Stereo HCJ DA 38

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

Writ Petition No.1938 of 2023

Rizwan Ali Sayal **V/S** *Federation of Pakistan and others*

J U D G M E N T

Date of hearing	**19.09.2023**
Petitioner(s) by	Mr. Tanveer Iqbal, ASC and Barrister Usama Tanveer Iqbal, Advocate with Rizwan Ali Sayal, Petitioner.
Respondent(s) by	Malik Muhammad Siddique Awan, Additional Attorney General alongwith Mr. Arshad Mahmood Malik, Assistant Attorney General. Barrister Asfandyar Khan Tareen, Advocate with Arslan Saleem Chaudhry, for the Respondent No.5. Mr. Abid Aziz Rajori and Jalil Akhtar Abbasi, Assistant Advocates General.
	Mr. Rashid Mehmood, Research Officer, Lahore High Court, Rawalpindi Bench, Rawalpindi.

> *"heterodoxy, or, as some might say, heresy, is not the more attractive because it is dignified by the name of reform. Nor will I easily be led by an undiscerning zeal for some abstract kind of justice to ignore our first duty, which is to administer justice according to law, the law which is established for us by Act of Parliament or the binding authority of precedent. The law is developed by the application of old principles to new circumstances. Therein lies its genius".*[1]
>
> **Lord Denning in Midland Silicons Ltd v Scruttons Ltd. [1962] AC 446, 467-468**

JAWAD HASSAN, J. This petition filed under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 (the

[1] *"Should the Law be Certain?, The Oxford Shreival lecture given in the University Church of St Mary The Virgin, Oxford on 11th October 2011 delivered by Lord Mance, Judge UK Supreme Court".*

"Constitution") assails the appointment of the Respondent No.5 (Muhammad Akram) as Member Judicial, Appellate Tribunal Inland Revenue (**"ATIR"**), Islamabad through Notification dated 26.04.2019 (the ***"impugned Notification"***) alleging that the said Respondent is holding the above post without lawful authority and thus is not fit to hold the public office, hence seeking a writ of *quo warranto* under Article 199(1)(b)(ii) of the *"Constitution"* by filing it on 01.06.2023 after lapse of about four (04) years.

I. OVERTURE OF THE CASE

2. The Court will examine the words used in Article 199(1)(b)(ii) of the *"Constitution"* for determination of the maintainability of writ of *quo warranto* with the focus on laches and the meaning of the word 'public office' in light of recent doctrine of textualism developed by this Court in *"Ms SERVICE GLOBAL INDUSTRIES LIMITED through Usman Liaqat versus FEDERATION OF PAKISTAN etc"* **(PLD 2023 Lahore 471 = 2023 PTD 1120)**, whereby the Court has held that Doctrine of Textualism envisages a method of statutory interpretation asserting that a statute should be interpreted according to its plain meaning and not according to the intent of the legislature, the statutory purpose, or the legislative history. This judgment will first examine the *(i)* **aetiology** of filing numerous *quo warranto* petitions before High Court including Principal Seat and its allied Benches i.e. Lahore High Court, Rawalpindi Bench, Lahore High Court, Multan Bench and Lahore High Court, Bahawalpur Bench. The word aetiology means the investigation or attribution of the case or reason for something often expressed in terms of historical or mythical explanation. Hence, unless the good and solid jurisprudential reasons are given in the judgment and test has been made out, the Court can control the filing of such petition by limiting the heterodoxy by various Benches and Court. Moreover, this Court will also examine the *(ii)* **anatomy** of writ of *quo warranto* under Article 199 of the *"Constitution"* which is under Part-VII, Chapter-3 of the

