

IN THE SUPREME COURT OF PAKISTAN
(Original Jurisdiction)

PRESENT: Mr. Justice Amir Hani Muslim
Mr. Justice Qazi Faez Isa
Mr. Justice Mazhar Alam Khan Miankhel

**Suo Moto Case No.18 of 2016 and C.M.As.No.7067,
7587, 8198 & 8495 to 8498 of 2016, C.M.As.No. 85, 142,
363, 422, 423,424, 551, 773,945, 946 and 967 of 2017**

(Suo Moto Action Regarding Eligibility of Chairman
and Members of Sindh Public Service Commission etc.)

In Attendance:

For Govt. of Sindh: Mr. Zameer Hussain Ghumro, A.G.
Mr. Sohail Ahmed Qureshi,
Additional Secretary, S & GAD,
Government of Sindh

For Sindh Public Service
Commission Mr. Shafi Muhammad Shah,
Secretary, Sindh Public Service
Commission.

For Applicants:

(in CMA 142/17): Ms. Asma Jahangir, Sr. ASC
Ch. Akhtar Ali, AOR

(in CMA 363/17): Raja M. Ibrahim Satti, Sr. ASC
Syed Rifaqat Hussain Shah, AOR

(in CMA 7587/16): Mr. Zulfiqar Khalid Maluka, ASC
Mr. Ahmad Nawaz Chaudhry, AOR

(in CMA 967/17): Mr. Shah Khawar, ASC
Mr. Mehmood A. Sheikh, AOR

(in CMA 8498/16): Muhammad Zulqurnain, In person
(in CMA 424/17): Dr. Shah Nawaz Mirani, In person
(in CMA 945/17): Asif Ali, In person
(in CMA 946/17): Masroor Ahmed, In person

For NAB: Mr. Nasir Mehmood Mughal,
Special Prosecutor, NAB

Date of Hearing: February 22, 2017

JUDGMENT

Qazi Faez Isa, J: A written application was received from Mr. Muhammad Junaid Farooqui, a practicing Advocate of the High Court of Sindh, alleging that large scale illegalities were committed

by the Chairman, Members and officers of the Sindh Public Service Commission ("**the Commission**"), constituted under the Sindh Public Service Commission Act, 1989 ("**the Act**"). Mr. Farooqui alleged that the Chairman and Members did not have the requisite qualifications as mandated by the Act and that the Chairman, Members and officers of the Commission had misused their official positions by indulging in nepotism and corruption and not selecting persons on the basis of merit. The Commission selects candidates and recommends them for appointment in the service of the Government of Sindh ("**the Government**"). It was further alleged that the best qualified persons were deprived and denied their due which also adversely affected the interest of the Province of Sindh ("**the Province**") and its people. Mr. Farooqui stated that he had no personal interest in the matter and none of the applicants were related to him and his only motivation was to serve the province and to bring forth the illegalities in the Commission's workings.

2. On September 16, 2016 the Chief Justice of Pakistan noted on Mr. Farooqui's application that, "It may be treated as suo moto case and fixed at Islamabad on 28.9.2016 with notice to A.G. Sindh and the persons named at the bottom of this application", who were the Chairman, eight Members, one Director and one Deputy Controller of the Commission (hereinafter collectively referred to as "**the respondents**"). On September 28, 2016 the respondents entered an appearance and sought time to, "submit a reply / concise statement". Time was granted and it was directed

that, the service profiles of the Chairman, Mr. Muhammad Saleem Bhnour, and of the Members of the Commission, indicating their length of service in each pay scale, including their length of service in basic pay scale 20, be produced to ascertain whether they had the requisite qualifications / experience as stipulated in the Act. On November 3, 2016 the Advocate General Sindh ("**AG**") submitted a written statement informing that the Chairman and five Members of the Commission had, "tendered their resignation to the Government of Sindh and as such Sindh Public Service Commission shall be reconstituted in accordance with the law".

3. When the case came up on January 3, 2017 this Court observed that since the Commission was created under Article 242 of the Constitution it was a constitutional body which was responsible for recruiting personnel in the public sector, therefore, every effort should be made to ensure that the Chairman and Members of the Commission are persons of integrity and competence:

"The Chairman/Members of this constitutional body, who enjoy the constitutional protection, need to be selected from amongst noble individuals possessing incomparable competence, exalted caliber, unblemished track record, impeccable integrity and unquestionable impartiality. They should be the persons who can be entrusted with the responsibility of selecting the most deserving candidates who will be holding key positions in the public sector a decade down the path.

13. The application of ultimate wisdom in selection of the Chairman and Members of the Commission is extremely important, as it should have been a symbol of excellence, which is at the brink of losing its traditional grace. We have also noticed the controversy recently generated by the examinations/interviews and recommendations undertaken by the Commission headed by the

Chairman namely Muhammad Saleem Bhanour, which was talk of the town.

14. The appointment of the Chairman and Members of the Commission has far reaching effects as observed by us hereinabove and the inherent disqualification that we have noticed in their appointments was willfully overlooked by the relevant forum, as there is no yardstick provided for scrutinizing the caliber of the persons before their appointment. The discretion of the competent authority in making the appointments of the Commission needs to be structured through the rules, which need to be framed by the Government in terms of Section 10, suggesting a high-powered permanent committee to examine the service profiles of the Chairman and Members to be selected under Section 3(3) and the qualifying standards provided therein. Likewise, the high-powered committee needs to scrutinize the eminence of the persons in the private sector before the selection as Member in consonance with the terms used in Section 3(4) of the Act."

