

131/22

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE IJAZ UL AHSAN

MR. JUSTICE SAYYED MAZAHAR ALI AKBAR NAQVI

(A/R)

Civil Petition No.3413 of 2017

(Against the judgment of the Peshawar High Court,
Peshawar dated 05.09.2017 passed in Writ Petition
No.3676-P/2018)

Muhammad Azim Khan Afridi

...Appellant(s)

VERSUS

The President of Pakistan thr. Principal
Secretary & others

...Respondent(s)

For the Petitioner: In-person

For the Respondents: N.R.

Date of Hearing: 22.08.2022

ORDER

IJAZ UL AHSAN, J- By way of this Civil Petition,
Mr. Muhammad Azim Khan Afridi (the "Petitioner") seeks
leave to appeal against a judgement of the Peshawar High
Court dated 05.09.2017 (the "Impugned Judgment").

2. Briefly stated, the facts giving rise to this *lis* are
that in 1984, the Petitioner was initially inducted in the
NWFP's Subordinate Judiciary as a Civil Judge. The Petitioner
was promoted over the years and was eventually made a
District & Sessions Judge *w.e.f.* 13.01.2003. In November
2011, the Petitioner was elevated as an Additional Judge of
the Islamabad High Court. However, on 22.10.2012, the
Judicial Commission of Pakistan (the "JCP") decided to not

recommend the Petitioner's name for confirmation. The Petitioner challenged such decision of the JCP through a constitutional petition before the Peshawar High Court seeking a declaration to the effect that the JCP's decision dated 22.10.2012 was illegal and incompetent. He also sought a direction to the President of Pakistan to notify the name of the Petitioner as a judge of the Islamabad High Court. The Peshawar High Court, vide the impugned judgement, dismissed the petition filed by the Petitioner owing to a lack of jurisdiction to adjudicate the matter as well as non-maintainability of the Petitioner's petition. The Petitioner has now assailed the said judgment before this Court.

3. On the date this instant Petition was taken up for hearing, the Petitioner submitted that his counsel was not well. There was no application for adjournment nor was a medical certificate produced showing that the learned ASC was unwell. The Petitioner, however, sought permission to argue the case himself. Permission was accordingly granted and the Petitioner made his submissions recorded herein.

4. The Petitioner contended that once the Petitioner had been elevated as an Additional Judge of the Islamabad High Court, he had a legitimate expectation of being appointed as a permanent judge of the said High Court, especially when the then-Chief Justice of the Islamabad High Court had recommended his name for confirmation to the JCP. He further submitted that the proceedings of the JCP being in-camera were not authorized under the Constitution

of Pakistan, 1973 (the "Constitution"). He argued if the legislature wished to have the JCP conduct its affairs in-camera, it could have drafted Article 175A(4) of the Constitution in similar terms as Article 175A(15). Further maintained that the JCP's agenda on 22.10.2012 did not include the matter of confirming the Petitioner's name and therefore the matter had never been taken up by the JCP at all. Moreover, he contended that a member of the said meeting was not competent to sit in the said meeting which rendered the decision taken by the JCP legally unsustainable. Lastly, he maintains that the decisions of the Judicial Commission are amenable to judicial review and that the High Court had erred in law by holding that the constitutional petition of the Petitioner was not maintainable.

5. We have heard the Petitioner at length and gone through the record.

6. Article 175A of the Constitution, introduced and subsequently amended by the 18th and 19th Amendments to the Constitution respectively, deals with appointment of judges to the Supreme Court, High Courts and the Federal Shariat Court. The relevant Articles are reproduced for ease of reference:-

175A.

(1) There shall be a Judicial Commission of Pakistan, hereinafter in this Article referred to as the Commission, for appointment of Judges of the Supreme Court, High Courts and the Federal Shariat Court, as hereinafter provided.

