IN THE PESHAWAR HIGH COURT, PESHAWAR,

[Judicial Department].

Writ Petition No.1584-P/2020

Zarak Arif Shah,
Advocate High Court,
Peshawar.

Petitioner (s)

VERSUS

The Government of Khyber Pakhtunkhwa,
through Chief Secretary Government of Khyber Pakhtunkhwa,
Civil Secretariat, Peshawar and others.

Respondent (s)

For Petitioner :- Mr. Ali Gohar Durrani, Advocate.
For Respondents :- Mr. Shumail Ahmad Butt, Advocate General Khyber Pakhtunkhwa.

Date of hearing: **06.05.2020**

JUDGMENT

ROOH-UL-AMIN KHAN, J:- Through the instant constitutional petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 **("the Constitution"),** Zarak Arif Shah, the worthy Advocate, Peshawar High Court Peshawar, the petitioner, seeks issuance of the following writ:-

> **"That insertion of sub-section (4) in section 22 of the Khyber Pakhtunkhwa Control of Narcotic Substances Act, 2019 (Act No.XXXI of 2019), made through Khyber Pakhtunkhwa Control of Narcotic Substances (Amendment) Ordinance 2020 (Ordinance No.II of 2020), being based on malice, against the**

Constitution and independence of Judiciary, be declared as ultra vires, therefore, be struck down.

Any other relief deemed appropriate in the circumstances of the case, may also be granted in favour of the petitioner, if not specifically asked".

2. Petitioner is a practicing lawyer by profession. In the writ petition he asserts that initially the control of narcotic substances, narcotic drugs, psychotropic substances, and control substances and the production, procession, trafficking and transportation of such drugs and substances and for matters ancillary thereto, were regulated by a Federal law, namely, the Control of Narcotics Substances Act, 1997 **("the Act of 1997"),** applicable across the country. In the year 2019, the Government of Khyber Pakhtunkhwa enacted and promulgated the Khyber Pakhtunkhwa Control of Narcotic Substances Act, 2019 ("**Act of 2019**") applicable to the Province of the Khyber Pakhtunkhwa only. Through section 59 of the Act of 2019, the Act of 1997, was repealed to the extent of cultivation, possession, selling, purchasing, delivery and transportation etc within the Province. Section 22 of the Act of 2019, provides for the establishment of the Special Courts and appointment of Judges for such

Special Courts by the Government after consultation with the Chief Justice of the Peshawar High Court. He further asserts that the Act of 2019, having no provision for bail was strongly objected by the lawyers' community of the province of Khyber Pakhtunkhwa, as a result, certain amendements were brought/introduced in the Act of 2019, through the Khyber Pakhtunkhwa Control of Narcotic Substances (Amendment) Ordinance, 2020 (Ord. No.II of 2020) (*to be referred hereinafter as the Ordinance, 2020*) vide which, inter alia, under section 26, the provisions of the Code of Criminal Procedure, 1898, were made applicable mutatis mutandis to all proceedings under the Act of 2019. Subsequently, The Khyber Pakhtunkhwa Control of Narcotic Substances (Second Amendement) Ordinance, 2020 (Ord. No.X of 2020), was promulgated vide which sub-section (4) in section 22 regarding constitution of the Special Courts was inserted in the Act of 2019, without consultation of Hon'ble the Chief Justice of the Peshawar High Court, Peshawar. He asserts that by use of word **"Shall"** in section 22 of the Act of 2019, the Provincial Government/Governor was not competent to insert sub-section (4) in section 22 of the Act of 2019, hence, he claims that amendment brought in section 22 of the Act of 2019 through Ordinance, 2020, is not only

against the mandate of constitution but is an attack on the independence of Judiciary, hence, be struck down.

3. Cr.Misc.BA No.140-P/2020, filed by accused/petitioner Parvaiz Hameed for his release on bail in case FIR No.535 dated 19.10.2019, registered under section 9 (d) of the Act of 2019, at Police Station Topi Swabi, was also pending before this Court in which the same legal point i.e. *"Whether powers of Hon'ble the Chief Justice of this Court can be abridged by issuance of an Ordinance by the Governor by inserting sub-section (4) in section 22 of the Act of 2019*", cropped up, therefore, bail petition was sent to Hon'ble the Chief Justice for constitution of a larger Bench or further appropriate orders vide order dated 10.02.2020. In view of the above, the bail petition was clubbed and fixed along with the instant writ petition before this Division Bench by Hon'ble the Chief Justice of this Court. As the accused/petitioner was behind the bars since 19.10.2019 and his bail petition was pending since 4th December, 2019, therefore, due to persistent requests of the Worthy Advocate General for adjournments on different dates, the petitioner was granted interim post arrest bail without touching merits of the case vide order dated 29.04.2020.

4. In the instant writ petition, the worthy Advocate General, was put on notice to file reply

within a fortnight vide order dated 03.03.2020, however, despite various adjournments, the same could not be filed, particularly, due to lack of interest of the Provincial Government in the matter.

5. We have heard the exhaustive arguments of learned counsel for the parties and perused and examined the law on the subject with their valuable assistance.

6. To cope with the legal point *(supra),* it would be advantageous to refer original section 22 of the Act of 2019, and the impugned amendments brought through the Ordinances, 2020, which for the sake of convenience and ready reference are reproduced below:-

> **"S.22 Establishment of the Special Courts:-**
> **(1)** Government **shall**, by notification in the official Gazettee, establish as many Special Courts as it considers necessary and appoint, **after consultation with the Chief Justice of the Peshawar High Court**, the Judges for each of such Special Court and where it establishes more than one Special Court, it shall specify in the notification the place of sitting of each Special Court and the territorial limits within which it shall exercise jurisdiction under this Act. (**Bold and underlines supplied emphasis).**
> (2)……
> (3) …….

