

Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah and Amin-ud-Din Khan, JJ

Mian IRFAN BASHIR---Petitioner

Versus

The DEPUTY COMMISSIONER (D.C.), LAHORE and others---Respondents

C. P. No. 446-L of 2019, decided on 27th January, 2021.

(On appeal from the order of Lahore High Court, Lahore dated 24.01.2019, passed in I.C.A. No.4343 of 2019).

(a) Constitution of Pakistan---

---Art. 199---Constitutional jurisdiction of the High Court---Scope---High Court did not enjoy suo motu jurisdiction under Art. 199 of the Constitution.

There must exist a dispute before the High Court before it exercises judicial power. "On the application of an aggrieved party" was an essential pre-requisite to invoke the constitutional jurisdiction of the High Court under Article 199 of the Constitution. There must be an application and an applicant to invoke the jurisdiction of judicial review as the High Court did not enjoy suo motu jurisdiction under Article 199 of the Constitution.

Dr. Imran Khattak and another v. Ms. Sofia Waqar Khattak, PSO to Chief Justice and others 2014 SCMR 122 and Jehanzaib Malik v. Balochistan Public Procurement Regulatory Authority through Chairman Board of Directors and others 2018 SCMR 414 ref.

(b) Provincial Motor Vehicles Ordinance (XIX of 1965)---

---S. 89-A---Constitution of Pakistan, Arts. 9, 18 & 199---Constitutional jurisdiction of the High Court--Scope---Suo motu exercise of judicial power under Art. 199 of the Constitution was not available to the High Court---Where the High Court issued directions in its constitutional jurisdiction with respect to an issue or dispute that was not before the Court, it would amount to judicial overreach.

A Traders Association, approached the constitutional jurisdiction of the High Court to challenge a notice issued by the Zonal Officer (Regulation) Metropolitan Corporation for the removal of signboards and advertisements from their shops within 24 hours. Single Bench of the High Court while dealing with this issue thought it best to also discuss and pass directions on to a totally different issue, which was not even before the Court, regarding wearing of helmets by motorcyclists plying their bikes on the Mall Road. Without there being any dispute before it, the Court examined the compliance by the motorcyclists of wearing helmets when plying their bikes on the Mall Road. The High Court exercising suo motu powers, passed directions to the effect that the petrol pumps shall not fill in the petrol tanks of the motorcyclists who did not wear helmets and in case any owner of the filling station was found to provide petrol to such motorcyclist, the petrol pump would be sealed and heavy fine would be imposed. Intra Court Appeal filed before the Division Bench of the High Court was dismissed and Order of the Single Bench was upheld.

In the instant case, the direction against the motorcyclists (who did not wear helmets) and the petrol pump owners was a suo motu exercise of judicial power not available to the High Court under the Constitution. There was no such lis or dispute before the High Court. The grievance agitated before the High Court was regarding the signboards and advertisements put up by the traders on the Mall Road and this matter was not even remotely connected to the motorcyclists, helmets or the purchase of petrol by them.

The use of helmets was provided under section 89-A of the Provincial Motor Vehicle Ordinance, 1965 which provided that no person shall drive or ride the pillion seat of a two-wheeled motor vehicle without wearing a crash helmet. While the requirement of wearing helmets by the motorcycle riders and those on the pillion seat was provided under the law, there was no legal backing for the impugned direction issued by the High Court. There was no law or executive policy supporting such a ban on sale and purchase of petrol by the petrol pump owners to the motorcyclists not wearing helmets. The impugned direction was above the law and had no legal legitimacy or sanctity. Such exercise of judicial power by a judge passed

for judicial overreach i.e., exercise of judicial power without any backing of law and clearly interfering in and encroaching on the legislative and executive domain.