"Constitution" and (iii) **pathology** of Article 199 of the Constitution which deals with the Powers of High Court and its jurisdiction. The Court is aware of the fact that under writ of *quo warranto* there is no requirement for the Petitioner to be an aggrieved person, rather the writ of *quo warranto* can be instituted by a person despite he may not come within the meaning of word 'aggrieved person'. Further for issuance of a writ of *quo warranto*, the person invoking the jurisdiction of the High Court under Article 199 of the Constitution is not required to fulfill the stringent conditions required for bringing himself within the meaning of an aggrieved person as held by the Supreme Court of Pakistan in *"JAWAD AHMAD MIR versus Prof. Dr. IMTIAZ ALI KHAN, VICE CHANCELLOR, UNIVERSITY OF SWABI, DISTRICT SWABI, KHYBER PAKHTUNKHWA and others"* **(2023 SCMR 162)**. While discussing the anatomy and pathology of Article 199 of the *"Constitution"*, the Court shall frame moot points with anatomy of the jurisprudence of the Supreme Court of Pakistan and (iv) **legal anthology** of *quo warrnato* will also be discussed in the light of Section 223-A of Government of the India Act, 1935, which was later continued in the Constitution of 1956, Constitution of 1962 and the Constitution of 1973. However, the Article 199 of the *"Constitution"* starts with words Jurisdiction of High Court, which is subject to the "Constitution" when there is no other remedy available, any party can bring *quo warranto* because Article 199(1)(a) deals with aggrieved person and Article 199(1)(b) not necessarily required to be moved by an aggrieved person. The judgments of Supreme Court of Pakistan though have annunciated that there should be a time frame in bringing the writ petition of *quo warranto*. This Court by framing moot points will go through the guidance regarding the issue of laches and maintainability of a writ of *quo warranto* in connection therewith as the appointment of the Respondent No.5 was challenged by the Petitioner after lapse of a considerable time period.

II. CONTEXT OF THE CASE

3. Succinctly, the Respondent No.5 Muhammad Akram was appointed as a "Member Judicial, ATIR" vide the *"impugned Notification"* for a probationary period of one year under the Civil Servant Act, 1973 (the ***"Act"***) and the same was extendable for a further period of one year. As per version of the Petitioner, the Respondent No.5 is receiving benefits equivalent to a BS-21 Federal Government Officer despite being not qualified for such a position on the sole ground that previously he was accused of FIR No.297 of 2005 registered under Sections 420, 468 and 471 PPC, and his bail was cancelled by the Supreme Court of Pakistan vide order dated 15.12.2005. The case was resolved through compromise, which is not considered an honourable acquittal. Therefore, the Petitioner's stance is that the appointment of the Respondent No.5 violates proviso to Section 6 of the *"Act"*.

III. PETITIONER'S SUBMISSIONS

4. Mr. Tanveer Iqbal, ASC, *inter alia* argues that the Respondent No.5 was not competent for the post due to his involvement in a criminal case; that proviso to Section 6 of the *"Act"* requires satisfactory character verification for a civil servant's probation period, but the Respondent No.5 was appointed without this verification; that the said Respondent was not acquitted on merits but his acquittal was based on a compromise, which cannot be termed as honourable acquittal. In support of his arguments, learned counsel has relied on "*PRESIDENT NATIONAL BANK OF PAKISTAN and others versus WAQAS AHMED KHAN"* **(2023 SCMR 766)**, "*JAWAD AHMAD MIR versus Prof. DR. IMTIAZ ALI KHAN, Vice Chancellor, University of Swabi, District Swabi, Khyber Pakhtunkhwa and others"* **(2023 SCMR 162)**, "*SAQIB ALI versus GOVERNMENT OF PUNJAB and others"* **(2023 PLC (CS) 310)** and *"MIRZA SHAHZEB versus CITY POLICE OFFICER etc"* **(2023 PLC (CS) 749)**

IV. RESPONDENTS' SUBMISSIONS

Submissions of Respondents No.1 to 4

5. Malik Muhammad Siddique Awan, Additional Attorney General has raised objections to the maintainability of this petition on the ground of laches as the petition in hand was filed more than four years after issuance of the *"impugned Notification"*. He relied on "*SAQIB ALI versus GOVERNMENT OF PUNJAB and others"* **(2023 PLC (CS) 310)**, wherein the Supreme Court of Pakistan discussed the limitation period in such like cases and also defined a public office. Mr. Arshad Mahmood Malik, Assistant Attorney General maintained that the appointment of the Respondent No.5 was made by the Federal Government strictly as per Section 130 of the *"Ordinance"*.

