Form No: HCJD/C

JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Intra Court Appeal No.300 of 2021

Federation of Pakistan and others
Vs.
Fazal Rahim Khan and others

Appellants by: **M/s. Makhdoom Ali Khan, Barrister Saad Hashmi & Noman Amin Farooqi, Advocates (I.C.As. No.302 to 305/2021).**
M/s. Qasim Wadud Additional Attorney-General & S.M. Tayyab, Deputy Attorney-General & Imran Farooq, Assistant Attorney-General (I.C.As. No.298 to 301/2021).
Mr. G. M. Chaudhary, Advocate (I.C.A. No.326/2021).
M/s. Ijaz Ahmed, Habib Ahmed Bhatti, Ikhlaq Ahmed Bhatti, Advocates (in Cross-objection No.1/2021).

Respondents by: **M/s. Syed Waqar Hunain Naqvi & Umair Majeed Malik, Advocates.**

Date of Hearing: **27.10.2021**

AAMER FAROOQ, J.- For the reasons recorded by this Court in judgment of even date passed in I.C.A. No.298/2021, the instant appeal is allowed.

(CHIEF JUSTICE) **(AAMER FAROOQ)**
JUDGE

Announced in open Court on the 31 day of January 2022.

(CHIEF JUSTICE) **JUDGE**

M.Naveed

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Form No: HCJD/C

JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Intra Court Appeal No.298 of 2021

Federation of Pakistan and others
Vs.
Javed Iqbal and others

Appellants by:	**M/s. Makhdoom Ali Khan, Barrister Saad Hashmi & Noman Amin Farooqi, Advocates (I.C.As. No.302 to 305/2021).** **M/s. Khalid Jawed Khan, Attorney General for Pakistan Qasim Wadud Additional Attorney-General & S.M. Tayyab, Deputy Attorney-General & Imran Farooq, Assistant Attorney-General (I.C.As. No.298 to 301/2021).** **Mr. G. M. Chaudhary, Advocate (I.C.A. No.326/2021).** **M/s. Ijaz Ahmed, Habib Ahmed Bhatti, Ikhlaq Ahmed Bhatti, Advocates (in Cross-objection No.1/2021).**
Respondents by:	**M/s. Syed Waqar Hunain Naqvi & Umair Majeed Malik, Advocates.**
Date of Hearing:	**27.10.2021**

AAMER FAROOQ, J.- This judgment shall decide the instant Intra Court Appeal as well as Intra Court Appeals mentioned in Schedule-A attached herewith as they assail judgment dated 29.06.2021 passed in various writ petitions mentioned in the said judgment.

2. The private respondents in all the appeals except Intra Court Appeal No.326/2021, filed petitions under

Article 199 of Constitution of the Islamic Republic of Pakistan, 1973 (the Constitution) challenging the appointment of Mr. Arif Usmani as President, National Bank of Pakistan and Mr. Zubyr Somroo as Chairman/Member Board of Directors of National Bank of Pakistan. The principal attack on the referred appointment was that Mr. Arif Usmani does not fulfill the eligibility requirements, for the said post, as he holds the degree of Physics which is a qualification not related to the field of banking. The challenge was also made on the premise that the appointment is in violation of State Bank of Pakistan Prudential Regulations (the Regulations) and Public Sector Companies (Corporate Governance) Rules, 2013 (the Rules of 2013). Similarly, the appointment of Mr. Zubyr Somroo as Chairman/Member, Board of Directors was challenged that since it is an appointment in the public sector company, hence requirements of advertisement was essential and that Mr. Zubyr Somroo does not fulfill the requisite eligibility criteria. The petitions were allowed by the learned Single Judge in Chambers and the appointments of the said incumbents were declared illegal and without lawful authority. Intra Court Appeals No.298/2021 to 305/2021 have been filed by Federation of Pakistan and National Bank of

Pakistan challenging the said judgment by the learned Single Judge in Chambers while Intra Court Appeal No.326/2021 has been filed by one of the petitioners in writ petitions asserting that though the appointment has been declared to be without lawful authority but no order has been passed for the recovery of salary and other perks and privileges received by the said persons during the course of holding such positions.