In the present case, the order passed by the single bench of the High Court had no law or executive policy behind it. It was a clear example of judicial legislation and thus judicial overreach. High Court was not vested with any such jurisdiction under the Constitution. Impugned direction by the High Court placing a ban on motorcyclists without a helmet to purchase petrol, lost sight of the fundamental rights guaranteed to the petrol pump owners and the motorcyclists under the Constitution. The impugned direction deprived the petrol pump owners of their business guaranteed under Article 18 of the Constitution and the motorcyclists of their right to mobility and right to livelihood guaranteed under Article 9 of the Constitution. The High Court, in its desire to make The Mall Road, an iconic thoroughfare, overstepped its jurisdiction, forgetting that a Judge was bound by the Constitution and the law.

Supreme Court set aside the impugned orders passed by the Single Bench as well as Division Bench of the High Court to the extent of the direction issued to the petrol pump owners of placing a ban on the sale of petrol to motorcyclists plying without a helmet, as the same were unconstitutional, illegal and without jurisdiction. Petition for leave to appeal was converted into appeal and allowed.

(c) Constitution of Pakistan---

---Arts. 184(3) & 199---'Judicial review', 'Judicial activism' and 'Judicial overreach'---Meaning and distinction.

Judicial review was the power of the courts to examine the actions of the legislative, executive, and administrative arms of the government and to determine whether such actions were consistent with the Constitution. Actions judged inconsistent were declared unconstitutional and, therefore, null and void. Judicial review was the genus and judicial activism or judicial restraint were its subspecies. While exercising judicial review, there came a point when the decision rested on judicial subjectivity; which was not the personal view of a judge but his judicial approach. One judge may accord greater significance to the need for change, while the other may accord greater significance to the need for certainty and status quo. Both types of judges acted within the zone of law; neither invalidated the decision of another branch of the Government unless it deviated from law and was unconstitutional.

Activist judges (or judicial activism) were less influenced by considerations of security, preserving the status quo, and the institutional constraints. On the other hand, self-restrained judges (or judicial restraint) gave significant weight to security, preserving the status quo and the institutional constraints. Both judicial activism and judicial self-restraint operated within the bounds of judicial legitimacy.

Aharon Barak, *The Judge in a Democracy*. Princeton. Chapter 15 ref.

It was one thing for a judge to progressively interpret the law because of human rights considerations about which he had substantial information. It was quite another to change or ignore the law for economic or social or political reasons based on polycentric considerations beyond the judge's expertise. Judicial power was never exercised for the purpose of giving effect to the will of the judge; but always for the purpose of giving effect to the will of the legislature; or in other words, to the will of the law. When courts exercised power outside the Constitution and the law and encroached upon the domain of the Legislature or the Executive, the courts committed judicial overreach.

Christopher Wolfe, 'The Rehnquist Court and "Conservative Judicial Activism"' in Christopher Wolfe (ed), *That Eminent Tribunal: judicial supremacy and the constitution* (Princeton 2004) ref.

Judicial overreach was when the judiciary started interfering with the proper functioning of the legislative or executive organs of the government. This was totally uncharacteristic of the role of the judiciary envisaged under the Constitution and was most undesirable in a constitutional democracy. Judicial overreach was transgressive as it transformed the judicial role of adjudication and interpretation of law into that of judicial legislation or judicial policy making, thus encroaching upon the other branches of the Government and disregarding the fine line of separation of powers, upon which was pillared the very construct of constitutional democracy. Such judicial leap in the dark was also known as "judicial adventurism" or "judicial imperialism." A judge was to remain within the confines of the dispute brought

before him and decide the matter by remaining within the confines of the law and the Constitution. The role of a constitutional judge was different from that of a King, who was free to exert power and pass orders of his choice over his subjects. Having taken an oath to preserve, protect and defend the Constitution, a constitutional judge could not be forgetful of the fact that he himself, was first and foremost subject to the Constitution and the law. When judges uncontrollably treaded the path of judicial overreach, they lowered the public image of the judiciary and weakened the public trust reposed in the judicial institution. In doing so they violated their oath and turned a blind eye to their constitutional role. Constitutional democracy leaned heavily on the rule of law, supremacy of the Constitution, independence of the judiciary and separation of powers. Judges by passing orders, which were not anchored in law and did not draw their legitimacy from the Constitution, unnerved the other branches of the Government and shook the very foundations of democracy.

