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**JUDGMENT SHEET**  
**IN THE LAHORE HIGH COURT**  
**RAWALPINDI BENCH, RAWALPINDI**  
**JUDICIAL DEPARTMENT**

**Writ Petition No.1080 of 2013.**

(Malik Zaheer Arshad                      versus.                      Federation of Pakistan and others)

**J U D G M E N T**

Date of hearing.	<b>29.08.2017</b>
Petitioner by	M/S Amjad Afsar Ghakhar and Malik Shaukat Hayyat, Advocates with petitioner.
Amicus Curiae appointed by the Court	M/S Muhammad Ilyas Sheikh and Muhammad Taimoor Malik, Advocates
Federation by	Malik Amjad Jalil, Assistant Attorney-General
Province by	Mr. Rashid Hafeez, Additional Advocate-General Punjab

**IBAD-UR-REHMAN LODHI J.:-** With the consent of learned counsel for the parties, the hearing of this petition is being treated as *pacca* one.

2. On 27.04.1963, Act No.XI of 1963 namely The Cantonments Rent Restriction Act, 1963 (hereinafter to be referred as Act) was promulgated making provision for the control of rents of certain class of buildings within the limits of the cantonment areas and for the eviction of tenants therefrom and for matters connected therewith. For the purposes of the said Act, the Federal Government was authorized by virtue of Section 6 thereof to appoint a person to be the Controller of rents for one or more cantonments.

The “Controller” is defined in Section 2(d) of the Act in the manner, which means a Controller of rents appointed by the Federal

Government under sub-section (1) of section 6 and includes an Additional Controller.

In all the cantonment areas, the Executive Officers in the cantonments were given additional powers to act as Controller for the purposes of the Act.

To make appointments of the cantonment servants from BPS-1 to above, the authorities nominated in Rule 7(1) of The Pakistan Cantonment Servants Rules, 1954 were made competent. In view of serial No.4 of the table provided under Rule 7(1) of the referred Rules for appointment of cantonment servants from BPS-16 and above, the Director General has been nominated as Appointing Authority. The Executive Officers in cantonments fall in the said category.

“Director General” is defined in Rule 2(eee) of The Pakistan Cantonment Servants Rules, 1954 in the following manner:-

*““Director-General” means the Director-General, Military Lands and Cantonments Department, and includes such other officer as the Government may appoint to exercise all or any of the powers of the Director-General under these rules.”*

In view of Rule 7(4) of the Rules, the appointing authorities under sub-rule (1) were required only to appoint fit and proper persons and to comply with the executive instructions issued by Government, from time to time, on the subject of recruitment of Government servants of the class and status concerned.

2. On 12<sup>th</sup> of April, 1973, the people of Pakistan through their representatives in National Assembly adopted, enacted and gave to themselves the “Constitution”.

Part VII of the Constitution deals with the judicature and Article 175(3) of The Constitution of the Islamic Republic of Pakistan, 1973 provides that the Judiciary shall be separated progressively from the Executive and originally a period of three years was fixed from the commencing day to achieve such goal, which was subsequently extended to 14-years by Presidential Order No.14 of 1985. This period of 14-years even elapsed in 1987.

The Tribunals or Quasi Judicial Courts constituted, before the Constitution was promulgated, continued working in the same manner and with the same Presiding Officers, who were mainly appointed from executive side, to act as head of such Courts or Tribunals. In some cases, the appointment of the Presiding Officers of such forums was made subject to the supervision of Public Service Commission. The matters of violation of the mandate of Article 175 of the Constitution after elapse of the provided period were started bringing in the notice of the Superior Courts of the country and consistently the concept of independence of Judiciary and its complete separation from the executive was being safeguarded by the Superior Courts.

