

Present: Asif Saeed Khan Khosa, C J, Mazhar Alam Khan Miankhel and

Syed Mansoor Ali Shah, JJ

JURISTS FOUNDATION through Chairman---Petitioner

Versus

FEDERAL GOVERNMENT through Secretary, Ministry of Defence and others---Respondents

Constitutional Petition No.39 of 2019, decided on 26th November, 2019

(Against Extension of Tenure of Chief of the Army Staff).

(a) Constitution of Pakistan---

---Arts. 243(4)(b) & 184(3)---Army Regulations (Rules), 1998, Regln.255---Constitutional petition before the Supreme Court regarding extension/re-appointment of the incumbent Chief of the Army Staff for a fresh term of three years in such office after expiry of his first term---Constitutionality and legality---Plea by Attorney General that in terms of Regulation No. 255 of the Army Regulations (Rules), 1998, retirement of an Army officer could temporarily be suspended or limited; that the Federal Government had the requisite authority to re-appoint or extend the services of an incumbent Chief of the Army Staff prior to his retirement if the exigencies of the service so required or the public interest so demanded---Held, that perusal of Regln. No.255, prima facie, showed that the said provision could be invoked after an officer had already retired from service and that was why the said Regulation spoke of suspension of retirement or limiting of retirement---Suspending a retirement or limiting a retirement before the retirement had actually taken effect may amount to putting the cart before the horse---Attorney-General was unable to refer to any provision in any legal instrument regarding extension in service of a Chief of the Army Staff upon completion of his first term in that office or for his re-appointment to that office after completion of his first term---Since present issue called for a detailed examination of the matter of extension/re-appointment of incumbent Chief of the Army Staff, therefore, he was made a respondent to present case---Supreme Court suspended the operation of the impugned order/notification in respect of extension/re-appointment of incumbent Chief of the Army Staff for another term in the said office---Matter was adjourned till next date of hearing.

(b) Constitution of Pakistan---

---Arts. 243(4)(b) & 184(3)---Constitutional petition before the Supreme Court regarding extension/re-appointment of the incumbent Chief of the Army Staff for a fresh term of three years in such office after expiry of his first term---Procedure adopted for issuing notification of extension in service---Lapses---Prime Minister had himself passed the order appointing the current Chief of the Army Staff for a second term in that office on 19-08-2019 whereas under Art.243 of the Constitution it was the President who was the appointing authority for such office---When such mistake came to notice straightaway on the same day, i.e. 19.08.2019 a summary was moved from the Prime Minister's office to the President for extension/reappointment of the incumbent Chief of the Army Staff and on that very day, i.e. 19.08.2019 the President approved the summary in that regard and, hence, the advice of the Prime Minister was apparently accepted and acted upon---Even said process was found to be flawed and on that very day it was realized that the Prime Minister or the President could not take action on extension/re-appointment of current Chief of the Army Staff without the approval of the Cabinet and, thus, on the next day, i.e. 20-08-2019 a summary was moved in the relevant regard for approval of the Cabinet and on 21.08.2019 the Cabinet was said to have approved the said proposal through circulation---Opinion of the Cabinet recorded in this regard, showed that there were 25 members of the Cabinet and out of those 25 members only 11 had agreed to the proposal for extension/reappointment of the current Chief of the Army Staff, which showed that the majority of the Cabinet had not approved the said proposal---Another peculiar aspect was that after the purported approval of the Cabinet regarding extension/re-appointment of the incumbent Chief of the Army Staff the matter was never sent to the Prime Minister or the President again for the purposes of a fresh advice or a fresh

order of the Prime Minister and the President respectively---Since present issue called for a detailed examination of the matter of extension/re-appointment of incumbent Chief of the Army Staff, therefore, he was made a respondent to present case---Supreme Court suspended the operation of the impugned order/notification in respect of extension/re-appointment of incumbent Chief of the Army Staff for another term in the said office---Matter was adjourned till next date of hearing.

(c) Constitution of Pakistan---

---Arts. 243(4)(b) & 184(3)---Constitutional petition before the Supreme Court regarding extension/re-appointment of the incumbent Chief of the Army Staff for a fresh term of three years in such office after expiry of his first term---Purpose of extension/re-appointment---Stated purpose for the proposed reappointment/extension in the term of office of the incumbent Chief of the Army Staff was "regional security environment"---Supreme Court observed that the said words were quite vague and if at all there was any regional security threat then it was the gallant armed forces of the country as an institution which were to meet the said threat and an individual's role in that regard may be minimal; that if the said reason/purpose was held to be correct and valid then every person serving in the armed forces would claim re-appointment/extension in his service on the basis of the said reason--
-Since present issue called for a detailed examination of the matter of extension/re-appointment of incumbent Chief of the Army Staff, therefore, he was made a respondent to present case---Supreme Court suspended the operation of the impugned order/notification in respect of extension/re-appointment of incumbent Chief of the Army Staff for another term in the said office---Matter was adjourned till next date of hearing.

Nemo for Petitioner.

Anwar Mansoor Khan, Attorney-General for Pakistan and Mian Asghar Ali, Deputy Attorney General for Pakistan for Respondents.

Date of hearing: 26th November, 2019.