(2) For appointment of Judges of the Supreme Court, the Commission shall consist of—

(i) Chief Justice of Pakistan (Chairman);

(ii) four most senior Judges of the Supreme Court;

(iii) a former Chief Justice or a former Judge of the Supreme Court of Pakistan to be nominated by the Chief Justice of Pakistan, in consultation with the four member Judges, for a term of two years;

(iv) Federal Minister for Law and Justice;

(v) Attorney-General for Pakistan;

(vi) a Senior Advocate of the Supreme Court Member of Pakistan nominated by the Pakistan Bar Council for a term of two years.

(3) Notwithstanding anything contained in clause (1) or clause (2), ~~the President~~ shall appoint the most senior Judge of the Supreme Court as the Chief Justice of Pakistan.

(4) The Commission may make rules regulating its procedure.

(5) For appointment of Judges of a High Court, the Commission in clause (2) shall also include the following, namely: -

(i) Chief Justice of the High Court to which the appointment is being made;

(ii) the most senior Judge of that High Court;

(iii) Provincial Minister for Law; and

(iv) an advocate having not less than fifteen years practice in the High Court to be nominated by the concerned Bar Council for a term of two years:

Provided that for appointment of the Chief Justice of a High Court, the most senior Judge mentioned in paragraph (ii) shall not be member of the Commission:

Provided further that if for any reason the Chief Justice of High Court is not available, he shall be substituted by a former Chief Justice or former Judge of that Court, to be nominated by the Chief Justice of Pakistan in consultation with the four member Judges of the Commission mentioned in paragraph (ii) of clause (2).

(6) ...

(7) ...

(8) The Commission by majority of its total membership shall nominate to the Parliamentary Committee one person, for each vacancy of a Judge in the Supreme Court, a High Court or the Federal Shariat Court, as the case may be.

(9) ...

(10) ...

(11) ...

(12) The Committee on receipt of a nomination from the Commission may confirm the nominee by majority of its total

membership within fourteen days, failing which the nomination shall be deemed to have been confirmed:

Provided that the Committee, for reasons to be recorded, may not confirm the nomination by three-fourth majority of its total membership within the said period:

Provided further that if a nomination is not confirmed by the Committee it shall forward its decision with reasons so recorded to the Commission through the Prime Minister

Provided further that if a nomination is not confirmed, the Commission shall send another nomination.

(13) ...

(14) No action or decision taken by the Commission or a Committee shall be invalid or called in question only on the ground of the existence of a vacancy therein or of the absence of any member from any meeting thereof.

(15) The meetings of the Committee shall be held in camera and the record of its proceedings shall be maintained.

(16) ...

(17)

(Underlining is ours)"

7. The JCP meeting dated 22.10.2012 which is the subject matter of this instant Petition was also the subject matter of Presidential Reference No. 01 of 2012. The opinion rendered by this Court in the said Reference was subsequently reported as Reference No.1 of 2012(PLD 2013 SC 279). In the said opinion, a five-member bench of this Court made the following observations:-

"3. When the tenure of Mr. Shaukat Aziz Siddiqui; Mr. Noor-ul-Haq N. Qureshi; and Mr. Muhammad Azeem Khan Afridi, who were initially appointed as Additional Judges of Islamabad High Court, Islamabad, for a period of one year with effect from the date they took oath of their offices was nearing expiry, their cases were referred to the Commission and after deliberations it nominated the names of Mr. Shaukat Aziz Siddiqui, as a Judge of Islamabad High Court, Islamabad with a vote of 8 to 2 and unanimously nominated Mr. Noor-ul-Haq N. Qureshi, as an Additional Judge of Islamabad High Court, Islamabad, for further period of six months from the date of expiry of his present term, whereas

the name of Mr. Muhammad Azeem Khan Afridi was dropped he was not nominated.