Reference was also made to the cases of Muhammad Yasin v Federation of Pakistan (PLD 2012 Supreme Court 132) and Muhammad Ashraf Tiwana v Pakistan (2013 SCMR 1159) and the guidelines provided therein regarding the manner in which appointments to public office should be made:

"These guidelines should be made basic criteria to the office of Chairman and Members of the commission. The proposed rules need to be framed in a manner where the selection to the posts of Chairman and Members should be transparent and confined to the persons who enjoy high standards of integrity and honesty. The rules should further provide that the proposed appointee has a clean service record without any adverse entry in his P.E.Rs throughout his career.

17. We, for the aforesaid reasons, direct the Government to immediately take steps to frame rules and thereafter appoint the Chairman and Members of the Commission against vacancies created by resignations of the Chairman/Members and by the order of this Court passed today."

4. With regard to the examinations and interviews conducted by the Commission, on the basis of which recommendations for appointment in civil service were made, it was observed:

"The next issued raised in these proceedings relates to the examinations / interviews and recommendations made by the Commission for appointments of the candidates to different departments in the intervening period. The Advocate General Sindh and the learned Counsel representing some of the recommendees shall make their submissions on the next date and appropriate orders shall be passed after hearing them."

The persons in control of the affairs of the Commission however prevaricated and did not make complete disclosure of the facts, as noted on January 24, 2017:

"On the last date of hearing i.e. 18.01.2017, we directed the Advocate General, Sindh to place before us the original result sheet of the candidates who passed the written examination as well as the final result sheet inclusive of the marks assigned by the Commission to the candidates in *viva-voce*. This direction has not been complied with and instead a combined result has been placed before us signed by the then Chairman and two Members, which does not mention the date against their signatures on any of its pages. We are informed by the Addl. Secretary, Sindh Public Service Commission (SPSC) that he had informed the Secretary, SPSC, to appear, in person, who refused on the ground that no notice has been issued to the Commission. We direct the Secretary of the Commission to be in attendance on the next date with explanation as to how can he refuse to appear in Court once the notice has been issued.

3. The Secretary, SPSC, shall immediately transmit the entire original examination papers/record of the candidates who were declared successful in the written examination, the minutes of meetings held at times from the date of written examination till the finalization of the results and the original sheets of interviews giving marks to the different candidates in *viva-voce* (interviews) reflecting marks assigned to each candidate. The original record shall contain the names with the Roll Numbers allotted to the candidates."

5. It would be appropriate to set out some of the material facts. The Commission published an advertisement inviting applications for 182 posts in basic pay scale (BPS) 17 and 16; in BPS-17: 45 of Assistant Commissioners, 76 of Section Officers, 12 of Excise & Taxation Officers, 3 of Assistant Directors Labour and in BPS-16: 24 posts of Mukhtiarkar, 18 posts of Labour Officers and 4 posts of District Food Controller/Storage & Enforcement Officers. The advertised posts were to be filled-in on the basis of written tests and interview results, designated as the Combined Competitive Examination (CCE)-2013 (hereinafter referred to as "**CCE-2013**"). The stipulated "closing date" for receiving applications was August 16, 2013. 28,000 persons applied. A "screening test" comprising of multiple choice questions (or MCQs) was conducted on December 28, 2014 and 3,375 applicants passed this test. It was alleged that large scale illegalities commenced after Justice Agha Rafique Ahmed Khan, the former Chief Justice of the Federal Shariat Court, resigned as its Chairman and when Mr. Saleem Mohammad Bhnour was appointed by the Government as Chairman. Though the reason for the resignation was not disclosed it is alleged that Justice Agha Rafique Ahmed Khan was not satisfied with the working of the Commission and the interference in its working from the outside. However, when the screening test was conducted and its results announced on January 8, 2015 Justice Agha Rafique Ahmed Khan held the position of the Commission's Chairman. On January 15, 2015 Justice Agha Rafique Ahmed Khan tendered his resignation which was accepted by

the Chief Minister, Sindh and in this regard the Government of Sindh issued notification dated January 20, 2015.

6. After issuance of notices by this Court a number of applications were filed by those who had failed the written tests or the interviews alleging serious illegalities. Many alleged that the sanctity of the examination centre was violated by permitting candidates to use mobile phones to get answers to questions. It was also alleged that curiously those who performed remarkably well in the written tests did poorly in the interview and not through a lack of ability, but because the examiners had intentionally given them a low score. It was likewise alleged that those who had barely passed the written tests did surprisingly well in the interview, receiving a disproportionately high score which raised their cumulative marks. In this regard specific instances were cited. Another discrepancy pointed out was in the 'Sindhi Essay Writing' paper where the marks awarded weren't in keeping with the marks the same candidate received in the 'Sindhi Literature' and 'Sindhi General' papers. One candidate stated that he received a gold medal from the Board of Intermediate and Secondary Education, Hyderabad in 2001 for Sindhi Essay Writing, but in the Sindhi Essay Writing test of the Commission he failed, getting only 16 marks. This inconsistency becomes all the more incredible when the same candidate, in the Sindhi Literature test of the Commission, was awarded 88% marks and in the Sindhi General paper 80% marks. 2,813 candidates participated in the written tests which were conducted in April, 2015, out of which 664 were

declared successful on March 16, 2016, after approximately a year. When the written tests were conducted and their results declared Mr. Muhammad Saleem Bhnour was the Chairman of the Commission.

