IN THE HIGH COURT OF SINDH, AT KARACHI

Present:
Muhammad Ali Mazhar and
Yousuf Ali Sayeed, JJ

Constitutional Petition No. D-281 of 2020

Petitioner	:	Advocate Sikandar Ali.
Respondents	:	Provincial Selection Board High Court of Sindh, Karachi & others.
Dates of hearing	:	20.10.2020, 09.11.2020 and 16.11.2020

Petitioner, in person.
Malik Naeem Iqbal, Advocate, for the Respondent No.2.
Abdul Razzak, MIT-II, High Court of Sindh
Shahriyar Mehar, AAG.

JUDGMENT

YOUSUF ALI SAYEED, J - This Petition under Article 199 of the Constitution follows in the wake of a formal process undertaken for the purpose of filling the vacant posts of Additional District & Sessions Judge ("**ADJ**") in the Province of Sindh, so as to assail the proposed recruitment of the Respondent No.2, Abdul Hafeez Memon, to that post.

2. The Petitioner, who is apparently a practicing advocate, professes to have come forward in the 'public interest', and has sought to question the scrutiny of the Provincial Selection Board (the "**Board**") vis-à-vis the Respondent No.2, alleging that there was an omission on its part to properly examine and verify his character and integrity.

3. Essentially, the case of the Petitioner turns on the assertion that the Respondent No.2 had engaged in malpractice as an advocate, hence was unfit to hold the post of an ADJ, being a high office within the judicial service of the Province and entailing work of an important and sensitive nature. On that basis, it has been sought that the Board be restrained from forwarding its summary recommending his appointment until verification of his antecedents, with it accordingly being prayed that:

> "**a)** This Hon. Court may be pleased to declare that Respondent No.2, being involved in corruption/malpractice cannot be treated as sagacious, righteous, non-profligate, honest, ameen, sane and trustworthy and therefore; cannot be recruited as an ***Additional District & Sessions JUDGE***, to justice with the public honestly.
>
> **b)** This Hon. Court may be pleased to refrain the Hon'able Provincial Selection Board, Respondent No.1, to send recommendation /summary on behalf of Respondent No.2, for final approval to the authority empowered under the law for appointment as ***Additional District & Sessions Judge***, till comprehensive inquiry into the matter and disposal of the instant petition.
>
> **c)** Any other relief(s), which this Hon. Court may deem fit, just and proper be granted in the interest of justice."

4. The substance of the Petitioner's allegation is that the Respondent No.2 is said to have fabricated a document purporting to be Letter No. 578 dated 13.05.2010 issued by the then Senior Civil Judge Badin, Mr. Shahid Hussain Janjua, bearing the forged signature of the judicial officer and a fake seal of the Court, which was produced by him on 18.05.2010 before the Mukhtiarkar (Estate) District Badin/Mukhtiarkar (Revenue) Golarchi. The document presented by the Petitioner as being a photocopy of that letter reads as follows:

"No. 578 OF 2010.
Dated 13-05-2010.

To,

The Mukhtiarkar (Estate)
B A D I N.

Subject: TO RECEIVE INSTALLMENTS.

Whereas, this Court has received the Record and proceedings of the above suit on 13-05-2010 from the Court of Honourable II Additional District Judge Badin who has maintained the decree dated 22-09-2009 of this Court vide Judgment dated 12-03-2010. It is pointed out that you are not ready to implement the above decree and avoiding to receive the instalments of suit land from the Lrs of grantee.

You are, therefore, hereby directed to receive the instalments of suit land from legal heirs of plaintiff Col: Khadim without fail.

This 13th day of May, 2010.