3. Mr. Khalid Jawed Khan, learned Attorney-General for Pakistan, arguing the case on behalf of the Federation of Pakistan, *inter alia,* contended that the learned Single Judge in Chambers while deciding the matter has failed to take into account provisions of Section 11(3)(a) of Banks Nationalization Act, 1974 (the Act of 1974). In this behalf it was contended that under the referred provision of law the appointment to the post of President or Chairman/Member of Board of Directors is to be made by the Federal Government from the list of eligible bankers maintained by State Bank of Pakistan. It was contended that the appointments were accordingly made of the persons who were on the list. It was also contended that there was no requirement in the case of post of Chairman of Board of Directors to be advertised inasmuch as there is no criteria under the law for the said purpose. He also

argued that Mr. Arif Usmani is a career banker and has unblemished record in such capacity. It was submitted that likewise, Mr. Zubyr Somroo is a distinguished person in the field of banking, hence based on his untarnished reputation and record the appointment was made. It was contended that no other rules or regulations shall be applicable to govern the appointment of President of National Bank of Pakistan in the presence of Section 11(3)(a) *ibid.*

4. Mr. Makhdoom Ali Khan, Senior Advocate Supreme Court, arguing the case on behalf of National Bank of Pakistan, *inter alia*, contended that the learned Single Judge in Chambers has erred in holding that Mr. Arif Usmani did not qualify or was eligible to be the President of National Bank of Pakistan. He emphasized that Arif Usmani has distinguished career in banking and his name was in the list maintained by the State Bank of Pakistan. He took the Court through the sequence of events from initiating the process of appointment till final notification. He overemphasized that the appointment could have been made without advertisement as no requirement exists in law for the said purpose and submitted that National Bank of Pakistan and/or Federation of Pakistan was well within its rights to have done the same in light of the judgment

of this Court passed in case titled ***Muhammad Amin v. Ministry of Interior*** **(2021 PLC (C.S.) 615)** as well as ***Senator Taj Haider v. Government of Pakistan etc.*** **(2018 CLC 1910).** It was contended that the Courts cannot apply *casus omissus* to fill in the gap. Reliance was placed on the case titled ***Federation of Pakistan v. Durrani Ceramics*** **(2014 SCMR 1630),** ***Khushi Muhammad v. Fazal Bibi*** **(PLD 2016 SC 872),** ***Colelctor of Sales Tax v. Super Asia Mohammad Din and Sons*** **(2017 SCMR 1427) &** ***Abdul Haq Khan v. Haji Ameerzada*** **(PLD 2017 SC 105).** Learned counsel reiterated that as per Section 11(3) of the Act of 1974 there are two conditions for appointment of President/Chief Executive Officer (CEO) of the bank; firstly, the appointment has to be made by the Federation of Pakistan in consultation with State Bank of Pakistan and it is to be made from the panel of bankers qualified to be the President and which panel is maintained and varied from time to time by the State Bank of Pakistan. He submitted that Mr. Arif Usmani meets the criteria as his appointment was made in consultation with State Bank of Pakistan by the Federation of Pakistan and as per the report by State Bank of Pakistan Arif Usmani fulfills the 'Fit and Proper' criteria. It was submitted that even otherwise,

under clause 4 of the State Bank of Pakistan Regulations for appointment of President/CEO of bank a person must be a career banker at senior level as EVP or above and should be between 40 to 70 years of age and also should have minimum qualification of graduation or equivalent in the discipline of banking, finance, economics, business administration and related fields. It was contended that Arif Usmani also fulfills the requirements as he is a career banker holding the qualification in Physics which according to State Bank of Pakistan is related field though it might not sound one to an ordinary person. It was contended that two different words have been used in the statute; one makes the criteria mandatory and other non-mandatory. It was contended that in the Regulations the word must has been used for career banker but not so in the other criteria, therefore, a person ought to be a career banker which is eligibility requirement. He further submitted that where two different words have been used it means two criteria apply. Reliance was placed on the case titled ***The State v. Zia ur Rehman*** **(PLD 1973 SC 49) &** ***Maula Dad Khan v. West Pakistan Bar council*** **(PLD 1975 SC 469).** It was argued that the learned Single Judge in Chambers has observed that the Court is not equipped to give a verdict on equalization of