Submissions on behalf of the Respondent No.5

6. Barrister Asfandyar Khan Tareen, representing Respondent No.5, objected qua maintainability of the petition *inter alia* on the grounds that it was filed with the ulterior motive of defaming the senior-most Judicial Member after a significant delay; that Respondent No.5 was acquitted in all criminal charges before his appointment on the basis of compromise which is considered honourable; that Respondent No.5, with a 28-year legal career and having passed the Federal Public Service Commission exam, was rightly appointed as Member Judicial; that the acquittal of the Respondent No.5, in a criminal case is an honourable, leaving behind no negative impact upon his past character to create bar against his appointment in question. He has referred to judgments reported in "*DR. MUHAMMAD ISLAM versus GOVERNMENT OF NWFP, etc."* **(1998 SCMR 1993)**, "*MALIK MUHAMMAD EJAZ CHANNAR versus THE STATE"* **(PLD 2022 Lahore 427)**, "*NAIMAT ULLAH versus THE STATE"* **(2021 P.Cr.L.J 1339 Sindh)**, "*MST. KULSOOM versus SESSIONS JUDGE"* **(2018 MLD 1484 Sindh)**, "*MUHAMMAD QASIM versus MUHAMMAD IQBAL"* **(2017 YLR 752)**, "*MUHAMMAD ZAFAR versus RUSTAM ALI"* **(2017 SCMR**

1639), "*RAJA MUHAMMAD SAFDAR versus DISTRICT RETURNING OFFICER, Rawalpindi"* **(2006 CLC 87)**, "*ISMAIL IJAZ versus THE STATE"* **(2023 PCr.LJ 114 Islamabad)**, "*NADEEM AHMAD versus SAIF-UR-REHMAN"* **(2021 MLD 354).**

V. POINTS OF DETERMINATION

7. In order to examine the language of Article 199 of the *"Constitution"* and from the arguments advanced by the parties, the following moot points have arisen.

(1) Whether the acquittal of Respondent No.5 from a criminal case, based on a compromise, can be considered an honorable acquittal?

(2) Whether the Income Tax Ordinance, 2001 (the "Ordinance") provide any restrictions or conditions relating to character verification during the probationary period of Respondent No.5?

(3) Whether the writ of quo warranto is maintainable?

(4) Whether the writ petition is hit by laches?

(5) Whether the office occupied by the respondent is a public one, and if so, is the respondent occupying this office lawfully?

It is to be noted that whenever important constitutional issues are raised in a constitutional petition, the Courts always framed moot points in order to settle them strictly under Article 201 of the *"Constitution"*. Since prudent approach to decide the cases, the Courts have to follow the principles already developed by the Superior Court and this Court under Article 189 and 201 of the *"Constitution"*. In order to avoid deviation from heterodoxy jurisprudence as well as to decide the lis between parties on basis of orthodox principles, this Court has discussed in details regarding framing of moot points and settling them in *"MUHAMMAD UMAIS Versus RAWALPINDI CANTONMENT BOARD etc"* **(PLD 2022 Lahore 148)** by holding that *"After framing of issues on constitutional moot points, this Court has narrowed down the law points and determined the fundamental rights of the Petitioner but*

while rendering judgment, the constitutional petition filed under Article 199 of the Constitution, if the writ petition is admitted for regular hearing, and after perusing the record from the report and parawise comments, the Court has to render a decision strictly as per Articles 199 and 201 of the Constitution. The decision or order could be a judgment or an order passed on the constitutional petition filed under Article 199 of the Constitution but those decisions are made under the established law of precedent under Article 201 of the Constitution, to have a binding effect and its principles have to be followed later. Article 201 of the Constitution states that a decision of High Court if (i) it decides a question of law or is (ii) based upon or (iii) enunciates a principle of law be binding on subordinate Courts. In this case, writ petition was filed on 21.04.2021 and after hearing the parties on 28.04.2021, the Court while admitting the writ petition directed the parties to file written statement. Thereafter, written statement was filed by the Respondents and perused by this Court, hence, before proceedings further, the Court framed moot points in order to render a judgment under Article 201 of the Constitution. It is a settled norm that the decision on a question of law can only be made if question of law is framed and highlighted from the pleadings. In this case the Court on 02.06.2021 framed the constitutional moot points, mentioned above, in order to render a judgment, while keeping in mind the principles of law already established by the Superior Court, relied by both the counsel for the parties, then passed its decision on it to be called a decision or a judgment. Accordingly, the judgment then passed will consists of ratio decidendi, facts, arguments of the parties, moot points involved, and stare decisis and obiter dicta. The Constitution clearly empowers the Courts in Pakistan to render on these parameters regarding the question of law or based on question enunciated a principle of law. As every judgment of the Supreme Court is binding on all Courts under Article 189 of the Constitution, the same words are used in Article 201 of the

Constitution but subject to Article 189 to follow its principle for consistency".

