

IN THE SUPREME COURT OF PAKISTAN
(Original Jurisdiction)

PRESENT:

Mr. Justice Umar Ata Bandial, CJ
Mr. Justice Ijaz ul Ahsan
Mr. Justice Syed Mansoor Ali Shah

Const. Petition No. 21 of 2022

Imran Ahmad Khan Niazi ...Petitioner(s)

Versus

Federation of Pakistan through Secretary, Law and Justice Division, Islamabad and another ...Respondent(s)

For the Petitioner(s) : Mr. Kh. Haris Ahmad, Sr. ASC
Dr. Yaser Aman Khan, ASC
Assisted by
Ms. Zaynib Ch. Adv
Mr. Hashim Butt, Adv

For the Federation : Mr. Makhdoom Ali Khan, Sr. ASC
Mr. Saad Hashmi, ASC
Ch. Aamir Rehman, Addl. AG

For the NAB : Ch. Mumtaz Yousaf, Addl. PG
Mr. M. Sattar Awan, DPG
Barrister Syeda Jugno Kazmi, Spl.
Prosecutor

Date of Hearing : 29.08.2023

ORDER

At the outset of the hearing, the learned counsel for the parties, namely, Mr. Khawaja Haris Ahmad, Sr. ASC and Mr. Makhdoom Ali Khan, Sr. ASC were requested to make their respective submissions on the question raised by one of us (Justice Syed Mansoor Ali Shah) in his separate note dated 18.08.2023 regarding the perceived effect of the Supreme Court (Practice and Procedure) Act, 2023 ("**Procedure Act**") on the further proceedings in the instant petition. The Procedure Act has brought about two fundamental changes in the practice and jurisdiction of the Court: firstly, it has created a Committee

comprising the Chief Justice and the two next most senior Judges of the Court for fixing 'every cause, appeal or matter' before a Bench constituted by it (refer Section 2 of the Procedure Act). The effect of this provision is that administrative powers vested in the Chief Justice under the Supreme Court Rules, 1980 ("**1980 Rules**") stand transferred to the Committee. Secondly, the Procedure Act has provided a right of appeal against the judgments/orders of the Court passed under Article 184(3) of the Constitution (refer Section 5 of the Procedure Act).

2. The *vires* of the Procedure Act were challenged in Constitution Petition Nos.6-8/2023 etc. Vide order dated 13.04.2023, as affirmed by the order dated 02.05.2023, an Eight Member Bench of the Court suspended the operation of the Procedure Act. Briefly, the grounds for granting such an injunction were that:

- i. Section 2 of the Procedure Act appears to be premised on the approach that the 1980 Rules framed by the Full Court under Article 191 of the Constitution are subordinate to and thereby trumped by the Procedure Act. Such an approach interferes with the functioning of the Court in the matters of fixation of cases and formation of Benches that are regulated by the 1980 Rules. That amounts to a serious encroachment into the independence of the Judiciary.
- ii. Section 5 of the Procedure Act has been enacted under Article 191 of the Constitution which only allows Parliament to regulate the Court's procedure. However, Section 5 has conferred a substantive right of appeal against judgments/orders of the Court passed in matters decided under Article 184(3) of the Constitution. It is therefore allegedly beyond the legislative competence of Parliament. Further, an intra-court appeal before the Court has been provided by Section 5 to litigants despite the clear

requirement in Entry 55 of the Fourth Schedule that expanding the jurisdiction of the Court requires 'express authorization' by or under the Constitution which is statedly lacking in this case.

3. Subsequently, on 26.05.2023 Parliament enacted the Supreme Court (Review of Judgments and Orders) Act, 2023 ("**Review Act**") which expanded the grounds of review available against judgments/orders of the Court issued under Article 184(3) of the Constitution. As a result, before arguing his case on the Procedure Act the learned Attorney General for Pakistan on 01.06.2023 and 08.06.2023 acknowledged that the provisions of the Procedure Act required rationalization and modification to cure their overlap with the provisions of the Review Act. Accordingly, he sought time to allow Parliament to do the needful. The request was granted by the Court on 01.06.2023 and again on 08.06.2023 because as explained by the learned Attorney General Parliament was busy with the Budget Session and would remain so till July 2023.