Muqatadir Akhtar Shabbir, Advocate Supreme Court and Nasrullah Khan Babar, Advocate Supreme Court for Petitioner.

Ch. Zafar Hussain Ahmad, Addl. A.G. along with Mudassar Riaz Malik, D.C., Amir Shafiq, ADC (Headquarters), Hammad, CTO, Lahore and Sajid Sharif, Law Officer for Respondents.

Date of hearing: 27th January, 2021.

ORDER

SYED MANSOOR ALI SHAH, J.---As a matter of background, The Mall Road Traders Association, approached the constitutional jurisdiction of the High Court to challenge Notice dated 16.07.2018 issued by the Zonal Officer (Regulation) Metropolitan Corporation, Lahore for the removal of signboards and advertisements from their shops within 24 hours. Learned Single Bench of the High Court while dealing with this issue in Order dated 20.12.2018 thought it best to also discuss and pass directions on to a totally different issue, which was not even before the Court, regarding wearing of helmets by motorcyclists plying their bikes on the Mall Road. Without there being any dispute before it, the Court examined the compliance by the motorcyclists of wearing helmets when plying their bikes on the Mall Road. The Court was informed that 99% motorcyclists were now wearing helmets. As if this was not enough, the Court exercising suo motu powers, passed the following direction in paragraph 13 of order dated 20.12.2018:

"13. ... Today, it is also ordered, that the petrol pumps shall not fill in the petrol tanks of the motorcyclists who have not worn the helmets and in case any owner of the filling station is found to provide the petrol to those motorcyclist, the petrol pump will be sealed and heavy fine will be imposed. It has also been reported that some of the petrol pumps are providing helmets for few minutes i.e. during pouring the petrol, just to flout the order of this Court, therefore, in case if any owner of petrol pump is found doing this, he will be dealt with iron hands of law." (emphasis supplied)

The petitioners assailed this part of the Order in appeal (ICA) before the learned Division Bench of the High Court, who vide impugned order dated 24.01.2019 dismissed the appeal and upheld the Order of the learned Single Bench in the following manner:-

"3...It is not denied by the learned counsel that every person riding a motorbike is required by law to wear a helmet. If that is so, the direction given by learned Single Judge in Chambers is not unlawful rather it is in accordance with law. (emphasis supplied)

2. After hearing the learned counsel for the parties, we at the very outset wish to point out that there must exist a dispute before the High Court before it exercises judicial power. "On the application of an aggrieved party" is an essential pre-requisite to invoke the constitutional jurisdiction of the High Court under Article 199 of the Constitution. There must be an application and an applicant to invoke the jurisdiction of judicial review as the High Court does not enjoy suo motu jurisdiction under Article 199.¹

3. In the instant case, the direction against the motorcyclists (who do not wear helmets) and the petrol pump owners is a suo motu exercise of judicial power not available to the High Court under the Constitution. There was no such lis or dispute before the High Court. The grievance agitated before the High Court was regarding the signboards and advertisements put up by the traders on the Mall Road and

this matter was not even remotely connected to the motorcyclists, helmets or the purchase of petrol by them.

4. The use of helmets is provided under section 89-A of the Provincial Motor Vehicle Ordinance, 1965 which provides that no person shall drive or ride the pillion seat of a two-wheeled motor vehicle without wearing a crash helmet. While the requirement of wearing helmets by the motorcycle riders and those on the pillion seat is provided under the law, there is no legal backing for the impugned direction issued by the High Court. There is no law or executive policy supporting such a ban on sale and purchase of petrol by the petrol pump owners to the motorcyclists not wearing helmets. The impugned direction is above the law and has no legal legitimacy or sanctity. Such exercise of judicial power by a judge passes for judicial overreach i.e., exercise of judicial power without any backing of law and clearly interfering in and encroaching on the legislative and executive domain. At this junction it might be opportune to shed some light on the distinction between judicial review, judicial activism and judicial overreach. Judicial review is the power of the courts to examine the actions of the legislative, executive, and administrative arms of the government and to determine whether such actions are consistent with the Constitution. Actions judged inconsistent are declared unconstitutional and, therefore, null and void.² Judicial review is the genus and judicial activism or judicial restraint are its subspecies. While exercising judicial review, there comes a point when the decision rests on judicial subjectivity; which is not the personal view of a judge but his judicial approach. One judge may accord greater significance to the need for change, while the other may accord greater significance to the need for certainty and status quo. Both types of judges act within the zone of law; neither invalidates the decision of another branch of the Government unless it deviates from law and is unconstitutional. Activist judges (or judicial activism) are less influenced by considerations of security, preserving the status quo, and the institutional constraints. On the other hand, self-restrained judges (or judicial restraint) give significant weight to security, preserving the status quo and the institutional constraints. Both judicial activism and judicial self-restraint operate within the bounds of judicial legitimacy.³

