

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

Mr. Justice Sardar Tariq Masood
Mr. Justice Amin-ud-Din Khan
Mr. Justice Muhammad Ali Mazhar

Civil Petition No.303 of 2019

Against the judgment dated 10.12.2018
passed by the Islamabad High Court,
Islamabad in I.C.A.No.253/2018 in
W.P.No.908/2017

Federation of Pakistan through Secretary
M/o Communications, Islamabad & another

...**Petitioners**

Versus

Shuja Sharif & others

...**Respondents**

For the Petitioners:

Ch. Aamir Rehman, Addl. AGP
Rana Liaquat Ali, AIG (Legal),
Motorway Police

For Respondents 1-8:

Mr. Mansoor Usman Awan, ASC

Date of Hearing:

24.10.2022

JUDGMENT

Muhammad Ali Mazhar, J. This Civil Petition for leave to appeal is directed against the judgment dated 10.12.2018 passed by the learned Division Bench of the Islamabad High Court in I.C.A.No.253/2018, whereby the I.C.A. filed by the petitioners was dismissed and the judgment passed by the learned single Judge in W.P.No. 908/2017 was affirmed.

2. Indeed, the respondents No.1 to 9 had filed a Writ Petition in the High Court and entreated a declaration that the ban on plying motorcycles on motorways imposed by the National Highways and Motorway Police ('**NH & MP**') was illegal. For the ease of convenience,

the prayer clause incorporated in the writ petition is reproduced as under:-

- “i) Declare that the Impugned Ban is in violation of fundamental rights of the Petitioners and is ultra vires of the NHSO, illegal and void ab initio and that Respondent No.3 is not authorized to exercise its authority in arbitrary and whimsical manner;
- ii. Declare that the NHSO does not prohibit motorcycles from using motorways to the extent that the motorcycles are duly registered and the drivers hold valid licenses in accordance with the provisions of the NHSO;
- iii. Declare that the DLA Rules are not duly authorized by the Federal Government and are of no legal effect being made in violation of the set requirements of law;
- iv. Restrain the Respondent No.3 from prohibiting motorbikes from using the motorways and suspend the Impugned Ban imposed by Respondent No.3 without any lawful order passed in accordance with the law;
- v. Direct Respondent No.1 to make any required changes to the existing regulatory regime after meaningful consultation with all the relevant stakeholders and in accordance with the requirements of law;
- vi. Direct Respondent No.1 to regulate access to the motorway in furtherance of public interest and road safety in such manner that is least restrictive of the rights of owners and drivers of motor vehicles, including motorcycles and based on objective criteria; and
- vii. Any other relief that may be deemed fit and proper by this Honorable Court in the circumstances of the case.”

3. The learned Additional Attorney General for Pakistan (“**AAGP**”) argued that, while allowing the Writ Petition No. 908/2017, the learned single Judge of the High Court failed to consider that the entry of motorcyclists on motorways is banned by the NH & MP under the Code of Highways and Motorways (شاہراہوں اور موٹروے کا ضابطہ) and the ban was imposed for the safety and security of persons commuting on the motorways. The use of motorbikes is a dangerous activity, therefore the ban was imposed in the public interest. He further argued that the learned single Judge of the High Court also failed to consider Section 45, Chapter-V of the National Highways Safety Ordinance, 2000 (“**the Ordinance 2000**”) in its proper perspective, which encapsulates that for the control of traffic in the interest of public safety or convenience, the Government may prohibit or restrict the driving of motor vehicles or any specified class of motor vehicle in a specified area or on any

specified road or bridge. He further invited our attention to the Notification dated 21.02.2019 issued after the decision of writ petition by the Ministry of Communications, Government of Pakistan in exercise of powers conferred by Section 90 of the Ordinance 2000, whereby the Federal Government designated the NH & MP already deployed and working as the authorized agency to execute provisions of enforcement and traffic control functions specified in the Ordinance 2000 and another Notification dated 15.03.2019, which was issued by the DIG (Operations & Evaluation), NH & MP, Islamabad with reference to Section 45 of the Ordinance 2000 read with Notification dated 21.02.2019, whereby the entry of all types of motorbikes (mentioned at Sr.No.4 in the aforesaid notification) was restricted on motorways. He further argued that respondent No.1 by means of Writ Petition No.1603/2019 has again challenged the Notifications dated 21.02.2019 and 15.03.2019 ("**Notifications**") on various grounds and the learned single Judge of the Islamabad High Court, *vide* order dated 28.06.2019, suspended the operation of the Notifications and the writ petition is pending adjudication.

