

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

CIVIL MISC. APPEAL NO. 120 OF 2009
IN
CIVIL REVIEW PETITION NO. NIL OF 2009
IN CONSTITUTION PETITION NOS. 9 & 8 OF 2009

AND

CIVIL MISC. APPEAL NO. 121 OF 2009
IN
CONSTITUTION PETITION NO. NIL OF 2009
*(Appeals under Order V, Rule 3 of the Supreme Court Rules,
1980 against the order of Institution Officer/Assistant
Registrar dated 28.10.2009)*

Abdul Hameed Dogar

... Appellant
(in both cases)

Versus

Federation of Pakistan & others

.... Respondents
(in both cases)

For the Appellant
(in both cases)

Mr. Naeem Bukhari, ASC
Assisted by
Mr. Muhammad Afzal Siddiqui, ASC
Mr. Yousaf Anjum
Mr. Ejaz Janjua
Mr. Kashif Siddiqui
Mr. Hammad Khan

Respondents

N.R.

Dates of hearing

5, 10 & 11.11.2009

ORDER

GHULAM RABBANI, J.- Civil Miscellaneous Appeals

bearing Nos. 120 of 2009 and 121 of 2009, filed by appellant, are
directed against the orders dated 28.10.2009 passed by the

Institution Officer and the Assistant Registrar, respectively, on Civil Review Petition No. Nil of 2009 accompanying application under Order XXVI Rule 6 read with order XXXIII of the Supreme Court Rules, 1980 (hereinafter to be called as the Rules) and Constitution Petition No. Nil of 2009 under Article 184(3) of the Constitution filed by appellant, whereby the same were returned. Both the appeals involve common questions of facts and law as also appears from statement of appellant in para 7 of petition under Article 184(3) of Constitution that *“reasons given in the petitioner’s petition for review, which is attached with this petition and whose contents may be read as part of the same”*. Both the appeals are, therefore, disposed of by this single Judgment.

2. In Civil Review Petition the appellant has made following prayer:

“it is, therefore, prayed that the judgment issued on 30.9.2009 be set aside, restoring the state of affairs that existed prior to 31.7.2009, leaving the whole matter to be addressed by the parliament” .

While by his application under Order XXVI Rule 6 read with Order XXXIII of the Rules, the appellant has sought special leave to file Review Petition.

3. In Constitution Petition filed under Article 184(3) of the Constitution, the appellant has made the following prayer:

“ In view of the aforesaid it is respectfully prayed that it be declared that the so called restoration of office of

respondents Nos.2 to 6 and the Notification dated 17.3.2009 are without lawful authority and of no legal effect and any judgment to the contrary has been issued without jurisdiction.

Any other relief which deemed fit and appropriate in the circumstances of the case may also kindly be granted”.

4. At the outset, it may be noted that learned counsel while arguing the case of appellant stated that some of the objections, palpably, forming the basis of order dated 28.10.2009, such as appearing at Sl. Nos. ix and xii on Civil Review Petition, were subsequently, complied with; therefore, no longer the same existed and speaking on objection No. x which relates to the point of limitation, learned counsel stated that the petition was in time, yet if it was considered to have been filed beyond the period of limitation; an application for condonation of delay was, later filed; therefore, it could alone be decided by the Court. As regards petition under Article 184(3) of the Constitution learned counsel stated that objection at Sl. Nos. iv, vii, viii and ix raised thereon were, too, subsequently, sorted out. In such circumstances, without prejudice to what follows next, it may be stated that the omissions supplied subsequently; ex-facie, reflect that both the above petitions were not filed in accordance with rules and the relevant objections were rightly raised.

5. On Civil Review Petition, among others, following objections have been raised:

- I. Review petitions filed earlier against the same impugned judgment dated 31.7.2009 passed by this Court in Constitution Petition Nos.8 & 9 of 2009 have already been dismissed by this Court and the judgment has attained finality, therefore, after disposal of the same this Review Petition against the same impugned judgment amounts to Second Review which is not permissible under Rule 9 of Order XXVI of Supreme Court Rules, 1980.
- II. This review petition is against the same judgment dated 31.07.2009 passed by 14 Members Bench of this Court in which Review Petition and Misc. Applications for permission to file the Review Petitions have already been dismissed, therefore, the judgment dated 31.07.2009 has attained finality.
- III. The date of impugned judgment is 31.07.2009, whereas 30.09.2009 is incorrectly mentioned as date of impugned judgment in Index, Title, Prayer Clause and Notice.
- IV. This Review Petition is barred by 13 days and no application for condonation of delay has been filed with this Review Petition.
- V. Scandalous and contemptuous language has been used against the Hon'ble Chief Justice of Pakistan and Judges of this August Court hence the same is not entertainable under Rule 5 of Order XVII of Supreme Court Rules, 1980.

