

JUDGMENT SHEET
PESHAWAR HIGH COURT, PESHAWAR
JUDICIAL DEPARTMENT

Writ Petition No.4627-P/2018

"Syed Aziz-ud-Din Kaka Khel
Vs.
Governor Khyber Pakhtunkhwa through its Principal
Secretary, Peshawar etc"

JUDGMENT

Date of hearing **13.03.2019**

Petitioner(s) by: In person.

Respondent(s) by: Mr. Waqar Ahmad Khan,
AAG.

Respondent No.11 by Barrister Waqar Ali Khan.

IKRAMULLAH KHAN, J.- Through the instant Constitutional petition, under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, petitioner has prayed for the following relief:-

"It is, therefore, most humbly prayed that on acceptance of this writ petition this Hon'ble Court may please be:

- 1. Declare the appointment of respondent No.11, vide Notification No. E&A / LD / 2-13 / 2018 dated 30.08.2018 issued by respondent No.1 as null and void ab-initio in the eyes of law and constitution and he be removed from the office of Advocate General forthwith**
- 2. Declare the Khyber Pakhtunkhwa Appointment of Law Officers Act, 2014 passed on 14th December 2014 and amended act Khyber Pakhtunkhwa Appointment of Law Officers (Amendment) Act 2018 as null and void ab-initio for the basis**

interest of Justice and in the best interest of the public at large.

3. Direct the respondent No.1 to 4 to appoint the Advocate General for the Province according to the qualification laid down for the appointment to be a Judge of High Court i.e.

- i. Citizen of Pakistan.
- ii. Shall not less than forty five years and more than sixty two years of age.
- iii. Shall not less than ten years practical experience been an advocate of High Court and
- iv. Shall consult with the Hon'ble Chief Justice of High Court.

4. Direct the respondent NO.1 to 4 to appoint the Law Officers to:-

- i. With prior consultation with the Hon'ble Chief Justice of High Court or committee constituted for the said purposes as the case may be and,
- ii. According to the following mandatory qualification,
 - a. To obtain clearance as well as practicing professionalism, good character and no inquiry Certificate from the Khyber Pakhtunkhwa Bar Council or Pakistan Bar Council, if any.
 - b. To obtain the same Certificate form his/her concerned District Bar Association where the proposed Law Officer is on roll.
 - c. To obtain the same Certificate from his/her concerned High Court Bar Association where the proposed Law Officer is on role.
 - d. T obtain the same Certificate form the concerned Head of District Judiciary i.e. the Learned District & Sessions Judge, where the proposed Law Officer is on roll.
 - e. To submit sworn affidavit regarding his/her good conduct, non-involvement in any case, non-pendency of any inquiry.
 - f. To submit list of 100 cases excluding miscellaneous matters, independently for Additional Advocate General and 50 cases for Assistant Advocate General conducted by him/her alongwith copies of detail judgments.
 - g. For Additional Advocate General.

- Is enrolled as an Advocate of Supreme Court or High Court and has for a period of not less than ten years been an Advocate of High Court and For Assistant Advocate General.
 - Is enrolled as an Advocate of High Court and has for a period of not less than eight years been an Advocate of High Court.
- h. To obtain fitness Certificate form the Committee, comprised of**
- The Hon'ble Chief Justice (Chairman)
 - Administrative Judge of the High Court for the concerned District where the proposed Law Officer is enrolled, (member)
 - The learned District & Sessions Judge of the concerned District where the proposed Law Officer is enrolled. (member).
 - Member of the KP Bar Council, (member)
 - President of the Peshawar High Court Bar Association, (member).
 - The Worthy Registrar of the Peshawar High Court (Secretary).
- i. To discourage Dual or Multiple nationality a Certificate or Affidavit about Nationality of Pakistan. Or**
- j. Any other suitable qualification in the best interest of the public at large and justice. Or any other relief if this Hon'ble Court deem it proper may also be awarded in favour of petitioner".**

02. Petitioner has challenged the appointment of the respondent who had been appointed by the Worthy Governor of Khyber Pakhtunkhwa vide Notification No.E&A/LD/2-13/2018 dated 30.08.2018 as Advocate General Khyber Pakhtunkhwa on the following grounds:-

- 1. That the respondent was not illegible to be appointed on the post of Advocate General as he was overage.**
- 2. That he was removed from the office of Advocate General vide Notification dated 26.06.2018 and as such, in view of section 5 (b) of the Legal Practitioners & Bar Councils Act, 1973 at the decision of the impugned appointment was not an Advocate and Advocate General could only be appointed amongst the Advocates bears his name on the role of Provincial or Pakistan Bar Council.**