In case titled “ACCOUNTANT-GENERAL, SINDH and others versus AHMED Ali U. QURESHI and others” (PLD 2008 Supreme Court 522), the Apex Court has authoritatively held in the following manner:-

*“24. In the broader sense, the concept of independence of judiciary is not confined to the extent of disposal of cases by the Judges and discharging of the judicial functions rather in the extended meaning, the concept of independence of judiciary is complete separation from executive authorities of the State in all matters including pay and pension which is an essential component of independence of judiciary but unfortunately as is evident from judicial history of Pakistan Executive Authorities instead of acting in aid of judicial independence and taking remedial steps for*

*judicial reforms have always behaved with step-motherly attitude towards judiciary and its independence of obvious reasons of maintaining their will and supremacy through administrative devices even at the cost of damaging the judicial system. This may be pointed out that all financial matters concerning with the judiciary including the pay and pension as well as other privileges of Judges are under the direct control of the Executive Authorities and it has been observed that the Executive Authorities, without recognizing the independent status of judiciary as an important Organ of State, treat it as their subordinate department in such matters.....In nutshell, the Executive is not supposed to interfere in the affairs of judiciary in any manner.”*

In case titled “PROVINCE OF SINDH through Chief Secretary and another versus RASHEED A. RIZVI and others” (PLD 2012 Supreme Court 649), the Hon’ble Supreme Court of Pakistan has held as under:-

“9. Our constitutional courts have consistently held that the process of appointments to the judiciary must be carefully scrutinized through the lens of constitutional principles such as the principle of separation of powers. In the Al-Jehad Trust case, this Court stated with reference to appointment of judges of the superior judiciary “...that the independence of the judiciary is inextricably linked and connected with the process of appointment of judges and the security of their tenure and other terms and conditions. “(PLD 1996 SC 324, 429) Although this was said in the context of appointment of the High Court, the principle applies with equal force to all judicial appointments, including those in the District Judiciary. Accordingly, the dictum laid down in the Al-Jehad case was soon reaffirmed by this Court in the case of Mehram Ali and others v. Federation of Pakistan (PLD 1998 SC 1445, 1474) and Sh. Liaquat Hussain v. Federation of Pakistan (PLD 1999 SC 504, 658), both cases which concerned the District Judiciary. The aforesaid dictum has also been recently reiterated in Sindh High Court Bar Association v. Federation of

*Pakistan (PLD 2010 SC 879, 1182) and Munir Hussain Bhatti v. Federation of Pakistan (PLD 2011 SC 407). In the latter case, the Court, after examining the case-law, concluded that “it is an undisputed tenet of our Constitutional scheme that in matters of appointment, security of tenure and removal of Judges the independence of the Judiciary should remain fully secured.” (PLD 2011 SC 407, 467).*

20. *The SPSC, to which certain functions of the Provincial Government of Sindh have by law been delegated under Article 138 of the Constitution, has correctly been deemed by the High Court as an executive authority. It is clearly performing an executive function and for this very reason, it cannot be given the task of making appointments to the Judicature. It may, however, be noted that while it remains a part of the Executive branch, for the effective discharge of its duties, it has been provided a certain degree of autonomy from the political executive. Where such autonomy is unlawfully impinged upon by the Executive in a given situation, the remedy lies in rectifying the specific situation under Article 199 of the Constitution, rather than declaring an Executive body to be incompetent or to be acting mala fide.”*

In case titled “MUHAMMAD ALI SATAKZAI and others versus APPOINTING AUTHORITY OF THE ADDITIONAL DISTRICT AND SESSIONS JUDGES through Registrar Balochistan High Court and others” (2012 PLC (C.S.) 1216), the Hon’ble Supreme Court of Pakistan has held that introduction of Public Service Commission in process of selection of such Judicial Officers was offensive of concept of independence of judiciary and separation of judiciary from executive.

In case titled “Sh. RIAZ-UL-HAQ and another versus FEDERATION OF PAKISTAN through Ministry of Law and others” (PLD 2013 Supreme Court 501), the Apex Court has held as under:-

“41. *It is pertinent to mention here that as the service Tribunals are not only deemed to be a civil Court but also exercise judicial powers,*

*therefore, they are included in the term 'Court' mentioned in Article 175 of the Constitution. As such, these Tribunals are to be manned, controlled and regulated in accordance with the law relating to management, regulation and control of Courts in Pakistan.*

