

In the Supreme Court of Pakistan
(Original Jurisdiction)

Present:

Mr. Justice Anwar Zaheer Jamali
Mr. Justice Mian Saqib Nisar
Mr. Justice Ejaz Afzal Khan
Mr. Justice Muhammad Ather Saeed
Mr. Justice Iqbal Hameedur Rahman

Constitution Petition No.127 of 2012

(Regarding pensionary benefits of the Judges of Superior Courts from the date of their respective retirements, irrespective of their length of service as such Judges)

AND

H.R.C No. 40927-S of 2012.

(Application by Abdul Rehman Farooq Pirzada)

AND

**Civil Miscellaneous Appeal No.176/2012 in
Constitution Petition No.Nil of 2012**

(Begum Nusrat Ali Gonda Vs. Federation of Pakistan etc.)

Attendane:

For Mr. Justice (R) Rustam Ali Malik		Mr. Hamid Khan, Sr. ASC. Mr. M. S. Khattak, AOR.
Mr. Justice (R) Rana M. Arshad Khan		
Mr. Justice (R) Ghulam Sarwar Sheikh		
Mr. Justice (R) Farrukh Latif		
Mr. Justice (R) Pervez Ahmed		
Mr. Justice (R) Muhammad Jehangir Arshad		
Mr. Justice (R) Ahmed Farooq Sheikh		
For Justice (R) Mrs. Majida Rizvi		Mr. Munir A. Malik, Sr. ASC. Mr. Faisal Kamal Alam, ASC.
Mr. Justice (R) Nadeem Azhar Siddiqui		
Mr. Justice (R) Tariq Mehmood		
Justice (R) Mrs. Qaiser Iqbal		
For Mr. Justice (R) Shah Abdul Rashid		Mr. Rafiq Rijwana, ASC.
For Mr. Justice (R) Khan Riaz-ud-Din Khan		Mr. M. Akram Sheikh, Sr. ASC.
Mr. Justice (R) Saeed-ur-Rehman Farrukh		
For Mr. Justice (R) Amjad Ali		Mr. Farhat Nawaz Lodhi, ASC
For Mr. Justice (R) Riaz Kiani		Syed Iftikhar Hussain Gillani, Sr. ASC.
Mr. Justice (R) Aqil Mirza		
Mr. Justice (R) Sharif Hussain Bokhari		
Mr. Justice (R) Ghulam Muhammad Qureshi		
Mr. Justice (R) Abdul Hafeez Cheema		
Mr. Justice (R) Munir Ahmed Mughal		
Mr. Justice (R) Rao Iqbal Khan		
Mrs. Shahida Khurshid,		
w/o Mr. Justice (R) Raja M. Khurshid		
For Mr. Justice (R) Raza A. Khan		
For Mr. Justice (R) Syed Najam-ul-Hassan Kazmi		Mr. Afnan Karim, Kundi, ASC.
For Mr. Justice (R) Mansoor Ahmed.		Mr. M. Afzal Siddiqui, ASC
		Raja M. Ibrahim Satti, Sr. ASC.
		Mr. Mehmood A. Sheikh, AOR.