03. Petitioner has also challenged the vires of KP Appointment of Law Officers Act, 2014.

04. On the other hand, learned counsel for respondent argued that the appointment of the respondent was legal, justified and no legal infirmity, could be found, therein his appointment, being the most senior Advocate of Supreme Court having a legal practice, experience of more than 44 years, no retiring age has been prescribed either by any rules, law or Constitution for the office of Advocate General; that the removal of respondent, therefrom the office of the Advocate General, by interim Government was not in pursuance of any

misconduct, disciplinary proceeding but the same was on account of change of the cabinet and in view of the power of the worthy Governor of KP in terms of Article 140 of the Constitution and such removal carries no stigma to disqualify him to be an Advocate.

05. We have heard learned counsel for the parties in light of law and Constitution of Islamic Republic of Pakistan, 1973 and facts available on record.

06. It is constitutional requirement in term of Article-140 of the Constitution that the Governor of each province shall appoint an Advocate General for each province in the prescribed manner. For convenience Article 140 of the Constitution, if reproduce would be read as:-

"140. Advocate General for a Province. - (1)The Governor of each Province shall appear in person, being a person qualified to be appointed a Judge of the High Court, to be the Advocate-General for the Province.

(2) It shall be the duty of the Advocate-General to give advice to the Provincial Government upon such legal matters, and to perform such other duties of a legal character, as may be referred or assigned to him by the Provincial Government.

(3) The Advocate-General shall hold office during the pleasure of the Governor [and

shall not engage in private practice so long as he holds the office of the Advocate-General].

(4) The advocate-General may, by writing under his hand addressed to the Governor, resign his office".

07. While Article 193 (2) of the Constitution prescribed the qualification of the Judge of the High Court, which reads as:-

"193 (2) A person shall not be appointed a Judge of a High Court unless he is a citizen of Pakistan, is not less than [forty-five] years of age, and –

(a) He has for a period of, or for periods aggregating, not less than ten years been an advocate of a High Court (including a High Court which existed in Pakistan at any time before the commencing day); or

(b) He is, and has for a period of not less than ten years been, a member of a civil service prescribed by law for the purposes of this paragraph, and has, for a period of not less than three years, served as or exercised the functions of a District Judge in Pakistan; or

(c) He has, for a period of not less than ten years, held a judicial office in Pakistan".

08. No doubt, in accordance with the provisions contained in Article 193 (2), the minimum age for appointment of a Judge, prescribed therein is 45 years, however, in Article 193 of the Constitution, maximum age limit is itself not mentioned which is prescribed thereunder Article 195 of the Constitution, which read as:-

"195. A Judge of a High Court shall hold office until he attains the age of sixty-two years, unless he sooner resigns or is removed from office in accordance with the Constitution".

09. The qualification for appointment of an Advocate General, would be construed in term of Article 193 of the Constitution, however the retiring age as mentioned in Article 195 of the Constitution, could not be applied to be a disqualification for the appointment of an Advocate General. A person less than 45 years, shall not be competent to be appointed as an Advocate General, but Article 193 of the Constitution, may not be construed in manner and mode which altogether give a different interpretation to the plain meaning of Article 193, to read as:

"A person shall not be appointed a Judge of High Court unless he is citizen of Pakistan is not less than forty five years of age and more than 62 years of age".

10. The contention of learned counsel (petitioner) that as a person appointed as Advocate General had to be one who qualified for appointment as a Judge of High Court, therefore, he could be deemed to be under the

same disability as has been placed by the constitution on a judge of a High Court in term of Article 195 of the Constitution, such contention is clearly misconceived, as merely prescribing a certain qualification for appointment as Advocate General of a Province does not mean that he would be governed by the same disability as applies to a Judge of a High Court.

11. Similar issue, under discussion also once came before the Apex Court in case titled "Secretary Ministry of Law parliamentary affairs and Human Rights government of Punjab Vs. Muhammad Ashraf Khan and others" (**PLD 2011 SC-7**) wherein, the Apex Court is held as:-

"14. In the recent case of State of Uttaranchal vs. Balwant Singh Chaufal decided on the 18th January 2010, Indian Supreme Court after considering all the earlier judgments on the point, held that the issue has been fully settled that the Advocate General for the State can be appointed after he/she attains the age of 62 years while the Attorney General for India can be appointed after he/she attains the age of 65 years".