MOOT POINT NO.1

Whether the acquittal of Respondent No.5 from a criminal case, based on a compromise can be considered an honorable acquittal?

8. Mr. Tanveer Iqbal, ASC states that the criminal history of the Respondent No.5 is established vide FIR No.297 of 2005 and this factum disqualifies him from holding public office and though he was acquitted in that case on basis of a compromise, but said acquittal was not on merits, hence eventual result of said criminal case does not negate the serious allegations against him. While, Barrister Asfandyar Khan Tareen, Advocate for the Respondent No.5 submits that mere registration of an FIR against the Respondent No.5 is insufficient to deem his character as criminal, barring him from his impugned appointment and that too in a situation that aforementioned criminal case was got registered by uncle of Respondent No.5 in outcome of some family disputes. He further states that the matter was settled between the parties and the Respondent No.5 was acquitted by the Judicial Magistrate vide order dated 14.12.2006 and this order was upheld by the Additional Sessions Judge, Sargodha vide order dated 08.03.2008.

9. A careful examination of the facts and arguments from both sides reveals that the FIR against the Respondent No.5 was registered by his real paternal uncle over a property dispute. This dispute was amicably settled among the parties through compromise leading to acquittal of the Respondent No.5. Therefore, the mere registration of an FIR against Respondent No.5 cannot be used as a definitive test to label him as having a bad character. As for as argument of an honorable acquittal is concerned, the Court is of the view that all acquittals including acquittal on compromise are honorable for the reason that the prosecution has not succeeded to prove their cases against the accused on the strength of evidence of unimpeachable

character. There can be no acquittals, which may be said to be dishonorable and the law has not drawn any distinction between any types of acquittals. Reliance is placed on "*DR. MUHAMMAD ISLAM versus GOVERNMENT OF NWFP, etc.*" **(1998 SCMR 1993)**. The Respondent No.5 was acquitted by the Judicial magistrate vide order dated 14.12.2006 and this order of acquittal was upheld by the Additional Sessions Judge, Sargodha vide order dated 08.03.2008. It shall, therefore, be presumed that the allegations leveled against him are baseless as, he has not been declared guilty. In presence of above meaning of "acquittal" the appellant is held to have committed no offence because the competent criminal courts have cleared him from an accusation or charge of crime. Moreover, once a person was acquitted by trial court, said person would stand shorn of stigma of any allegation and he would have to be deemed thereafter as innocent and having not committed any such crime. If acquittal of accused is not assailed before higher forum, such acquittal earned by accused from trial court, on whatsoever basis, would attain finality and pandora box of allegations could not be re-opened or used against him. In short, acquittal is an acquittal simpliciter and, must entail upon all consequences of pure acquittal. Reliance is placed on *"MUMTAZ ALI SHAH versus CHAIRMAN, PAKISTAN TELECOMMUNICATION COMPANY LTD., H.Q., ISLAMABAD and 6 others"* **(PLD 2002 Supreme Court 1060)**. Additionally, order of acquittal of accused shall erase, efface, obliterate and wash away his alleged or already adjudged guilt in the matter apart from leading to setting aside of his sentence or punishment, if any. Reliance is placed on "*SUO MOTU CASE NO. 03 OF 2017"* (**PLD 2018 Supreme Court 703**).

MOOT POINT NO.2

Whether the Income Tax Ordinance, 2001 (the "Ordinance") provide any restrictions or conditions relating to character verification during the probationary period of Respondent No.5?