(Shahid Hussain)
Senior Civil Judge Badin"

5. It was submitted that such malpractice on the part of the Respondent No.2 was apparent from the Order made by the Senior Civil Judge in F.C. Suit No.26 of 2007 (Re-Col. ® Khadim Hussain through his LR's vs P.O. Sindh & others) on 27.05.2010 and the connected Report No. Sr. C.J.B./724 of 2010 dated 27.07.2010 submitted to the District Judge Badin, with the documents presented by the Petitioner as being photocopies thereof reading as follows:

The Order dated 27.05.2010

"Today, the Incharge Mukhtiarkar (Estate), District Badin Mr. Arshad Ibrahim Siddiqui, the Mukhtiarkar Revenue Golarchi, appeared before this court and seek time to obtain installments from LRs of the deceased Col. (R) Khadim Hussain as the FCS no.26/2007 has been decreed and appeal against the judgment has been maintained by the

Worthy 2nd District and Sessions Judge Badin vide judgment and decree dated 12/3/2010. He also produced Letter no.578 of 2010 dated 13/5/2010 saying that the same letter has been produced in his office by advocate Abdul Hafeez Memon, in which he was directed to obtain installment from the LRs of Col. (R) Khadim Hussain.

From the perusal of letter, it appears that it is a false, forged and factitious letter and not issued from this court nor signed by the undersigned. Moreover, according to outward register of this court, this letter is not entered in the register and one another entry has been made on S. no.578/2010.

Therefore, the advocate Abdul Hafeez Memon has committed the offence u/s. 463/466/468 and 471 PPC and the Reader of this court is directed to lodge FIR with the police station Badin without fail.

(Shahid Hussain)
Senior Civil Judge, Badin"

The Report

"NO: Sr:C.J.B/-724 OF 2010 Dated: 27.7.2010.

To,
The Honourable,
District Judge,
Badin.

Ref'nce:- Your honour's office letter No.2101/2010 dated: 2.7.2010.

Respected Sir,

I have the honour to submit the report on the application made by the office of Head Quarter MFRO Hyderabad dated 16 June, 2010 as under:-

That the case bearing FCSNo.26/2007 (Kol: Khadim Hussain since dead) through his L.Rs V/S Prov: of Sindh & Others was pending before the file of this court and the same was decreed to the extent of prayer class A and C to the plaint because prayer class be to the plaint has already been withdrawn by the plaintiff vide Judgment dated 16.09.2008.

That thereafter the defendants MFRO filed Civil Appeal against the Judgment and decree of this court, the said appeal was dismissed vide Judgment dated 12.3.2010 by the worthy IInd: Addl: District Judge, Badin and the Judgment and decree of this court has been maintained.

It is further submitted that on 27.5.2010 Incharge Mukhtiarkar (Estate) District Badin namely Mr. Arshad Ibrahim Siddiqi, the Mukhtiarkar Revenue Golarchi appeared before this court and submitted a letter and seek time to obtained instalments from L.Rs of deceased Col. (R. Khadim Hussain. The said Mukhtiarkar further said that a letter bearing No.578/2010 dated: 13.5.2010 was produced in his office by Advocate Abdul Hafeez Memon. This court found that the letter produced by the Mukhtiarkar named above is a fake and forged one and the same was not issued from this court nor signed by the undersigned. Besides the outward Register of this court showed another entry on S.No.578/2010. Such order has been sent to your honour's for intimation. No any further proceedings has been made by this court in the above suit.

Report is submitted, as desired.

(Shahid Hussain)
Senior Civil Judge, Badin"

6. The Petitioner relied upon those documents to contend that the Respondent No.2 had remained involved in corruption and malpractice as an advocate, having committed the offence of forgery, that too of the record of a Court for the purpose of cheating, hence was unfit to hold the post of an ADJ. He further averred that the Respondent No.2 had also been involved in an attempt to usurp the immovable properties of two brothers namely Rizwan Ahmed & Adnan Ahmed, sons of Nissan Ahmed Qaimkhani, through F.C. Suit No.171 of 2018 (re- Abdul Hafeez vs Rizwan Ahmed & others) before the Court of learned Sr. Civil Judge-1, Tando Muhammad Khan on the basis of a forged agreement to sell drafted by his colleague Anwar Ali Shah Advocate/Notary Public/Stamp vender, but had then withdrawn the suit in order to save himself from adverse consequences. He submitted that the Board had not properly scrutinized such antecedents when making its recommendation in the matter, hence the recommendation ought to be held in abeyance until a comprehensive inquiry was conducted.