4. Be that as it may, we are not inclined to comment on the *vires* of the Procedure Act which is a matter for the Eight Member Bench seized of Constitution Petition Nos.6-8/2023 etc. to decide. It would clearly be presumptuous of us to assume the outcome on the above issue. However, it should not be ignored that the Procedure Act has been suspended by the orders of 13.04.2023 and 02.05.2023 passed by the Eight Member Bench. The Federal Government thereafter in the hearing has neither requested for the recall of these orders nor for their modification. Consequently, so long as these interim orders are in the field we

are of the considered view that the same must be complied. The titled Constitution Petition has already undergone nearly 50 hearings. Its proceedings have reached the final stage and are near conclusion. The said petition should therefore continue to be heard and decided by the present Bench. Any change in the composition of the Bench is neither necessary as a matter of law or of propriety nor is it advisable at this end stage of the case. Indeed, concluding the case would serve the public interest as much time of the Court and public money have been expended in hearing the instant petition.

5. In the above circumstances, both learned counsel proceeded with the case. The submissions by Mr. Makhdoom Ali Khan, Sr. ASC are still ongoing. Adjourned to **30.08.2023** at 11:45 am.

Sd/-
Chief Justice

Sd/-
Judge

Islamabad
29.08.2023
Naseer/Meher LC

I have attached my
separate note.
Judge

Syed Mansoor Ali Shah, J.- I raised the following question during the hearing of this case on 18 August 2023:

[W]hether this Bench should continue hearing this case or should this case be adjourned till the Court first decides the constitutionality of the Supreme Court (Practice and Procedure) Act, 2023 or in the alternate, should a Full Court Bench hear this case pending decision on constitutionality of the Act.

Today, the learned counsel for the parties made their submissions on this question. The Hon'ble Chief Justice of Pakistan and my learned brother Justice Ijaz-ul-Ahsan have through their order of today answered the question in negative on both alternatives, that is, they have not thought it appropriate either to constitute a Full Court Bench for hearing this case or to adjourn the hearing till decision on the constitutionality of the Supreme Court (Practice and Procedure) Act, 2023 ("**Act**"). I, with respect, disagree with my learned brothers and by this note record my reasons therefor:

2. Section 3 of the Act provides that the Bench for hearing petitions under Article 184(3) of the Constitution is to be constituted by a Committee comprising of the Chief Justice of Pakistan and two next most senior Judges of the Court, whereas Section 4 thereof mandates that any case involving the interpretation of constitutional provision is to be heard by a Bench comprising at least of five Judges. The Act being a procedural law *prima facie* applies retrospectively to the pending cases under Article 184(3) of the Constitution, including the present one. Although the operation of the Act has been suspended by an eight-member Bench of this Court, the Act would take effect from the date of its enforcement, not from the date of decision of the Court, if ultimately the Court upholds the constitutional validity of the Act. In case the Act is held to be valid, any decision given in the present case by this Bench, which is not constituted as per the procedure prescribed and of the strength of Judges required under the Act, would arguably be *coram non iudice* and thus a nullity in the eye of law.

3. Needless to underline that under Sections 3 and 4 of the Act, a due process is provided to deal with matters invoking exercise of original jurisdiction of this Court under Article 184(3) of the Constitution and matters involving the interpretation of any constitutional provision. Section 3 read with Section 4 of the Act mandates hearing of a matter involving interpretation of any constitutional provision, which includes provisions containing fundamental rights, by at least a five-member Bench. Further, on the constitution of a three-member administrative

Committee envisaged under the Act, a policy would have to be framed to deal with all the pending cases including the present one, where-under the present composition of this Bench might not remain the same.