10. Pertinently, the Respondent No.5 was appointed as a Judicial Member of the ATIR vide the "impugned Notification" issued under Section 130(3) of the Income Tax Ordinance, 2001 (the ***"Ordinance"***). According to the learned counsel for the Respondent No.5, at the relevant time of his appointment, the Appointment of Income Tax Appellate Tribunal Member's Rules, 1998 were in force having been issued vide SRO No. 5(1)/98. Aforementioned Section 130 dealing with appointment of Judicial Member of ATIR is reproduced as follows:

> *"**130. Appointment of the Appellate Tribunal:-***
> *(1) There shall be established an Appellate Tribunal to exercise the functions conferred on the Tribunal by this Ordinance.*
> *(2) The Appellate Tribunal shall consist of a chairperson and such other judicial and accountant members as are appointed by the Federal Government having regard to the needs of the Tribunal.*
> ***(3) A person may be appointed as a judicial member of the Appellate Tribunal if the person:-***
> ***(a) has exercised the powers of a District Judge and is qualified to be a Judge of the High Court;***
> ***(b) is or has been an advocate of a High Court and is qualified to be a Judge of the High Court;***
> ***(c) is an officer of Inland Revenue Service in BS20 or above and is a law graduate.***
>
> *(underlined by me)*
>
> ……..

11. For appointment as Judicial Member of Income Tax Appellate Tribunal, two categories of persons had been provided under Section 130(3) of the *"Ordinance"*, one who had exercised powers of District Judge and the other who had been an Advocate of High Court, and both categories of persons were required to fulfil one common qualification i.e. they should be qualified to be a Judge of the High Court. Bare reading of aforementioned provision reveals that Section

130(3) of the *"Ordinance"* does not provide any restrictions or conditions relating to character verification during the probationary period of Respondent No.5. The provision never transpires any condition that mere involvement of a candidate in any criminal case/FIR would be sufficient to bring any clog for his appointment as a judicial member of ATIR. It is reiterated that the Respondent No.5 in aforementioned criminal case had never been adjudged as guilty of the charges, rather complainant of said case had entered into a compromise with him and he was acquitted on basis thereof. Furthermore, no other occasion, besides registration of aforementioned FIR pertaining to any criminal liability of the Respondent No.5 has been brought on record by the Petitioner.

MOOT POINT NO.3

Whether the writ of quo warranto is maintainable?

12. The writ *quo warranto* is provided under Article 199 of the Constitution and the same is reproduced for ready reference:

> ***ARTICLE 199. Jurisdiction of High Court.***
> *(1) Subject to the Constitution, a High Court may, if it is satisfied that no other adequate remedy is provided by law:-*
> *(a) ……..*
> *(b) on the application of any person, make an order:-*
> *(i) … ……..*
> *(ii) requiring a person within the territorial jurisdiction of the Court holding or purporting to hold a public office to show under what authority of law he claims to hold that office; or……..*

13. A meticulous study of aforementioned provision and the relevant case law on the subject reveals that for the purpose of maintaining a writ of *quo warranto* there is no requirement of an aggrieved person, and before a person can claim this relief he must satisfy the court, inter alia, that the office in question is a public office and is held by a usurper without legal authority. It is a settled

law that granting relief in the nature of *quo warranto* is within the discretionary power of the superior courts and this relief cannot be allowed as a matter of course, rather the conduct and the bona fides of the petitioner, the cause and the object of filing such petition is also of considerable importance, which is to be examined. The Supreme Court of Pakistan has held in numerous judgments that the writ of *quo warranto* can only be issued in exceptional cases and the relief should not be allowed as a matter of course, more so when the candidature of a candidate was duly scrutinized at the time of the scrutiny of his appointment to ascertain whether he was qualified in terms of the Constitution and the law. Accordingly, the Court is not required to go into the merits of the case and should summarily dismiss the petition on the basis of lack of bona fides and extraneous motives of the petitioner and on account of the petition being frivolous. Reliance is placed on *"JAWAD AHMAD MIR versus Prof. DR. IMTIAZ ALI KHAN, VICE CHANCELLOR, University of Swabi, District Swabi, Khyber Pakhtunkhwa and others"* **(2023 SCMR 162)**, *"NISAR KHAN KHATTAK versus HAJI ADAM, DIRECTOR GENERAL (Admin), PEMRA Headquarter, Mauve Area, Islamabad and another"* **(2021 PLC (C.S) 140)**, *"ATTAULLAH KHAN versus ALI AZAM AFRIDI and others"* **(2023 PLC (C.S) 182)** and *"MIRZA ABDUL REHMAN versus FEDERATION OF PAKISTAN and others"* **(2017 PLC (C.S) 1327)**.

