

**IN THE SUPREME COURT OF PAKISTAN**

(Appellate Jurisdiction)

**PRESENT**

Mr. Justice Umar Ata Bandial, HCJ.  
Mrs. Justice Ayesha A. Malik  
Mr. Justice Athar Minallah

**Civil Petition Nos.388-P, 389-P, 395-P,  
396-P, 397-P & 399-P of 2016**

*(Against the judgment dated 20.04.2016 of the  
Peshawar High Court, Peshawar passed in WPs  
Nos.4323-P/15, 4324-P/15, 2655-P/15, 2656-  
P/15, 2658-P/15 & 2657-P of 2015)*

The State thr. Director A.N.F. Peshawar	... (in CP-388-P/16)
The State thr. Director A.N.F. Peshawar	... (in CP-389-P/16)
Force Commander ANF, Peshawar	... (in CP-395-P/16)
Federal Govt./State through ANF, Peshawar	... (in CP-396-P/16 & CP-397-P/16)
The State thr. Director A.N.F. Peshawar	... (in CP-399-P/16)

**Petitioners**

**Versus**

Shereen Shah and another	... (in CP-388-P/16)
Hanif Gul Jadoon, decd. thr. LRs and others	... (in CP-389-P/16)
Rahim and others	... (in CP-395-P/16)
Haji Umar Afridi decd. thr. LRs and others	... (in CP-396-P/16)
Gul Anwar and others	... (in CP-397-P/16)
Malik Gul Bahadur decd. thr. LRs and others	... (in CP-399-P/16)

**Respondents**

For the petitioner(s): Mr. Tariq Khan Kakar, ASC (in all cases)  
*(via video-link, Peshawar)*

For the respondent(s): Qazi Jawad Ehsanullah, ASC  
*(in CPs-388-P & 399-P of 2016)*  
Mr. Ghulam Mehboob Khokhar, ASC  
*(in CP-395-P/16)*  
Mr. Aftab Alam Yasir, ASC  
*(in CP-396-P/16)*

Date of hearing: 10.05.2023

**ORDER**

**Athar Minallah, J.-** The judgment of the Peshawar High Court, dated 24.04.2016, has led to seeking leave in these petitions.

2. The Anti Narcotics Force filed a complaint under section 31 of the Prevention of Smuggling Act 1977 ("**Act of 1977**"). The complaint was entertained by a Special Judge, Customs, Taxation and Anti-Smuggling, Khyber Pakhtunkhwa, Peshawar, vide order dated 04.01.2011. An appeal was preferred

under section 43 of the Act of 1977 before the Special Appellate Court established under section 44, *ibid*, and it was allowed *vide* judgment dated 19.10.2015. The Anti-Narcotics Force invoked the jurisdiction of the High Court, vested in it under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 ("**Constitution**"). The petitions were dismissed through the impugned consolidated judgment by the High Court on the sole ground that since a Judge of the High Court presides over the Special Appellate Court, therefore, a writ cannot be granted in terms of Article 199(5) of the Constitution because the High Court did not fall within the ambit of the expression "person".

3. We have heard the learned counsels for the parties. It is not disputed that the Special Appellate Court is the creation of the Act of 1977 while the High Court has been established under Article 175 of the Constitution. The High Court, as described under Article 192(1), consists 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. On the other hand, the Federal Government is empowered under section 44 of the Act of 1977 to appoint as many Special Judges as it considers necessary. The place of headquarter of each Special Judge and the latter's territorial limits of jurisdiction are also specified by the Federal Government through a notification. Likewise, the Special Appellate Courts are established by the Federal Government, pursuant to the powers conferred under section 46 of the Act of 1977. The Federal Government has exclusive jurisdiction to specify the place of headquarter and set out its territorial jurisdiction, or specify the class of cases in respect of which each Special Appellate Court shall exercise its jurisdiction. The Special Appellate Court

constituted under the Act of 1977 has to be presided over by a person who is a sitting Judge of a High Court. The appointment by the Federal Government is subject to consultation with the Chief Justice of the concerned High Court. The Special Appellate Court, established under the Act of 1977, has to be presided over by a Judge of the High Court but it is not a High Court, nor does it perform its judicial functions under the Constitution. The Special Appellate Court exercises powers and functions as a special forum and the presiding Judge cannot assume jurisdiction conferred on the High Court. The Special Appellate Court, constituted under the Act of 1977 is, therefore, distinct from the High Court. The former is a creation of a statute while the latter that of the Constitution. The jurisdiction, powers and functions of the Special Appellate Court are provided and governed under the Act of 1977. While presiding a Special Appellate Court, the status of its presiding Judge, despite being a sitting Judge of the High Court, is that of a *persona designata* and not as a Judge of the High Court. The presiding Judge of the Special Court is no more than an individual as opposed to a Judge ascertained as a member of the High Court. The mischief contemplated under Article 199(5) is, therefore, not attracted.<sup>1</sup> It is settled law that the action of a Judge, which relates to the performance of the latter's duties and functions as a Judge of the High Court, or as a member thereof, cannot be brought under challenge under Article 199 of the Constitution.<sup>2</sup> Every action of a Judge of a High Court, performing functions and exercising powers and jurisdiction as a *persona designata* are amenable to the jurisdiction of the High Court under Article 199 of the Constitution. The competence of a High Court to issue a writ to

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<sup>1</sup> *Mian Jamal Shah v. Member Election Commission and others (PLD 1966 SC 1)*

<sup>2</sup> *Malik Asad Ali and others v. Federation of Pakistan and others (PLD 1988 SC 161)*

a Judge of the High Court in his personal capacity, or where working as a *persona designata* has been affirmed by a larger bench of this Court consisting of thirteen Judges.<sup>3</sup> As a corollary, the acts, orders or judgments of the Appellate Court, established under the Act of 1977, are not immune from the jurisdiction of the High Court under Article 199 of the Constitution because its presiding Judge performs judicial functions as *persona designata*. In the cases in hand, it appears that the High Court did not appreciate the distinction between the powers and jurisdiction and performance conferred on the High Court under the Constitution and the special forum, the Special Appellate Court, established under a statute, the Act of 1977. The impugned judgment of the High Court is, therefore, based on the erroneous interpretation of the Constitution, particularly Article 199(5) *ibid*. The above are the reasons for converting the petitions into appeals with the leave of this Court and consequently setting aside the impugned judgment. The petitions filed by the Anti-Narcotics Force before the High Court shall be treated as pending and expected to be decided at the earliest.

Chief Justice

Judge

Judge

Islamabad, the

10<sup>th</sup> May, 2023

APPROVED FOR REPORTING.

(*Aamir Sh.*)

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<sup>3</sup> Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan and others (PLD 2010 SC 61)