ORDER

ASIF SAEED KHAN KHOSA. C J.---The Court-Associate has produced before us a handwritten application statedly submitted by the petitioner seeking permission to withdraw this petition. The petitioner has failed to appear in person nor anybody else has appeared on his behalf. The application received does not carry any date and the same is not accompanied by any affidavit. There is nothing before us to accept or to presume that the said application has actually been submitted by the petitioner himself or that he has submitted the same voluntarily. Be that as it may the petition in hand invokes Article 184(3) of the Constitution and the subject matter of the petition involves a question of public importance with reference to enforcement of fundamental rights and, thus, the individual capacity of the petitioner pales into insignificance even if he decides not to pursue the present petition. The application attributed to the petitioner is, therefore, not entertained.

2. The learned Attorney-General for Pakistan is in attendance on his own and he has presented before us photocopies of many documents leading to an order passed by the President approving the summary sent to him by the Prime Minister along with his advice for extension/re-appointment of General Qamar Javed Bajwa, Chief of the Army Staff for a fresh term of three years in that office after expiry of his first term in that office. With the assistance of the learned Attorney-General for Pakistan we have gone through the said documents and have ex facie noticed the following things:

- i) A summary had initially been moved by the Ministry of Defence for extension of the term of office of the Chief of the Army Staff and subsequently he was appointed as Chief of the Army Staff for a second term of three years after completion of his first term in that office but the learned Attorney-General for Pakistan has not been able to refer to any provision in any legal instrument regarding extension in service of a Chief of the Army Staff upon completion of his first term in that office or for his re-appointment to that office after completion of his first term.

- ii) In the case in hand the Prime Minister had himself passed an order appointing the current Chief of the Army Staff for a second term in that office on 19.08.2019 whereas under Article 243 of the Constitution it is the President who is the appointing authority for that office. Apparently that mistake came to notice straightaway and on the same day, i.e. 19.08.2019 a summary was moved from the Prime Minister's office to the President for extension/re-appointment of the incumbent Chief of the Army Staff and on that very day, i.e. 19.08.2019 the President was pleased to approve the summary in that regard and hence, the advice of the Prime Minister was apparently accepted and acted upon. It appears that even that process was found to be flawed and on that very day it was realized that the Prime Minister or the President could not take the above mentioned actions without the approval of the Cabinet and, thus, on the next day, i.e. 20.08.2019 a summary was moved in the relevant regard for approval of the Cabinet and on 21.08.2019 the Cabinet was said to have approved the said proposal through circulation. The opinion of the Cabinet recorded in this regard, photocopies whereof have been produced before us, shows that there are 25 members of the Cabinet and out of those 25 members only 11 had agreed to the proposal which shows that the majority of the Cabinet had not approved the said proposal. Yet another peculiar aspect is that after the purported or so-called approval of the Cabinet regarding extension/re-appointment of the incumbent Chief of the Army Staff the matter was never sent to the Prime Minister or the President again for the purposes of a fresh advice or a fresh order of the Prime Minister and the President respectively.
- iii) After our repeated queries the learned Attorney-General for Pakistan has referred to Regulation No. 255 of the Army Regulations (Rules) according to which a retirement of an Army officer can temporarily be suspended or limited. By placing reliance upon the said Regulation the learned Attorney-General for Pakistan has maintained that the Federal Government has the requisite authority to re-appoint or extend the services of an incumbent Chief of the Army Staff prior to his retirement if the exigencies of the service so require or the public interest so demands. A bare perusal of Regulation No. 255, however, prima facie shows that the said provision can be invoked after an officer has already retired from service and that is why the said Regulation speaks of suspension of retirement or limiting of retirement. Suspending a retirement or limiting a retirement before the retirement has actually taken effect may amount to putting the cart before the horse. The learned Attorney-General for Pakistan has, however, very candidly submitted before us that in the entire body of laws pertaining to the Pakistan Army there is no express provision available regarding re-appointment or extension in the service of a Chief of the Army Staff.
- iv) The stated purpose for the proposed re-appointment/extension in the term of office of the incumbent Chief of the Army Staff is "regional security environment". The said words are quite vague and if at all there is any regional security threat then it is the gallant armed forces of the country as an institution which are to meet the said threat and an individual's role in that regard may be minimal. If the said reason is held to be correct and valid then every person serving in the armed forces would claim re-appointment/extension in his service on the basis of the said reason.

3. The points noted above call for a detailed examination of the matter of extension/re-appointment of General Qamar Javed Bajwa, Chief of the Army Staff and, therefore, he is hereby made a respondent to this petition and the office is directed to carry out the necessary addition in the memorandum of this petition. Let notice of this petition be issued to all the respondents for tomorrow, i.e. 27-11-2019, as requested by the learned Attorney-General for Pakistan. In the meanwhile the operation of the impugned order/Notification in respect of extension/re-appointment of General Qamar Javed Bajwa, Chief of the Army Staff for another term in the said office shall remain suspended.

(Sd.)

Asif Saeed Khan Khosa,

Chief Justice

(Sd.)

Mazhar Alam Khan Miankhel,

Judge

(Sd.)

Syed Mansoor Ali Shah,

Judge