14. This Court firmly believes that a writ of *"quo warranto"* should only be issued in exceptional cases and the relief should not be allowed in a casual manner, especially when a candidate's qualifications were thoroughly examined during his appointment which has never been challenged by the Petitioner. The Court will not further discuss s the merits of this case as this petition is liable to be dismissed due to Petitioner's lack of bonafide, extraneous motives, and frivolous nature of petition. Further reliance is placed on *"ABRAR HASSAN versus GOVERNMENT OF PAKISTAN AND*

Respondents" **(PLD 1976 Supreme Court 315)**, wherein it was candidly observed that the *quo warranto* has never been a writ of right. The Court may in exercise of its discretion, refuse it, if the application is not bona fide or is made for a collateral purpose. Similarly, in *"ASIF HASSAN and others versus SABIR HUSSAIN and others"* **(2019 SCMR 1720)**, it was held that a writ in the form of *quo warranto* is an extraordinary discretionary jurisdiction and the Court is not bound to exercise such jurisdiction in each and every case specially where on account of laches the matter has lost its significance.

MOOT POINT NO.4

Whether the writ petition is hit by laches?

15. Admittedly, the FIR was registered against the Respondent No.5 on 09.08.2005 and he was acquitted from relevant case vide order of Judicial Magistrate dated 14.12.2006 which was upheld by the Additional Sessions Judge vide order dated 08.03.2008. The Respondent No.5 was appointed as Member Judicial, ATIR vide the *"impugned Notification"* dated 26.04.2019 but interestingly instant petition has been filed on 01.06.2023 to challenge the same after lapse of more than four (04) years without explaining any convincing reasonable cause for the inordinate delay. As such principle of laches is applicable upon this case as three months' time is considered reasonable for a party to assail an adverse order in writ jurisdiction of this Court. The Supreme Court of Pakistan in *"STATE BANK OF PAKISTAN through Governor and another Versus IMTIAZ ALI KHAN and others"* **(2012 SCMR 280)** has held that *"laches is a doctrine whereunder a party which may have a right, which was otherwise enforceable, loses such right to the extent of its enforcement if it is found by the Court of a law that its case is hit by the doctrine of laches/limitation. Right remains with the party but it cannot enforce it. The limitation is examined by the Limitation Act or by special laws which have inbuilt provisions for seeking relief against any grievance*

within the time specified under the law and if party aggrieved do not approach the appropriate forum within the stipulated period/time, the grievance though remains but it cannot be redressed because if on one hand there was a right with a party which he could have enforced against the other but because of principle of limitation/laches, same right then vests/accrues in favour of the opposite party". It was further held by Supreme Court of Pakistan in *"MEMBER (S&R)/CHIEF SETTLEMENT COMMISSIONER, BOARD OF REVENUE, PUNJAB, LAHORE and another Versus Syed ASHFAQUE ALI and others"* **(PLD 2003 Supreme Court 132)** as under:

> *"On account of Laches in setting the machinery of law into motion they have indeed disentitled themselves to the exercise of discretionary and equitable jurisdiction, which in all cases must be exercised in order to foster the ends of justice and to right a wrong. Writ jurisdiction is undoubtedly discretionary and extraordinary in nature which may not be invoked by a party who demonstrates a style of slackness and laxity on his part. Furthermore, if a party does not choose legal remedy available under the Statute strictly speaking Constitutional jurisdiction of the High Court cannot be exercised in his favour. Law is well-settled that a patty guilty of gross negligence and laches is not entitled to the equitable relief. One who seeks equity must show that equities lean in his favour. In the facts and circumstances of the appeal we are, therefore, in no manner of doubt that the High Court was not competent to exercise its writ jurisdiction conferred under Article 199 of the Constitution".*

16. It is well settled principle that law helps the vigilant and not the indolent. Reliance is placed on *"AFTAB IQBAL KHAN KHICHI and another Versus Messrs UNITED DISTRIBUTORS PAKISTAN LTD. KARACHI"* **(1999 SCMR 1326).**

MOOT POINT NO.5

Whether the office occupied by the respondent a public one, and if so, is the respondent occupying this office lawfully?