77. As regards question No.(iv) "Whether JCP was properly constituted as per provision of Article 175-A of the Constitution as Mr. Justice Kasi who participated in the meeting was not a Member thereof and was a stranger to the proceedings". Mr. Justice Muhammad Anwar Khan Kasi attended the meeting of the Commission, dated 22-10-2012. The Chief Justice of Islamabad High Court, Islamabad, initiated the names of Mr. Shaukat Aziz Siddiqui, as a Judge and Mr. Noor-ul-Haq N. Qureshi, as an Additional Judge [for a period of six months] of Islamabad High Court, Islamabad. For this reason, the notifications in respect of these learned Judges were not issued. The Commission after deliberations nominated the above named learned Judges by majority of 7 to 2. Even if it is accepted that Mr. Justice Muhammad Anwar Khan Kasi was not the most senior Judge of Islamabad High Court, Islamabad, and attended the meeting of the Commission, it is established from the record that on the date when the meeting of the Commission was called for the purpose of considering the appointment of three Additional Judges of the High Court, Mr. Justice Riaz Ahmad Khan was on ex-Pakistan Leave and the former (Mr. Justice Muhammad Anwar Khan Kasi) was the most senior Judge available of the said High Court. The terms "Chief Justice" and "Acting Chief Justice" have been defined by the Constitution, whereas the term "most senior Judge" has not been defined. However, even if it is accepted that Mr. Justice Muhammad Anwar Khan Kasi, was not eligible to sit in the meeting of the Commission, Clause 8 of Article 175A stipulates that the decision of the nomination of a person for any vacancy of a Judge of the superior Court is to be taken by the Commission, by majority of its total members and as such, his attending the said meeting does not vitiate the entire proceedings or makes the nomination invalid.

82. Consequently, in our opinion, in view of the principle laid down in the cases of Ghulam Abbas and Muhammad Saleem (supra), the proceedings of the Judicial Commission, thereby nominating the names of two, mentioned above, as Judges of Islamabad High Court, Islamabad, are not vitiated because

of the attendance of Mr. Justice Muhammad Anwar Khan Kasi in the meeting.

91. Except initiating the nomination of a person, the Chief Justice of Pakistan or the Chief Justice of the High Court has no other special role in the appointment process and is just like any other member of the Commission and merely because he initiates the nomination, the same itself cannot be recommended, but to be considered as an act of mere procedure. The name initiated by the Chief Justice of Pakistan or the Chief Justice of the Provincial High Court is discussed in the Commission comprising all members from different spheres including the Executive, Representatives of Bars and Senior Judges of the Supreme Court and the High Courts. After deliberations and technical/professional evaluation of person's caliber as a Judge, the Commission nominates the name of such person to be appointed as a Judge of the superior Courts by majority of its total membership of the Commission.

Appointment of Judges of the superior courts are made under the provisions of Article 175-A of the Constitution. The said Article provides the procedure that is to be followed by the Parliamentary Committee but it does not provide the procedure that is to be followed by the Judicial Commission. Under sub- Article (4) of Article 175-A of the Constitution it was left to the Judicial Commission to devise its procedure by framing its own rules. Such rules were framed by the Judicial Commission described as Judicial Commission of Pakistan Rules, 2010. Rule 3(2) of the said Rules provide that for each vacancy of a Judge in a High Court, nomination for appointment is to be initiated by the Chief Justice of the concerned High Court. Hence under the new dispensation also it is the Chief Justice of the concerned High Court who initially proposes a name against an anticipated or actual vacancy in his Court and sends it to the Chairman of the Judicial Commission. The Chairman then convenes meeting of the Judicial Commission. The nomination is discussed and deliberated and then either it is approved or rejected.

93. Rules being delegated Legislation are subject to certain fundamental factors. Underlying the concept of delegated legislation is the basic principle that the Legislature

delegates because it cannot directly exert its will in every detail.

94. The Judicial Commission of Pakistan Rules, 2010 are not in contravention with or inconsistent or repugnant to any provision of the Constitution, and have been made and promulgated in exercise of the authority conferred on it by the Constitution.

97. The recommendations made by the Judicial Commission in its meeting dated 22-10-2012 are not vitiated merely because Mr. Justice Muhammad Anwar Khan Kasi attended the said meeting.