For Mr. Justice (R) Sh. Javaid Sarfraz Mr. Justice (R) Fazal-e-Miran Chohan Mr. Justice (R) Syed Asghar Haider Mr. Justice (R) Tariq Shamim Mr. Justice (R) M. Nawaz Bhatti through widow Mrs. Perveen Nawaz	{ Mr. Amir Alam Khan, Sr. ASC
For Mr. Justice (R) Aslam Arian	Mr. Mehmood A. Sheikh, ASC
For Mr. Justice (R) Abdul Ghani Sheikh: Mr. Justice (R) Tanvir Bashir Ansari Through widow Mrs. Shahnaz Ansari	Mr. Abdul Rahim Bhatti, ASC Mr. Zaheer Bashir Ansari, ASC
Mr. Justice (R) Sheikh Abdul Rashid Mr. Justice (R) Ch. Mushtaq Ahmad Khan Mr. Justice (R) Sh. Abdul Manan Mr. Justice (R) Munib Ahmed Khan	{ Mr. Muhammad Munir Peracha, ASC
For Mr. Justice (R) Muhammad Muzamil Khan	Mr. Gulzar Kiani, Sr. ASC Ch. Akhtar Ali, AOR
For Mr. Justice (R) Sher Bahadur	Mr. Abdul Aziz Kundi, ASC
For Mr. Justice (R) Iftikhar Ahmed Cheema Mr. Justice (R) M.K.N. Kohli	Sardar Muhammad Aslam, ASC. Raja Abdul Ghafoor, AOR.
For Widow of Mr. Justice (R) M. Khayar Khan	Ms. Asma Jehangir, ASC
For Mr. Justice (R) Ghous Muhammad:	Rana M. Shamim, ASC.
For Mr. Justice (R) G.M. Kourejo Mr. Justice (R) Ali Sain Dino Metlo	Nemo.
Mr. Justice (R) Salim Khan Mr. Justice (R) M. Sadiq Laghari Mr. Justice (R) Abdul Aziz Kundi Mr. Justice (R) Azam Khan Mr. Justice (R) Hamid Farooq Durani	{ In person.
Mr. Justice (R) Abdul Ghafoor Khan Ladhi Mr. Justice (R) Mian Ghulam Ahmad Mr. Justice (R) Muhammad Ismail Bhatti Mr. Justice (R) Ch. Shahid Saeed Mr. Justice (R) Sagheer Ahmed Qadri Late Justice (R) Abdul Rehman Khan Kaif Mr. Justice (R) Abdul Khaliq Khan Mr. Justice (R) Qazi Hamid-ud-Din Mr. Justice (R) Raja Muhammad Khan Mr. Justice (R) Muhammad Raza Khan Mr. Justice (R) Said Maroof Khan Mr. Justice (R) Attaullah Khan Mr. Justice (R) Salim Dil Khan Mr. Justice (R) Amanullah Abbasi Mr. Justice (R) S.A. Rabbani Mr. Justice (R) Shahid Anwar Bajwa	{ N.R.
Applicant in HRC-40927-S/2012 (Mr. Justice (R) Abdul Farooq Pirzada)	Absent
For the applicant in CMA No.176/2012 in Const. P. No. Nil/2012:	Sardar Muhammad Aslam, ASC

On Court notice	Mr. Irfan Qadir, Attorney General for Pakistan. Mr. Azam Khan Khattak, Addl. AG., Balochistan. Mr. Muhammad Qasim Mirjut, Addl. AG, Sindh. Mr. Muhammad Hanif Khatana, Addl. AG Punjab Syed Arshad Hussain Shah, Addl: AG, KPK
On Court notice } (<i>amici curiae</i>): }	Khawaja Haris Ahmed, Sr. ASC Mr. Salman Akram Raja, ASC
On Court's Call:	Mr. Abdul Qadeer Ahmed, Deputy Accountant General, Sindh.
Dates of Hearing:	26 th , 27 th , 28 th , 29 th March, 2013 and 2 nd , 3 rd , 8 th , 9 th , 10 th & 11 th April, 2013.

JUDGMENT

Anwar Zaheer Jamali, J.- By our short order announced in open Court on 11.4.2013, this case and the other connected cases were disposed of in the following manner:-

".....we hereby, in exercise of all the enabling powers vested in this Court, hold and declare that the law enunciated in the case of Accountant General Sindh and others versus Ahmed Ali U. Qureshi and others (PLD 2008 SC 522) is *per incuriam* and consequently this judgment is set aside. The titled appeal is accepted and the judgment impugned therein is also set aside. Other miscellaneous applications moved therein and in these proceedings are dismissed accordingly."