Subsequently, the following amendment was brought in section 22 of the Act of 2019, through Khyber

Pakhtunkhwa Control of Narcotic Substances (Amendment) Ordinance, 2020 (Ord. No.II of 2020):-

> **"5. Amendment of section 22 of the Khyber Pakhtunkhwa Act No.XXXI of 2019.-** In the said Act, in section 22:
>
> (a) In sub-section (1) after the word "establish", and "appoint", the words "or designate" and "or confer" shall respectively be inserted; and
>
> (b) After sub-section (3) the following new sub-section shall be added, namely;
>
> **(4)** Notwithstanding the repeal of the Control of Substances Act, 1997 (Act No.XXV of 1997), under section 59 of this Act, "hereinafter referred as repealed Act" the Court functioning under the repealed Act shall continue to entertain and dispose of matters under this Act, till the time of necessary establishment or designation of Special Court and conferment of powers thereupon, under this Act".

7. Again, through the Khyber Pakhtunkhwa Control of Narcotic Substances (Second Amendment) Ordinance, 2020 (Ord. No.X of 2020), inter alia other sections of the Act of 2019, the following new sub-sections after sub-section (3) were added; namely:

> **"S.5 Amendment of section 22 of the Khyber Pakhtunkhwa Act No.XXXI of 2019**:- In the said Act, in section 22, after sub-section (3), the following new sub-sections shall be added, namely:
>
> **(4)** Notwithstanding the repeal of the Control of Narcotic Substance Act, 1997 (Axt No.XXV of 1997), under section 59 of this Act, hereafter referred to as the repealed Act,

> the Court, functioning under the repealed Act, shall continue to entertain and dispose of matters under this Act till the time of necessary establishment or designation of Special Court and conferment of powers thereupon under this Act.
>
> (5) Notwithstanding anything contained in sub-section (1) Government may, in consultation with the Chief Justice of the Peshawar High Court, designate and confer the powers of a Special Court referred to :-
>
> (a) in sub-section (2) in clause (a) on any Sessions Judge or Additional Sessions Judge; and
>
> (b) In sub-section (2), in clause (b), on any Judicial Magistrate, First Class.
>
> Provided that any consultation of Government or consent of the Chief Justice in pursuance of the provisions of Khyber Pakhtunkhwa Control of Narcotics Substances (Amendment) Ordinance, 2020 (Ordinance No.II of 2020) shall be deemed to be sufficient for the purpose of this sub-section.".

8. Section 2(ao) of the Act of 2019, defines **"Special Court",** constituted under section 22 of the Act of 2019, as below:-

> **"Special Court"** means the Special Court, established under section 22 of this Act".

9. Under the Ordinance No.II of 2020, section 22 of the Act of 2019, was amended to the effect that in sub-section (1) after the words **"establish",** and **"appoint",** the words **"or designate"** and **"or confer"** were respectively inserted and after sub-

section (3), the newly subsection (4) reproduced above was added. The thorough perusal of section 22 of the Act of 2019 would reveal that appointment of the Judges of Special Courts can only be made by the Governor Khyber Pakhtunkhwa through an Ordinance with **consultation** of Hon'ble the Chief Justice of the Peshawar High Court. By use of word **"shall"** in section 22 of the Act of 2019, **"the consultation of Hon'ble the Chief Justice"** was the mandatory requirement of the law.

10. During arguments, when the Worthy Advocate General was confronted with the proposition as to whether the Hon'ble Chief Justice has consulted by the Provincial Government for **"designating"** or **"conferring"** powers upon the Special Courts, constituted and established under the Act of 1999, he referred to correspondence between the Registrar of this Court and the Deputy Secretary (Judicial) Khyber Pakhtunkhwa Home and Tribal Affairs Department; which for the sake of convenience and ready reference are reproduced below. The letter addressed by the latter to the former on 05.12.2019, read as under:-

"To

The Registrar,
Peshawar High Court,
Peshawar.

Subject: **ESTABLISHMENT OF COURTS UNDER SECTION 22 OF THE KHYBER**

PAKHTUNKHWA CONTROL OF NARCOTIC SUBSTANCES ACT 2019.

Dear Sir,

I am directed to refer to the subject cited above and to state that section 22 of the Khyber Pakhtunkhwa Control of Narcotic Substances Act, 2019, empowers the Government to establish as many Special Courts as it considers necessary and appoint, after consultation with the Chief Justice of the Peshawar High Court, the Judges for each of such Special Court.

Since, no Additional Special Courts have been established under section 22 of the Act ibid and in view of hardships to litigant public, it is proposed that the Courts of District and Sessions Judges, Additional District & Sessions Judges and Courts of Judicial Magistrates First Class already notified under section 46(5) of the Control of Narcotic Substances Act, 1997 (now repealed) may be conferred power of Courts respectively for the time being.

You are, therefore, requested to kindly place the matter before the Hon'ble Chief Justice of the Peshawar High Court for requisite consultation and consent for conferment of the power of judges Special Court upon the District and Sessions Judges/Additional District and Sessions Judges and Judicial Magistrate, for the purpose of trial of offences under the Khyber Pakhtunkhwa Control of Narcotic Substances Act, 2019.

Yours faithfully,

Deputy Secretary (Judicial).

In response of the above mentioned letter, the worthy Registrar of this Court informed the concerned authority through letter No.24674 dated 24.12.2019, text of which is reproduced below:-

"To

The Deputy Secretary (Judicial)
Government of Khyber Pakhtunkhwa,
Home & Tribal Affairs Department,
Peshawar.