7. In the written comments filed by the Secretary of the Commission it is disclosed that the Commission "received about 250 applications / Complaints in connection with Recounting and Retotalling of marks in different subject papers" and by attending to the complaints the viva voce / interview was thereby delayed and so was eventually held from April 25, 2016 to August 11, 2016. The interview results were announced on August 19, 2016. 227 persons were declared successful. On August 31, 2016 the Commission sent its recommendations to the Government recommending the appointment of successful candidates to some of the advertised posts (hereinafter the "**successful candidates**"), but "as no suitable candidates were found, 25 posts pertaining to urban area were left vacant which will be re-advertised in due course of time". The Commission gave no reason why in respect of urban areas "suitable candidates" could not be found even after a protracted selection process.

8. After receipt of the Commission's recommendations the Government of Sindh issued offer letters to the successful candidates, a specimen of one such letter dated October 19, 2016 is reproduced hereunder:

"Subject:- **OFFER OF APPOINTMENT AS ASSISTANT COMMISSIONER (BS-17) IN Ex-PCS CADRE**

On your selection by Sindh Public Service Commission, you are hereby offered a post of Assistant Commissioner (BS-17) in Ex-PCS Cadre, on following terms and conditions:-

- i. Your appointment will be subject to certificate of physical fitness by the Medical Board and verification of your character and antecedents.
- ii. You will undergo training at the Service Academy or any other institution and will pass the Assistant Collector's Departmental Examination (Part-I & II) within fifteen months of the date of your appointment.
- iii. You will be on probation for a period of 02 years with effect from the date of joining extendable by order either before or after its termination by a further period not exceeding two years provided that if no order has been made by the day following the termination of either of the aforementioned probationary periods, the appointment shall be deemed to be held until further order.
- iv. You will be governed by West Pakistan Civil Service (now Sindh) (Executive Branch) Rules 1964 as amended from time to time, the instructions in force relating to the service and the Sindh Civil Services Act, 1973 and the rules made there under.
- v. Your seniority will be counted in the cadre of PSS from the date of your regular appointment.

2. If you accept the offer on the above terms and conditions, please communicate your acceptance to the undersigned within 14 days of receipt of this letter, failing which this offer shall stand cancelled."

However, none of the successful candidates undertook the prescribed training as restraining orders were passed by this Court on October 17, 2016, consequently, those who were offered employment could not be inducted into service.

9. Ms. Asma Jehangir, learned Senior Advocate Supreme Court ("**ASC**"), filed CMA No. 142/2017 and represents one hundred and seventy-seven successful candidates, Mr. Zulfiqar Khalid Maluka, learned ASC, filed CMA No. 7587/2016 and represents thirty-three successful candidates, Raja Muhammad Ibrahim Satti, learned Senior ASC, filed CMA No.363/2017 and represents three successful candidates, Mr. Shah Khawar, learned ASC, filed CMA No. 967/2017 and represents one successful candidate and two, namely Asif Ali filed CMA No. 945/2017 and Masroor Ahmed filed CMA No. 946/2017, elected to plead their own cases. Through the referred to applications the successful candidates wanted to be impleaded as parties and heard. All sides agreed that the case should be urgently decided, consequently, we didn't want to delay the matter by first allowing the applications and then hearing the affected parties, but instead permitted everyone to make their submissions. Accordingly, the learned counsel representing the successful candidates, successful candidates themselves, and the applicants who had failed were heard.

10. The primary contention of the learned counsel representing the successful candidates is that, Article 184(3) of the Constitution is not attracted as in this case there is no question of public importance with reference to the enforcement of any Fundamental Rights mentioned in the Constitution, therefore, the application of Mr. Farooqui should not have been entertained nor proceeded with as a *suo moto* case under Article 184(3). It was further contended that, admittedly, Mr. Farooqui was neither an *aggrieved person* nor

could be considered to be so even if the definition of an *aggrieved person* is extended to cover one whose relative may have had a grievance with regard to the tests and selection process. As regards the purported disqualification of the Chairman and Members of the Commission, the learned counsel submitted, that no one had questioned the credentials or qualifications of the Chairman and Members and the successful candidates should not be penalized even if the Chairman and Members were not qualified to be appointed. It was urged that the process started in August 2013 and that the successful candidates had cleared the screening tests, the written tests and finally the interviews, and were found to be medically fit, but this smooth process was thwarted by the restraining orders of this Court, which should be vacated. The successful candidates had acquired a vested right or a legitimate expectancy to be appointed, which had crystallized when the offer letters were issued to them by the Government, the learned counsel added. They also referred to the cases of Farzand Ali v Province of West Pakistan (PLD 1970 Supreme Court 98), Mehram Ali v Federation of Pakistan (PLD 1998 Supreme Court 1445), Asad Ali v Federation of Pakistan (PLD 1998 Supreme Court 161), Mahmood Khan Achakzai v Federation of Pakistan (PLD 1997 Supreme Court 426), Muhammad Rafi v Federation of Pakistan (2016 SCMR 2146), Government of the Punjab v Aamir Junaid (2015 SCMR 74), Sindh High Court Bar Association v Federation of Pakistan (PLD 2009 Supreme Court 879), Province of Punjab v Zulfiqar Ali (2006 SCMR 678) and Secretary to Govt. of N.W.F.P. v Sadullah Khan (1996 SCMR 413).