theoretical physics with other discipline to be called as related field and the matter is for the experts to decide however, it was contended that the Court after observing the same ought not to have given its findings. Reliance was placed on the case titled ***Arshad & Company v. Capital Development Authority*** **(2000 SCMR 1557),** ***Dr. Akhtar Hassan Khan v. Federation of Pakistan*** **(2012 SCMR 455) &** ***Shabnam Irshad Ahmed v. Muhammad Muneer Malik*** **(2017 PLC (C.S.) 1263).** Learned counsel submitted that the Chairman, National Bank of Pakistan is a non-executive post on which Mr. Zubyr Somroo has been appointed. It was contended that as per Section 11 (3) of the Act of 1974 the only requirement for appointment of Chairman is that he must be from a panel of bankers as determined by State Bank of Pakistan. It was contended that Mr. Zubyr Somroo possesses the requisite qualification for the post of Chairman, Board of Directors, National Bank of Pakistan and he has been on the panel since 1997 when he was appointed President and Chairman, United Bank Limited; his name remained till 2016 when it was omitted when he became a Director of State Bank of Pakistan. However, it was inserted back when he left the post. It was argued that previous two Chairmans, Ali Raza and Munir

Kaleem were appointed in the same manner. Mr. Makhdoom Ali Khan, Senior Advocate Supreme Court further argued that the internal assessment of the criteria for any public post is a policy matter which cannot be interfered by the Courts. Reliance was placed on the case titled ***Muhammad Amin v. Ministry of Interior*** **(W.P. No.444 of 2018),** ***Govt. of KPK v. Hayat Hussain*** **(2016 SCMR 1021) &** ***Dr. Alyas Qadeer Tahir v. Secretary, Education*** **(2014 SCMR 997).** He also argued that the observations by the learned Single Judge in Chambers that Zubyr Somroo became the Chairman through support of someone in the Finance Division attributes to *mala fide* which is not evident and has no factual basis as well. It was contended that the malice has to be pleaded in a precise manner and demonstrated beyond doubt. Reliance was placed on the case titled ***Saeed Ahmed Khan v. the State*** **(PLD 1974 SC 151) &** ***Dr. Akhtar Hassan Khan v. Federation of Pakistan etc.*** **(2012 SCMR 455).**

5. Dr. G. M. Chaudhary, learned Advocate appearing for the appellant in I.C.A. No.326 of 2021 and private respondents in some I.C.As, *inter alia*, contended that though the writ petitions filed by the private respondents have been allowed; however, no order has been made to recover the salary and other

emoluments received by the incumbents which ought to have been done in light of the pronouncements of the Hon'ble Supreme Court of Pakistan. It was contended that the impugned judgment, even otherwise, does not suffer from any error of law or fact calling for setting aside.

6. Syed Waqar Hussain Naqvi, learned Advocate for some of the respondents, *inter alia,* contended that the judgment does not suffer from any error warranting interference; it is well reasoned. It was submitted that the discretion has been exercised by the Federation and its functionaries in an arbitrary manner. Reliance was placed on the case titled ***Aman Ullah Khan and others v. The Federal Govt. of Pakistan etc.*** **(PLD 1990 SC 1092),** ***Muhammad Yasin v. Federation of Pakistan etc.*** **(PLD 2012 SC 132),** ***Continental Insurance Company Limited in the matter of Show Cause Notice dated 14.02.2013*** **(2014 CLD 686),** ***Kh. Muhammad Asif v. Federation of Pakistan etc.*** **(2013 SCMR 1205),** ***Tanveer Ahmed Khan v. Registrar LHC etc.*** **(PLD 2013 Lahore 386),** ***Fash Azhar v. Federation of Pakistan etc.*** **(2012 PLC (C.S.) 377),** ***Kh. Ahmad Hassan v. Govt. of Punjab etc.*** **(2005 SCMR 186), &** ***Umar Baz Khan v. Syed Jehanzeb etc.*** **(PLD 2013 SC 268).**

7. Messrs. Arif Usmani & Zubyr Somroo, though did not file any appeals but during the course of proceedings filed cross/counter objections challenging the judgment. Learned counsel appearing for the referred respondents adopted the arguments advanced by Mr. Makhdoom Ali Khan, Senior Advocate Supreme Court appearing for National Bank of Pakistan.