Subject:- ESTABLISHMENT OF COURTS UNDER SECTION 22 OF THE KHYBER PAKHTUNKHWA CONTROL OF NARCOTICS SUBSTANCES ACT, 2019.

"I am directed to refer to your letter No.SO(J)/HD/GEN/483/2019/Vol.I dated

> 05.12.2019, on the subject and to say that after due consideration, it has been observed that appointment of judges etc could not precede the establishment of the Special Courts on part of the Government as required by the law. When the establishment of the Special Courts in accordance with law takes place, **the requisite consultation will follow for appointment of the Judges of such Courts or conferment of the powers, as the case may be, subject to the permissibility by law.** (The underlines supplied for emphasis).
>
> It is, therefore, hereby asked that the Government shall establish the Special Courts in accordance with law by Notification in the Official Gazette, please.
>
> Additional Registrar (Admn)
> For Registrar.

11. After receipt of the above mentioned letter dated 24.12.2019, the Provincial Government went into a deep slumber and ultimately awakened through the agitation of the lawyers' community demonstrating throughout the Province, as the accused involved in narcotics cases had been left remediless. Resultantly, the Provincial Government again addressed a letter to the worthy Registrar of this Court on 11th February, 2020, text of which is reproduced below:-

> "The Provincial Government promulgated the Khyber Pakhtunkhwa, Control of Narcotic Substances (Amendement) Ordinance, 2020 on 31st January, 2020. Section 22(1) of the ibid Ordinance empowers the Provincial Government to "designate" Special Courts or "confer" such powers on any existing Courts in consultation with the Hon'ble Chief Justice Peshawar High Court.
>
> In order to avoid delay in trials of the offences under the ibid Ordinance, it is proposed that the Courts of District & Sessions Judges, Additional District &

> Sessions Judges and Courts of Judicial Magistrates first class already notified under Section 46(5) of the Control of Narcotic Substances Act, 1997 (now repealed) may be conferred powers of courts respectively for the time being.
>
> You are therefore, requested to kindly place the matter before the Hon'ble Chief Justice Peshawar High court for requisite consultation and consent for conferment of the powers of Judges Special Courts upon the District & Sessions Judges, Additional District & Sessions Judges and Courts of Judicial Magistrates First Class for the purpose of trial of offences under section 22(4) of the Khyber Pakhtunkhwa, Control of Narcotic Substances (Amendment) Ordinance, 2020."

The above mentioned request of the Provincial Government was replied by the worthy Registrar of this Court vide letter dated 19.03.2020, wherein the concerned authority was informed that by inserting the words "Designate" or "confer" after the word "establish" in section 22 of the Act of 2019, the Provincial Government has encroached the powers of the Chief Justice with regard to designation of the Judicial Officers and conferment of powers upon them under section 22 of the Act of 2019. In such like matters, "consultation" with Hon'ble the Chief Justice to designate the existing Criminal Courts of relevance as special Courts under the KP CNS Act, 2019 was mandatory. For better understanding, we deem it

appropriate to reproduce the text of the letter dated 19.03.2020 i.e. reply to letter dated 11.02.2020:-

> "I am directed to refer to your office Letter No.SO (Judl)/Home Department/P-483/2019/Vol-I dated 11.02.2020 on the subject noted above, and to say that the matter was placed before Hon'ble the Chief Justice in light of the request as made for consultation and consent in the letter under reference. Hon'ble the Chief Justice has been pleased to approve the following consultative view:-
>
> > "Despite addition of the isolated word "confer" in sub section (1) of section 22 of the Act, the Government is still devoid of authority to confer the powers of Special Courts upon judges of ordinary courts in absence of the object for the said word or there being no specific provision like Sub-section (5) in CNS Act, 1997.
> >
> > By providing the word "or designate" after the word "establish" the Government has got the power to designate the existing courts of Sessions Judges/Additional Sessions Judges, and of the Judicial Magistrates First Class as Special Courts under the Khyber Pakhtunkhwa Narcotic Substances Control Act, 2019. Thus, it may seek for consultation with Hon'ble the Chief Justice to designate the existing criminal courts of relevance as the Special Courts under KP CNSA, 2019, but again in this case the designated courts may not be able for all times to share the workload generated by two different

> enforcement agencies including the Directorate General of Excise & Taxations and the Police Department as introduced and authorized for registration of cases and investigation under the said Act. So, if the Government intends to run with scheme of designated courts for purpose of KP CNSA Act to save the additional cost of infrastructure and support staff of judges in case of establishment of Special Courts, it will have to create the additional posts of Additional Sessions Judges and of the Judicial Magistrate. If we simply concur with the demand of the Government for designation of existing Courts as the Special Courts, we may face the hardships to manage the workload with existing strength of the Judicial Officers. So, we may appropriately enter into a short term arrangement with the Government, until it meets with the mandatory requirement of establishment of Special Courts and appointment of its judges.
>
> Therefore, I am further directed to ask the Government to establish the Special Courts and create posts of judges in the next financial year; and to convey hereby the consent of Hon'ble the Chief Justice for designation of the existing relevant courts as the Special Courts under the Khyber Pakhtunkhwa Control of Narcotic Substances Act, 2019 for a period till establishment of Special Courts as herein indicated, please."