7. Conversely, learned counsel appearing on behalf of the Respondent No.2 questioned the maintainability of the Petition while pointing out that the relief sought was not in the nature of quo warranto, as the Respondent No.2 was not holding any public post, and the Petitioner otherwise lacked locus standi in as much as he was not an aggrieved party; that the averments underpinning the Petition were merely unsubstantiated allegations and a factual determination could not be made in exercise of Article 199 of the Constitution, which even otherwise could not be invoked so as to question the proceedings or recommendation of the Board, being a body comprised of the five senior most Judges and headed by the Honourable Chief Justice, in terms of Rules 2(e) of the Sindh Judicial Service Rules, 1994 (the "**Rules**"), hence subject to the bar set out in Article 199(5). Reliance was placed on the judgment of the Honourable Supreme Court in a bunch of cases, with the lead case being CA 353-355/2010, titled Gul Taiz Khan Marwat v. The Registrar, Peshawar High Court, Peshawar & others.

8. The Respondents Nos. 3 and 4 also submitted their para-wise comments, wherein it was clarified that the Sindh High Court Establishment had invited applications for appointment to the posts of ADJ through publications in different widely circulated newspapers on 29.08.2019 after approval of the Board, in response to which various candidates had submitted their applications. Those applicants who were found eligible as per the specified criteria firstly participated in the prescribed test, with only four candidates passing the same and then being called for an interview by the Board, with the Respondent No.2 proving successful upon culmination of that process and a recommendation for his recruitment following to the Provincial Government, being the appointing authority under the Rules. It was further submitted that

prior to giving effect to the recommendation made by the Board, the Provincial Government (i.e. the Respondent No.8) was to verify the character antecedents of the candidates recommended for appointment.

9. Having heard and considered the arguments advanced at the bar in light of the material placed on record, it would be appropriate to turn firstly to the aspect of maintainability, which revolves around whether the process of the Board admits to scrutiny under Article 199 of the Constitution. For an authoritative answer, one need look no further than the seminal judgment of the Honourable Supreme Court in the case of Gul Taiz Khan Marwat (Supra), where the specific point of consideration was whether the executive, administrative or consultative actions of the Chief Justices or Judges of a High Court were amenable to the constitutional jurisdiction of a High Court. After examining the scope of Article 199 of the Constitution, particularly sub-article (5), as well as Articles 176 and 192, the Apex Court revisited its earlier judgment in the case of Ch. Muhammad Akram v. Registrar, Islamabad High Court and others PLD 2016 SC 961, which had involved a challenge under Article 184(3) of the Constitution to various appointments, absorptions and transfers made by the Administration Committee of the Islamabad High Court on the ground that the same were in violation of the relevant Services Rules. Whilst it had *inter alia* been concluded in that case that notwithstanding sub-article (5), a writ could lie under Article 199 against an administrative/consultative/ executive order passed by the Chief Justice or the Administration Committee involving any violation of the Rules framed under Article 208 that caused an infringement of the fundamental rights of a citizen, the Apex Court specifically departed from that earlier view in the following terms:

