Judgment Sheet

IN THE PESHAWAR HIGH COURT, PESHAWAR
JUDICIAL DEPARTMENT

Writ Petition No. 2956-P/2012 with Interim Relief.

JUDGMENT

Date of hearing…….**07.11.2012……...**

Petitioners. (Ghulam Nabi, Advocate & 02 others) In person.

Respondents. (Government of KPK through its Chief Secretary & 04 others) By Mr. Obaid Razzaq, AAG along with Farhat Ullah Khan, AMIT-II & Qasam Jan Khan, Consultant Law Department.

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DOST MUHAMMAD KHAN, C.J.- Petitioners namely, (1) Ghulam Nabi, (2) Abdul Qayyum & (3) Muhammad Tahir Zaman, Advocates of the High Court, have filed this writ petition and have prayed for issuance of writ to the following effect: -

i. that Section 7 (1) (a) (i) of the NWFP (Khyber Pakhtunkhwa) Public Service Commission Ordinance, 1978;

ii. that Rule 3 of the NWFP (Khyber Pakhtunkhwa) Public Service Commission (Function Rules, 1983);

AND

iii. that Rule 5 of Judicial Service Rules, 2001 be declared illegal, unlawful

being in disregard & ultra vires of the provisions of constitution, contained in Articles 4, 2-A, 175 & 203. The offending provisions, therefore, to the extent of inconsistency with the constitution are void-ab-initio, of no legal effect and are liable to be struck down. The recruitment of Judicial Officers including Civil Judges, Magistrates, Illaqa Qazis & others alike through Public Service Commission be declared illegal, being in violation of the constitutional command and the Provincial Government / respondents be directed to amend the law and the rules on the subject ibid accordingly and that the recruitment of all such Judicial Officers and their appointments order shall be made / issued by the High Court or a Commission / Committee, constituted & established by the High Court. Further that recruitment of all such Judicial Officers be initiated

without fail and without any delay by the High Court itself.

2. Notice of this petition was given to the respondents, after it was admitted to full hearing, and they were directed to file their respective replies, if they so desired.

3. When the petition came up for hearing on 07.11.2012, the learned Additional Advocate General, representing the Provincial Government and all respondents, stated at the bar that the respondents would not contest the case because the Provincial Cabinet recently deliberated upon the summary, sent to it, which has been referred back to a Committee for final opinion. He was asked to explain that when the matter is almost six (06) months old and all controversial issues & points were discussed thoroughly with all the respondents & stakeholders at different occasions then, why the same has been referred to the Committee, constituted by Cabinet.

4. It is deemed essential to point out that the case was discussed by the Team of Officials of the High Court with all the concerned Secretaries including the Chief Secretary

of the Provincial Government in light of the judgment of the Hon'ble Apex Court in the case of ***"Province of Sindh through Chief Secretary & another Vs. Rashid A. Rizvi & others"*** and the one given in the case of ***"Province of Sindh through Chief Secretary & another Vs. Abdul Haleem Siddiqui & others"***, the very judgment of the Sindh High Court, the Notification issued by the Government of Balochistan through Services & General Administration Department (Regulation-II) dated 14th April, 2011 vide SOR-II-22(51)/2011/S&GAD/1050-1100 and the Notification issued by the Government of Punjab through Services & General Administration Department (Section Admn-IV) dated Lahore, the 10th February, 2012 bearing No.1-1/2003-SO(ADMN-IV) and it was agreed in principle that the view point of the Peshawar High Court shall prevail and let the recruitment of Judicial Officers of all categories be taken away from the fold of the Provincial Public Service Commission and the High Court shall have the authority to recruit such officers, the learned AAG could not convince the Court that what was the motive &

purpose behind, referring the subject matter to the Committee constituted by the Cabinet, to be headed by the Minister for Law, vide Notification dated 5th October, 2012, moreso, when it had already agreed in principle to the suggested mode. The only plea he took was that some time be given to the Provincial Government, so that, the matter is discussed at all levels and final decision taken would be submitted to the Court.