12. From the correspondence *(ibid),* we did not find any consultation by the Provincial Government as

required under section 22 of the Act, 2019 or assent accorded by Hon'ble the Chief Justice of this Court for **"designating"** or **"conferring"** power upon the Special Courts under the Act of 1999, whereas, subsection (4) inserted through the Ordinance II of 2020, speaks volumes that power conferred upon Hon'ble the Chief Justice of this Court was abridged by the Governor through an Ordinance not only to avoid the consultation of Hon'ble the Chief Justice but also to offend the mandate of Articles 2A, 175(3) and 203 of the Constitution, which exercise is against the independence of judiciary.

13. Under the provisions of Article 2-A of the Constitution of Islamic Republic of Pakistan, 1973, the Objectives Resolution, which set the code and ethics, has been made integral part of the Constitution and is inseparable limb of the supreme law of the land. The objectives Resolution provides that:-

> **"Wherein the independence of the judiciary shall be fully secured."**

14. Under Article 175 (3) of the Constitution (*as originally enacted*), it was provided that the Judiciary shall be separated from the Executive progressively within three years from the date on which the Constitution came into force viz 14.08.1973. The period of three years was subsequently extended to

five years by the Constitution (5th Amendment) Act, 1976 and then to 14 years by the Revival of the Constitution, 1973 Order (P.O. 14 of 1985). Thus, the period during which the Judiciary was to have been separated from the Executive was enlarged under various extensions up to the 14th August, 1987, however, neither the democratically elected governments nor the interveners tried to attend this important issue. In this backdrop, two Constitutional petitions were filed before the worthy Sindh High Court (C.Ps Nos.D-123/1974 and D-89/1987) by Mr. Sharif Fardi and some other members of the Pakistan Bar Council complaining of this defiance and seeking issuance of appropriate directions against the Governments concerned obliging them to implement the mandate of the Constitution. This was the case of first expression on the point of independence of judiciary, therefore, both the petitions were fixed before the Full Bench of the worthy Karachi High Court which arrived at a conclusion *(by a majority of five to one)* that the Constitutional obligations contained in Article 175 (3) had indeed been disregarded and that appropriate directions could competently be issued by the High Court under Article 199 directing the authorities to fulfill them. Accordingly, the petitions were accepted vide

authoritative judgment dated 24.04.1989, reported as, **"Sharif Faridi and 03 others Vs the Federation of Pakistan" (PLD 1989 Karachi 404)**, relevant parts of which are reproduced below:-

> "Supervision and control over the subordinate judiciary vested in the High Court under Art.203, keeping in view Art. 175, is exclusive in nature, comprehensive in extent and effective in operation and comprehends the administrative power as to the working of the subordinate Courts and disciplinary jurisdiction over the subordinate judicial Officers. Any provision in an Act or any rule or a notification empowering any executive functionary to have administrative supervision and control over the subordinate judiciary will be violative of Art. 203 of the Constitution and will militate against the concept of separation and independence of judiciary as envisaged by Art.175 of the Constitution and the Objectives Resolution".
>
> "In a set-up where the Constitution is based on trichotomy of power, Judiciary enjoys a unique and supreme position within the framework of the Constitution as it creates balance amongst various organs of the State and also checks the excessive and arbitrary

> exercise of power by the Executive and the Legislature, Judiciary has been termed as a watch-dog and sentinel of the rights of the people and the custodian of the Constitution. It has been described as "the safety valve" or "the balance wheel" of the constitution. The jurisdiction and the parameters for exercise of power by all the three organs have been mentioned in definite terms in the Constitution. No organ is permitted to encroach upon the authority of the other and the Judiciary by its power to interpret the Constitution keeps the Legislature and Executive within the spheres and bounds of the Constitution."

The judgment *(supra)* was assailed by the Government of Sindh through Chief Secretary to the Government of Sindh, Karachi and others by filing **Civil Appeals Nos.105-K to 107-K of 1989**, before the Hon'ble Supreme Court. As all the Provincial Governments, represented by their respective Chief Secretaries, willingly agreed to the separation of judiciary from the executive and giving it full independence, hence, the appeals were dismissed vide judgment rendered in case titled, **"Government of Sindh through Chief Secretary to Government of Sindh Karachi and**

<u>others Vs Sharaf Faridi and others (PLD 1994 SC 105),</u>

In **Al Jehad Trust's case (PLD 1996 Supreme Court 324),** appointments of Judges in the Superior Judiciary were challenged on the ground that they have been made in contravention of the procedure and guidelines laid down in the Constitution and in this context the august Supreme Court while examining in detail the relevant Articles of the Constitution pertaining to the Judiciary specified in Part-VII of the Constitution and meaning of "consultation", rendered an authoritative judgment in the case *(supra)*, relevant parts relating to the controversy are reproduced below:-

> "The words **"after consultation"** employed inter alia in Articles 177 and 193 of the Constitution connote that the **consultation** should be effective, meaningful, purposive, consensus oriented, leaving no room for complaint of arbitrariness or unfair play."…..
>
> "In the Constitution of 1973, by which Pakistan is being governed, in the Chapter relating to the Judiciary and in the process of appointments, the word **"consultation"** is used.
>
> The meaning of the word **"consultation"** is very pivotal in nature because the independence of the judiciary and the appointments of the Judges have close nexus with it or in other words deep-rooted in it.

The word **"consultation"** used in the Constitutional provisions relating to the Judiciary is to be interpreted in the light of the exalted position of the Judiciary as envisaged in Islam and also in the light of the several provisions of the Constitution which relate to the Judiciary guaranteeing its independence.

The Legislature has to legislate, the Executive has to execute laws and the Judiciary has to interpret the Constitution and laws. The Success of the system of governance can be guaranteed and achieved only with these pillars of the State exercise their powers and authority within their limits without transgressing into the field of the others by acting in the spirit of harmony, cooperation and coordination.