4. The learned counsel for the respondents argued that under Section 45 of the Ordinance 2000, the Federal Government, or any agency authorised by the Government, has the power to prohibit any specified class of vehicles on any specified road in the interest of public safety, however, the powers granted under Section 90 of the Ordinance 2000 were merely regulatory and not prohibitory. He further argued that no condition for motorbikes is mentioned in the Motorway Police Drivers Licensing Authority Rules, 2014 ('**the Rules of 2014**'), which may prohibit plying of motorbikes on the motorways. However, he admits that after the issuance of Notifications dated 21.2.2019 and 15.3.2019, the respondent No.1 has again challenged the imposition of ban before the High Court by dint of Writ Petition No.1603/2019 in which interim orders are also operating.

5. We have heard the learned AAGP, as well as the learned counsel for the respondents and with their valuable assistance have carefully gone through the available record. The learned single Judge of the High Court in the judgment passed in Writ Petition No.908/2017, essentially focused on Article 9 of the Constitution of the Islamic Republic of Pakistan, 1973 ("**Constitution**"), which envisages that no person shall be deprived of life or liberty save in accordance with law.

In the concluding paragraph, the learned judge held that the *"the term 'life' covers the quality life including the right to use motorways by the bikers whether it is for the purpose of travelling or for the enjoyment of plying motorcycles whereas the motorway police can only regulate the motorways in terms of Section 45 of the Ordinance and not to restrict its usage permanently without any basis"*.

6. It is unequivocally resonating that the purpose of promulgating the Ordinance 2000 was to ensure and regulate safe driving measures on the national highways and motorways. The motorways and national highways have been defined separately in the Ordinance 2000. Under Section 2, clause (xxxiv), "motorway" is defined as a road especially designed and built for motor vehicles which does not serve the properties bordering on it, except at special points and has separate carriageways for the two directions of the traffic and does not cross at level with any road, railway, tramway, cycle tract or footpath; whereas, according to clause (xxxv), "national highway" means a national highway as defined in the National Highway Authority Act, 1991 (XI of 1991); and includes a road declared to be a national highway under the said Act. Chapter-V of the Ordinance 2000 is straightforwardly germane to the control of traffic. Section 57 of the Ordinance 2000 provides that no driver of motorcycle driving on a national highway shall carry more than one person in addition to himself and no person shall allow himself to be carried otherwise than sitting on a proper seat securely fixed to the motorcycle behind the driver's seat with further restrictions in its sub-section (2) that no person shall drive or to be carried on a motorcycle except when he is wearing a crash helmet. It is somewhat discernible within the same Chapter concerning the control of traffic that the provision contained under Section 45 of the Ordinance 2000, in its plain language, is analogous to a non-obstante clause which seems to have been given an overriding effect on other provisions in its true spirit and all practical purposes for proper administration of smooth flow of traffic and safety measures, wherein the Government or any agency authorized by it, if satisfied that it is necessary in the interest of public safety or convenience, or because of the nature of any road or bridge, may prohibit or restrict, subject to such exceptions and conditions as may be specified, the driving of motor vehicles in a specified area or on any specified road or bridge, and when any such prohibition or restriction

is imposed, shall cause appropriate traffic signs to be placed or erected under Section 46 of the Ordinance 2000 at suitable places in such places in such area or on or near such road or bridge as the case may be.