11. Those supporting Mr. Farooqui's application contended that the constitution of the Commission was not in accordance with the Act as its Chairman and Members were not qualified, which fact was conceded by the Chairman and five Members when they resigned upon receipt of notices, and that the learned AG on behalf of the Government had not disputed this fact. It was next contended that the previous Chairman of the Commission, Justice Agha Rafique Ahmed Khan, had resigned as he was not prepared to be part of an unfair selection process. No questions were raised when under his Chairmanship screening tests were conducted. When Mr. Mohammad Saleem Bhnour took over as Chairman the written tests and interviews were conducted and it is with regard to these that there were misgivings. The 664 candidates who passed the written tests were interviewed by those who admittedly were not qualified. The details of the interview was also not disclosed, including, how the 250 marks allocated for the interview were apportioned amongst the three interviewers, the marks awarded by each interviewer and the dates on which interview results were compiled. Reference was also made to the discrepancies between the marks obtained in written tests and in interviews (as noted above) for which no explanation was offered. The fact that 25 posts pertaining to urban areas were left vacant was yet another illegality and one indicative of bias and prejudice when no reason is given why 25 posts all of urban areas were left vacant.

12. Mr. Zameer Hussain Ghumro, the learned AG, did not controvert the fact that those who had resigned from their positions of Chairman and Members of the Commission were not qualified to be appointed, but instead stated that, merely because they were not qualified would not undermine the integrity of the selection process which was otherwise transparent. He also stated that the present case did not come within the domain of cases wherein this Court could invoke Article 184(3) of the Constitution and with regard to this and other matters adopted the arguments of the learned counsel for the successful candidates.

13. The first question to be determined is whether this Court could entertain Mr. Farooqui's application under Article 184(3) of the Constitution and particularly whether the matter is one of public *importance* involving the enforcement of Fundamental Rights conferred by Chapter 1 of Part II of the Constitution. But before attending to this issue the laws governing the Commission, selection of candidates by it and their appointments by the Government need to be mentioned. Article 242 of the Constitution of the Islamic Republic of Pakistan, 1973 ("**the Constitution**") mandates the establishment and constitution of public service commissions for the Federation and the provinces:

"**242.** (1) Majlis-e-Shoora (Parliament) in relation to the affairs of the Federation, and the Provincial Assembly of a Province in relation to affairs of a Province, may, by law, provide for the establishment and constitution of a Public Service Commission.

(1A) The Chairman of the Public Service Commission constituted in relation to the affairs of the Federation shall be appointed by the President on the advice of the Prime Minister.

(1B) The Chairman of the Public Service Commission constituted in relation to affairs of a Province shall be appointed by the Governor on advice of the Chief Minister.

(2) A Public Service Commission shall perform such functions as may be prescribed by law."

The Sindh Public Service Commission Act, 1989 establishes the Commission, prescribes its composition and qualification of its Chairman and Members, their terms and conditions of service, the manner in which they may be removed and the functions that the Commission performs. The Government has been empowered under section 10 of the Act to, "make rules for carrying out the purposes of this Act" and in exercise of powers under section 11 the Commission, "may frame regulations for performance of functions and transacting business assigned to it by or under this Act". The functions of the Commission include, conducting "tests and examinations for recruitment for initial appointment" (clause (i) of section 7 of the Act).

The law regulating appointment of persons in the Province of Sindh is the Sindh Civil Servants Act, 1973 and those appointed are "civil servants" employed in the "civil service of the Province". The Sindh Civil Servants Act prescribes how *initial appointments* (that is not by promotion or transfer) are to be made and stipulates that such appointments are to be made in the prescribed manner (section 5) and the Commission is designated as "selection authority" (clause (i) of section 2). The appointments made under the Civil Servants Act also designated as "service of Pakistan". Article 260 of the Constitution defines "service of Pakistan" as "any

service, post or office in connection with the affairs of the Federation or of a Province". The civil service, whether of a province or the Federation, provides the foundation on which good governance is built. The Civil Service enables government in its most essential way. A robust and efficient system, allows for smooth governance. A weak and corrupt system disables government. Without a properly functioning Civil Service, even the most basic functions and workings of the government become an enormous task.

14. It was correctly pointed out by the learned counsel that this Court's jurisdiction under Article 184(3) of the Constitution can only be invoked in respect of a matter of *public importance* "with reference to the enforcement of Fundamental Rights". It would therefore be appropriate to consider some of the precedents wherein this Court dilated on the term *public importance* and Fundamental Rights with reference to Article 184(3) and whether an individual could invoke this jurisdiction if he/she was not personally affected, that is, was not an *aggrieved party* or *aggrieved person*.

In the case of Benazir Bhutto v Federation of Pakistan (PLD 1988 Supreme Court 416) the Co-Chairperson of a political party had challenged certain amendments made to the Political Parties Act, 1962, by filing a petition under Article 184(3) directly before this Court. During the dictatorship of General Zia-ul-Haq, the law was amended which the petitioner alleged infringed on the Fundamental Right to the "Freedom of Association" guaranteed by