Appointment of a Judge and the mode and manner in which he is appointed has close nexus with the independence of Judiciary and cannot be separated from each other. The word **"consultation"** used in the Constitutional provisions relating to the Judiciary is to be interpreted in the light of the exalted position of the Judiciary as envisaged in Islam and also in the light of the several provisions in the Constitution which relate to the Judiciary guaranteeing its independence".

"Word **"consultation"** has to be interpreted in the light of the objectives Resolution, which is integral part of the constitution providing in unequivocal terms that the **independence of the**

> **Judiciary shall be fully secured.**" (emphasis supplied).

The aforesaid view was reiterated by Hon'ble Supreme Court in case titled **"Zafar Ali Shah Vs Pervez Musharraf, Chief Executive of Pakistan (PLD 2000 SC 869),** wherein it was held that:-

> "The independence of judiciary is a basic principle of the constitutional system of governance in Pakistan. The Constitution of Pakistan contains specific and categorical provisions for the independence of judiciary. The Preamble and Article 2A state that "the independence of judiciary shall be fully secured" and with a view to achieve this objective, Article 175 provides that "the Judiciary shall be separated progressively from the executive".

In case titled, **"Shahzia Munawar vs Punjab Public Service Commission through Secretary Lahore" (PLD 2010 Lahore 160)** in the matter of appointment of Civil Judge-cum-Judicial Magistrate, the Hon'ble Lahore High Court while following the ratio of Sharaf Faridi case **(PLD 1994 SC 105)**, observed that:-

> "Though we have already held that the appellants were eligible for appointment as Civil Judges-cum-Judicial Magistrates, we are constrained to examine this aspect of the matter. The Constitution of Islamic Republic of Pakistan, 1973, proceeds on the premises of Trichotomy of powers with the independence of Judiciary and its separation from the Executive as one of its salient features. No statute or Rule or

Regulation made thereunder can be interpreted so as to offend against the aforesaid principle of independence of Judiciary lest its every validity and constitutionality become doubtful. In mattes relating to selection, appointments and promotion of members of the Judicial service this independence needs to be guarded even more a jealously. In this behalf the observation of the Honourable Supreme Court in the case reported as Abdul Matin Khan and 02 others vs NWFP through Chief Secretary and 02 others (PLD 1993 SC 187) is of great relevance and is reproduced as follow:-

> "Although a case is pending before us from Sindh High Court on question of separation of Judiciary and another regarding independence of judiciary, vis a vis the transfer of High Court judges to the Federal Shariat Court, this case presents a third feature regarding both the independence and separation of judiciary. If power of the Government and its functionaries to override the assessment, opinion and directions of the High Court with regard to its own subordinate judiciary in matter of their promotion is upheld, the very fabric of independence and separation of judiciary is considerably damaged. It is not necessary to spell out the detailed consequences in the context of our Constitutional set up. It would suffice to say that besides the contravention of some of the commands in the specific constitutional provisions including Article 175 thereof but also that contained in the Objectives Resolution which inter alia provides that the independence of judiciary shall be fully secured, would be flouted."

The aforesaid observations leave no room for doubt that matter pertaining to members of the judicial service and their selection, appointments and promotions the view and opinions of this Court must take precedence over any purported opinion of the Executive. It is in the above perspective that Rule 12 reproduced above must necessarily be interpreted. In the instant case not only specific observations were made by this Court on the judicial side but a reference was made by the Chief Justice and the other Judges forming part of the Administration Committee of this Court. The competent authority should have given defence to such observations

> rather than override the same, specially as this court was the appointing authority of the appellants".

In case titled, "**Agha Inam ur Rehman Khan vs the Registrar Lahore High Court Lahore" (2013 SCMR 109),** the legal point involved was that appellant was a Civil Judge and was dismissed from service by the competent authority i.e. the Chief Justice and Judges. The appellant made departmental representation before Hon'ble the Chief Justice Lahore High Court, Lahore, which was returned to him being incompetent. On return, the appellant, preferred appeal before the Governor Punjab, followed by appeal before Punjab Subordinate Judiciary Service Tribunal, which ultimately befell before the Hon'ble Supreme Court of Pakistan, wherein it was elaborated under the constitutional guarantees of independence of judiciary that Governor is not an authority to hear appeal against the order of the Chief Justice of High Court. The relevant paragraph from the above cited judgment is reproduced below:-

> "We are afraid that the contention propounded by the learned counsel for the appellant is conceptually flawed, unfounded and misconceived. The remedy of representation under section 21(2) of the Act 1974, is only available before the "authority next above the authority which made the order". The governor of a province who in terms of Article 105 of the Constitution of Islamic Republic of Pakistan

> 1973, has to act on the advice of the Chief Minister as has been explained in the case reported as Rana Aamer Raza Ashfaq and another Vs Dr. Minhaj Ahamd Khan and another (2012 SCMR 6) that the Governor of a Province, by no stretch of constitutional scheme or on the interpretation of any provisions of the Constitution or the law on the subject can be held to be an authority next above the Chief Justice and the Judges of the High Cout, who in this case were pleased for the dismissal order of the appellant dated 09.03.2000. Rather, shall be ludicrous unfounded and misconceived to hold so, especially for the reasons that according to Article 192 of the Constitution of Islamic Republic of Pakistan, 1973, which reads as "Constitution of High Court:- A High court shall consist of a Chief Justice and so many other Judges as may be determined by law or until so determined as may be fixed by the President". Therefore, the honourable Chief Justice and the Judges of the High Court put together is the High Court, thus neither on the touchstone of the constitutional scheme etc nor on the established rule of independence of judiciary, the Governor can be said to be an authority next above the High Court for any purpose whatsoever".