In support of above short order, now we proceed to record our detailed reasons as under:-

2. This Petition, for *suo moto* review of judgment dated 6.3.2008, passed in Civil Appeal No.1021 of 1995, other connected petitions and miscellaneous applications, emanates from the office note dated 21.11.2012 submitted by the Registrar of the Supreme Court of Pakistan for the perusal of Honourable Chief Justice, which reads thus:-

"It is submitted that the Civil Petition for Leave to Appeal No. 168-K of 1995 was filed in this Court by the Accountant General Sindh, challenging the validity of the judgment of High Court of Sindh, at Karachi, dated 02.02.1995, wherein the Court had granted the relief of pension to the respondent (since dead), a former judge

of the High Court of Sindh, who while holding the post of District and Sessions Judge was posted as Secretary to the Government of Sindh, Law Department and was elevated as Additional Judge, High Court of Sindh in 1985. He retired on 25.10.1988 and was allowed pension at the rate of Rs.4,200 per month with the benefit of commutation, gratuity and additional sum of Rs.2,100 per month as cost of living allowance payable to a retired Judge of the High Court under paragraph 16-B of President's Order No.9 of 1970, as amended by P.O. No.5 of 1988. In pursuance of the Constitution (Twelfth Amendment) Act, 1991 (Act XIV of 1991), the pension of the respondent was revised and fixed as Rs.6300 per month and thereafter by virtue of P.O. No.2 of 1993, the pension of retired Judges of superior judiciary was again revised, wherein the pension of High Court Judges was fixed with minimum and maximum ratio of Rs.9.800 and Rs.10,902 per mensum but this increase in pension was declined to the respondent on the basis of departmental interpretation of the President's Orders referred to above read with Fifth Schedule of the Constitution. The respondent thereafter, invoking the Constitutional jurisdiction of the High Court, filed a constitution petition wherein he sought a declaration that he was also entitled to the benefit of P.O. No.2 of 1993. Relief was granted to him by the Sindh High Court. The Accountant General, Sindh feeling aggrieved approached this Court by filing said Civil Petition for Leave to Appeal.

2. Leave to appeal was granted by this Court vide order dated 28th August 1995, on the following terms:

"2. So far the main petition is concerned, it is submitted by the learned Deputy Attorney General for the petitioner that respondent No.1 was a District and Session Judge and was elevated as Judge of the High Court in July, 1985 and retired after completing tenure of three years two months and twenty-seven days in that capacity, hence for the purpose of pension his case is covered by Article 15 of the High Court Judges (Leave, Pension and Privileges) Order, 1970, which is applicable to such judges of the High Court who retire before completion of five years service in the High Court and are entitled to draw pension as having retired from the service they were taken from for elevation to the High Court.

3. Leave is granted to examine the following questions. Firstly, whether for claim of respondent No.1 for extra/maximum pension writ petition before the High Court was competent to and maintainable. Secondly, whether P.O.9/70 is to be read in conjunction with P.O.2/93, P.O.3/95 and Article 205 read with Fifth Schedule to the Constitution, if yes, what will be its effect on the claim of respondent. Thirdly, whether the President can only increase or decrease the amount of pension with altering the terms and conditions as contemplated under Article 205 read with the Fifth Schedule to the Constitution. Fourthly, whether respondent No.1 is entitled to the minimum and maximum amount of the pension as contemplated under P.O.2/93."

3. Pending disposal of the Appeal, a number of other retired Judges of the High Courts, who were not allowed pension on the ground that they having been not put minimum service of five years in terms of paragraph 3 of Fifth Schedule to the Constitution were not entitled to the grant of pension, moved a joint representation to the President of Pakistan, through the Ministry of Law, Justice and Human Rights, Government of Pakistan and having received no reply, filed direct petitions before this Court under Article 184(3) of the Constitution, whereas, some of the retired Judges filed miscellaneous applications to be impleaded as party in the proceedings before this Court. Constitution Petition No.40 of 2002 filed by Mr. Justice (Retd) S.A. Manan was disposed of as withdrawn, but in view of the nature of right claimed in these petitions, this withdrawal was inconsequential to the right of pension of the judges. The appellant in the main appeal and the petitioners in the other constitution petitions sought declaration, as under:

a. *The provision of President's Order No.3 of 1997 was in derogation to Article 205 of the Constitution read with Fifth Schedule of the Constitution wherein the right of pension of only those Judges who have put minimum five years of service as Judge of the High Court, was recognized.*

b. *The retired Judges of the High Court, irrespective of their length of service were entitled to the grant of pension, as per their entitlement under Article 205 read with paragraph 2 of the Fifth Schedule of the Constitution.*