Article 17 of the Constitution. The Attorney General for Pakistan opposed the petition on a number of grounds, including that there was “no actual proof of discriminatory treatment”, however, this contention was repelled by an eleven member Bench of this Court which held, that the, “provisions were ex facie discriminatory” (per Muhammad Haleem, CJ, page 485E). The Attorney General’s objection that the petitioner could not invoke the jurisdiction of this Court under Article 184(3) because she was not an “aggrieved party” was also rejected; “The plain language of Article 184(3) shows that it is open ended” and that “I would not read such constraint in it” (per Muhammad Haleem, CJ, pages 488 and 491). With regard to the matter of *public importance* it was held that, “it will be for the Supreme Court to consider in each case whether the element of ‘public importance’ is involved” (per Muhammad Haleem, CJ, page 492L) and that “this provision is open-ended, the proceedings could either be maintained by an individual whose fundamental rights are infringed or by a person bona fide alleging infraction of the fundamental rights of a class or a group of persons...” (per Muhammad Haleem, CJ, page 493M). The objection of the Attorney General that, since the power of the Supreme Court “under Article 184(3) being discretionary and co-terminus with that of Article 199 of the Constitution should not be exercised by the Supreme Court when similar matters on facts and law are pending adjudication before the High Courts, inter alia, for the reason that the appeals lie from the decisions of the High Court in those petitions to the Supreme Court” (third paragraph, page 493), was discarded, as “there was a denial of justice as a result of

the proceedings [in the High Courts] being dilatory" (per Muhammad Haleem, CJ, page 496P).

In the case of Al-Jehad Trust v Federation of Pakistan (PLD 1996 Supreme Court 324) this Court assumed jurisdiction under Article 184(3) with regard to the mode and manner of the appointment of the Chief Justice of Pakistan and judges of the superior judiciary, even though this was not a specific Fundamental Right, because all Fundamental Rights would "become meaningless if there is no independent Judiciary available in the country" (per Ajmal Mian, J, page 419VV). The petition was filed by an advocate who was not personally *aggrieved*, but this was not an impediment to invoke Article 184(3); "even a member of the public is entitled to see that the three limbs of State, namely, the Legislature, the Executive and the Judiciary act not in violation of any provision of the Constitution" (per Ajmal Mian J, page 419UU). The "question of locus standi" is not relevant "in the Supreme Court when jurisdiction is invoked under Article 184(3) of the Constitution" (per Sajjad Ali Shah, CJ, page 372T).

The view taken in the Al-Jehad Trust case, regarding maintainability of a petition under Article 184(3), was followed in the case of Asad Ali v. Federation of Pakistan (PLD 1998 Supreme Court 161), which was a unanimous judgment of ten judges of this Court. It was held that if the Chief Justice of Pakistan was not appointed in accordance with the Constitution than it, "would give rise to infringement of the right of a citizen to have free, fair and equal access to an independent and impartial Court/Tribunal,

thus violating the rights guaranteed under Articles 9 and 25 of the Constitution" (per Saiduzzaman Siddiqui, J, page 189A).

The powers of this Court under Article 184(3) were again elaborated upon in the case of the Sindh High Court Bar Association v Federation of Pakistan (PLD 2009 Supreme Court 879), and, after considering the precedents of this Court (paragraph 170, pages 1185 to 1198), it was enunciated, "that it is a fundamental principle of our jurisprudence that Courts must always endeavour to exercise their jurisdiction so that the rights of the people are guarded against arbitrary violations by the executive" (in paragraph 171 at page 1198). This case was one where *suo motu* notice was taken by this Court of General Pervez Musharraf's November 3, 2007 actions, whereby, he attempted to subjugate the superior judiciary of Pakistan to his personal whims. The exercise of *suo motu* powers stopped another military dictator from causing havoc and inflicting permanent harm on the State and its people by attempting to dismember the judicial arm of the State and replacing it with a compliant prosthetic one.

Muhammad Tahir-ul-Qadri v Federation of Pakistan (PLD 2013 Supreme Court 413) was a petition filed by the petitioner under Article 184(3) seeking directions to ensure free and fair elections. This Court held that the petitioner's holding of a Canadian nationality did not prevent him from filing such a petition under Article 184(3), but as the petitioner lacked *bona fides* and none of the Fundamental Rights were shown to have been infringed the petition was dismissed. In dismissing his petition it was observed that entertaining a petition under Article

184(3) is, "subject to discretion of the Court as the words '*if it considers*' have been prefaced" with *public importance* and *enforcement of Fundamental Rights* [in Article 184(3) of the Constitution] (per Iftikhar Muhammad Chaudhry, CJ, page 424D). The judgment also mentioned the cases where Article 184(3) had been invoked.

In Baz Muhammad Kakar v Federation of Pakistan (PLD 2012 Supreme Court 923) the vires of the Contempt of Court Act, 2012 was challenged on the ground that it violated Fundamental Rights. The Attorney General objected that, none of the petitioners were personally aggrieved nor were their Fundamental Rights infringed. He further objected that the matter should be first attended to by the High Courts. The objections of the Attorney General were overruled by a five member Bench of this Court and it was held that, Article 184(3) does not only prescribe that a person who is personally aggrieved can have recourse thereto; it "is open ended and nowhere mandates that resort to Article 199 in the first instance is a pre-requisite". As regards whether this Court should itself entertain when the matter could also be attended to by the High Courts it was held that, a petition "is to be decided by the [Supreme] Court considering the peculiar facts and circumstances of a particular case" (per Iftikhar Muhammad Chaudhry, CJ, page 1022). With regard to the matter of *public importance*, after referring to the Benazir Bhutto (above) and other cases, it was held, that, "The Courts are obliged to exercise their powers and jurisdiction to secure the rights of the citizens against arbitrary violations. While protecting and enforcing the

Fundamental Rights of the people, the courts may also determine the legality of a executive action or a legislative act" (per Iftikhar Muhammad Chaudhry, CJ, paragraph 107, page 1022).

