has been defined in Black's Law Dictionary 6th Ed. (1990) as "that power in a State, to which none other is superior or equal, and which includes all the specific powers necessary to accomplish the legitimate ends and purposes of government". The expression 'public power' has not been defined in any legal instrument, however, the word 'public' means "the whole body politic, or the aggregate of the citizens of a State, district or municipality" whereas the word 'power' means "the right, ability, or faculty of doing something" [Black's Law Dictionary 6th Edn. (1990)]. The above definitions of

words 'public' and 'power' collectively suggest that 'public power' means "the right or authority vested in the whole body politic or the aggregate of the citizens of a State, District or Municipality to do something".

14. In order to understand the above proposition, it would be advantageous to have a glance to Maqsood Ahmed Toor v. Federation of Pakistan (2000 SCMR 928) and Aitchison College v. Muhammad Zubair (PLD 2002 SC 326). In Maqsood Ahmed Toor's case (supra) it has been held that an organization, not performing the functions of the State involving some exercise of the public powers, would not fall within the definition of a person. However, while applying the above referred tests in Aitchison College's case (supra), this Court observed that "we feel no hesitation in drawing inference that the Board of Governors, Aitchison College, Lahore headed by the Governor of the Province as its President along with other officers i.e. Secretaries Education, Finance and General Officer Commanding as well as unofficial Members are involved in providing education which is one of the responsibility of the State and by taking over its management and control the Board, exercises sovereign powers as well as public powers being a statutory functionary of Government who in order to provide it full legal/Constitutional protection had brought it into the folds of its Education Department by amending the Provincial Rules of Business as back as in 1994 and even if for sake of arguments if it is presumed that no financial aid is being provided to the College from the Provincial Public exchequer, even then, the College remains in dominating control of the Provincial Government through Board of Governors; therefore, the above test stands fully satisfied and we are persuaded to hold that organization of the Aitchison College, Lahore falls within the definition of a person". Likewise, in Ziaullah Khan Niazi v. Chairman Pakistan Red Crescent Society (2004 SCMR 189), while discussing the status of the Pakistan Red Crescent Society, it has been observed that "the respondent-Society was constituted by the provisions of section 2 of the Pakistan Red Crescent Society Act, 1920; its operational area covers

the whole of Pakistan; the President of Islamic Republic of Pakistan is the President of the Society as provided by section 3 of the Act; by section 4 of the Act it is a body corporate having perpetual succession and a common seal with power to hold and acquire property, movable and immovable and may sue or be sued by the name of the Society; as enumerated in the General Principles of Society, its object and principal aims include the prevention and alleviation of the suffering with complete impartiality both at national and international level. The Society cannot be treated as a person performing functions in connection with the affairs of the Province; therefore, the employees of the Society cannot be treated as civil servants of the Province of Punjab, by any stretch of imagination". Subsequently, in Pakistan Red Crescent Society v. Nazir Gillani (PLD 2005 SC 806), the Court while following the dictum laid down in above mentioned case held that "a careful perusal of the above mentioned observations would reveal that it has been decided in a categoric manner that the Pakistan Red Crescent Society cannot be treated as a person performing function in connection with the affairs of the Federation or Province; we are conscious of the fact that the President of Pakistan is the President of the Pakistan Red Crescent Society and Minister Health, Government of Pakistan, is the ex officio Vice-President but it would have no substantial bearing on the legal character of the Society because no budget allocation has been made by the Federal Government and no share capital is involved; the Pakistan Red Crescent Society generates its income from the donation made by public and allocation from International Agencies having a charitable character. It is pertinent to point out that under section 5 of the Act the management and control of the affairs of the Society exclusively vests in the Managing Body. In the light of what has been mentioned hereinabove, the only inescapable conclusion would be that Federal or Provincial Governments have nothing to do with the affairs of the Society and vice versa". It has been further held that "a careful perusal of the said rule would indicate that the "Managing Body" is competent to frame rules for the management,

control and procedure of the Society; the rule-making powers has been conferred upon the Managing Body in an unambiguous manner and from whatever angle it is interpreted no role for framing of rules has been assigned to the Government and moreso no such role has been reserved by the Government for itself; it is worth-mentioning that no sanction or approval from any quarter including the Government is required for framing of such rules, which shall be framed by the "Managing Body" alone. It can thus safely be inferred that the powers qua rule-making exclusively fall within the jurisdictional domain of "Managing Body" and the ultimate conclusion would be that the rules or regulations framed by the Managing Body are non-statutory."