4. On 06.3.2008, the Civil Appeal No. 1021 of 1995 and the connected constitution petitions involving

common question of law and facts, were disposed of through the single judgment (PLD 2008 SC 522) by three member Bench of this Court comprising Mr. Justice Nawaz Abbasi, Mr. Justice Muhammad Qaim Jan Khan and Mr. Justice Muhammad Farrukh Mahmud in the following terms:

"34. In consequence to the above discussion, the Constitution Petitions Nos. 8/2000, 10/2001, 26/2003, 34/2003, 04/2004 and 26/2007, filed by the retired Judges of the High Courts are allowed and the petitioners/applicants in these petitions and miscellaneous applications, along with all other retired Judges of the High Courts, who are not party in the present proceedings, are held entitled to get pension and pensionary benefits with other privileges admissible to them in terms, of Article 205 of the Constitution read with P.O.No.8 of 2007 and Article 203-C of the Constitution read with paras 2 and 3 of Fifth Schedule and P.O. No.2 of 1993 and P.O.3 of 1997 from the date of their respective retirements, irrespective of their length of service as such Judges."

5. It is evident from the above that the matter was decided on the basis of High Court Judges (Pensionary Benefits) Order, 8 of 2007. This Order was promulgated on 14.12.2007 and at the time of decision of the matter was considered as a valid piece of legislation. But subsequently, vide this Court Judgment dated 31.07.2009 (Sindh High Court Bar Association V. Federation of Pakistan), reported as (PLD 2009 SC 879) this P.O 8 of 2007 was declared unconstitutional, illegal, ultra vires and void ab initio. The relevant paragraph of said judgment is reproduced as under:

"179. All the acts/actions done or taken by General Pervez Musharraf from 3rd November, 2007 to 15th December, 2007 (both days inclusive), that is to say, Proclamation of Emergency and the subsequent 'acts/actions done or taken in pursuance thereof, having been held and 'declared to be unconstitutional, illegal, ultra vires and void ab initio are not capable of being condoned. These include Proclamation of Emergency and the PCO No.1 of 2007 issued by him as Chief of Army Staff and Oath Order, 2007 issued by him as President of Pakistan in pursuance of the aforesaid two instruments, all dated 3rd November, 2007; Provisional Constitution (Amendment) Order, 2007 dated 15th November, 2007; Constitution (Amendment) Order, 2007 (President's Order No.5 of 2007 dated 20th November, 2007); Constitution (Second Amendment) Order, 2007 (President's Order No.6 of 2007 dated 14th December, 2007); Islamabad

*High Court (Establishment) Order 2007 (President's Order No.7 of 2007 dated 14th December 2007); High Court Judges (Pensionary Benefits) Order, 2007 (President's Order No.8 of 2007 dated 14th December, 2007) and Supreme Court Judges (Pensionary Benefits) Order, 2007 (President's Order No.9 of 2007 dated 14th December, 2007). The aforesaid actions of General Pervez Musharraf are also shorn of the validity purportedly conferred upon them by the decisions in Tikka Iqbal Muhammad Khan's case. The said decisions have themselves been held and declared to be *coram non judice* and nullity in the eye of law. The amendments purportedly made in the Constitution in pursuance of PCO No. 1 of 2007 themselves having been declared to be unconstitutional and void *ab initio*, all the actions of General Pervez Musharraf taken on and from 3rd November, 2007 till 15th December, 2007 (both days inclusive) are also shorn of the validity purportedly conferred upon them by means of Article 270AAA."*

6. It is further submitted that the issue in hand has far reaching implications. The practical effect of the judgment is that Judges of the superior courts are being granted pension and pensionary benefits without any consideration of tenure or length of service.

7. It is pointed out that Supreme Court in the case of Province of Punjab v. Dr. Muhammad Daud Khan Tariq (1993 SCMR 508) held that it is not against any principle for the Courts of this country to protect the interest of the tax-payers as well as the public exchequer notwithstanding the follies or illogical and some times even casual attitude of the custodians of the public exchequer. Furthermore, this Court in the case of Secretary, Board of Revenue, Punjab v. Khalid Ahmad Khan (1991 SCMR 2527) held that the Government has chosen to spend much more on the litigation instead of paying Rs. 15,000 as judgment-debt to the respondent towards the discharge of the decree in case where substantial justice has been done. Further, although the law point has been decided in favour of the appellants yet in the interest of justice we do not want to inflict further heavy burden on the public exchequer; which would indeed be burdened with more expenses.