*42. It is to be noted that independence of judiciary has been recognized as a universal human right. In terms of Article 10 of the Universal Declaration of Human Rights, G.A, 1948, everyone is entitled to full equality to a fair and public hearing by an independent and impartial Tribunal. In Pakistan, the independence of judiciary is a basic principle of the constitutional system of governance. The Preamble and Article 2A state that "the independence of judiciary shall be fully secured". This Court while interpreting Article 175 has further strengthened the principle of the independence of judiciary, by emphasizing the separation of Judiciary from the Executive. The Constitution makes it the exclusive power/responsibility of the Judiciary to ensure the sustenance of the system of "separation of powers" based on checks and balances. This is a legal obligation assigned to the Judiciary. It is called upon to enforce the Constitution and safeguard the Fundamental Rights and freedom of individuals. To do so, the Judiciary has to be properly organized and effective and efficient enough to quickly address and resolve public claims and grievances; and also has to be strong and independent enough to dispense justice fairly and impartially....*

*45. The Principle of separation and independence of judiciary as envisaged in Article 175 of the Constitution is also applicable to the lower judiciary as it is the part of the judicial hierarchy. Thus, its separation and independence has to be secured and preserved as that of superior judiciary. In terms of Article 175 read with Article 203 of the Constitution, the lower judiciary should be separated from the Executive and the High Court shall supervise and control all courts subordinate to it....As it has been held that Service Tribunal discharges judicial functions, thus falls within the definition of a "Court" in view of the*

*above discussion, therefore, the Tribunals have to be separated from Executive following the principle of independence of judiciary in view of Article 175(3) of the Constitution.”*

In case titled “YOUNAS ABBAS and others versus ADDITIONAL SESISONS JUDGE, CHAKWAL and others” (PLD 2016 Supreme Court 581), the Apex Court has held that a provision of law can be declared ultra vires if it is violative of the provisions of the Constitution which guarantee fundamental rights, independence of judiciary or its separation from the executive.

In case titled “AMANULLAH KHAN YOUSUFZAI and others versus FEDERATION OF PAKISTAN through Law Secretary and others” (PLD 2011 Karachi 451), the Division Bench of Karachi High Court has held that judicial service is essentially and structurally distinct and separate service from the civil, executive and administrative services of Pakistan and Judicial service cannot be treated at parity with such services on any account nor can judicial service be combined, abolished, replaced, mixed up and or tied together with the civil executive and or administrative services. Judiciary as a whole is a separate and distinct class in itself. Further that supervision and control over the subordinate judiciary vested in the High Court under Art.203 of the Constitution, keeping in view Art.175 of the Constitution, is exclusive in nature, comprehensive in extent and effective in operation and such supervision comprehends the administrative power as to the working of the subordinate courts and disciplinary jurisdiction over the subordinate judicial officers and any provision in an Act or any rule or a notification empowering any executive functionary to have administrative supervision and control over the subordinate judiciary will be violative of Art.203 of the Constitution and militates against the concept of separation and independence of judiciary as envisaged by Art. 175 of the Constitution and the Objectives Resolution. The Division Bench has further held that High Court is quite competent to direct the concerned

quarters to implement Art. 175(3) of the Constitution in its true sense by eliminating the intervention of executive into the affairs of judiciary from each and every angle, so that Pakistan as nation ranks and stands out amongst comity of nations having independent, impartial and competent judiciary for all times to come.

In another case titled “YOUSAF AYUB KHAN versus GOVERNMENT through Chief Secretary, Peshawar and 2 others” (PLD 2016 Peshawar 57), the Division Bench of Peshawar High Court has held as under:-

*“33. It is settled that the mandate and commencement of Article 175 must be obeyed and implemented; any laxity in this regard will amount to violation of Constitutional provisions. It is also admitted principle of law that a fair trial is deemed to be vitiated if judicial functions are given to the executive and its officer and the independence of the judiciary cannot be secured if the executive is made a part of judiciary.”*

3. Challenging the vires of Section 6 of the Act on the touchstone of Article 175(3) of The Constitution of Islamic Republic of Pakistan, 1973 and the subsequent examination of the said subject by the Superior Courts as highlighted above, the petitioner has prayed for issuance of a writ declaring the said provision of law as being violative to Article 175(3) of The Constitution of Islamic Republic of Pakistan, 1973, which provides complete separation of judiciary from executive.

