

Syed Mansoor Ali Shah, J.- Even though we have been hearing this case since 19 July 2022 but after the 46th hearing of the case held on 16 March 2023, the Parliament enacted the Supreme Court (Practice and Procedure) Act 2023 ("Act") on 21 April 2023¹ which, *inter alia*, requires under Section 3 that the Bench for hearing petitions under Article 184(3) of the Constitution is to be constituted by a Committee comprising of the Chief Justice of Pakistan and two next most senior Judges of the Court. Section 4 provides that any case involving the interpretation of constitutional provision is to be heard by a Bench comprising atleast of five Judges.

2. The next hearing in this case after the promulgation of the Act was scheduled to be held on 16 May 2023. Before the said hearing, I apprised the Hon'ble Chief Justice of Pakistan of my reservations to continue with hearing the case by the present Bench (as expressed in this note). The case was therefore simply adjourned on that date. My understanding was that the present case would be taken up for further hearing only after the constitutionality of the Act is finally decided by this Court. However, this case has been fixed for hearing today, and there is no date of hearing fixed in the other case² that will determine the constitutionality of the Act.

3. The Act being a procedural law also applies to pending cases under Article 184(3) of the Constitution, including the present one. I am aware that the operation of the Act has been suspended by an eight-member Bench of this Court. It is, however, clear that the suspension order of the eight-member Bench is an interim measure. If ultimately the Court upholds the constitutional validity of the Act, which is an equally possible outcome with that of the possible decision of its constitutional invalidity, the Act would take effect from the date of its enforcement, not from the date of decision of the Court. In case the Act is held to be valid, the decision of this Bench, which is not constituted as per the procedure prescribed and strength of Judges required under the Act, in the present matter, may arguably be *coram non judice* and thus a nullity in the eye of law.

4. In order to avoid such an anomaly, I was of the view that the cases under Article 184(3) of the Constitution should not be heard till the

¹ which was suspended by this Court on 13.04.2023 when it was still a Bill.

² Raja Amer Khan v Federation of Pakistan (C.P. 6/2023), etc.

case dealing with the constitutional validity of the Act is decided, or if some urgency requires that a case under Article 184(3) of the Constitution must be heard, it would be prudent and appropriate if it is heard by a Full Court Bench. That is why I recorded my opinion in Const. Petitions No.24-26 of 2023 (Trial of Civilians in Military Courts case) on 22 June 2023 thus:

I am of the opinion that until this Court decides the constitutionality of the Supreme Court (Practice and Procedure) Act 2023, Section 3 of which has prescribed the procedure for invoking original jurisdiction of this Court under Article 184(3) of the Constitution, all such matters under this jurisdiction must be heard by the Full Court Bench of this Court.

I, therefore, made a request today to the Hon'ble Chief Justice of Pakistan on the Bench to constitute a Full Court Bench, for hearing the present case, which I hope his lordship would consider earnestly.

5. Despite the above, in all fairness to the parties of this case, I also consider it appropriate to give an opportunity to them to assist the Court on the question whether this Bench should continue hearing this case or should this case be adjourned till the Court first decides the constitutionality of the Supreme Court (Practice and Procedure) Act, 2023 or in the alternate, should a Full Court Bench hear this case pending decision on constitutionality of the Act. Learned Counsel for the parties are to come prepared on the next date to address the Court on this question.

Judge

Islamabad,
18th August, 2023.
Sadaqat