

Present: Mian Saqib Nisar, C.J., Qazi Faez Isa and Syed Mansoor Ali Shah, JJ

HUMAN RIGHTS CASE No.14959-K of 2018: In the matter:

Human Rights Case No. 14959 of 2018, decided on 1st January, 2019.

(In the matter regarding disposal of infectious wastes in the Province of Khyber Pakhtunkhwa)

Per Syed Mansoor Ali Shah, J; agreeing with Qazi Faez Isa, J.

Supreme Court Rules, 1980---

---0. XI---Constitution of Pakistan, Art. 184(3)---Human rights case Constitution/re-constitution of Bench---Administrative powers of the Chief Justice---Scope---Order XI of Supreme Court Rules, 1980 provided for administrative powers of the Chief Justice to constitute benches---Once a bench was constituted, cause list was issued and the bench was assembled for hearing cases, the matter regarding constitution of the bench went outside the pale of administrative powers of the Chief Justice and rested on the judicial side, with the bench---Any member of the bench may, however, recuse to hear a case for personal reasons or may not be available to sit on the bench due to prior commitments or due to illness---Bench may also be reconstituted if it was against the Rules and required a three-member bench instead of two; in such eventualities the bench passed an order to place the matter before the Chief Justice to nominate a new bench---In the absence of a recusal by a member of the Bench, any amount of disagreement amongst the members of the Bench, on an issue before them, could not form a valid ground for reconstitution of the Bench (by the Chief Justice)---Any reconstitution of the Bench on such ground would impinge on the constitutional value of independence of judiciary---Reconstitution of a bench while hearing a case, in the absence of any recusal from any member on the bench or due to any other aforementioned reason, would amount to stifling the independent view of the judge---Any effort to muffle disagreement or to silence dissent or to dampen an alternative viewpoint of a member on the bench, would shake the foundations of a free and impartial justice system, thereby eroding the public confidence on which the entire edifice of judicature stood---Reconstitution of the Bench by the Chief Justice, in the present case, was unwarranted and unprecedented and undermined the integrity of the system, therefore, the same was held to be void and non-est.

Ahron Barak, The Judge in a Democracy, Princeton University Press, p.109-110 ref.

In attendance:

Abdul Latif Yousafzai, A.G. Khyber Pakhtunkhwa.

Azam Khan, Chief Secretary, Khyber Pakhtunkhwa.

Abid Majeed, Secretary Health, Khyber Pakhtunkhwa.

Date of hearing: 9th May, 2018.

ORDER

SYED MANSOOR ALI SHAH, J.---I have seen the order passed by my learned brother Qazi Faez Isa, J. in the instant case dated 09.05.2018 (the "Order"). This Order was passed when the three-member bench, of which he was a member, was abruptly reconstituted, ousting him as member of the bench. The relevant extracts from the Order of my learned brother are as under:

"3. Article 184(3) of the Constitution grants to the Supreme Court the power to make an order of the nature mentioned in Article 199 of the Constitution if "the Supreme Court... considers that a question of public importance with reference to the enforcement of any of Fundamental Rights conferred by Chapter I Part-II is involved". Once the Supreme Court is satisfied that these two conditions (public importance and Fundamental Rights) are involved then the question of enforcement of the relevant Fundamental Rights arises. Needless to state the powers that the Constitution has granted to the Supreme Court cannot be assumed by the said Director. The approval of the Hon'ble Chief Justice is also not a substitute for an order of the Supreme Court.