17. The Court will examine the jurisprudence under Article 199(b)(ii) of the *"Constitution"* keeping in view two pre-conditions for writ of *quo warranto* (i) holding or purporting to hold a public office and (ii) under what authority of law, principles relating whereto have been elaborated in "Judicial Review of Public Actions" (2018, Pakistan Law House), Second Edition., Vol. 3 Page, 1633 (the ***"Book"***) authored by well acclaimed jurist of the country Mr. Justice Fazal Karim, Former Judge, Supreme Court of Pakistan. The "Book" is used as secondary source as already done by this Court in *"LAHORE STOCK EXCHANGE versus LAHORE APPELLATE BENCH S&EC"* **(2006 CLD 988)** wherein Justice Ali Nawaz Chohan (as he then was), relied on treaties by the Harvard Professor Louis Loss who in 1969 drafted Securities Ordinance 1969 by following the model of Security and Exchange Commission in the United States created through the Stock Exchange Act of 1933. Whilst discussing holding or purporting to hold a public office, it is explained in the *"Book"* that the public law remedy under Article 199(1)(b)(ii) is available only against a person holding or purporting to hold a public office and not for the holder of a private office. Moreover, discussing the word 'purporting' envisaged in aforementioned article, it is detailed that the word 'purport' according to the dictionary, means 'be intended to seem'. The expression 'purporting to hold a public office' may be contrasted with the expression 'officer de facto' which expression is defined by Thomas McIntyre Cooley in his book 'Constitutional Limitations', Vol. II. p.1355 as 'one who by some colour of right is in possession of an office and for the time being performs its duties with public acquiescence, though having no right in fact', as also with the expression 'intruder' which is defined in the same book at p.1357 as

‘one who attempts to perform the duties of an office without authority of law and without the support of public acquiescence. In addition thereto, it is identified therein that the expression ‘public office’ is not defined in the 1973 Constitution, however, it was defined in the 1962 Constitution to include any office in the Service of Pakistan and membership of an assembly. It was further referred that Ferris in his “Extraordinary Legal Remedies”, 1926 Edition, p.145, explained that “a public office is the right, authority and duty created and conferred by law, by which an individual is vested with some portion of the sovereign functions of the government to be exercised by him for the benefit of the public, for the term and by the tenure prescribed by law; it implied a delegation of a portion of the sovereign power; it is a trust conferred by the public authority for a public purpose, embracing the ideas of tenure, duration, emolument and duties, hence, a public officer is thus to be distinguished from a mere employment or agency resting on contract, to which such powers and functions are not attached. It is further referred by Mr. Justice (R) Fazal Karim in the *“Book”* that aforementioned definition of the term *“public office”* has been adopted by the courts in Pakistan in cases *“MASUD-UL-HASSAN versus KHADIM HUSSAIN”* (**PLD 1963 SC 203**) in the words that *“a public office is an office created by the state, by charter or by statue, when the duties attached to the office are of a public nature”,* which was reiterated in *“M.A.U.Khan versus M. Sultan”* **(PLD 1974 SC 228).** Mr. Justice (R) Fazal Karim in his aforementioned Book, discussed the language “under what authority of law” with substance that *“We have seen that the expression “quo warranto” means “by what authority” or “by what warrant”. Sub-Clause (b)(ii) gives effect to the same concept by using the phrase “under what authority of law”. The word ‘authority’, we have seen, also means jurisdiction, power or right. According to Black’s Law Dictionary, “authority” is inter-alia permission; right to exercise powers; to implement and enforce laws.*

*Often synonymous with power; legal power; a right to command or to act; the right and power of public officers to require obedience to their orders lawfully issued in the scope of their public duties. In the context of this sub-clause (b)(ii) the word 'authority' means right permission or sanction; and the power of the High Courts is to require the respondent to show cause what is his legal right, or what right in law he has, to hold the office in question. In the words of Justice Muhammad Iqbal in "Muhammad Khan versus Lahore Cantonment Board" (**PLD 1964 Lahore 125**) "what is in question is the right of the respondent to hold an office of public nature."*

18. The learned counsel for the Petitioner when confronted as to whether the post held by Respondent No.5 is a public office as the writ of *quo-warranto* is only maintainable against holder of public office, he stated that the term 'public office' has not been defined in the Constitution of 1973 and the same was defined in the Constitution of 1962. He placed his reliance on "*MASUDUL HASSAN versus KHADIM HUSSAIN and another"* **(PLD 1963 SC 203)**, which stated that for a writ to be issued the office should be one created by the State, by charter or by statute, and that the duty should be of a public nature and the respondent should be in possession of the office. Moreover, he further argues that the term 'public officer' is defined under Section 2(17) of Civil Procedure Code as a person falling under any of the descriptions given in the said Section, including every person in the service of Pakistan.