12. The second contention of the learned counsel that as respondent has been appointed as Advocate General, without consultation of the

Chief Justice of Peshawar High Court, is also not backing by any constitutional provision.

13. There is no any such provision, prescribed under Article 193 that Advocate General of a Province shall be appoint by the Governor with consultation to the Chief Justice of a High Court.

14. This Court while deciding W.P.No.2566 of 2013 dated 22.10.2013 and W.P.No.1049 of 2018 dated 27.02.2018 has also held that as no retiring age has been prescribed, therein Constitution itself for Advocate General, therefore, the age prescribed under Article 195 of the Constitution for a Judge of High Court could not be counted or deemed to be a disqualification for appointment of a person as Advocate General, more or above the age of 62 years.

15. The post of Advocate General is also not a permanent one, however, the office of Advocate General is a permanent Constitutional office, Advocate General shall hold office during the pleasure of the Governor, while a Judge of a High Court, could only be de-notified under the procedure prescribed under Article 209, so in

sense both offices are different in many respect, and any disqualification prescribed thereunder for a Judge of a High Court could not be attributed to the post of Advocate General.

16. The third submission of the learned counsel (petitioner) that as the respondent was previously removed, therefrom his office vide Notification No.E&A/LD/2-13/2018 DATED 26.06.2018 and as such, he could not be re-appointed as Advocate General, in view of Section 5 (B) of the Bar Council Act, 1973, this contention is also highly misconceived.

17. The Notification dated 26.06.2018 itself reveals that services of the respondent were dispensed with in exercise of its power envisaged by the Worthy Governor of KPK under clause (3) of Article 140 of the Constitution and such removal of an Advocate General could not be deemed to be or to be treated as a removal from service as a result of any misconduct or any other disciplinary action, which entails stigma.

18. It was a removal simpliciter in term of Article 140 of the Constitution and no any show cause, is issued by respective Bar Council in order

to cancel his license on account of his mere removal from the office.

19. As discussed hereinabove, an Advocate General will hold office during pleasure of the Governor and the Governor may at any time, de-notify or dispense with services of the Advocate General without assigning any reasons and without any prior notice in this regard, therefore, such removal shall not entail any stigma or disqualification, in order to re-appoint him on any public post, including the office of the Advocate General. Therefore, the word "*remove*" used in Notification No.E&A/LD/2-13/2018 dated 26.06.2018, issued by the worthy Governor of Khyber Pakhtunkhwa may be rectified in order to remove any future difficulty for the respondent career.

20. In so far as the 2nd part of the prayer of petitioner, wherein the vires of the Khyber Pakhtunkhwa Act 2014 is challenged, we see no any illegality, un-constitutionality, in the Khyber Pakhtunkhwa Appointment of Law Officers Act 2014 (Amendment Act, 2018) being passed by the Provincial Assembly of KP in

accordance with the relevant provisions of the Constitution.

21. As to whether the said Act is against any provision of the Constitution or any Federal law and either against the Provincial Bar Council Act, 1973 or Pakistan Bar Council Act, 1973 or the Rules made thereunder, petitioner did not satisfy us in this regard. However, law making is the prerogative of the legislature, whereas in term of section 3 of the Khyber Pakhtunkhwa Appointment of Law Officers Act, 2014, Government has been authorized to appoint Law Officer but it would be not improper or unreasonable that while appointing Law Officers, the Chief Justice of the High Court shall be consulted, in order to select and appoint best lawyer, in larger public interest and to remove all sort of political consideration (if any) in the matter of appointment of Law Officers. Learned Additional Advocate General on behalf of respondents also apprised the Court that relevant Amendment in the Khyber Pakhtunkhwa Appointment of Law Officers Act, 2014 is under consideration, in order to bring useful and purposeful amendment to include the Worthy

Registrar of this Court to be a consultant body in matter of appointing of Law Officer.

22. Irrespective of the legal proposition as to whether a High Court could direct the legislature to amend a law, we would appreciate in best interest of public that in matter of appointment of Law Officer, Political consideration at all be vindicated and it would be only possible if to solicit the matter of appointment by meaningful consultation with the Chief Justice of the High Court.

24. With the above observation, this petition is dismissed accordingly.

ANNOUNCED.
13.03.2019

J U D G E

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Hon'ble Mr. Justice Ikamullah Khan
Hon'ble Mr. Justice Muhammad Ibrahim Khan

Himayat