8. Syed Waqar Hussain Naqvi, learned Advocate objected to the maintainability of the cross objections on the ground that they are not maintainable inasmuch as though the Civil Procedure Code 1908 (CPC) is applicable to proceedings under Article 199 of the Constitution; however, since the appeals have been filed under the Law Reforms Ordinance, 1972 (the Ordinance) which does not provide any concept akin to Cross Objections as contained in Order XLI Rule 22 CPC.

9. Arguments advanced by the learned counsel for the parties have been heard and the documents placed on record examined with their able assistance.

10. Before embarking upon rendering findings on the rival contentions of the learned counsel for the parties, it is appropriate that some basic facts be mentioned. The factual controversy leading to filing of the appeals

in hand has already been mentioned in the preceding paragraphs and is also reflected from the arguments of the learned counsel for the parties. With respect to the appointment of Mr. Arif Usmani as President/CEO of National Bank of Pakistan an advertisement was made in the leading newspaper of the country for appointment of the President, National Bank of Pakistan. The referred advertisement appeared on 30.09.2018. On 11.10.2018 shortlisting Committee by the Finance Division to scrutinize the applications was constituted and started functioning. On 22.10.2018 the Committee scrutinized and evaluated the applications and according to marks received shortlisted five candidates including Mr. Arif Usmani. On 02.11.2018 a Selection Committee was constituted by the Finance Division for conducting interviews of the shortlisted candidates. The referred Committee on 09.11.2018 shortlisted four candidates including Arif Usmani; eventually three persons were selected as one of the candidates Atif Bajwa did not appear for interview. Javed Kureshi that is one of the candidates withdrew his application, hence on 13.11.2018 the Finance Ministry moved a summary to the Federal Cabinet for appointment of Arif Usmani as President/CEO, National Bank of Pakistan. On 23.11.2018 the summary was approved by the Cabinet

subject to clearance on the 'Fit and Proper' criteria from State Bank of Pakistan. On 11.02.2019 the State Bank of Pakistan gave its nod to the appointment of Mr. Arif Usmani as President, National Bank of Pakistan, hence on 12.02.2019 notification was issued by the Finance Division appointing Arif Usmani as CEO of National Bank of Pakistan for a period of three years. Insofar as the appointment of Mr. Zubyr Somroo as Chairman, National Bank of Pakistan is concerned, his nomination was made on 24.01.2019 and was sent to State Bank of Pakistan for approval. On 14.02.2019 no objection was received from State Bank of Pakistan, hence notification was issued on 17.04.2019 of Mr. Zubyr Somroo as Chairman, National Bank of Pakistan.

11. The State Bank of Pakistan is a Bank in the public sector and is creation of the National Bank of Pakistan Ordinance, 1949. The criteria for the appointment of CEO and Members of Board of Directors in the public sector is provided in the Act of 1974. The relevant provision of law is Section 11 of the same. Section 11(3)(a), which is the most significant provision for the purpose of decision of these appeals, is reproduced below:

> *"'"***11. General provisions pertaining to management of banks.-**
>
> ……..

(3) The Chairman, the President and other members of the Board-

(a) shall be appointed by the Federal Government in consultation with the State Bank, for a term of three years, on such terms and conditions as may be fixed by the General Meeting of the bank: provided that the Chairman and the President shall be appointed from amongst professional bankers whose names are included in a panel of bankers qualified to be the Chairman or the President, which panel shall be determined, maintained and varied, from time to time, by the State Bank;

12. The bare perusal of the relevant section shows that the Chairman, President and other members of the Board are to be appointed by the Federal Government in consultation with the State Bank of Pakistan for a term of three years from amongst professional bankers whose names are included in a panel of bankers qualified to be the Chairman or the President, which panel shall be determined, maintained and varied, from time to time, by the State Bank of Pakistan. It is relevant to observe here that under the said provision or under National Bank of Pakistan Ordinance, 1949 there is no requirement for appointment of a person as President or Chairman of the Board of Directors through advertisement. Where such is the case as has