When the learned AAG was apprised of the fact that there are 108 vacancies of Judicial Officers throughout the Province and due to acute shortage of Judicial Officers, the National Judicial Policy for speedy & inexpensive justice is getting setback due to the delaying tactics of the Government, he could not advance any convincing reason for such negative attitude of the Provincial Government. Left with no alternative, the case was heard at length with the assistance of both sides.

5. The petitioners argued the case and reiterated the stance which they have taken in the petition, however, they emphatically urged that if the process of recruitment of the

said Judicial Officers is not taken in hand by the High Court, the independence of judiciary would remain merely a dream which could not be materialized in future, moreso, when vested interests elements are bent upon to retain such power & authority within its folds, using Public Service Commission a channel for recruitment of the Judicial Officers according to their whims & wishes. According to them, this phenomena would definitely corrupt & pollute the system of Administration of Justice rather Justice itself would become a casualty and the noble cause of administering justice without fear & favour and independently would remain a faraway cry.

6. On the other hand, the learned AAG urged that let the Government decide this issue conclusively once for all and till that time the Court has to wait for its decision. In this way, he repeated his arguments; he offered initially when the case was opened for hearing, however, he was not sure as to when the Government would be able to decide the issue and in what manner.

7. From the conduct of the respondents, we have come to a definite conclusion that they are in no mood to retrace and set the things right, as has been done in the cases of other Provinces by the Provincial Governments i.e. Punjab & Balochistan and through authoritative judgment of the Sindh High Court which was upheld by the Hon'ble Apex Court.

8. Under the provisions of Article 2-A of the Constitution, the Objectives Resolution set the code & ethics for the Nation, has been made integral part of the Constitution which is by now inseparable limb of the supreme law of the land.

The Objectives Resolution squarely provide as under:-

> *"**Wherein** the independence of the judiciary shall be fully secured"*

9. Article 175 (3) of the Constitution provides that judiciary shall be separated progressively from the executive within five (05) years context (original text), however, the dictators and even democratically elected

Governments did not attend to this important issue for ulterior considerations and the judiciary was constrained to snatch its independence while giving authoritative judgment in the case of ***"Government of Sindh through Chief Secretary to Government of Sindh Karachi & others Vs. Sharaf Faridi & others"*** **(PLD 1994 SC 105).** When this case was under consideration of the Apex Court, all the Provincial Governments, represented by their respective Chief Secretaries, willingly agreed to the separation of judiciary from the executive and giving it full independence, however, till date arrangements were not made for the recruitment of Judicial Officers through inbuilt mechanism by the higher judiciary itself through its own Commission or Committee and this important process was retained by the executive within its folds which was a clear invasion on the independence of judiciary.

10. It is squarely not understandable that when judges of the High Court and Supreme Court are elevated on the recommendations of the Chief Justices and after 18th Amendment such recommendations are to be endorsed by

the Judicial Commission, headed by Hon'ble the Chief Justice of Pakistan then, no earthly reason exists for the executive to retain the power & authority by making recruitment of the junior Judicial Officers of the District Judiciary through Public Service Commission. The only inference which could be legitimately drawn from such a move is that the executive authority is in no mood to give full independence to the judiciary and to implant their own favourities in the district judiciary, who would ultimately be elevated to the High Court and then to the Supreme Court in due course. Retention of such powers & authority by the executive has virtually chocked the efforts of the judiciary, made through authoritative judgment in ***Sharaf Faridi's*** case ibid and to thwart the attempt of judiciary to get full independence from the executive limb of the State.