The hon'ble apex Court in case titled, **Munir Hussain Bhatti Vs Federation of Pakistan (PLD 2011 SC 407),** has held as under:-

> "It is an undisputed trend of our Constitutional System that in matter of appointment, security of tenure and removal of judges the independence of

judiciary should remain fully secured"……

"The supervision and control over the judiciary vested in the High Court under Article 203 of Constitution, keeping in view Article 175, is exclusive in nature and any notification empowering any executive functionary to have control over the subordinate judiciary will be violation of the above Article 203 of the Constitution. Besides it would militate against the concept of operation of powers and independence of judiciary."

15. Deriving wisdom from the above referred judgments, it can be safely held that the matters of appointment, promotion, posting, transfer and conferment of powers including the terms and conditions of service of members of the Subordinate Judiciary, shall be controlled and governed by a High Court of the Province and any legislative enactment in the garb of power of promulgating an Ordinance, for grabbing the constitutionally assigned mandate of the Judiciary, will not only be violative of Articles 175(3) and 203 of the Constitution, but also offending against the constitutional scheme of independence of the Judiciary, enumerated in Article 175 of the Constitution and the Objectives Resolution. The

inappropriate and unwarranted interference with the powers vested in the Chief Justice and the High Court, by any Executive Authority, will create an imbalance in the constitutionally empowered Organs of the State which must result into a state of great confusion and turmoil. The division of functions of the three main Organs of the State is recognized and emphasized by the Constitution. Judicial powers are vested in the judiciary in terms of Article 2 and 203 of the Constitution. Similarly, the Executive and the Legislature are vested with powers in their respective spheres. It is neither the intention of the Legislature nor the scheme of the Constitution that the powers of judiciary may be bypassed or be shared by the Executive or Legislature or that the powers vested in the Executive or the Legislature be exercised by the Judiciary. Each organ of the State, under the trichotomy of powers, distributed by the Constitution, shall remain restricted in its sphere.

Needless to mention that, the Legislature is vested with the power to legislate, but they are presumed not to legislate contrary to the rule of law and main scheme of Constitution. The Legislative competence of the Governor or to promulgate an Ordinance by him is not disputed. The controversy raised in the petition is that the Governor by

exercising his power vested in him under Article 128 of the Constitution, shall adhere to his sphere envisaged by the Constitution in the scheme of trichotomy of powers and shall not legislate contrary to Constitution. As observed in the earlier part of the judgment, the strike of the lawyers' fraternity in the Province, was a circumstance which render it necessary for the Governor to exercise his powers under Article 128 of the Constitution by taking immediate action for promulgation of the Ordinance under challenge, whereby the provision of bail was provided by introducing amendment in the KP CNS Act, 2019, with an addition in section 22 whereby after words **"establish"** and **"appoint",** the words **"or designate"** and **"or confer",** were respectively inserted. Similarly, by insertion of subsection 4 in section 5 of the Act of 2019, section 46 of the repealed Act of 1997, was resuscitated and the consultation and consent of the Chief Justice of Peshawar High Court, made under the Act of 1997, were held sufficient for the purpose of the Act of 2019. Though the Federal Act (CNSA) 1997 was partially repealed by the provincial (CNSA) 2019, but to the extent to cultivation, possession, selling, purchasing, delivery and transportation etc. to the extent of Khyber Pakhtunkhwa, whereas the provisions of section 45 of

and 46 of Act 1997 with regard to jurisdiction and establishment of Special Courts was not expressly repealed, however, by insertion of a particular section i.e. 22 in the Act 2019 the utility and existence and applicability of sections 45 and 46 of the Act 1997 completely obliterated from the statute to the extent of Khyber Pakhtunkhwa province. Sections 46 (4) and (5) of the partially repealed act 1997 provided for consultation of the Chief Justice of the province for appointment and establishment of the Special Courts. Likewise section 22 also provides for consultation of the Chief Justice of the Peshawar High Court in relation to establishment of the Special Court. It is settled principle of law that the later statute repeals the earlier statute. By insertion of section 22 in the Act 2019 i.e. specific provision for establishment of court in Khyber Pakhtunkhwa, section 45 and 46 of the partially repealed Act 1997 has lost its efficacy and applicability in Khyber Pakhtunkhwa and as such shall be deemed as impliedly repealed, hence the consultation with the Chief Justice under the repealed act cannot be dragged to the newly enacted law for carrying out the requirement of section 22 of the Act 2019. Had it been an amendment in Act 1997, the consultation of the Chief Justice would have been sufficient for establishment of new courts, but in case

of repeal of the Act 1997 and promulgation of Act 2019 with a particular provision of consultation of the Chief Justice for establishment of Courts would be sine qua non under the new dispensation. The repeal of law is differ from amendment, because the amendment of a law involves making a change in a law that already exist, leaving a portion of the original still standing, whereas a repeal is an amendment or abrogation of previously existing statute expressly or impliedly. On the cost of repetition we must reiterate that the provisions of section 46 of the Act 1997 have impliedly repealed by section 22 of the Act 2019. From the detail analysis of the case law, rendered by the august Supreme Court as well as the High Courts of the Country, while interpreting the supervisory and administrative powers of the High Court, it is manifest that conferment of powers and designating a court/ Judge of subordinate Judiciary is the sole prerogative and powers of High Court. All the matters pertaining to member of the judicial services *viz* their selection, appointment, promotion, posting, transfer and disciplinary proceedings, come under the power of the High Court, whereas, any amendment abridging powers of the Chief Justice and High Court and empowering the Executive Authority to confer power on a Judicial Officer or designate a Court, without

