

IN THE SUPREME COURT OF PAKISTAN
(Review Jurisdiction)

Present:

Mr. Justice Amir Hani Muslim
Mr. Justice Mushir Alam
Mr. Justice Mazhar Alam Khan Miankhel

CMA's NO.204 AND 233 OF 2017 IN C.R.P. NO.474 OF 2016.

(Review arising out of the judgment dated 26.09.2016
passed by this Court in Const. Petition No.3 of 2014)

Shahzada Aslam and others. ... Applicants(s)
(in both Applications)

VERSUS

Ch. Muhammad Akram and others (in both Applications)... Respondents

For the Applicants : Syed Iftikhar Hussain Gillani, Sr. ASC
Mr. Mehmood A. Sheikh, AOR (Absent)

For Respondents : Not represented.

Date of hearing : 20-01-2017.

O R D E R

AMIR HANI MUSLIM, J. -

CMA 204/2017 in C.R.P 474/2016 in Const. P. 3/2014

Syed Iftikhar Hussain Gillani, learned Sr. ASC has, *inter alia* contended that if the impugned judgment remains in the field, no Superior Court including this Court, would be able to dispense justice without fear and anxiety. He next contended that the superior judiciary has a special place and immunity under the Constitution of Pakistan and the judiciary is protected from ridicule even in the Parliament of Pakistan but the impugned judgment is being used to malign the Hon'ble Judges at various forums and that the two judgments i.e Muhammad Iqbal and others vs Lahore High Court (2010 SCMR 632) and Asif Saeed vs Registrar Lahore High Court (PLD 1999 Lahore 350), were wrongly overruled by holding them to be *per*

incurim. He prays for the constitution of a larger Bench to examine the points raised by him.

2. We have heard the learned Senior ASC and we are of the considered view that the request for the constitution of a larger Bench will be covered by Order XI of the Supreme Court Rules, 1980 which clearly provides that the constitution of Benches is the domain of the Chief Justice and no litigant or lawyer can be permitted to ask that his case be heard by a Bench of his choice. We are in agreement with the view taken in the case of In re: M.A. No. 657 of 1996 in Reference Nos. 1 and 2 of 1996 (PLD 1997 SC 80), wherein the request for the constitution of a Full Court Bench was considered and turned down. While dismissing the application, it was observed that *this is the exclusive jurisdiction of the Chief Justice to constitute Bench of any number of Judges and it is not at all mandatory or necessary for him to constitute Full Court Bench for hearing of the References*.

CMA 233/2017 in C.R.P 474/2016 in Const. P. 3/2014

3. On 02.12.2016, when this matter was fixed before a Bench of which the author Judge of the impugned judgment was a Member, Syed Iftikhar Hussain Gillani, learned Sr. ASC contended that in terms of Order XXVI, Rule 8 of the Supreme Court Rules, 1980, this matter is to be placed before the same Bench, which had passed the judgment under review. Therefore, this Court passed the following order on 02.12.2016:

“Syed Iftikhar Hussain Gillani, learned Sr. ASC for the review petitioners, submits that in terms of Order XXVI Rule 8 of the Supreme Court Rules, 1980, this matter may be placed before

the same Bench, which has passed the judgment under review, as both the other learned Members of the Bench are available. Office to examine and put up the case before the same Bench, subject to its availability.”

4. In pursuance of these directions the office examined the case and a note was put up before the Hon’ble Chief Justice of Pakistan by referring to the Supreme Court Rules. The “Constitution of Benches” of this Court is the sole privilege and prerogative of the Hon’ble Chief Justice of Pakistan envisaged under Order XI of the Supreme Court Rules, 1980. After perusal of the note, the Hon’ble Chief Justice of Pakistan was pleased to direct the office to fix the case before a three Member Bench of which the author judge is a Member. Thereafter, on 09.01.2017 when this case was again fixed for hearing, the following order was passed:

“Syed Iftikhar Hussain Gillani, learned Sr. ASC requests time to file objections to the order dated 9.1.2017, passed by the Hon’ble Chief Justice in C.R.P No. 474/2016, whereby he has directed the office to fix the matter before the three member Bench of which the author Judge is a Member. This matter is adjourned to next week; meanwhile, the learned Counsel shall collect the order dated 9.1.2017, from the office.”

5. Now the matter is fixed today for hearing and the learned Counsel has filed CMA No. 233/2017 and has contended that the review Petition can only be heard by the same Bench. In this regard he has referred to the case of Asad Ali Vs. Federation of Pakistan (PLD 1998 SC 161). He further contended that the order passed by the Court to fix the matter before the same Bench was a judicial order and it could not be substituted by an administrative order of the Hon’ble Chief Justice of Pakistan.