(Underlining is ours)"

In the case of Nadeem Ahmed Advocate vs. Federation of Pakistan (2013 SCMR 1062), another five-member bench of this Court held that:-

"3. Facts necessary to dispose of the listed petition, not in dispute, briefly stated are that when the tenure of Mr. Shaukat Aziz Siddiqui; Mr. Noor-ul-Haq N. Qureshi; and Mr. Muhammad Azeem Khan Afridi, who were initially appointed as Additional Judges of Islamabad High Court, Islamabad, for a period of one year with effect from the date they took oath of their offices was nearing expiry, their cases were referred to the Commission and after deliberations it nominated the names of Mr. Shaukat Aziz Siddiqui, as a Judge of Islamabad High Court, Islamabad with a vote of 8 to 2 and unanimously nominated Mr. Noor-ul-Haq N. Qureshi, as an Additional Judge of Islamabad High Court, Islamabad, for further period of six months from the date of expiry of his present term, whereas the name of Mr. Muhammad Azeem Khan Afridi was dropped as was not nominated.

26. The argument that the proceedings in the Judicial Commission could not be held in camera when the legislature purposely provided otherwise so as to ensure complete transparency and open scrutiny appears to be ornamental as its members not only represent all the essential segments of the Bar and Bench but also those of the Federation and the Province through Attorney-General for Pakistan, Minister for Law and Justice of the Federation and Minister for Law of

the Province. The scrutiny is open in the truest sense of the word when each member is at liberty to present his point of view one way or the other. Transparency in the proceedings cannot be affected by holding it in camera if every member consciously and conscientiously gives his input in the nomination, keeping in view its overall impact on the Institution on the one hand and society at large on the other. I do not understand what does the learned counsel for the President want to project by using the expressions "complete transparency and open scrutiny". If he by using these expressions wants the inclusion and intrusion of all and sundry, I am afraid, he is far off the lines drawn by the Constitution. It was in view of this backdrop, that the Judicial Commission while framing the rules in exercise of the powers conferred on it under clause 4 of Article 175-A of the Constitution provided for holding the proceedings in camera.

(Underlining is ours)"

It would therefore appear that the majority of the Petitioner's contentions have already been addressed by larger benches of this Court. There is nothing on the record to suggest that the Petitioner has ever filed a review against the two judgements supra and challenged the factual observations recorded by this Court in the said cases. The said factual findings recorded by this Court have therefore attained finality and the Petitioner cannot re-agitate a matter that has already been put to rest by this Court on two different occasions.

8. The question of judicial review of JCP decisions would require an in-dept analysis of the parameters, extent and scope of Article 199 of the Constitution.

Although the Constitution does away with the Latin terminology (Habeas Corpus, Mandamus, Certiorari, Quo Warranto, and Prohibition), the power conferred on the High

Courts under Article 199 is in essence incorporate the power to issue the said writs.

One of the five kinds of constitutional petitions that can be filed before the High Courts of Pakistan under Article 199 of the Constitution are, in essence, writs for Certiorari. Writs for certiorari have been defined in a judgment of the Privy Council in Ryots of Garabandho vs. Zemindar of Parlakimedi (AIR 1943 PC 164). The relevant portion of the judgement is reproduced below for ease of reference:-

"The ancient writ of certiorari in England is an original writ which may issue out of a superior Court requiring that the record of the proceedings in some cause or matter pending before an inferior Court should be transmitted into the superior Court to be there dealt with. The writ is so named because, in its original Latin form, it required that the King should "be certified" of the proceedings to be investigated and the object is to secure, by the exercise of the authority of a superior Court, that the jurisdiction of the inferior tribunal should be properly exercised. This writ does not issue to correct purely executive acts, but, on the other hand, its application is not narrowly limited to inferior "Courts" in the strictest sense. Broadly speaking, it may be said that if the act done by the inferior body is a judicial act, as distinguished from being a ministerial act, certiorari will lie. The remedy, in point of principle, is derived from the superintending authority which the Sovereign's superior Courts, and in particular the Court of King's Bench, possess and exercise over inferior jurisdictions. This principle has been transplanted to other parts of the King's dominions, and operates, within certain limits, in British India."