7. We are also sanguine that in the Writ Petition No.908/2017, neither the *vires* nor the constitutionality of Section 45 of the Ordinance 2000 was in question and in such a situation, despite the declaratory judgment rendered in Writ Petition No.908/2017, the applicability and rudiment of this section is still intact under the statute book. So far as the fundamental right enshrined under Article 9 of the Constitution is concerned, it is unambiguously envisaged that the life or liberty of a person shall not be deprived save in accordance with law. The powers vested in under Section 45 of the Ordinance 2000 are in fact meant to ensure and regulate safety measures in the larger public interest to avoid untoward risks of accidents in order to save precious lives which in no way seems to have any tendency, objective and or ingenuity to deprive a person from his life or liberty, rather the powers have been conferred by all means to restrict entry in the public interest to regulate and ensure safety measures of traffic on motorways. We have noted that the learned Division Bench of the High Court, while rendering the impugned judgment in the I.C.A., also did not take into consideration the nitty-gritties and *raison d'être* of Section 45 of the Ordinance 2000.

8. When we confronted the learned counsel for the respondents that Section 45 of the Ordinance 2000 was not questioned as being *ultra vires* to the Constitution and secondly, how this infringes or contravenes any fundamental rights of the respondents, the learned counsel for the respondents could not controvert the same, however, he submitted that the fresh Notifications issued subsequent to the judgments in the writ petition are also considered to be violative of Section 45 of the Ordinance 2000, therefore, the same are under challenge in the Writ Petition No.1603/2019.

9. It is well settled exposition of law that a statute or any enacting provision therein must be construed as to make it effective and operative. The Latin legal maxim "*ut res magis valeat quam pereat*" denotes that it is better for a thing to have effect than to be made void or it is better to validate a thing than to invalidate it. The Court

should, in so far as possible, avoid that construction which may ascribe or attribute unreasonableness to the will of legislature and while moving into the task of interpretation of any law or provision, the predominant objective should be that the law survives and the presumption, if any, must be in favour of its constitutionality. The court should not adopt such interpretation which renders the statute or any of its provisions inoperative or unworkable. No doubt, the Court can strike down a law if it is found to be unconstitutional, but it cannot introduce any inexactitude or absurdity or restrict or constrict a provision by espousing or presuming an anomalous elucidation in a peculiar manner to make it meaningless or inconsequential in the reading down concept.

10. It is a well acknowledged and long-standing precept that persons may be classified into groups and such groups may be treated differently if there is a reasonable basis for such difference. Article 4 of the Constitution safeguards and guarantees the inalienable right of every citizen of Pakistan to enjoy the protection of law and to be treated in accordance with law wherever he may be, and of every other person for the time being within Pakistan, with a further rider that no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law; no person shall be prevented from or be hindered in doing that which is not prohibited by law; and no person shall be compelled to do that which the law does not require him to do. The principle of equality or egalitarianism does not mean that every law must have universal application to all persons. In fact, the fluctuating needs of dissimilar sets of persons necessitate different treatment. The touchstone of acceptable classification requires the fulfillment of two basic ingredients, namely that the classification must be founded on an *intelligible differentia* which may judiciously distinguish persons or things that are grouped together from others left out of the group, and the *differentia* must have a logical and reasonable linkage with the object sought to be achieved. The expression "*intelligible differentia*" connotes the departure which is capable of being understood and made sense of. A categorization of groups of people is ruminated as being reasonable when the classification is based on *intelligible differentia* having a rational relationship with the objective of the act.