19. Before judicial adjudication on this moot point it is expedient here to explore the term public office. Admittedly, the term "Public office" has not been defined in the Constitution, 1973. According to the **BLACK'S LAW DICTIONARY**, 9th edition, the public office is a position whose occupant has legal authority to exercise a government's sovereign powers for a fixed period. According to the **P RAMANATHA AIYAR'S THE ADVANCED LAW LEXICON**, 4th Edition, the public office is a position whose occupant has legal

authority to exercise a government's sovereign powers for a fixed period. According to the **FERRIS' EXTRAORDINARY LEGAL REMEDIES** (72 CWN 64, Vol. 72) as referred in "*V.C. SHUKLA versus STATE"* **(1980) Supp SCC 249**, a public office is the right, authority and duty created and conferred by law, by which an individual is vested with some portion of the sovereign functions of the government to be exercised by him for the benefit of the public, for the term and by the tenure prescribed by law. It implies a delegation of a portion of the sovereign power. It is a trust conferred by public authority for a public purpose, embracing the ideas of tenure, duration, emoluments and duties. The determining factor, the test, is whether the office involves a delegation of some of the solemn functions of government, executive, legislative or judicial, to be exercised by the holder for the public benefit. Aforesaid definition of *Public office* was approved by the Supreme Court of Pakistan in "*SALAHUDDIN versus FRONTIER SUGAR MILLS & DISTILLERY Ltd"* **(PLD 1975 Supreme Court 244)**.

20. The survey of relevant literature and case law on the subject reveals that the Respondent No.5 was appointed as a Member Judicial ATIR vide impugned notification dated 26.04.2019 by the Federal Government after qualifying the Federal Public Service Commission Exam. He was appointed u/s 130(3) of the Ordinance read with the Appointment of Income Tax Appellate Tribunal Member's Rules, 1998.The office of Member Judicial, ATIR is by all intents and a purpose is a public office. As this office is created by the State and the statute, and the duties attached to the office are of a public nature. Reliance is placed on "*M.U.A. KHAN versus RANA M. SULTAN and another"* **(PLD 1974 Supreme Court 228)**. Furthermore, although, the term Public Office has not been defined under Article 260 of the Constitution, but generally it refers to any person working in the Public Sector, whether in Parliamentary, Government or Municipal Institutions. The offices created under the Constitution or specific

statutes are deemed to be public offices. Reliance is placed on "*AKBAR KHAN versus SAID GUL"* **(PLD 2020 Peshawar 10)** & **"***Dr. FARZANA BARI versus MINISTRY OF LAW, JUSTICE AND HUMAN RIGHTS"* **(PLD 2018 Islamabad 127)**. Undoubtedly, the Respondent No.5 was appointed as Member Judicial of ATIR vide the *"impugned Notification"* to hold public office, but it is observed that the Federal Government has appointed Respondent No.5 as a Member Judicial, ATIR after fulfilling all codal formalities and keeping in view Section 130(3) of the *"Ordinance"* prescribing eligibility criteria of person to be appointed and the Respondent No.5 being appointed in due course of law, now is lawfully occupying the said public office. Reliance is placed on *"MUHAMMAD SHAHID AKRAM versus GOVERNMENT OF THE PUNJAB through Chief Secretary and 3 others"* **(2016 PLC (C.S.) 1335)**. It is pertinent to note that the Petitioner has neither challenged the qualifications of the Respondent No.5, as mentioned in Section 130 of the "Ordinance" nor his experience rather the said Respondent is holding the public office strictly as per criteria stipulated in Section 130(3) of the "Ordinance". The said requirement was duly considered by the Federal Government at the time of appointment of the Respondent No.5 through Notification dated 26.04.2019 followed by memorandum dated 30.04.2019 which was sent to the Respondent No.5 clearly mentioning the terms and conditions mentioned therein.

VI. *CONCLUSION*

21. The nutshell of the above discussion is that the writ petition fails and is accordingly dismissed with no order as to cost.

(JAWAD HASSAN)
JUDGE

APPROVED FOR REPORTING

JUDGE

*Usman**