8. The matter is therefore of great public importance as huge public money is being expended without any legal justification despite the fact that the basis of judgment itself has lost its validity. It is therefore a fit case for Suo Moto Review.

9. There are precedents, when this Court took up issues suo moto in the interest of justice. In the case of rowdysim in the Supreme Court premises *titled Shahid Orakzai v PML(N)* (2000 SCMR 1969), a Bench of three Judges acquitted the contemnor. Criminal Original Petition was filed by the Petitioner and the same was heard by a Bench of 5 Judges and the same was converted into Appeal. It was objected that the matter could not be reviewed by filing a Criminal Original Petition by a third person who was not party in the matter. However, the Counsel for the Contemner conceded that this Court is not precluded from recalling of its earlier order by taking Suo Moto action on coming to know that such miscarriage of justice had occurred due to the Court having proceeded on wrong premises. It was held that under Article 187(1) of the Constitution, Supreme Court can recall its earlier order by taking Suo Moto action on coming to now that sum miscarriage of justice has occurred. In yet another judgment, when two different interpretations by two Benches of the Supreme Court taking contrary views of the judgment of Shariat Appellate Bench passed in a pre-emption case of Said Kamal Shah, a Suo Moto Review (PLD 1990 SC 865) was taken by the Shariat Appellate Bench to clarify the effect of its judgment given in the said case. Again, it was held in the case *State v. Zubair* (PLD 1986 SC 173) that if a Judge of High Court had heard a bail application of an accused person, all subsequent applications for bail of the same accused or in the same case, should be referred to the same Bench/Judge wherever he is sitting and in case it was absolutely impossible to place the second or subsequent bail application before the same Judge, who had dealt with the earlier bail application of the same accused or in the same case in such cases, the Chief Justice of the concerned High Court may order that it be fixed for disposal before any other Bench/Judge of that Court. The Supreme Court by taking suo moto action of the difficulties arising out of the strict implementation of the ratio in the *State v. Zubair* and on receipt of the reports from the High Courts and hearing the Attorney General of Pakistan and Advocates-General of the

Provinces it was observed (2002 SCMR 177) that the spirit underlying the said case which still held the filed was not intended to create difficulties/bottlenecks or to work prejudicially to the interest of all concerned. It was held that the rule laid down in the above case shall continue but due to exigency of service or any other sufficient cause departure can be made in the large interest of justice and may be referred to any other bench for reason to be recorded in writing by the Chief Justice. Recently, a Constitution Petition filed for revisiting of this Court judgment dated 13.9.2011 passed in Constitution Petition No. 50/2010 for declaratory judgment regarding existence of Article 186A of the Constitution was treated as Civil Misc Application (CMA No. 4711/2012 in Constitution Petition No. 50/2010) for the purpose, which awaits hearing before the Court.

10. In view of the above, if approved, Suo Moto action may be taken in the matter for review of judgment dated 6.3.2008 passed in Civil Appeal No. 1021 of 1995 etc and the matter may be fixed before a Larger Bench comprising minimum five members.

HCJ

Registrar
21.11.2012
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3. Taking notice of the facts and circumstances disclosed in the above reproduced submission note, coupled with the legal position canvassed therein for taking cognizance in the matter, on 23.11.2012, following order was passed by the Honourable Chief Justice of Pakistan:-

"Perusal of above note *prima facie* makes out a case for examination of points raised therein. Therefore, instant note be registered as Suo Motor Misc. Petition and it may be fixed in Court in the week commencing from 03.12.2012. Notice to Hon'ble Retired Judges, who are beneficiaries of the judgment dated 6.3.2008 be issued. Office shall

provide their addresses. Notice to Attorney General for Pakistan may also be issued.”.