11. Primarily Judicial review is a Court's regimen to review legislative and executive actions to maintain and sustain the rule of law. Under the territory and province of Judicial review, the Court reviews the lawfulness of a decision or action made by a public body. In fact, this is a process under which executive or legislative actions may be subject to review by the judiciary. The Court may invalidate laws, acts and governmental actions that are incompatible with a higher authority; more so, an executive decision may be invalidated for being unlawful and also maintains check and balance. Judicial review can be sought on the grounds that a decision-maker misdirects itself in law, exercises a power wrongly, or improperly purports to exercise a power that it does not have, which is known as acting *ultra vires*. A decision may be challenged as unreasonable if it is so unreasonable that no reasonable authority could ever have come to it; there is a failure to observe statutory procedures or natural justice; or the same is in breach of the doctrine of legitimate expectation, either procedural or substantive. At the same time, clear distinction or line of demarcation is also required to be drawn by the Courts in the middle of judicial review vis-à-vis judicial overreach in order to avoid transgression of border line. In the case of Mian Irfan Bashir Vs. The Deputy Commissioner (D.C.), Lahore and others (PLD 2021 SC 571), this Court shed some light on the distinction between judicial review, judicial activism and judicial overreach and held that the Judicial review is the power of the courts to examine the actions of the legislative, executive, and administrative arms of the government and to determine whether such actions are consistent with the Constitution. Actions judged inconsistent are declared unconstitutional and, therefore, null and void. Judicial review is the genus and judicial activism or judicial restraint are its subspecies. It was further held that the judicial overreach is when the judiciary starts interfering with the proper functioning of the legislative or executive organs of the government. This is totally uncharacteristic of the role of the judiciary envisaged under the Constitution and is most undesirable in a constitutional democracy. Judicial overreach is transgressive as it transforms the judicial role of adjudication and interpretation of law into that of judicial legislation or judicial policy making, thus encroaching upon the other branches of the Government and disregarding the fine line of separation of powers, upon which is pillared the very construct of constitutional democracy. Such judicial

leap in the dark is also known as “judicial adventurism” or “judicial imperialism.” A judge is to remain within the confines of the dispute brought before him and decide the matter by remaining within the confines of the law and the Constitution.

12. At present, the issue only relates to the niceties and applicability of Section 45 of the Ordinance 2000, wherein the Government or any agency authorized by it in the interest of public safety or convenience may prohibit or restrict the driving of motor vehicles or of any specified class of motor vehicles in a specified area or on a specified road etc. According to the scheme of the Ordinance 2000, the prime factor and consideration is the safety of the public at large and the ban imposed on motorcycles is within the precincts and parameters of law which can neither be construed as the violation of any fundamental right to life or liberty, nor this section was challenged before the High Court as being *ultra vires* the Constitution or the Ordinance 2000. We do not subscribe to the views of the learned High Court that the terms regulate wherever used in the Ordinance 2000 can only be considered for the purpose of supervision, superintendence and administration and no restrictions can be imposed under Section 45 of the Ordinance 2000. On the contrary, the true purpose and exercise of powers conferred under Section 45 also encompasses the responsibility of supervision, superintendence and administration including the power to restrict the entry of motorcyclists on motorways with the solitary cautiousness and intelligence of maintaining safety and protection vice versa. In fact, the judgment rendered in the Writ Petition No.908/2017 has for all practical purposes nullified the effect of Section 45 of the Ordinance 2000. So far as the verbal imposition of the ban noted in the judgment is concerned, the learned AAGP filed a copy of Notification dated 15.3.2019 which shows that in order to execute provisions of enforcement and traffic control functions in terms of the Ordinance 2000, the entry of fourteen categories have been restricted including bicycles, scooters, agricultural vehicles, construction vehicles, armed carriers, animal drawn carts, rickshaws/qinguis and also motorbikes (at serial No.2) on Motorways (M-1, M-2, M-3 & M-4) which notification is under challenge before the High Court and obviously, if the petitioner in the Writ Petition No.1603/2019 deems that said notifications are defective due to some procedural lapses or modalities or non-compliant to Section 45 of the Ordinance 2000, that

aspect will be surely examined by the learned High Court and we do not want to offer any comment which may prejudice the outcome of a pending writ.

13. As a result of the above discussion, this petition is converted into an appeal by consent and allowed. The impugned judgment dated 10.12.2018 passed in I.C.A. No.253/2018 and the judgment dated 19.04.2018 passed in Writ Petition No.908/2017 by the learned High Court are set aside. In consequence thereof, the Writ Petition stands dismissed, thus rendering the I.C.A. infructuous.

Judge

Judge

Judge

ISLAMABAD
24th October, 2022
Mudassar
Approved for reporting