4. Responding to the observation that the Act being a procedural law also applies to pending cases under Article 184(3) of the Constitution, including the present one, the learned counsel for the petitioner while relying upon several cases¹ contended that even a procedural statute is not to be given retrospective effect if such effect will cause inconvenience or injustice. I am afraid, it is not for this Bench to decide whether the Act if ultimately held constitutionally valid should not be given retrospective effect to avoid any inconvenience or injustice but rather it is for the eight-member Bench hearing the case regarding the constitutionality of the Act to decide upon this question. Similarly, the contention of the learned counsel for the Federation that in view of the well-settled opinion of this Court as expressed in several cases² the operation of the Act could not have been suspended is not for this Bench to deal with. This Bench cannot entertain this contention as a court of appeal to the Bench that has suspended the operation of the Act. With great respect, I also do not subscribe to the discussion made in this case by my learned brothers in their order of today, explaining the reasons for suspending the operation of the Act in another case, what the learned Attorney-General for Pakistan argued in that case and whether or not the Federal Government made any request for recalling the stay order in that case. While sitting in this Bench hearing the present case, we cannot, in my humble view, explain or defend the orders made or proceedings conducted by another Bench in some other case.

5. The learned counsel for the Federation has argued in favour of adjourning the hearing of the present case till decision on the constitutionality of the Act or in the alternate constituting a Full Court Bench to hear it, mostly for the same reasons as recorded in my last order and reiterated above. And no satisfactory answer has been put forth by the learned counsel for the petitioner to the proposition recorded therein that if ultimately the Court upholds the constitutional validity of the Act, any decision given in the present case by this Bench, which is not constituted as per the procedure prescribed in the Act and of the

¹ Adnan Afzal v. Sher Afzal PLD 1969 SC 187; Muhammad Bashi v. Muhammad Firdaus PLD 1988 SC 232; Khalid Qureshi v. United Bank Limited 2001 SCMR 103; Senior Member BOR v. Bakhsh Bhutta 2012 SCMR 864.

² Federation of Pakistan v. Aitzaz Ahsan PLD 1989 SC 61; Aijaz Jatoi v. Liaqat Jatoi 1993 SCMR 2350; Commissioner Inland Revenue v. Yaqoob Ahmed C.P. 1796/2013 decided on 20.11.2013; Pakistan v. A. J. Textile Mills C.P. 471/2015 decided on 14.05.2015.

strength of Judges required under the Act, may arguably be *coram non judice* and thus a nullity in the eye of law. The order of my learned brothers, I submit most respectfully, does not address this concern either, even though they note in their order that "[it] would clearly be presumptuous of us to assume the outcome on the above issue." The decision of constitutional validity of the Act is an equally possible decision with that of its constitutional invalidity; it is not a presumption or speculation. No one can be sure of either of the decisions before pronouncement of the same by the Bench concerned. Further, it is not the matter of *compliance or non-compliance* of the interim order passed by the eight-member Bench, which is only of temporary nature, the real concern is the effect of the possible final outcome of the constitutional validity of the Act on the present proceedings and any decision given therein. There is a possibility that the instant proceedings and the decision given therein may become *coram non judice* and a nullity in the eye of law, if the constitutionality of Sections 3 and 4 of the Act is upheld by the other Bench. So this Damocles' sword hanging over these proceedings can easily be removed if either we await the decision of the eight-member Bench on the constitutionality of the Act or make it ineffective by placing the matter before a Full Court Bench.

6. The interim order of the eight-member Bench suspending the Act was passed on 13 April 2023 more than four months ago and there is no next date of hearing fixed in the case. This unnecessary delay in adjudicating a matter which directly deals with the core functioning of this Court is not understandable. Considering that almost 50 hearings have been held in the instant case, it therefore doubly requires that the constitutionality of the Act be decided first at the earliest so that the Court can function in accordance with law rather than under the uncertainty of a stay order.

7. I, therefore, maintain my earlier view recorded in my note of 22 June 2023 in Const. Petitions No.24-26 of 2023 (Trial of Civilians in Military Courts case) and answer the question in the terms that in order to avoid such an anomaly, the hearing of the present case should either be adjourned till the Court first decides the constitutionality of the Act or in the alternate a Full Court Bench should be constituted to hear the instant case.

Islamabad,

Judge

29th August, 2023.
Approved for reporting.