It is in this background that subsequently this petition came up for hearing before this five member larger Bench:-

4. At the commencement of the proceedings in the matter, Syed Iftikhar Hussain Gillani, learned senior ASC, representing eight of the honourable retired judges of the High Court, M/s Riaz Kiyani, Muhammad Aqil Mirza, Sharif Hussian Bukhari, Ghulam Mehmood Qureshi, Abdul Hafeez Cheema, Dr. Munir Ahmed Mughal, Tariq Shamim and Rao Iqbal Ahmed Khan, JJ and the widow of one honourable retired Judge Raja Muhammad Khurshid, who have been issued notices of these proceedings, came at the rostrum and made his submissions as one of the lead counsel for these judges.

5. At the outset, he gave a brief summary of the relevant facts regarding the services rendered by the judges represented by him, to show their actual period of service as judge of the High Court before becoming entitled for pensionary benefits in the light of judgment dated 6.3.2008, passed in civil appeal No.1021/1995 and other connected petitions (PLD 2008 SC 522), (hereinafter referred to as the “judgment under challenge”). In the same context, he also made reference of C.M.A No.802/2013, which contains relevant facts as regards their respective service as judge of the High Court. He further made reference to the statement in writing subsequently submitted by him, containing the formulations of his arguments, which read as under:-

“a. Entitlement to the remuneration of the Judges of the Superior Courts are guaranteed by the Constitution and no Sub-Constitutional legal instrument can take away such entitlement.

- b. Para 2 in the Vth Schedule is an independent provision and is not to be 'governed' by Para 3.
 - c. Dictum of Qureshi's judgment reported in PLD 2008 SC 522 was not decided 'on the basis' of the Presidential Order 8 of 2007, as observed in para 5 of learned Registrar's note, but founded on the mandate of the Constitution.
 - d. That High Court Judges (Leave, Pension and Privileges) Order, 1997 (President's Order 3 of 1997) is violative of Article-205 and Schedule V of the Constitution."
6. The learned Sr.ASC referring to some legal aspects of the controversy involved in the present petition, made specific reference to all the relevant statutes starting from the Government of India Act, 1935 upto the Constitution of 1973 as well as various orders and President's Orders issued in this regard from time to time. Making reference to the language of Article 205 read with paragraph-2 of its Fifth Schedule, relating to High Court judges, he emphasized that the language of paragraph-2 of the Fifth Schedule, commencing from the word "Every judge" makes it abundantly clear that irrespective of his length of service, every judge, once elevated to the High Court is entitled, inter alia, for the pensionary benefits while the authority for determination vested with the President in terms of this para is only confined to the quantum of such pension and nothing more. He added that paragraph-3 of the Fifth Schedule to Article 205 of the Constitution, which was available in the original text of the Constitution of 1973, and subsequently amended in the year 1991, was to be read independent and separate from paragraph-2, which provides for pensionary benefits for the two categories of the honourable retired judges, depending upon their length of service, when read in conjunction with it. He reiterated that every judge of the High Court is entitled for pensionary benefits, but for the determination of quantum of such benefit, they are categorized

into two; one, who have served as such for a period of five years or more and, the others, having served for less than five years. According to Mr. Gillani, insofar as the entitlement of pensionary benefits of those judges of the High Courts is concerned, who have rendered more than five years of service, there is no dispute or controversy at all about their entitlement of pensionary benefits. However, for the other category of judges, having rendered less than five years actual service, till date no independent determination, as required by law and under the Constitution, has been made by the President. At this stage, he also made reference to the judgment under challenge to show that it was in this background of the controversy that this Court resolved the issue of pensionary benefit of all the retired judges, including those, who have rendered less than five years service, and such conclusion based on valid reasonings is not open to interference in any form. More so, in a situation when such judgment was passed more than four years ago; it has already been implemented in its letter and spirit, and not challenged by the Government or from any other corner.