consultation of the Chief Justice, not only amount to intrusion and encroachment on the powers vested in the Chief Justice and the High Court, but also violative of Article 2-A, 175(3) and 203 of the Constitution. The provisions inserted through amendment in section 22 of the Act of 2019, being against the principles of trichotomy of power, as envisaged in the Constitution and most particularly the law settled down on the independency of judiciary, is not sustainable being ultra vires of the Constitution and transgression of powers. No doubt, in such like matters, deviation from the Constitution shall create harmful disharmony in three pillars of the State. We are conscious of the facts that only the Legislature have the powers to make laws, but it must be subject to constitutional limitations, without encroaching upon the independence of judiciary and keeping in view the principles of supremacy of rule of law and spheres of power, because improper exercise of power by the executive may gravely imperil the independence of judiciary which, of course, is one of the foremost concern of constitution. There is no cavil to the proposition that mala fide may not be attributed to the Legislature, however, we have noted with great concern that the amendement under challenge, whereby the power of delegating conferment and

designating upon the District courts are vested in the High Court under Article 203 of the Constitution were over sighted rather militated through a poorly drafted amendment in section 22 by inserting sub-section 4 & 5 therein and that too, after clarification of situation by the Registrar of the High Court through letter dated 19.03.2020. Though, through the amendment ordinance, after sub section 3 new subsections 4 and 5 with a proviso were added to section 22 of the Act 2019 but the main section i.e. 22 was neither omitted nor modified. By the use of word "shall" in the section (ibid) the consultation of the Chief Justice is still the mandatory requirement while bringing back one of the provisions of repealed Act of 1997, about consultation of Chief Justice, shall amount only to an unexpected mischief and to gravely imperil the independence of judiciary. We deem it necessary to mention here that the consultation with Chief Justice and ascent of his lordship qua conferment and designation of power on District Judiciary is not only the requirement of Act, 2019, but also mandatory under Article 203 of the Constitution. Not only under the Narcotic Laws, but on establishment of any court by the Federal/Provincial Government, the concerned Government while require the services of members of District Judiciary, shall consult the Chief Justice of the

respective High Courts for providing the services of judicial officer. The judicial service whether at the level of district courts or Courts subordinate thereto is under the control of the High Court in all respects. The members of District judiciary are recruited amongst the members of the bar and by promotion from amongst the senior civil judges on the basis of seniority-cum-fitness by the Administrative Committee of the High Court. In such a way the service of District Judicial officer is distinct and separate from civil and executive service of the province. The transfer and posting of members of judicial service fall under the domain of High Courts while the executive authority has no nexus with the conferment of power upon the judicial officer. The draft man of the Ordinance was either unaware about the above discussed judicial hierarchy or was avoiding the process of consultation of Chief Justice to wriggle out from the contents of last reply to the Government by the Registrar of this Court. In both the situations the respectable Governor of the province was misled and deluded. It is necessary to emphasize here that the legislative drafter is under a laden duty to ensure that the contents of the legislative draft are not inconsistent or ultra virus with the provisions of the Constitution and the proposed enactment is within the competence

of legislative Authority. Such a drafter must be well conversant with the legislative list of the Constitution, the Federal and the Provincial Codes, which contains all Federal and Provincial laws. At least, the drafter should know about the provisions of the General Clauses Act, which is commonly known as Interpretation Act. The words, sentences and language of the provisions of the under challenge Ordinance will make it abundantly clear that its drafter was either alien to Articles 2-A, 175(3) and 203 of the Constitution or he has deliberately deviated from the Constitution or over sighted the importance of independence of Judiciary. Likewise, the Promulgating Authority has also signed the Ordinance without adhering to its contents. Without dilating upon the competency of the drafter of the impugned Ordinance and its promulgation by the Provincial Government, it would be expedient to refer to the book "Jinnah: Creator of Pakistan" authored by Hector Bolitho, wherein about perspective on legislative drafting of Quaid-e-Azam Muhammad Ali Jinnah, he says: -

> "**When Bills arrived for him to sign, the Quaid-e-Azam, would go through them sentence by sentence. Clumsy and badly worded, "he would complain. He would tell his Secretary,**

> **"Split it up into more clauses!" "This should go back and be rewritten!" When the Secretary pleaded, "Sir, you will be holding up a useful piece of legislation, "he would relent. But his vigilance did not weaken. "They cannot hustle me," he would say, "I won't do it".**

16. The matter relating to the posting and conferring powers upon the members of District Judiciary have elaborately been discussed by the Hon'ble Lahore High Court, Lahore in case titled, **"Shazia Munawar vs Punjab Public Service Commission through Secretary, Lahore" (PLD 2010 Lahore 160)** wherein placing reliance on **Mian Khan's case (PLD 1993 SC 187)**, it was ruled that:

> "Constitution of Pakistan 1973, proceeds on the premises of trichotomy of powers with independence of judiciary and its separation from executive as one of its salient features. No statute or regulation made under the constitution can be interpreted so as to offend against the principle of Independence of Judiciary lest its very validity and constitutionality become doubtful. In matters relating to selection, appointment and promotion of members of judicial service the Independence needs to be guarded even more jealously."

Same view has been followed by the worthy Lahore High Court in case titled, **"Government of Punjab**

through Chief Secretary, vs Syed Riaz Alizaidi" (2016 PLC (CS) 1074).