already been held by this Court in case titled ***Muhammad Amin v. Ministry of Interior*** **(2021 PLC (C.S.) 615)** that where the law does not provide appointment after advertisement there is no requirement for the same. The referred conclusion was arrived at by the Court after discussing the law on the subject as has been propounded by the Superior Courts of the country from time to time. The argument by the learned counsel for the appellants namely Mr. Makhdoom Ali Khan, Senior Advocate Supreme Court that the Courts cannot read into a statute something which is not there is instructive as the Courts in such eventuality cannot observe or hold that advertisement is or was must in the facts and circumstances. Reliance is placed on the case titled ***Khushi Muhammad v. Fazal Bibi*** **(PLD 2016 SC 872),** ***Collector of Sales Tax v. Super Aisa Mohammad Din & Sons*** **(2017 SCMR 1427),** ***Abdul Haq Khan v. Haji Ameerzada*** **(PLD 2017 SC 105).** State Bank of Pakistan Regulations on the subject also provide criteria for appointment of President/CEO in private sector. The State Bank of Pakistan Regulations are subservient to statutory provision on the subject i.e. but since they govern the field vis-à-vis the private sector and the criteria mentioned therein was incorporated in the advertisement made by the Finance

Division, hence it is worthwhile to consider the same as well. The basic criteria on which a great deal of stress has been laid and which also prevailed with the learned Single Judge in Chambers is holding of qualification in business, finance, commerce or the other related field. Mr. Arif Usmani holds a degree in Physics and is a career banker. It has been held by the learned single judge in chambers that the degree in Physics is a qualification in a non-related field. Learned Single Judge in Chambers did observe that this Court does not have expertise to make the equivalence but proceeded to hold that qualification amounts to non-eligibility of Mr. Arif Usmani. We feel that the learned Single Judge in Chambers fell in error where he proceeded to decide the question of qualification or the fact that the degree in Physics whether is related to business or banking. It is trite law that the Courts do not possess requisite expertise when it comes to holding that someone has requisite qualification or is appropriate for a particular post. Reliance is placed on the case titled ***Arshad & Company v. Capital Development Authority*** **(2000 SCMR 1557) &** ***Dr. Akhtar Hassan Khan v. Federation of Pakistan*** **(2012 SCMR 455).** The Federal Government approved the appointment of Arif Usmani subject to meeting “Fit and Proper” test by

State Bank of Pakistan and it is only after the State Bank of Pakistan gave its consent to the appointment by holding Messrs. Arif Usmani and Zubyr Somroo as fit and proper persons, the notifications were made. The State Bank of Pakistan being the regulator of the banks in Pakistan maintains panel of eligible persons for the post of CEO/President as well as Board of Directors; there can be no better judge of the eligibility criteria for a post of President or Chairman, Board of Directors other than the State Bank of Pakistan and a decision taken by the regulator cannot be overruled or set aside by the Courts without any plausible justification or basis. Even before the learned Single Judge in Chambers the State Bank of Pakistan acknowledged that the names of Messrs. Arif Usmani and Zubyr Somroo were in the panel/list maintained by it. As noted above, the Courts are not experts in the field of banking; even otherwise, the field of science is generally wide enough, hence when the regulator decided the question of related field and career of a person in a particular field, the Courts in judicial review cannot and should not interfere with the same. The decision impugned before us has created an anomaly; as the names of Arif Usmani and Zubyr Somroo are still on the list maintained by the State Bank of Pakistan and

even today they are eligible to be appointed as President or Chairman of the Board of Directors despite the decision by this Court. Private respondents in their writ petitions had not questioned the list and even the Court never gave any findings as to the decision of the State Bank of Pakistan to include the names of the referred person in the list.

13. An objection was raised during the course of proceedings as to the maintainability of the appeals on the basis that Messrs. Arif Usmani and Zubyr Somroo never challenged the impugned judgment and it is only National Bank of Pakistan and Federation of Pakistan that have filed the appeals. It is only after the said objection was taken that the referred persons filed counter objections under Order XLI Rule 22 CPC. Learned counsel for the private respondents challenged the counter objections on the ground that they are not maintainable inasmuch as the referred provision of CPC is not applicable. In light of the judgment of the Hon'ble Supreme Court of Pakistan in case reported as ***Hussain Bukish v. Settlement Commissioner, Rawalpindi*** **(PLD 1970 SC 1)** provisions of CPC apply to the proceedings under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973; however, with deference to the judgment of the Apex Court it cannot