19. We differ with the view taken in the said judgment in the meaning, interpretation, scope, extent and interplay of Articles 199 and 208 of the Constitution. Keeping in view Articles 176, 192, 199 and 208 of the Constitution, and upon a harmonious interpretation thereof, in our humble opinion, no distinction whatsoever has been made between the various functions of the Supreme Court and High Courts in the Constitution and the wording is clear, straightforward and unambiguous in this regard. There is no sound basis on which Judges acting in their judicial capacity fall within the definition of 'person' and Judges acting in their administrative, executive or consultative capacity do not fall within such definition. In essence, the definitions of a High Court and Supreme Court provided in Articles 192 and 176 *supra* respectively are being split into two when the Constitution itself does not disclose such intention. It is expressly or by implication a settled rule of interpretation of constitutional provisions that the doctrine of *casus omissus* does not apply to the same and nothing can be "read into" the Constitution. If the framers of the Constitution had intended there to be such a distinction, the language of the Constitution, particularly Article 199 *supra,* would have been very different. Therefore to bifurcate the functions on the basis of something which is manifestly absent is tantamount to reading something into the Constitution which we are not willing to do. In our opinion, strict and faithful adherence to the words of the Constitution, specially so where the words are simple, clear and unambiguous is the rule. Any effort to supply perceived omissions in the Constitution being subjective can have disastrous consequences. Furthermore, the powers exercisable under the rules framed pursuant to Article 208 *supra* form a part and parcel of the functioning of the superior Courts. In other words, the power under Article 208 *supra* would not be there *but for* the existence of the superior Courts. This 'but for' test, as mentioned by the learned Attorney General, is pivotal in determining whether or not a particular act or function carried out by a Judge is immune to challenge under the writ jurisdiction under Article 199 *supra.* This test is employed by Courts in various jurisdictions to establish causation particularly in criminal and tort law - but for the defendant's actions, would the harm have occurred? If the answer to this question is yes, then causation is not established. Similarly in the instant matter, but for the person's appointment as a Judge (thereby constituting a part of a High Court or the Supreme Court under Articles 192 and 176 *supra* respectively), would the function in issue be exercised? If the answer to this question is yes, then such function would not be immune to challenge under Article 199 *supra.* In this case with respect to the administrative, executive or consultative acts or orders in question, the answer to the "but for" test is an unqualified no, therefore such acts or orders would in our opinion be protected by Article 199(5) of the Constitution and thereby be immune to challenge under the writ jurisdiction of the High Court.

> In light of the foregoing, with respect to Article 199 of the Constitution read as a whole and bearing in mind the specific bar contained in sub-Article (5) thereof, we find that the framers did not intend that the remedy of a writ be available against a High Court or the Supreme Court as mentioned above in this opinion. It cannot be assumed that there must necessarily be a right of appeal in cases involving administrative, executive or consultative acts or orders of the Judges or Chief Justice of a High Court or the Supreme Court, which right must have been expressly mentioned in clear and unequivocal terms in the Constitution if that was the intention and no inference can be drawn from Article 199 *supra* that a writ petition against the aforesaid orders is competent. For the foregoing reasons, we find that the judgment rendered in *Ch. Muhammad* Akram's case *supra* needs to be revisited and is hereby overruled.

10. The aforementioned binding precedent removes all doubt that the present Petition is not maintainable to the extent that it seeks to assail the process and proceedings of the Board. It also merits consideration that the Petitioner has come forward against what is merely a recommendation, with the Respondent No.2 not yet having been appointed to any post. Furthermore, as regards the declaration sought as to the character of the Respondent No.2 and his alleged involvement in the averred acts of forgery and misconduct, the Petitioner lacks *locus standi* as the Petition does not disclose any infringement of his fundamental rights. Even otherwise, it is axiomatic that any such determination has to necessarily be predicated on findings of fact based on evidence. As such, it falls to be considered that whilst an FIR was to have been registered as per the order dated 27.05.2010 cited by the Petitioner, and the allegations arising therefrom were to have been investigated and then proven at trial, that process did not ensue as the requisite steps were not taken by the concerned Court. Needless to say, that exercise cannot now be undertaken in the constitutional domain within the parameters of the present proceeding under Article 199.

11. That being so, the Petition fails and is dismissed accordingly. Be that as it may, the Respondents Nos. 3 and 4 remain at liberty to conduct a proper inquiry into the matter, and the findings may be placed before the competent authority.

JUDGE

JUDGE

Karachi
Dated _____