Following the view of the Hon'ble Supreme Court, this Court in case titled, **Yousaf Ayub Khan vs Government through Chief Secretary, Peshawar and 02 others" (PLD 2016 Peshawar 57),** observed as under:-

> "In the Al-Jehand Trust's case PLD 1996 SC 324, 429, although the august Supreme Court stated with reference to the appointment of Judges of Superior Judiciary but the principle applies with equal force to all judicial appointment including those of in the District Judiciary. The dictum laid down in Al-Jehand case was soon reaffirmed by Supreme Court in case of Mehram Ali and others V Federation of Pakistan PLD 1998 SC 1445-1474 and Sheikh Liaqat Hussain Vs Federation of Pakistan PLD 1999 SC 504, 658. This dicum has also been reiterated in Sindh High Court Bar Association Vs Federation of Pakistan PLD 2010 SC 879, 1182, Munir Hussain Bhatti Vs Federation of Pakistan PLD 2011 SC 407.
>
> In the case of Mehram Ali and others Vs Federation of Pakistan and others (PLD 1998 SC 1445 the august Supreme Court after consideration the relevant constitutional provisions and precedents laid down guiding principles, some of these are as follows:-
>
> i. That Articles 175 and 202 and 203 of the Constitution provide a frame work of judiciary i.e. Supreme Court, a High Court for each province and such other Courts as may be established by law.
>
> ii. That the word "such other courts as may be established by law" employed in clause (1) of

Article 175 of the Constitution are relatable to the subordinate courts referred to in Article 203 thereof.

iii. That in view of Article 203 of the Constitution read with Article 175 thereof the supervision and control over the subordinate judiciary vests in High Court, which is exclusive in nature, comprehensive in extent and effective in operation.

iv. Any court which is not under the administrative control of High Court and/or the Supreme Court does not fit in within the judicial frame work of the constitution.

v. That independence of judiciary is inextricably linked and connected with the process of appointment of judges and the security of their tenure and other terms and conditions.

17. In view of the above discourse and deriving wisdom and guidance from the judgments of the Hon'ble Supreme Court of Pakistan, we have no hesitation to hold that insertion of section 5 of KP Control of Narcotic Substances (Amendment) Ordinance 2020 (Ordinance No.II of 2020), being inconsistent and ultra virus to Articles 2-A, 175 (3) and 203 of the Constitution, is not sustainable. Similarly, sections 5(4) and (5) of the Ordinance (ibid), being an encroachment upon the powers of the Chief Justice of High Court and intrusion on the independence of judiciary is also against the judgments of the august Supreme Court of Pakistan which, under Article 189 of the Constitution, 1973 are binding upon all organs of

the State, therefore, on this score too is not sustainable and liable to be set-aside. Simultaneously the power conferred upon the Sessions Judges, Additional Sessions Judge, and Judicial Magistrate 1st Class, as Special Court under the amendment ordinance 2019, being, without consultation and consent of the Chief Justice, Peshawar High Court is in violation of section 22 of the Act 2019 and Article 2A, 175(3) and 203 of the Constitution of Islamic Republic of Pakistan, 1973, as such, held an act void-ab-initio and holder of the post by above said judges as special court, will be treated as having exercised powers and functions in a defective capacity.

18. During the course of arguments, the Advocate General stated at the bar that the Ordinance under challenge has died its own death i.e. on expiration of its statutory period and that subsequently, vide Notification No. SO (Judl)/HD/Gen/P-483/2019/Vol. dated 22.04.2020, Hon'ble the Chief Justice was pleased to accord his assent in pursuance of the required consultation by the Provincial Government for designating of the Courts of Sessions Judges, Additional Sessions Judges and Judicial Magistrate 1st Class, as Special Courts under the Act of 2019.

19. From the above referred to notification dated 22.04.2020, it divulges that the Provincial Government

has realized its mistake committed in the Ordinance No.II of 2020, however, has repeated the same mistake in the subsequent Ordinance promulgated for extension of further time of the impugned ordinance. It was also brought into our notice that the Ordinance has not yet been placed before the Provincial Assembly for further proceedings, as required under Article 128 of the Constitution. It is expected that the Provincial Government while presenting it before the Provincial Assembly, shall omit and delete the amended sub sections 4 & 5 in section 22 of the Act 2019, through Ordinance No.II of 2020 from its text as the same, after consulting the Hon'ble the Chief Justice and accord of his ascent have became redundant.

20. Since the power conferred upon the Sessions Judges, Additional Sessions and Judicial Magistrate 1st Class as special judges in pursuance of the amended section 22 by insertion of subsection 4 and sub section 5 has been declared void ab initio and in violation of the Constitution 1973 and the act done and order or judgment passed by the Special Courts, including all the proceedings, have been treated as having done in defective capacity. However, after rectification of the mistake by the Government through getting notification dated 22.4.2020 i.e consulting the Chief Justice as required under section 22 of the Act 2019,

all the acts done and order and judgment passed by the above mentioned judges, including all the proceedings under the Act 2019, shall remain protected under the defective doctrine. Reference in this regard may be made to **Mehram Ali's case (PLD 1998 SC 1445) and Malik Asad's case (PLD1998 SC 161).**

21. The plea of bail of petitioner in connected Cr.Misc.BA No.140-P/2020 has already been accepted and has been granted interim post arrest bail which order is confirmed on existing bonds.

22. This petition is disposed of accordingly.

23. Copy of this judgment shall be provided to the worthy Governor through Secretary Law Parliamentary Affairs and Human Rights Department, Khyber Pakhtunkhwa Peshawar for kind perusal of Para-15 of the judgment for guidance and future legislation under Article 128 of the Constitution, 1973.

Announced:
06.05.2020

M.Siraj Afridi PS

JUDGE

JUDGE

DB of Hon'ble Mr. Justice Rooh ul Amin Khan; and
Hon'ble Mr. Justice Ishtiaq Ibrahim.