15. The importance of the *civil service* can be gauged from the fact that the Constitution itself mandates (Article 242) that induction into the *civil service* be undertaken by an independent commission and provides for Federal and provincial public service commissions. Appointments in the civil service must be made in accordance with the Constitution. A serious challenge to the selection and appointment process is clearly, therefore, a matter of *public importance*. To be appointed as a *civil servant* is a matter of great prestige and positions in the *civil service* are coveted. The present case itself demonstrates this, for 182 advertised posts 28,000 applications were received in effect 154 applicants per post. We now need to consider whether this matter pertains to the enforcement of any of the Fundamental Rights.

16. If through a discriminatory selection process civil servants are selected and appointed it would infringe Article 27 of the Constitution which states that, "No citizen otherwise qualified for appointment in the service of Pakistan shall be discriminated against." Article 25, prescribing the *equality of citizens*, is another Fundamental Right which is attracted if all those who are tested and interviewed are not treated equally. The present matter also involves the contravention of the Fundamental Right in Article 18

which mandates, that, "every citizen shall have the right to enter upon any lawful profession or occupation".

17. The Constitution makers specifically incorporated Article 184(3) which confers jurisdiction upon the Supreme Court. Jurisdiction under Article 184(3) is not exercised by this Court arbitrarily or because it yearns to, but because this power to ensure the enforcement of Fundamental Rights has been conferred upon it by the Constitution. In this case, serious allegations have been leveled about the manner in which tests and interviews were conducted, that those under whose aegis the whole process was conducted were themselves not qualified and there is sufficient material to support such allegations. The two preconditions stipulated in Article 184(3), of *public importance* and of the *enforcement of Fundamental Rights*, are met. Therefore, Mr. Farooqui's application was rightly entertained as a petition under Article 184(3) of the Constitution.

18. After the issuance of notices by this Court a number of illegalities in the affairs of the Commission have already been redressed. Chairman of the Commission, Mr. Muhammad Saleem Bhnour, and five Members of the Commission resigned as they could not justify that they met the stipulated statutory conditions for appointment to the said positions. On January 3, 2017 it was noted that certain individuals may be working illegally in the Commission. This Court in another case set out the principles governing the place where a civil servant may work, and if a civil

servant was found to be working at another place, in contravention of the applicable law, he was to be repatriated to the concerned or his/her parent department. One such person was Mr. Juma Khan Chandio, who was found working as the Deputy Controller of Examinations in the Commission despite being an employee of the Education Department. The learned AG informed us (on February 22, 2017) that notification for his repatriation to the Education Department will be issued in three days.

19. An important aspect, with regard to the appointment of the Chairman of the Commission, has escaped the attention of all concerned. The Chairman has to be appointed "by the Governor on advice of the Chief Minister" (Clause 1(B) of Article 242 of the Constitution), but they are being appointed by the Government. In this regard the Constitution and the Act have been amended, therefore, the history of the applicable Constitutional provisions and those in the Act need mentioning. Article 242 of the Constitution as it was originally enacted (PLD 1973 Central Statutes 313) is reproduced:

"242. (1) Parliament in relation to the affairs of the Federation, and the Provincial Assembly of a Province in relation to the affairs of the Province, may, by law, provide for the establishment and constitution of a Public Service Commission.

(2) A Public Service Commission shall perform such functions as may be prescribed by law."

Through the "Revival of the Constitution of 1973 Order, 1985" (PLD 1985 Central Statutes 457) after clause (1) of Article 242 a new clause (1A) was inserted, which is reproduced:

“(1A) The Chairman of the Public Service Commission constituted in relation to the affairs of the Federation shall be appointed by the President in his discretion.”

Article 242 underwent another change when another clause (1B) was inserted vide Constitution (Eighteenth Amendment) Act, 2010 (PLD 2010 Federal Statutes 1), which is reproduced:

“(1B) The Chairman of the Public Service Commission constituted in relation to affairs of a Province shall be appointed by the Governor on advice of the Chief Minister.”

20. The Act provides that, “The Chairman and Members shall be appointed by the Government” (sub-section (1) of section 4), however, even before Article 242 of the Constitution was amended (as mentioned in the foregoing paragraph), the Act had been changed, *vide* Sindh Public Service Commission (Second Amendment) Ordinance, 1998 (Sindh Ordinance No.XII of 1998), by substituting the word “Government” with the word “Governor” in sub-section (1) of section 4. The Second Amendment Ordinance, 1998 and the amendments made by it lapsed/stood repealed (Article 128 of the Constitution), therefore, the Sindh Public Service Commission (Amendment) Ordinance, 1999 (Sindh Ordinance No. VI of 1999) was promulgated on March 27, 1999 and once again the Governor was given the power to appoint the Chairman. The Governor’s power in this regard was maintained by the Sindh Public Service Commission (Amendment) Ordinance, 2001 (Sindh Ordinance No. XXXIX of 2001), which was promulgated on December 8, 2001.