be said that all the provision of CPC are applicable in the writ petition as the CPC is a comprehensive Code for conducting trials and appeals and ancillary matters on the civil side. It is divided into two categories, one creation of substantive rights which are provided by way the sections (substantive provisions) and other the rules of procedure (provided in Orders and Rules) that generally are created or amended from time to time by the respective High Courts. A concept of the appeal as such is provided in Section 96 CPC which is against the decrees; however, there is also a concept of appeals against orders. The rules regarding governance of appeals is provided in Order XLI primarily as well as XLIII in case of appeal against orders. It is only in Order XLI Rule 22 that cross objections are provided where a person has not assailed the judgment but is aggrieved any part of it; in the appeal filed by the appellant he can raise objections to it. The instant appeals have been filed under Section 3 of the Law Reforms Ordinance, 1972 which is a special statute and the same are not in CPC. Since the Order XLI Rule 22 CPC is only a procedural provisions. It is trite law that appeal is continuation of basic proceedings. A writ petition is filed under Article 199 of the Constitution and appeal against the same is under

section 3 of the Law Reforms Ordinance, 1972. Hence, the relevant provisions of CPC would be applicable even in the appeals. This Court while hearing Writ Petitions and Intra Court Appeals entertains miscellaneous applications such as application under Order I Rule 10 CPC to implead or delete a party and/or amendment under Order VI Rule 17 CPC, hence on the analogy of the same it would be just to hold that cross objections would be maintainable by the respondents in appropriate circumstances. Even otherwise, if the cross objections were not filed, we feel that the same by no means would be fatal to appeals as Federation of Pakistan is the appointing authority and National Bank of Pakistan is the employer of Messrs. Arif Usmani and Zubyr Somroo and the challenge made by any one party or person suffices for attacking the judgment. Reliance is placed on cases reported as Shahro versus Fatima (PLD 1998 SC 1512) and Muhammad Hayat versus Nishat Ahmed (1994 CLC 1357). The stance of the respondents that the discretion vested with Federation of Pakistan has not been exercised in appropriate manner and that while scrutinizing the applications it was overlooked by the Committee and Federation that both the persons, in question, do not possess the requisite, qualifications is without any justification or

substance for the reasons already mentioned hereinabove. Likewise, the Corporate Governance Rules or other provisions are inapplicable under the facts and circumstances due to the reasons again mentioned hereinabove.

14. For the reasons stated hereinabove, I.C.As. No.298 of 2021 to 305 of 2021 are allowed and the impugned judgment dated 29.06.2021 is set aside; consequently, the writ petitions filed by the private respondents stand dismissed. In light of our decision in dismissing the writ petitions, I.C.A. No.326 of 2021 has become infructuous and is disposed of accordingly. All pending applications are disposed of accordingly along with Cross Objections.

(CHIEF JUSTICE) **(AAMER FAROOQ)**
JUDGE

Announced in open Court on the *31st* day of January 2022.

(CHIEF JUSTICE) **JUDGE**

M.Naveed

Approved for reporting

Serial No.	CASE NO./YEAR	TITLE
1	I.C.A. No. 299/2021	Federation of Pakistan, Ministry of Finance through Secretary Finance G.O.P. **Vs** Abdul Latif Qureshi & others
2	I.C.A. No. 300/2021	Federation of Pakistan, Ministry of Finance through Secretary Finance G.O.P. **Vs** Fazal Rahim Khan & others
3	I.C.A. No. 301/2021	Federation of Pakistan, Ministry of Finance through Secretary Finance G.O.P. **Vs** Syed Jahangir and others
4	I.C.A. No. 302/2021	National Bank of Pakistan **Vs** Javed Iqbal and others
5	I.C.A. No. 303/2021	National Bank of Pakistan **Vs** Fazal Rahim Khan and others
6	I.C.A. No. 304/2021	National Bank of Pakistan **Vs** Abdul Latif Qureshi and others.
7	I.C.A. No. 305/2021	National Bank of Pakistan **Vs** Syed Jahangir and others
8	I.C.A. No. 326/2021	Abdul Latif Qureshi **Vs** Federation of Pakistan and others