This Court, while hearing F.A.O. No.123 of 2016, titled “Sohail Ahmed Qureshi and others versus Muhammad Rashid Farooqi” has taken notice of the novel way adopted by the Additional Rent Controller, Chaklala Cantonment, Rawalpindi, who has dealt with ejection matter in the manner, which has no legal sanction at all and reading of the said order constitutes an impression that the Officer passed such order has no knowledge even of the basics of judicature. The said incumbent of Chaklala Cantonment/Controller of Rents was directed by this Court to



furnish report and give proposals to improve the working in the Courts of Controller of Rents in cantonment areas. The report received on 04.04.2017 *inter alia* provides the following proposals:-

“2. As far as functions performed by the Controller of Rent/Additional Controller of Rent, are the same as performed by the civil judges. The only difference is that the Federal Government while appointing the Controller of Rent, preferred the Executive Officers/Additional Executive Officers as Controllers of Rent. The wisdom of legislature cannot be challenged because no qualification/experience has been prescribed for holding the post of Controller of Rent/Additional Rent Controller for Cantonments. As the Executive Officers have not much experience of writing judgments as such occasionally some judgments may be well worded.

3. To overcome this factor, it is suggested that the Executive Officers/Additional Executive Officers be given 3 months training in judicial Academy to get training in understanding the statutes and writing judgments in a logical and systematic manner.

4. The second suggestion is that the Federal Government may appoint independent Controllers of Rent from Executive Officers who must be law graduate and must have been practicing law for at-least 5 years.

5. The last but not the least suggestion is counseling of the Controllers of Rent by the Honourable Judges of the High Court. This practice can improve a lot the functions and process of Judicial work under the Cantonment Rent Restriction Act 1963.”

The Hon’ble Supreme Court of Pakistan in case titled “*GHULAM MUSTAFA BUGHIO versus ADDITIONAL CONTROLLER OF RENTS, CLIFTON and others*” (2006 SCMR 145), while dealing with a matter relating to The Cantonments Rent Restriction Act, 1963 has concluded in the following manner:-

*“It is high time that the Government should take steps for amendment in the provisions of Act, 1963 providing for appointment of Judicial Officers as Controller and Additional Controller of Rent under section 6 of the Act, 1963, instead of conferring quasi-judicial powers on Executive Officer of the Cantonment, who is generally not fully well versed with the complexities of law but otherwise invested with the power to deal with very valuable property rights of the citizens owning properties in Cantonment areas throughout the country.”*

Almost a decade has gone, when the Hon’ble Supreme Court of Pakistan felt it appropriate to advise the Government to take steps for amendment in the provisions of Act, 1963, but it seems that the concerned quarters in the Government have not moved inspite of such clear directions of the Apex Court.

4. In view of what has been discussed above, it is clear that representatives from executive are performing judicial functions in the Courts of Controller of Rents constituted under the provisions of the Act, which is in negation of Article 175(3) of The Constitution of Islamic Republic of Pakistan, 1973 providing complete separation of judiciary from executive. The enabling provision of appointment of Controller of Rents i.e. Section 6 of the Act, thus, is declared as violative to Article 175(3) of The Constitution of Islamic Republic of Pakistan, 1973 and the concept of independence of judiciary from executive.

5. The Federal Government is directed to take appropriate measures to bring the provisions of the Act in conformity with the Constitution and the findings already arrived at by the Superior Courts within a period of next six months and either the appointment as Controller of Rents in view of Section 6 of the Act be made from amongst the persons having legal knowledge and skill with the consultation of the concerned Chief Justices of the Provincial High Courts or such judicial powers within the meaning of Section 6 of the Act be directed to be performed

by the Civil Judges already performing their duties as Special Judges Rent (in Punjab) and Rent Controllers in other Provinces under Urban Rent Laws.

6. With these observations, this Constitutional petition stands **allowed**.

7. Copy of this judgment be transmitted to the Secretaries, Government of Pakistan in Ministry of Law, Justice and Parliamentary Affairs and of National Assembly of Pakistan for information and necessary action at their end.

**Judge**

Approved for reporting.

**Judge**

*\*Haider Shah\**