21. Article 270AA of the Constitution states that all ordinances enacted between October 14, 1999 and December 31, 2003, subject to the provisions of the Constitution (Eighteenth Amendment) Act, 2010, shall be saved and not lapse or stand repealed. The Eighteenth Amendment Act inserted clause (1B) in Article 242 of the Constitution, and the Governor was given the power to appoint the Chairman of the Commission, but on the advice of the Chief Minister. However, the Sindh Public Service Commission (Amendment) Act, 2008 (Act I of 2008) (PLD Unreported Statutes, Federal and Provincial Statutes 2004-2009, Part-III, Sindh Statutes 612) purported to substitute the word "Governor" with the word "Government" throughout the Act (section 3). This amendment to the extent that it states that the Chairman shall be appointed by the Government contravenes clause (1B) of Article 242, which mandates that the Chairman of the Commission "shall be appointed by the Governor on advice of the Chief Minister". We may add that this point was not raised before us by any counsel or party even though in this case the question of the Chairman's appointment has been raised. Since the language of the said Constitutional provision is clear, it does not give rise to a possible alternative interpretation and as this matter does not require any detailed examination issuance of a specific notice to the AG Sindh, who is already on notice, is required nor for that matter to the Attorney General. Moreover, this point was observed when judgment in this case was being written and all parties would be prejudiced if this matter were delayed any further.

22. Great emphasis was placed by the learned counsel that if illegalities have been committed by either the Commission or the Government the successful candidates couldn't be blamed or made to suffer as a consequence thereof. This is not simply a case of the purported rights or expectations of the successful candidates; there is much more at stake. It would not be an exaggeration to categorize this case as the future of the *civil service* and good governance in the Province of Sindh. Grade 16 and 17 officers selected pursuant to CCE-2013 may in due course of time rise to the highest echelons of Government. By only focusing on the so called plight of the successful candidates whilst disregarding the interest of the people, the Government and the Province would be losing sight of the final goals. It may be added that, if indeed the successful candidates were selected on merit than they should have no apprehension on taking the tests and interviews again. We are, however, aware that there are various other aspects which also need to be considered. Many of those who sat for the written tests may have crossed the maximum prescribed age mentioned in the advertisement for CCE-2013; if they have to again submit applications because the process commences afresh then they would be required to make payment of the requisite fee/charges again which may not be possible. Moreover, if all those who did not participate in written tests of CCE-2013 were now allowed to do so it would place all those who did at a disadvantage. These legitimate concerns can be easily safeguarded, but before doing so

it needs to be considered whether the written tests and interview conducted by the Commission were free, fair and transparent.

23. The following illegalities and discrepancies were committed in the written tests and interviews of CCE-2013:

- a. Written tests were conducted in April 2015 and results were announced almost a year later, in March 2016;
- b. Those who did remarkably well in the written tests got very low marks in the interview, therefore were excluded;
- c. Those who barely passed in the written tests got very high marks in the interview, therefore, were included;
- d. 250 marks was allocated for the interview part of the CCE-2013, but no disclosure was made about the marks allocated to each of the three interviewers nor the marks respectively awarded by them;
- e. Two out of the three Members who conducted the interviews, admittedly, were not qualified to be Members of the Commission;
- f. 250 complaints were received by the Commission;
- g. Marks of candidates as per their respective roll numbers obtained in different tests and interviews were not publicly displayed;
- h. In the results compiled by the Commission, against the names of many successful candidates is written "not qualified" for no discernible reason;

- i. Of the 73 posts in respect of "urban" areas 25 posts, that is about 35%, were "left vacant" and in the absence of any explanation it can be presumed that these posts were left vacant because of bias, prejudice and / or for ulterior motives; and
- j. Written tests were conducted in April 2015, results announced in March 2016 and final results were announced on August 19, 2016. Such an unreasonable delay of approximately sixteen months raises legitimate misgivings and undermines the integrity of the entire process.

These large scale illegalities and discrepancies cannot be categorized as innocent mistakes or coincidences and it becomes difficult, if not impossible, to overlook or condone them. No one has, however, faulted the screening tests and the results of the screening tests. Incidentally, Justice Agha Rafique Ahmad Khan was the Chairman of the Commission at this stage. Upon his resignation Mr. Muhammd Saleem Bhnour was appointed, by the Government, as Chairman of the Commission, even though neither he nor five other Members were qualified to be so appointed as they did not have the prescribed qualifications. When notices were issued to them they elected to resign.

24. The Commission and the Government are obliged to ensure complete transparency in the process of selection and appointment respectively and anything less is unacceptable. If qualified and competent individuals are appointed their performance and work

would be far superior to the inept allowed in through the back door of nepotism and/or corruption. Those who have earned the privilege yearn to serve the nation and the people, unlike those whose loadstar is nepotism or corruption. Since tax payers are paying dearly to be served by the best they are entitled to get the best. If the incompetent or the corrupt ingratiate themselves into the civil service, citizens are deprived of their due. The hapless taxpayers foot a never ending bill which includes the salaries and other emoluments of civil servants till they retire, and after their retirement their pensions and other benefits. And they are denied the benefit of competent and honest individuals. Appointments which disregard merit, perpetuate bad governance, and drain the public exchequer; such appointments also erode the credibility of the Commission and the Government. The performance of the Government is also adversely affected, the consequences of which is borne by the public. Those given the responsibility to select the best candidates must acquit themselves of the trust reposed in them to the best of their ability and, needless to state, without any fear or favour.