6. We have heard the learned Counsel at length on this point. We are of the considered view that the constitution of Benches is the privilege and prerogative of the Hon'ble Chief Justice of Pakistan. The same was done in accordance with the Rules and even the order of this Court dated 02.12.2016 was subject to examination by the Office of this Court and availability of the same Bench.

7. Before answering the contentions of the learned Counsel for the Petitioners, we would like to reproduce the language of Rule 8 of Order XXVI of the Supreme Court Rules:-

“8. As far as practicable the application for review shall be posted before the same Bench that delivered the judgment or order sought to be reviewed.”

8. The contention of the learned Counsel for the Petitioners that this Rule has been interpreted in the case of Asad Ali vs. Federation of Pakistan (PLD 1998 SC 161) (at page 253) and this Court has held that “*a matter is to be heard as far as possible by the same Bench*”, is misconceived. Even this judgment, in no way, extends any help to the learned Counsel for the Petitioners, whereas the language of the said Rule and the interpretation given by this Court in the aforesaid case are very much clear and does not mandate that the same Bench should hear the Review Petition. In fact, it states that the same Bench that delivered the judgment needs to hear the matter, but subject to the availability and practicability of the Bench, which in other words suggests that the Review Petition needs to be assigned by the Chief Justice or the office at least before a Bench of which the author Judge is a Member. If the contention of the learned Counsel is accepted, it would lead to anomalous consequences, because

hundreds of review petitions are filed and the practice of the nature will deprive the Hon'ble Chief Justice from exercising powers under Order XI, besides it would cause inconvenience to the lawyers and the office. Even the plain reading of Rule 8 of Order XXVI itself does not suggest so.

9. Moreover, Order XXXIII Rule 7 of the Supreme Court Rules provides that *“where at any stage of the proceedings in the Court, there has been a failure to comply with these rules, the failure shall be treated as an irregularity and shall not nullify the proceedings or the judgment.”* The Rules are procedural in nature and do not confer any right on a party to object the formation of a Bench. We are also fortified by the judgment of this Court in the case of Federation of Pakistan Vs. Muhammad Shahbaz Sharif (PLD 2009 SC 391) wherein this Court was pleased to observe that:

“4. The expression “by the same Bench” appearing in the aforesaid provision is qualified by “As far as practicable”. The rationale for this may not be difficult to discern because the number of applications for review coming up before this Court may be frequent being the apex Court and the remedies of appeal and revision not being available. Since the hearings of this Court are held at the four Branch Registries as well i.e. at Lahore, Karachi, Peshawar and Quetta, it may not be practicable for a Member of the same Bench to be available at a Bench in a given time. Perhaps a strict adherence to provisions of “hearing by the same Bench” could seriously affect the functioning of different Benches of this Court. Moreover, the well settled practice and convention of this Court is that an application for review is ordinarily placed before the Bench of which the author Judge or in case of unavailability any other member of the earlier Bench is a Member, so as to ensure that working of that Bench is not interrupted. The Office Order No.P.Reg.99/90 (14)/SCA dated 3-3-1990 of this Court is reflective of this convention. Since two out of the three Hon'ble Judges of the Bench which passed the judgment under review are part of this Bench and as both of them are authors

of the same, the mandate of Order XXVI, Rule 8 of the Supreme Court Rules, 1980, stands substantially complied with. The applications devoid of any merit are accordingly dismissed in limine.”

10. Furthermore, two out of the three Hon’ble Judges of the Bench who had heard the Constitutional Petition and delivered the impugned judgment are on the Bench today. In the case of Government of Punjab Vs. Aamir Zahoor-ul-Haq (PLD 2016 SC 421), the issue of the nature came up before this Court and it was observed that:

17.First we will address the objection raised by Mr. Kamran Murtaza, learned ASC for the respondent on the formation of the Bench Rule 8 of Order XXVI of Supreme Court Rules, 1980 stipulates that as far as practical the review will be heard by the same Bench. The Rule provides a flexibility in constitution of the Bench, and rightly so, as there may be situation where the constitution of the same Bench may be impossible for the reason beyond the control of anyone, as in case of retirement of a judge or his indisposition on account of failing health. The objection therefore, is misconceived and accordingly repelled.”

11. The above are the reasons for our short order of even date which reads as under:-

“For reasons to be recorded later, the Review Petitions alongwith Civil Misc. Applications No.204/2017 and 233/2017, are dismissed.”

Judge

Judge

Judge

Islamabad the, 20th January, 2017.

Not approved for reporting.

Sohail/**