15. Another key factor in determining the status of an organization to be within the effective control of the Government is the factum of having controlling shares in it by the Government. This proposition has been elaborately examined by a larger Bench of this Court in Muhammad Mubeen-us-Salam v. Federation of Pakistan (PLD 2006 SC 602), wherein following the rule pronounced in Printing Corporation of Pakistan v. Province of Sindh (PLD 1990 SC 452), the Court held that "the fact that the part of the capital has been subscribed by the Government does not in any manner establish that the Federal Government controls the affairs of the appellant and the workers of the appellant are in the service of the State; similarly, if the Government has provided working capital, it would be a loan to the appellant, which has to be repaid; therefore, it cannot be said by any reason or logic that by doing so the Federal Government controls the affairs of the appellant or the workers of the appellant could be considered to be in the service of the State". It is also pertinent to mention here that in Muhammad Idrees v. Agricultural Development Bank of Pakistan (PLD 2007 SC 681) the impact of Muhammad Mubeen-us-Salam's case (supra) was reconsidered but as far as the above findings are concerned, these were not disturbed for the

reason that there was no challenge to it.

16. A careful perusal of the above referred case law reveals that the facts of each case are distinct and different from each other but the question of law, to some extent, is similar i.e. whether any organization/corporation/society is performing functions in connection with the affairs of the State."

Similarly, the Hon'ble Supreme Court of Pakistan in case titled "Pir Imran Sajid vs. Managing Director/General Manager Telephone Industry of Pakistan (2015 SCMR 1257) observed as follows:

"5. Keeping in view such status of the company, and the "Function Test" as prescribed and applied by a five member Bench of this Court in the case of Abdul Wahab and others v. HBL and others (2013 SCMR 1383), authored by one of us (Mian Saqib Nisar, J.), which test/criterion is fully met in the present case, the status of TIP could not prevent the appellants from seeking constitutional remedy as the company clearly falls within the definition of a "person" as envisaged by Article 199 of the Constitution."

Similarly, the August Apex Court of the country in case titled "Abdul Wahab vs. HBL" (2013 SCMR 1383) observed as follows:

"7. Question No.1: It is an admitted position that the Bank has been privatized and the majority shareholding thereof, has been acquired and is vested in Agha Khan Foundation, there also is no discord that the Board of Management of HBL is predominantly represented by the said foundation. However, in order to bring the Bank within the purview and the connotation(s) of a 'person' and 'authority' appearing in Articles 199, 199(5) and 199(1)(c) of the Constitution and also for the purposes of urging that appropriate order, in the nature of a writ can be issued independently by this Court under Article 184(3) (Constitution), to the Bank, the learned counsel for the petitioners has strenuously relied upon the 'function

test'; and in this respect it is submitted that the State/Federation has a considerable, shareholding in the Bank and representation in the managing affairs thereto therefore it shall qualify having the status of a person/authority within the meaning of the law; besides, the Bank is being regulated by and under the authority of the SBP thus on this account as well it (Bank) has the status mentioned above, therefore this Court should exercise its jurisdiction in terms of the Article supra. In this context, it may be held that for the purposes of resorting to the 'function test', two important factors are the most relevant i.e. the extent of financial interest of the State/Federation in an institution and the dominance in the controlling affairs thereof. But when queried, it is not shown if the State/Federation has the majority of shareholding, or majority representation in the Board of Management of the Bank. As regards the authority and the role of the SBP (in the above context), SBP is only a regulatory body for all the banks operating in Pakistan in terms of Banking Companies Ordinance 1962 and suffice it to say that such regulatory role and control of SBP shall not clothe the Bank, with the status of a 'person' or the 'authority' performing the functions in connection with the affairs of the Federation. Rather it shall remain to be a private entity. In support of the above, reliance can be placed on two judgments of this Court reported as Salahuddin and 2 others v. Frontier Sugar Mills and Distillery Ltd. Takht Bhai and 10 others (PLD 1975 SC 244), which prescribes that "regulatory control does not make a person performing functions in relation to the federation or a province"; likewise in Pakistan Red Crescent Society and another v. Syed Nazir Gillani (PLD 2005 SC 806) it was held "such control must be particular to the body in question and must be persuasive on the other hand, when the control is merely regulatory whether under the statute or otherwise it would not serve to make the body a 'State', therefore, we have no hesitation to hold that the Bank is a private institution for all intents and purposes. And we vide short order dated 17-10-2012 has deferred our decision on the issue if such a private person is amenable to writ jurisdiction in the context of Article 199(1)(c) of the

Constitution.