25. There is another matter which has incidentally come before us. The prescribed functions of the Commission under the Act stipulate that it shall, "conduct tests and examinations for recruitment for initial appointment" to posts connected with the affairs of the Province of Sindh and also to posts in corporations, autonomous bodies and organizations that have been set up by the Government (section 7 of the Act). We, however, learnt that the

Commission is not holding annual tests and examinations. There have been many years when competitive examinations have not been held by the Commission. The Secretary of the Commission informed us that since the Act was enacted in the year 1989 combined competitive examinations have been held only for the years 1992, 1995, 1998, 2003, 2008 and 2013, that is only in six out of the twenty eight years since the Commission came into existence pursuant to the Act. When the Commission does not conduct annual competitive examinations then initial appointments are made through non-prescribed methods. The Government should submit a list of vacancies that exist or may become due in the foreseeable future to the Commission to enable it to conduct examinations, but neither the Government does so nor the Commission calls upon it to do so. Arbitrariness and adhocism prevails. The importance given by the Constitution and the Act to the manner in which induction into the civil service is to be made is being undermined. The Commission is not fulfilling its constitutional and legal mandate. Consequently, the pool of competent officers in the Government is shrinking, the public is being denied good governance and qualified and competent young men and women of the Province deprived of opportunities to enter into the civil service. If the Federal Public Service Commission can take examinations annually, including those of the central superior services ("**CSS**") and the provincial public service commissions of some provinces can also manage to have competitive examinations every year then there is no reason that the Sindh Commission cannot do so too.

26. Having determined that the petition was maintainable under Article 184(3) and that the results of written tests and the interviews were not free, fair or transparent it remains to be considered what should be done and how the interest of all those who participated in the written tests and interviews, including the successful candidates, can be protected. Those who participated cannot be blamed for the fault of the Government and the Commission. It would also not be fair to give those who never applied in CCE-2013 or did not take the written tests an opportunity to do so now. We are also mindful of the fact that the inordinate delay by the Commission in finalizing matters may have caused some to exceed the maximum age thereby preventing them from applying again for another competitive examination that is advertised and many may also be financially constrained to bear additional fee/charges. At the same time those who obtained an illegal advantage cannot be permitted to retain it. Therefore, balancing the lawful and genuine concerns of all concerned, safeguarding the legitimate concerns of the successful candidates, ensuring the credibility of the Commission and the integrity of the selection process we dispose of this matter by issuing the following directions:

- (1) A person of integrity and competence who meets the stipulated qualification for appointment as Chairman of the Commission be appointed in terms of Article 242 (1B) of the Constitution within two weeks from the date of the announcement of this judgment;

- (2) It should be ensured that all Members of the Commission meet the prescribed qualifications;
- (3) Persons of integrity and competence possessing the prescribed qualifications should be appointed to the vacant positions of Members of the Commission within four weeks of the announcement of this judgment;
- (4) In view of the large scale illegalities / discrepancies committed in the written tests and interviews of CCE-2013 the same are set aside and cancelled. It is, however, clarified that the screening tests results are not cancelled/set aside;
- (5) Fresh written tests for CCE-2013 for the posts as advertised be held as soon as possible after the appointment of the Chairman and Members of the Commission and after the verification of the credentials of the existing / remaining Members;
- (6) Only the 2,813 candidates who had earlier taken the written tests of CCE-2013 for the 182 posts be permitted to take the fresh written tests even if in the meanwhile they have crossed the stipulated upper age, and without requiring payment of any additional fee / charge;
- (7) When the papers of the written tests are sent for checking/marking the identity of the candidates must be kept anonymous/secret;

- (8) The marks of the written tests should be publicly displayed on the Commission's website, on the notice board in its premises and in one Urdu, English and Sindhi newspaper; disclosure should be made of the marks obtained in each subject as well as the cumulative total against the candidates' roll numbers;
- (9) All those who obtain the prescribed minimum pass marks in the written tests must be invited for the interview;
- (10) The marks allocated for the interview must be allocated to the interviewers equally, however, to avoid a fraction the Chairman, or in his/her absence, the senior most Member shall have the higher mark rounded off to avoid a fraction;
- (11) The Commission shall keep a separate record of the marks awarded by each interviewer and each interviewer should sign and date the same as well as the combined results;
- (12) The results of the interview should be displayed in the same manner as mentioned above in point (8) with respect to written tests;
- (13) The written tests, their checking/marking, interviews and display of results be completed as soon as is practicable since the matter pertains to CCE-2013;

- (14) Candidates should be selected for all the advertised posts, unless they don't pass the written tests and the interview; and
- (15) The candidates who are selected by the Commission should be offered appointment by the Government as per applicable law, and if any candidate declines the candidate who is next on the merit list be offered the same.
- (16) That in the future the Government should provide a list of existing vacancies, which should include a list of posts that may become vacant in the foreseeable future and a list of new posts to the Commission every year and by a specified date. Upon receipt of such lists the Commission should start making arrangements for holding of competitive examinations; for the current year 2017 the said lists should be provided by the Government to the Commission within sixty days, upon receipt whereof the Commission should invite applications from interested individuals by placing advertisements, which should also clearly stipulate the legally mandated reserved seats, including those for women and persons having physical disabilities. It is clarified that the direction contained in this paragraph is not applicable to the examinations for CCE-2013 in respect whereof separate directions hereinabove have been issued.

27. In conclusion we want to record our appreciation for the assistance provided by all the learned counsel. We also acknowledge the effort of the petitioner, Mr. Muhammad Junaid Farooqui, who took it upon himself to invoke the jurisdiction of this Court and draw its attention to a matter that may have gone undetected and unattended, with attendant grave consequences; the petitioner had no personal interest and it is commendable that he was motivated with the spirit to serve the people and the Province of Sindh.

The office is directed to return to the Commission the test papers / results and any other material that was submitted to the Court.

Judge

Judge

Judge

Islamabad

March __, 2017
(Farrukh)

Announced in open Court at Islamabad on March __, 2017.

Judge

Approved for Reporting