6. In the first instance, I will deal with objection No. I & II. In this, it may be stated that Constitution Petitions Nos. 9 and 8 of 2009 filed by Sindh Bar Association and one Nadeem Ahmad, Advocate, respectively were disposed of by a short order dated 31.7.2009 for reasons to be recorded later, which were accordingly

released. Several Judges had filed review petitions and for that matter sought special leave of court within terms of rule 6 of Order XXVI of the Rules. Many of these Judges withdrew petitions/applications so made by them and the remaining contested their petitions/applications viz. CMA Nos. 2745/2009 (filed by Justice Khurshid Anwar Bhinder), CMA 2747/2009 (Justice Hasnat Ahmed Khan), CMA 2748/2009 (Justice Zafar Iqbal Chaudhry & another), CMA 2750/2009 (Justice Syed Shabbar Raza Rizvi), CMA 2776/2009 (Syed Sajjad Hussain Shah), CMA 2779/2009 (Mrs. Yasmin Abbasi), CMA 2782/2009 (Syed Sajjad Hussain Shah), CMA 2788/2009 (Muhammad Ahsan Bhoon), CMA 2790/2009 (Anwar-ul-Haq Pannu), CMA 2825/2009 (Syed Hamid Ali Shah) and CMA 4002/2009 (Barrister Jahanzeb Rahim). These applications were heard on 13.10.2009 by a 14 Members Bench of this Court and were dismissed vide Short Order passed on the same day. Learned counsel argued that since the appellant had not filed previously any Review Petition, the one filed by him now, could not be treated a second Review Petition. In my humble opinion the proposition advanced is not tenable for, on dismissal of afore-referred Review Petitions, the Short Order/Judgment dated 31.7.2009 attained finality, therefore, no second review petition filed by appellant was permissible. Thus, the objections Nos. I and II noted in para 5 supra on the Civil Review Petition accompanied by application for special permission, were rightly raised, and are sustainable.

7. The other objections noted at Sl. Nos. III & IV in para No.5 supra relate to the question of limitation. While furnishing reply to objection No. III, reproduced above, the appellant has advanced a novel proposition by observing that “*the Civil Review Petition is against the detailed judgment which was released on the internet on 30.9.2009 and given the date dated 31.7.2009.*” In his arguments, too, learned counsel for him was insistent that the Civil Review Petition was filed against the detailed reasons which the appellant wants to be reviewed, therefore, the Review Petition needs to be considered as having been filed in time reckoning the same from the date of detailed reasons. In my humble view, the averments of appellant and the contention of his learned counsel, wherein no challenge vis-à-vis the computing the prescribed time is thrown to the short order being a final verdict for all intents and purposes in a lis remaining no more pending, appears to be illogical, misconceived, baseless, frivolous and unconscionable proposition to reckon the time from the date of detailed reasons. The date which matters for computing the period of limitation viz. 30 days in filing Review Petition is to be reckoned from the pronouncement of judgment or the making of the order which in this case is 31.7.2009. The Review Petition was filed on 28.10.2009, therefore, on the face of it, the same was time-barred.

8. Learned counsel for appellant argued that the Review Petition is time-barred or otherwise is to be determined by Court

and not by the Institution Officer. In this, it may be stated that there is no cavil to the proposition that the Court is empowered to see that a petition has been filed in time or otherwise; equally it cannot be said that it is not the function of the Registrar/Scrutiny Officer to reckon the time and see that the petition has been filed within prescribed period of time. Initially, it is his function to compute the period of time on filing of a Review Petition. According to Order XXVI, rule 2 an application for Review Petition is to be filed in the Registry within 30 days after pronouncement of judgment/order which is sought to be reviewed. At the initial stage, the time was, as such, reckoned and it was found that the petition was filed beyond the prescribed period of limitation and the petition having not been filed in accordance with the mandate of above rule was, rightly so, refused to be received. Learned counsel for the appellant, next argued that the question of limitation would not come in the way of the appellant as after objections were raised, an application for condonation of delay was filed. The question whether that application has been competently filed shall be dealt with in paragraphs next to follow; nonetheless, seen in the light of foregoing discussion, it cannot be said that the objections raised on the point of limitation are untenable.

