

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI

C. P. No. D-508 of 2023

Along with

C. P. No. D-509, 1080, 1105, 1587, 227, 2736, 3978, 4308, 5087 and
5422 of 2023

Date

Order with signature of Judge

PRIORITY

- 1) For orders as to non prosecution of CMA No. 5877, 5878 and 896/2024.
- 2) For orders as to maintainability of CMA No. 12705/2024.
- 3) For hearing of CMA No. 16294/2024.
- 4) For hearing of CMA No. 2217/2024.
- 5) For hearing of CMA No. 2218/2024.
- 6) For hearing of main case.

22.04.2025.

M/s. M. m. Aqil Awan, Danish Rashid, Aijaz Ahmed Sipra, Balosch Ahmed Junejo, Ghulam Mustafa Abro, Ali Tahir Soomro, Advocates for Petitioners.

Mr. Akhtiar Hussain Soomro, Advocate for Intervener.

Mr. Naeem Talpur Additional Advocate General Sindh.

Mr. Kishore Kumar, Director HR SELD.

Mr. Naveed Ahmed Litigation Officer SELD.

This larger bench has been constituted pursuant to two conflicting orders dated 14.01.2025 and 10.04.2025 passed by a Constitutional Bench and a Regular Bench of this Court, whereby they have differed as to which bench has to hear this matter. Both these orders read as under:-

"14.01.2025 (Constitutional Bench)"¹

Two lead Petitions in this case challenging the vires of the Recruitment Policy of 2021 claiming that it is unconstitutional. Accordingly, these Petitions shall be placed before regular bench after four weeks."

10.04.2025 (Regular Bench)"²

During hearing, it transpired that the main Prayer clause 'A' is seeking quashment of Recruitment Policy 2021, and no issue of Quo Warranto is involved, thus, these matters be heard by the learned Constitutional Bench. On this, Mr. M. Aqil Awan, Advocate, has referred to the Order dated 14.01.2025 that learned Constitutional Bench has observed that these matters be placed before the Regular

¹ Comprising Muhammad Karim Khan Agha & Mr. Adnan-ul-Karim JJ's.

² Comprising Muhammad Faisal Kamal Alam & Jawwad Akbar Sarwana JJ's.

Bench. Office is directed to put up a Note before the Honourable Chief Justice within three days for consideration.”

Heard learned Counsel for the parties and perused the record. Mr. M. M. Aqil Awan submits that as per his understanding the issue in this matter falls within Article 199(1)(a)(ii) as the primary relief being sought is declaratory in nature; hence, it is to be heard and decided by a Regular Bench and not by a Constitutional Bench. In support he has also placed reliance on Judgment in the case of *Attock Cement Pakistan Ltd*³. and submits that the said judgment is a binding precedent for this larger bench; hence, the issue in hand must be answered in the light of the said judgment and matter be sent to a Regular Bench. The other respective Counsel have supported his submissions.

On perusal of the dominant prayer clause in this case i.e. prayer clause (a), it reflects that while seeking setting aside and quashment of Recruitment Policy 2021 dated 24.02.2021 amended subsequently vide Notifications dated 08.12.2021 and 19.03.2021, the petitioner has though sought a declaration that it is ultra vires, but such declaration in fact seeks enforcement of fundamental rights including Article 25 and 27 of the Constitution which fall under Chapter 1 Part II and such fundamental rights can only be enforced by way of Article 199(1)(c) of the Constitution. Post 26th Amendment and after insertion of Article 202A(3) in the Constitution no bench of a High Court other than a Constitutional Bench shall exercise jurisdiction vested in the High Court under Paragraph (c) of sub-article 1 of Article 199 of the Constitution. For the present purposes, the issue in hand is simple and does not require any deliberation or whether the observation of the learned Division Bench in the case of *Attock Cement supra* are to be followed or not. For the present purposes, this Larger Bench is not required to finally dilate upon such aspect of the matter as in this case it is simply enforcement of fundamental rights which is in consideration and for that merely articulation in drafting of a particular prayer clause or even seeking a declaration of such nature, would not ipso facto bring this case within the ambit of Article 199(1)(a)(ii) as

³ Dated 2.12.2024 passed by a learned Division Bench of this Court in C. P. No. D-1590 of 2023 (*Attock Cement Pakistan Ltd. And others Vs. Federation of Pakistan and others*)

contended by the learned Counsel for the petitioner. Moreover, at best, if for some reason there is a case which has some overlapping issues falling within a larger and broader perspective under Article 199 (1) of the Constitution, then the Constitutional Bench can always hear such a case as it is not denuded with such powers. The Judges of Constitutional Benches, therefore, can always exercise jurisdiction, as and when required while hearing a particular case, in respect of Article 199(1)(a)(ii) & (b) as well.

Lastly, this issue already stands decided by a majority judgment (2:1) in the case of ***Sharjeel Inam Memon***⁴, whereby, it has been held that *issuance of writs of mandamus, prohibition and / or enforcement of fundamental rights falls within the exclusive domain of a Constitutional bench and the verbiage of the Constitutional provision is clear and there is an embargo upon any bench, save for a Constitutional bench, from exercising the jurisdiction so explicated*. It has been further held that *while such a sanction is apparent in respect of any other bench, read as Regular bench, however, there is no restraint upon the Constitutional bench from exercising any jurisdiction conferred upon a High Court per Article 199 of the Constitution*.

Therefore, this matter has to be heard by a Constitutional Bench and not by a Regular Bench. In view of the above, the issue so referred is answered accordingly. Let this matter be fixed before a Constitutional Bench in the coming week. Adjourned. Interim order passed earlier to continue till next date. Office to place copy of this order in connected Petitions.

ACTING CHIEF JUSTICE

J U D G E

J U D G E

Arshad/

⁴ CP No.473 of 2025 (Yousuf Ali Sayeed & Agha Faisal JJ's agreeing, whereas Muhammad Karim Khan Agha J dissenting)