From a reading of the above-reproduced extract, and for the purposes of this petition, it becomes clear that whenever a High Court is exercising its constitutional jurisdiction for the purposes of certiorari, it is directing a Court under its

superintendence to correct any error of law or jurisdiction in a judgement/decision assailed before it in such a manner that the same order or judgement can be "certified" by the same High Court. However, whilst certiorari may be a prerogative of the High Court under Article 199 of the Constitution of Pakistan, it is still a discretionary power. It was held by this Court in the case of Darvesh Khan vs. Muhammad Sher Khan and others (1986 SCMR 352) that:

"The principle that a writ in the nature of certiorari in exercise of superintending control over inferior Courts is not a matter of right, but one of the discretion is now well-established as laid down by this Court. Such a writ will be granted or denied according to all the circumstances of each particular case, as the ends of justice may require and in accordance with the sound public policy.

(Underlining is ours)"

Similarly, in a judgement passed by a three-member bench of this Court in Rehmatullah and others vs. Mst. Hameeda Bequm and others (1986 SCMR 1561), it was held that:-

"Undoubtedly, the Constitutional jurisdiction under Article 199 of the Constitution is discretionary. Even when an order impugned before the High Court is found to be lacking in some legal or jurisdictional requirement, the Constitutional provision does not compel the High Court to issue a writ much less that of certiorari or mandamus. The merits of the case have also to be seen in order to examine whether the discretion is to be exercised or not in favour of the party successfully challenging the legality of the order impugned in writ jurisdiction. If the result is that by setting aside such an order another order would be revived which is unjust or unfair or is otherwise also illegal, then before setting aside

the first mentioned order the Court will have to examine more carefully the question of exercise of discretion and in proper cases would decline to exercise the discretion and would thus not set aside and order even if it is illegal provided the setting aside of such an order would result, inter alia, in injustice or revive another illegal order.

It is also a settled principle of law that when exercising constitutional jurisdiction, the High Court does not sit as a court of appeal. In the United Kingdom, the England and Wales Court of Appeal in Rex vs. Northumberland Compensation Appellate Tribunal (1952 1 KB 338) held that:

It is plain that certiorari will not issue as the cloak of an appeal in disguise. It does not lie in order to bring up an Order or decision for re-hearing of the issue raised in the proceedings. It exists to correct error of law where revealed on the face of an Order or decision or irregularity, or absence of, or excess of, jurisdiction where shown. The control is exercised by removing an Order or decision, and then by quashing it.

(Underlining is ours)

By no stretch of imagination can it be assumed that the framers of the 18th and 19th amendment envisaged that decisions of JCP would be made amendable to judicial review by way of constitutional petitions filed under Article 199 of the Constitution. The JCP is also not a "Court" whose decisions can be made the subject of superintendence by the High Courts of Pakistan for the purposes of exercising certiorari under Article 199. Moreover, the Petitioner cannot claim a vested right to be confirmed as a Judge of the Islamabad High Court on the sole ground that the then-Chief

Justice of High Court had recommended him for confirmation. A recommendation from the Chief Justice of a High Court is nothing but a process of procedure and the said recommendation needs to be deliberated and ultimately voted on by the JCP before a name is either confirmed or dropped by a majority vote of the JCP. Even if it is to be assumed that a decision of the JCP was amenable to judicial review under Article 199 of the Constitution, this court has already found the JCP's decision that is the subject matter of this petition without any legal or jurisdictional defect. The constitutional petition of the Petitioner was therefore bound to fail.

9. We have also gone over the impugned judgement of the High Court. It is well-reasoned, takes note of all material aspects of the case and has assigned valid and legally sustainable reasons for dismissing the Petitioner's constitutional petition. We have arrived at the same conclusion the Learned High Court and find no reason or basis as a ground of justification to take a different view. Consequently, we do not find any merit in this Petition. It is accordingly dismissed and leave to appeal is refused.

10. In view of the fact that the main Petition has been dismissed, all pending CMAs are also dismissed.

sd/- J
sd/- J

23/11/22