9. Coming to the application for condonation of delay, it has been noted that the said application has been filed with signatures of Advocates, namely, Sahibzada Ahmed Raza Kasuri,

Advocate Supreme Court and Mr. Naeem Bukhari, Advocate Supreme Court. The Advocate-on-Record, namely; Mr. Ejaz Muhammad Khan, who has put his stamp, on this application has, however, not signed that application. This application is available in the file at pages 466-A & B. No Affidavit in support of that application has been filed. Both the learned Advocates fall within definition of the “Advocate” as provided under Order I rule 2 sub rule (1) of the Rules meaning “a person entitled to appear and plead before the Supreme Court”. Thus they can only appear and plead and are not permitted to act, which is the sole function of Advocate-on-Record. According to same rule the “Advocate-on-Record” means “an Advocate” who is entitled under these rules to act and plead for a party in the Supreme Court”. Thus the authorized performance of the two persons is different. Signing and presentation of the petitioner neither falls within the terminology of “appearing” nor in “pleading”. It is obviously an “act” which can alone be performed by the Advocate-on-record. In case of Abdul Wadud v. The State (PLD 1964 Dacca 543) it has been held that:

“To act or apply for a client in Court, is to take on his behalf in the Court or in the offices of the Court the necessary steps that must be taken in the course of the litigation in order that the case may be properly laid before the Court Thus “acting” includes applying; so that a Pleader, who makes an application on behalf of a litigant, acts for him but he cannot do so unless he is authorized in writing.....”

In the light of above discussion it becomes evident and so is held that the objections raised at Sl. Nos. III and IV in para 5 supra are tenable.

10. Coming to remaining objection noted at Sl. No. V in para 5 supra, it may be stated that the same is to the effect that scandalous and contemptuous language has been used against the Chief Justice of Pakistan and Judges of this August Court. I have gone through the petition. The language used therein, on the face of it, is scandalous and contemptuous. In this, reference is, specifically, made to paragraphs 3, 4, 8, 17, 35 of the petition, wherein, the order dated 3.11.2007 passed by seven member Bench of this Court has been contemptuously and scandalously criticized, by observing, beside other averments, that, “*the order dated 3.11.2007 passed by strangers is not even a judicial order and being the foundation of the detailed Judgment, the same is not sustainable.*” and that “*which was itself a nullity, had been set aside on 6.11.2007, but resurrected on 31.7.2009 and declared to have been always in the field, alive and enforceable.*”

11. It may be observed that General Pervez Musharraf (retired) had himself confessed that what he had done on 3.11.2007 was unconstitutional as was reported in the *Daily DAWN* of 18th November, 2007 which fact finds place in the judgment dated 31.7.2009 passed by fourteen members Bench of Judges of this Court. Beside that the nation in particular and the whole world at large lauded the restoration of Judges. For brevity's sake, as an

illustration, reference is made to Daily **Dawn** dated 18 March, 2009, quoting “*The United Nations human rights chief Tuesday welcomed the Pakistani government’s decision to reinstate the former Supreme Court Chief Justice and other judges*” and that “*Reinstating all of the 60 judges who had been sacked by the previous administration was an important step in the process of restoring the rule of law in Pakistan.*” Similar statements were also made in Daily Nation, Islamabad dated 18.3.2009 and the Daily News Islamabad dated 19.3.2009 quoting national and the international sources.

12. Besides, in recognition of his services to the rule of law and his struggle regarding supremacy of law and Constitution in Pakistan, so on so forth Mr. Justice Iftikhar Muhammad Chaudhry, the Hon’ble Chief Justice of Pakistan has been conferred upon many awards within and outside the country. Some of the awards are as follows:

i) ***The “Medal of Freedom”*** by the most prestigious universities in the world, Harvard, which is an honour bestowed only on two other persons before him – South Africa’s Nelson Mandela and Thurgood Marshal – in the over – two hundred year history of the university.

ii) *The New York Bar, the world’s largest bar, had also awarded a **lifetime honorary membership**.*

iii) *Award by Doctors for Democracy (DD) and Association of Pakistan Physicians of North America (APPNA). ”*

13. The language, therefore, used in the Review Petition against the person of such a high stature the Hon’ble Chief Justice of Pakistan enjoys, is on the face of it, very bad, grossly disgraceful

spreading scandal. According to Black's Law Dictionary Eighth Edition the word "Scandalous matter" means "*A matter that is both grossly disgraceful (or defamatory) and irrelevant to the action or defence*" and in the Webster Comprehensive Dictionary Encyclopedic Edition "Scandalous" means "**1.** *Causing, or tending to cause, scandal; being a scandal; opprobrious; disgraceful; shocking to the sense of truth, decency, or propriety.* **2.** *Consisting of evil or malicious reports; tending to inure reputation*". Seen the language used in Review Petition, as referred to above, it can safely be inferred that it is nothing but scandalous. The objection in question, has therefore, been rightly raised and is, accordingly, sustainable.

14. On Constitution Petition under Article 184(3) of the Constitution similar objections were raised in the following terms:

"iv. That the judgment dated 31.07.2009 passed by this Court in the Constitution Petition Nos. 8 & 9 of 2009 has been maintained in Review Petitions by 14 Members Bench of this Court and has attained finality, hence the petitioner is filing collateral proceedings and wants to join the proceedings indirectly, therefore, the aforementioned judgment i.e. 31.07.2009 cannot be challenged now under Article 184(3) of the Constitution."