4. The Director had written similar notes, also dated April 12, 2018, in the cases at serial numbers 3, 4 and 5 of the List (HRC Nos.14960-K of 2018, 14962-K of 2018 and 14964-K of 2018 respectively). The files of these cases and of those listed at serial numbers 6, 7 and 8 of the List (HRC Nos.16549- K/2018, 18200-K/2018 and 18879-K/2018) also did not indicate that the Supreme Court had satisfied itself that the abovementioned two conditions had been met.
5. However, before Article 184(3) could be read the Hon'ble Chief Justice intervened and said that he will be reconstituting the Bench and suddenly rose up. The Bench was then presumably reconstituted, I say presumably because no order was sent to me to this effect. However, a two member Bench did assemble later, from which I was excluded. This for me is a matter of grave concern. In my humble opinion it is unwarranted and unprecedented to reconstitute a Bench, in such a manner, whilst hearing a case. To do so undermines the integrity of the system, and may have serious repercussions.
6. Before exercising its original jurisdiction the Supreme Court must satisfy itself that the jurisdiction it is assuming accords with the Constitution. However, even before any opinion could be expressed thereon the matter was cut short as mentioned above.
7. I am constrained to write this as not doing so would weigh heavily on my conscience and I would be abdicating my responsibility as a judge."
2. Since then I waited for the senior member of the Bench (the Hon'ble Chief Justice) to pass an appropriate order in the case and also respond to the Order passed by my learned brother Qazi Faez Isa, J in order to explain the reconstitution of the bench that day. However, no such order has been passed till date and the case has been incorrectly reflected in the "Bench Disposal Statement" of the said date as an "adjourned case." The Hon'ble Chief Justice is retiring on 17th January, 2019, therefore, I feel constitutionally obligated, as a member of the bench, to express my views regarding the Order of my learned brother and to pass my order in this case for 19.05.2018, when it came up for hearing before the bench.
3. As a matter of background, a special three member bench, was constituted to hear the under-mentioned cases on 09.5.2018 at 3:00 pm as per Supplementary Cause List No.6-P of 2018, dated 8th May, 2018 at the Peshawar Registry of the Supreme Court of Pakistan, including the instant case. This Bench was to assemble after the conclusion of work by the regular two member bench already working at Peshawar comprising Qazi Faez Isa, J. and myself.

	Case No.
1.	Const. P.74/2013 and HRC No.25684-K/2017
2.	H.R.C.14959-K/2018
3.	H.R.C.14960-K/2018
4.	H.R.C.14962-K/2018
5.	H.R.C.14964-K/2018
6.	H.R.C.16549-K/2018
7.	H.R.C.18200-K/2018
8.	H.R.C.18879-K/2018

4. The special three member bench heard the first case i.e., Constitution Petition No.74/2013 titled Professor Muhammed Ibrahim Khan and others v. ERRa through its Chairman and others and connected HRC No.25684-K/2017 Application by Sheraz Mehmood Qureshi and passed a verbal order constituting a Commission.¹ When the titled case (second case on the Cause List) came up for hearing, my learned brother Qazi Faez Isa J., member of the bench, inquired from the counsel as to how the case was initiated by the Human Rights Cell, under Article 184(3) of the Constitution (The Order passed by my brother, relevant extracts reproduced above, is self-explanatory). At this juncture I felt a

certain unease amongst the other two members of the bench over the issue of Article 184(3) and in order to avoid any further escalation, I proposed to the Hon'ble Chief Justice to take a brief recess so that the members of the Bench can discuss this matter in chambers to avoid embarrassment in open court. However, the Chief Justice, instead, announced in open court that the Bench stands reconstituted and that the new two-member bench will re-assemble soon.

5. The Bench was reconstituted and the new two-member bench, comprising the Hon'ble Chief Justice and myself, assembled and resumed the hearing of the instant case, which was being heard earlier by the three-member bench. We also heard the other cases from the same Cause List. However, after court, I had a chance to read the Order of my learned brother (reproduced above). This necessitated the examination of the legal scope of reconstitution of benches under the Supreme Court Rules, 1980 ("Rules"). Upon examining the legal position, I declined to sign the orders of the newly re-constituted two-member bench unless the Order of my learned brother was responded to.² Here are my reasons:

6. Under Order XI of the Supreme Court Rules, 1980 ("Rules") the Chief Justice has the prerogative to constitute benches. The Order is reproduced for ready reference:

ORDER XI

CONSTITUTION OF BENCHES

Save as otherwise provided by law or by these Rules every cause, appeal or matter shall be heard and disposed of by a Bench consisting of not less than three Judges to be nominated by the Chief Justice:

Provided that

- (i) all petitions for leave to,
- (ii) appeals from appellate and revisional judgments, and orders made by a Single Judge in the High Court, and
- (iii) appeals from judgments/orders of the Service Tribunals or Administrative Courts, and appeals involving grant of bail/cancellation of bail, may be heard and disposed of by a bench of two Judges, but the Chief Justice may, in a fit case, refer any cause or appeal as aforesaid to a larger Bench.