5. It is one thing for a judge to progressively interpret the law because of human rights considerations about which he has substantial information. It is quite another to change or ignore the law for economic or social or political reasons based on polycentric considerations beyond the judge's expertise. According to Chief Justice John Marshall, judicial power is never exercised for the purpose of giving effect to the will of the judge; but always for the purpose of giving effect to the will of the legislature; or in other words, to the will of the law.⁴ When courts exercise power outside the Constitution and the law and encroach upon the domain of the Legislature or the Executive, the courts commit judicial overreach.

6. Judicial overreach is when the judiciary starts interfering with the proper functioning of the legislative or executive organs of the government. This is totally uncharacteristic of the role of the judiciary envisaged under the Constitution and is most undesirable in a constitutional democracy. Judicial overreach is transgressive as it transforms the judicial role of adjudication and interpretation of law into that of judicial legislation or judicial policy making, thus encroaching upon the other branches of the Government and disregarding the fine line of separation of powers, upon which is pillared the very construct of constitutional democracy. Such judicial leap in the dark is also known as "judicial adventurism" or "judicial imperialism." A judge is to remain within the confines of the dispute brought before him and decide the matter by remaining within the confines of the law and the Constitution. The role of a constitutional judge is different from that of a King, who is free to exert power and pass orders of his choice over his subjects. Having taken an oath to preserve, protect and defend the Constitution, a constitutional judge cannot be forgetful of the fact that he himself, is first and foremost subject to the Constitution and the law. When judges uncontrollably tread the path of judicial overreach, they lower the public image of the judiciary and weaken the public trust reposed in the judicial institution. In doing so they violate their oath and turn a blind eye to their constitutional role. Constitutional democracy leans heavily on the rule of law, supremacy of the Constitution, independence of the judiciary and separation of powers. Judges by passing orders,

which are not anchored in law and do not draw their legitimacy from the Constitution, unnerve the other branches of the Government and shake the very foundations of our democracy.

7. In the present case, the order passed by the single bench of the Lahore High Court has no law or executive policy behind it. It is a clear example of judicial legislation and thus judicial overreach. High Court is not vested with any such jurisdiction under the Constitution. Needless to mention, that the impugned direction by the High Court placing a ban on motorcyclists without a helmet to purchase petrol, loses sight of the fundamental rights guaranteed to the petrol pump owners and the motorcyclists under the Constitution. The impugned direction deprives the petrol pump owners of their business guaranteed under Article 18 of the Constitution and the motorcyclists of their right to mobility and right to livelihood guaranteed under Article 9 of the Constitution. The High Court, in its desire to make The Mall Road, an iconic thoroughfare, overstepped its jurisdiction, forgetting that a Judge is bound by the Constitution and the law.

8. We, therefore, for the above reasons, set aside the impugned orders passed by the learned Single Bench dated 20.12.2018, as well as, learned Division Bench of the High Court dated 24.01.2019 to the extent of the direction issued to the petrol pump owners of placing a ban on the sale of petrol to motorcyclists plying without a helmet. The impugned direction is declared to be unconstitutional, illegal and without jurisdiction. Resultantly, this petition is converted into appeal and allowed.

MWA/I-2/SC Petition allowed.