"v. That this Constitution Petition is based on mala fide intents, scandalous as evident from its contents. Therefore, office cannot entertain the same under Order XVII Rule 5 of the Supreme Court Rules, 1980."

15. I have gone through the memo of above petition. The prayer in this petition, reproduced in para No.3, supra, at a glance; although tends to seek a declaration to the effect that the restoration of offices of Hon'ble Chief Justice of Pakistan Iftikhar Muhammad Chaudhry, other Honourable Judges and the notification dated 17.3.2009 be declared unlawful etc.; in actual fact, it has been skillfully drawn up aiming at to dilute the effect of judgment dated 31.7.2009 which has attained finality. In this judgment, inter-alia, it has been held that:

"20. The judgment purported to have been delivered in Constitutional Petitions bearing No. 87 and 88 of 2007 in the case titled as Tika Iqbal Muhammad Khan v. General Pervez Musharraf and others (PLD 2008 SC 615 and PLD 2008 SC 178) and the judgment dated 15-2-2008, purported to have been passed in C.R.P. No.7 of 2008 titled as Tika Iqbal Muhammad Khan v. General Pervez Musharraf and others and any other judgment/judgments passed on the strength of the said two judgments are hereby declared to be void ab initio.

21. The Proclamation of Emergency issued by General Pervez Musharraf as the Chief of Army Staff (as he then was) on November 3, 2007; the Provisional Constitution Order No.1 of 2007 issued by him on the same date in his said capacity; the Oath of Office (Judges) Order of 2007 issued by him also on the same date though as the President of Pakistan but in exercise of powers under the aforesaid Proclamation of Emergency and the Provisional Constitution Order No.1 of 2007; The Provisional Constitution (Amendment) Order, 2007 issued by him likewise on 15-11-2007; the Constitution (Amendment) Order, 2007 being President's Order No.5 of 2007 issued on November 20, 2007; the Constitution (Second Amendment) Order, 2007 being the President's Order No.6 of 2007 issued on 14th December, 2007; the Islamabad High Court (Establishment) Order, 2007 dated 14th December, 2007 being the President's Order No.7 of 2007; the High Court Judges (Pensionary Benefits) Order, 2007 being President's Order No.8 of 2007; the Supreme Court Judges (Pensionary Benefits) Order, 2007 being President's Order No.9 of 2007 dated 14th December, 2007 are hereby declared to be

unconstitutional, ultra vires of the Constitution and consequently being illegal and of no legal effect.

22. As a consequence thereof:---

(i) the Chief Justice of Pakistan; the Judges of the Supreme Court of Pakistan; any Chief Justice of any of the High Courts and the Judges of the High Courts who were declared to have ceased to hold their respective offices in pursuance of the afore-mentioned alleged judgments or any other such judgment and on account of the instruments mentioned in para 21 above, shall be deemed never to have ceased to be such Judges, irrespective of any notification issued regarding their reappointment or restoration;

(ii) it is declared that the office of the Chief Justice of Pakistan never fell vacant on November 3, 2007 and as a consequence thereof it is further declared that the appointment of Mr. Justice Abdul Hameed Dogar as the Chief Justice of Pakistan was unconstitutional; void ab initio and of no legal effect,"

Learned counsel for appellant emphasized in his arguments that judgments in Tika Iqbal Muhammad Khan's case were, in like petitions filed by Sindh High Court Bar Association and another, taken up and declared void ab-initio, therefore, the appellant's petition could also be also entertained. To strengthen his submission, he referred to the very judgment dated 31.7.2009 passed by 14 Members Bench of this Court in Constitution Petitions Nos. 9 & 8 of 2009. I regretfully state that I do not feel myself inclined to agree with him for the reason next to follow. Firstly, it may be stated that side by side the instant petition, the appellant also filed a separate Review Petition. Essentially the objective of filing the instant petition is an attempt to achieve the same objective as that of his Review Petition i.e. to subvert the judgment dated 31.7.2009

passed by the Judges rightly appointed under the Constitution before 3rd November, 2007. On dismissal of host of review petitions filed against the judgment dated 31.7.2009, it has attained finality and the Review Petition filed by appellant has not been entertained and rightly so by refusing to receive the same on valid objections discussed in the earlier part of this judgment. The settled principle of law is that what cannot be achieved directly cannot be permitted to be achieved indirectly. Evaluating the question of validity of objections reproduced above, on the touchstone of the cited principle, the petition under Article 184(3) is also not entertainable. Secondly, the instant petition also contains scandalous and malicious material. The above-noted objections were, therefore, rightly taken. The same are tenable.

16. In the above circumstances without going deep into other objections, I am of the considered view that both the petitions were rightly returned. The instant appeals merit no consideration and are dismissed accordingly.

Judge

Islamabad,

11th November, 2009.

Saeed Aslam

APPROVED FOR REPORTING