Provided further that if the Judges hearing a petition or an appeal are equally divided in opinion, the petition or appeal, as the case may be, shall, in the discretion of the Chief Justice, be placed for hearing and disposal either before another Judge or before a larger Bench to be nominated by the Chief Justice.

The above Rule provides for administrative powers of the Chief Justice to constitute benches. However, once the bench is constituted, cause list is issued and the bench starts hearing the cases, the matter regarding constitution of the bench goes outside the pale of administrative powers of the Chief Justice and rest on the judicial side, with the bench. Any member of the bench may, however, recuse to hear a case for personal reasons or may not be available to sit on the bench due to prior commitments or due to illness. The bench may also be reconstituted if it is against the Rules and requires a three-member bench instead of two. In such eventualities the bench passes an order to place the matter before the Chief Justice to nominate a new bench. Therefore, once a bench has been constituted, cause list issued and the bench is assembled for hearing cases, the Chief Justice cannot reconstitute the bench, except in the manner discussed above.

7. In the absence of a recusal by a member of the Bench, any amount of disagreement amongst the members of the Bench, on an issue before them, cannot form a valid ground for reconstitution of the Bench. Any reconstitution of the Bench on this ground would impinge on the constitutional value of independence of judiciary. The construct of judicial system is pillared on the assumption that every

judge besides being fair and impartial is fiercely independent and is free to uphold his judicial view. This judicial freedom is foundational to the concept of Rule of Law. Reconstitution of a bench while hearing a case, in the absence of any recusal from any member on the bench or due to any other reason described above, would amount to stifling the independent view of the judge. Any effort to muffle disagreement or to silence dissent or to dampen an alternative viewpoint of a member on the bench, would shake the foundations of a free and impartial justice system, thereby eroding the public confidence on which the entire edifice of judicature stands. Public confidence is the most precious asset that this branch of the State has. It is also one of the most precious assets of the nation.

8. Professor Ahraon Barack points out that a judge ought to be aware of his power and the limits thereof. Naturally, the judge knows the law and the power it grants to the judge, but he must also learn the limits imposed on him as a judge. Second, a judge must recognize his mistakes. Like all mortals, judges err. A judge must admit this. According to the well-known statement of Justice Jackson, 'We are not final because we are infallible, but we are infallible only because we are final.' In one opinion, citing Justice Jackson's statement, it was added, 'I think that the learned judge erred. The finality of our decision is based on our ability to admit our mistakes, and our willingness to do so in appropriate cases.' McLachlin Beverly in 'The Charter of Rights and Freedom: A Judicial Perspective' notes, 'I hope that if we admit our mistake, we will strengthen public confidence in the judiciary.' Third, in our writing and our thinking, judges must display modesty and an absence of arrogance. Statements such as those of Chief Justice Hughes that 'we are under the Constitution, but the Constitution is what the judges say it is' are not merely incorrect but also perniciously arrogant.³ I must admit that my sitting on the reconstituted two-member bench was a mistake and having realized that after examining the legal position, I did not sign the orders passed by the reconstituted two-member bench and as a junior member of the Bench, awaited for the Hon'ble Chief Justice to pass an appropriate order in response to the Order of my learned brother Qazi Faez Isa, J.

9. In my opinion, a bench, once it is constituted and is seized of a matter on the judicial side, cannot be reconstituted by the Chief Justice in exercise of his administrative powers, unless a member(s) of the bench recuses or for reasons discussed above. Therefore, the reconstitution of the two-member bench and the proceedings before the said bench on 9th May, 2018 in all the cases fixed before it are void and non-est. I agree with my learned brother Qazi Faez Isa, J. that the reconstitution of the Bench by the Hon'ble Chief Justice in the present case is unwarranted and unprecedented and undermines the integrity of the system.

10. This order may be read into other cases fixed before the three member bench on that day i.e. from serial Nos.2 to 8 of the cause list (reproduced in paragraph 3 above), and which were again fixed before the reconstituted two-member bench. All those cases are to be put up for rehearing before an appropriate bench to be constituted by the Hon'ble Chief Justice and record of the court must reflect the correct status of these cases.

For the above reasons, I concur with my learned brother Qazi Faez Isa, J.
MWA/R-2/S Order accordingly.