11. In the case of ***"Province of Sindh through Chief Secretary & another Vs. Rashid A. Rizvi & others"*** the Hon'ble Apex Court has laid down a binding dicta and while answering the question "*the link between the independence of the judiciary and the process of*

appointment of Judges", held that the independence of judiciary is inextricably linked and connected with the process of appointment of judges and the security of their tenure and other terms & conditions by referring to the Rule laid down in the case of ***"Al-Jehad Trust through Raees-ul-Mujahideen Habib-ul-Wahab-ul-Khairi & others Vs. Federation of Pakistan & others"*** **(PLD 1996 SC 324, 429)**. It was further held that although such rule was laid down in the context of appointment of judges to the High Court, however, the principle applies with equal force to all judicial appointments including those in the district judiciary. Accordingly, the dictum laid down in the aforesaid case was soon reaffirmed by the Supreme Court in the case of ***"Mehram Ali & other Vs. Federation of Pakistan"*** **(PLD 1998 SC 1445, 1474)** and in the case of ***"Sheikh Liaqat Hussain Vs. Federation of Pakistan"*** **(PLD 1999 SC 504, 658)** which directly relate to the district judiciary. This dicta of binding nature was reiterated in the case of ***"Sindh High Court Bar Association Vs. Federation of Pakistan"*** **(PLD 2010 SC**

879, 1182) and in the case of ***"Munir Hussain Bhatti Vs. Federation of Pakistan"*** **(PLD 2011 SC 407)**. In the latest case, it was squarely held that it is an undisputed tenet of our constitutional scheme that in the matter of appointment, security of tenure and removal of judges the independence of the judiciary should remain fully secured, hence, it was concluded that making appointments of judicial officers through an authority, other than the High Court, has the effect of negating the independence of judiciary and the separation of powers envisaged in Articles 175 & 203 of the Constitution because the High Court is neither involved in the selection of judges nor in their appointments as the function is to be performed by the Provincial Public Service Commission exclusively.

12. While concluding the judgment, the Apex Court supported the judgment of the Sindh High Court on the same issue and held that the High Court alone shall be competent to make recruitment & selection of judges of the District Judiciary and not the Public Service Commission

thus, the subsequent Notification, issued by the Government of Sindh, was struck down.

13. The Provinces of Punjab and Balochistan through their respective notifications, mentioned in the earlier para, have also surrendered this power and authority to their respective High Courts.

14. In the above background, the Provincial Government of Khyber Pakhtunkhwa is left with no justification much less plausible to retain such powers & authority by making recruitment of Judicial Officers of the District Judiciary through the Provincial Public Service Commission because it would amount to giving discriminatory treatment to the Peshawar High Court, undermining its authority & independence when in the rest of the country such authority & powers are exercised by the respective High Courts.

Accordingly, the impugned action taken by the Provincial Cabinet, referring the summary to the Committee, constituted by it, is held to be without lawful authority, coram-non-judice, void-ab-initio, based on

malafide and of no legal effect and the same is declared as such. It is further held that the provisions of Section 7 (1) (a) (i) of the NWFP (Khyber Pakhtunkhwa) Public Service Commission Ordinance, 1978, Rule 3 of the NWFP (Khyber Pakhtunkhwa) Public Service Commission (Function Rules, 1983) & Rule 5 (e) of the Judicial Service Rules, 2001 are equally ultra vires of the constitutional command, contained in Articles 175 (3) and 203, hence, the same are declared void-ab-initio and shall ceases to have effect to the extent of recruitment of Judicial Officers of the District Judiciary. It is further directed that the Provincial Government, particularly the Establishment Department, shall move the summary for the required amendments immediately without any fail and amendments shall be made where High Court shall be substituted for the Public Service Commission for all these Rules and provisions of law, so that, to make the High Court as a sole authority with powers & function to appoint all the Judicial Officers of the District Judiciary through its own process, independent of Public Service

Commission or any other authority. Till such amendments are carried out in the impugned provisions of law, the same are held in abeyance and of no legal effect and the High Court shall have the authority to initiate the process of recruitment and appointment of all the judicial officers of the district judiciary under the Rules, framed by it and through the process & mode already setout for that purpose. Accordingly, Notification No. SOR-IV (E&AD)/3-11/2001 dated 28th August, 2001 is hereby restored and shall remain effective & operative in the field. This constitutional petition is allowed in the above terms.

These are the detailed reasons for our short order of the even date.

Announced:
07.11.2012.

CHIEF JUSTICE

J U D G E

/*Saif*/