Attending to the second part of the proposition, it is an admitted position that the petitioners were employed (promoted) by the Bank as a result of a prescribed internal process of the Bank and the letters of petitioners appointment (promotion) clearly indicate that they were taken into employment on their unequivocal acceptance of the terms and conditions employment, because in the said letters (appended by the petitioners themselves with the petition), it is clearly mentioned that "you shall be bound by the rules and regulations of the bank for the time being in force". Thus when such offer (of appointment) was duly accepted by the petitioners, it culminated into a valid and a binding service contract between the parties, which for all intents and purposes was meant to govern and regulate the relationship inter se the parties. It may not be irrelevant to mention here (which may also be reiterated in other parts of the judgment) that it is not the case of the petitioners that they are governed by any statutory rules of service. It is settled law that, where a service grievance is agitated by a person/employee who is not governed by the statutory rules of service, before the High Court(s), in terms of Article 199 of the Constitution such petition shall not be maintainable; reference in this behalf can be made to PLD 2010 SC 676 (Pakistan International Airline Corporation v. Tanweer-ur-Rehman) and PLD 2011 SC 132 (Pakistan Telecommunication Co. Limited v. Iqbal Nasir). (note: the question however if that is possible in terms of Article 199(1)(c), we have deferred). But the plea that such law shall not prevent this Court while exercising its jurisdiction under Article 184(3); suffice it to say that while exercising the jurisdiction this Court is bound by the conditions of Article 184(3); and moreover by such rules which are laid by this Court for regulating its jurisdiction, keeping in view the principles of restraints. We find that in the cases of contractual service, where the grievance agitated is against a private person, there is no reason that such restraint should not be resorted to by this Court and any exception should be taken to the law laid down in Tanweer ur Rehman case supra (note: even if it pertains to the writ

jurisdiction of High Courts).

08. On the basis of the above case law it is essential to see the composition of respondent No.1 and examine whether it meets the criteria of function test as laid down by the Apex Court. Section 3 of the Legal Practitioners and Bar Councils Act, 1973 (the Act) provides for Constitution and incorporation of Bar Councils. In this behalf under Section 3(1) (2) there is to be incorporated and constituted a Bar Council for each Province and Islamabad Capital Territory (*ICT*). Under subsection 2 to section 3 every Bar Council shall be a body corporate having perpetual succession and common seal with powers to acquire and hold property both moveable and immovable and may sue or be sued. The term of every Bar Council is five years following the General Elections where-after the term of the Members shall cease, however, under the proviso notwithstanding on expiry of the term every Bar Council shall continue to function till the new council is elected and the list of the Members is published in the Official Gazette. Section 5 provides for the composition of the each Bar Council and under the same the Advocate General is the ex-Officio Chairman and the Members are elected as provided in the referred section. Under section 6 there is to be a Chairman and Vice Chairman of Islamabad Bar Council. In this behalf the Advocate General is the Chairman and Vice Chairman is elected by the Members of the Bar Council from amongst themselves. The functions of the Bar Council are provided in Section 9 and Section 10 *ibid* provides for the constitution of the Committees. The referred provisions of law do not in any way suggest that the Government (in the present case the Federal Government) has any financial or administrative control over the affairs of respondent No.1. Apart from the fact that the Advocate General, Islamabad Capital Territory is the Chairman of the Council by virtue of designation, there is no role of Government in the affairs of the Council. Respondent No.1 is a statutory body which is autonomous and generates its funds

independently and the Government does not even have financial control over it. The council has been formed to act as a regulator for the affairs of the Advocates in Islamabad Capital Territory and to admit Advocates to practice before the High Court and to maintain a roll of such Advocates. The functions of the council also, inter alia, include cases of misconduct against the Advocates on its roll and to order punishment in such cases.

09. During the course of arguments, learned counsel for the petitioner placed reliance on case titled "Muhammad Shoaib Sheen vs. Pakistan Bar Council" (*Writ Petition No.3394/2016*) to argue that petition under Article 199 of the Constitution is maintainable. The Division Bench of this Court in the referred judgment issued certain directions to the respondents, however, the question of maintainability was neither raised nor adverted to in the said judgement. Similarly, other judgments cited by the learned counsels for the parties do not address the question of maintainability on the touch stone of function test as laid down by the August Apex Court.

10. The learned counsel for the respondents raised the issue of maintainability on various grounds including non-availing of the alternate remedy, rules of the Bar Council being non-statutory and controversy involving disputed questions of facts. No specific finding on the said objections is required in light of the findings mentioned hereinabove.

11. In view of the above factual and legal position respondent No.1 cannot be regarded as a person performing the functions in connection with the affairs of Federation, a Province or Local Authority; hence no order can be passed against it under Article 199 of the Constitution.

12. For the reasons mentioned above, instant petition is not maintainable and is accordingly dismissed.

(AAMER FAROOQ)
JUDGE

Altaf Malik

Approved for Reporting