7. Touching to the moral side of this controversy relating to payment of pension, he further argued that all judges of the superior judiciary, including those who have retired from their office before rendering complete five years actual service as High Court Judge, are highly respected segment of the society, who need to maintain special protocol befitting to their earlier status and office; further in terms of Article 207 of the Constitution, they are disqualified to practice in the same High Court. In such circumstances, merely due to the fact that they have rendered less

than five years of service in the said position, they cannot be discriminated and deprived of such benefit, which in turn would, in many cases, result in leaving them at the mercy of the society for the purpose of meeting their financial needs in the old age. In order to gain support to his submissions, learned Sr. ASC further made reference to 12th Constitutional Amendment; President's Order No.2 of 1993 (PLD 1994 C.S 192) and President's Order No.5 of 1996 (PLD 1997 C.S 199) and relied upon the cases reported as M.A Rashid v. Pakistan (PLD 1988 Quetta 70), Ahmed Ali U. Qureshi v. Federation of Pakistan (PLD 1995 Karachi 223) and I.A Sharwani v. Government of Pakistan (1991 SCMR 1041). Amongst these cases, in the 1st case decided by learned Division Bench of Balochistan High Court on 08.5.1988, a dispute was agitated by honourable retired Justice M.A Rashid, as regards the entitlement of his pensionary benefits under the High Court Judges (Leave, Privileges and Pension) Order, 1970 qua the effect of amending order 5 of 1983, of which benefit was refused to him. In this case, the honourable Judge of the Balochistan High Court had initially adorned the office in that position on 07.10.1974, after being elevated to the High Court of Sindh and Balochistan. Thereafter he ceased to hold the office as Judge of the Balochistan High Court w.e.f. 25.3.1981, after having served for a period of more than six years. The Court, while holding him entitled for the benefit of amending order 5 of 1983, concluded that Constitution is a fundamental document and while interpreting a provision of the Constitution, article thereof must receive a construction which would be beneficial to the widest maximum extent. Moreover, making reference to some Presidential Orders, the Court observed that such Orders nowhere stipulate that the benefit of these

Presidential Orders would not be available to the Judges who had retired before the dates mentioned in the two orders, as the Orders are clear and admit of no ambiguity, therefore, the necessary conclusion would be that the benefit of these Orders would be available to all the Judges irrespective of their date of retirement. The 2nd case of Ahmed Ali U. Qureshi (*supra*), need not be discussed here as it was against the same judgment that an appeal was preferred before this Court, which was decided vide judgment under challenge dated 6.3.2008. The 3rd case of I.A Sharwani (*supra*) is also not being discussed here as it will be discussed in detail in some later part of the judgment.

8. At the conclusion of his arguments, Mr. Gillani also made reference to Article 260 of the Constitution to show the definition of '*remuneration*', which includes the word '*pension*', however, when confronted with other definitions contained in this Article, he conceded that since '*pension*' has been separately defined therein, therefore, its inclusion in the definition of "*remuneration*" will not make much difference.

9. After conclusion of arguments of Mr. Iftikhar Hussain Gillani, Mr. Munir A. Malik, learned Sr. ASC, who is representing four other honourable retired judges M/s Majida Rizvi, Nadeem Azhar Siddiqui, Mrs. Qaiser Iqbal and Tariq Mehmood, JJ, came at the rostrum and made his submissions. In the first place, he made reference of C.M.A's No.867 to 869 of 2013, to give some details about the services rendered by each one of them as honourable judge of High Court, particularly the dates of their appointment as an additional judge, permanent judge; and retirement/resignation, with total length of their respective service. Before commencing his

arguments on legal footing, Mr. Malik, frankly stated that none of the retired judge of the High Court represented by him has rendered actual service as such for a period of five years, but less than five years. In the context of entitlement of pensionary benefits, he gave brief history of constitutional legislation and other provisions of law including the President's Orders promulgated/ issued in the sub-continent before and after the independence of Pakistan from time to time and reiterated that paragraph-2 of the Fifth Schedule to Article 205 of the Constitution of 1973 is to be read independently; it covers the right of "every judge" of the High Court for the purpose of pensionary benefit to be determined by the President, therefore, irrespective of the fact whether no such determination has yet been made by the President for the category of those honourable retired judges of the High Court, who have rendered service as such for less than five years, they are entitled for the pensionary benefits. When confronted with the query as to how and in what manner the quantum of such pension for these judges could be determined, if no mode of determination in this regard is available before us in any form, he candidly stated that as yet no such determination has been made by the President even once, nor this matter was earlier agitated by any of the honourable retired judge of the High Court, who had rendered less than five years of service in the said office, since the promulgation of the Constitution of 1973 or even before that under the Constitution of 1956 or 1962 etc. The pith and substance of his submissions was that "every judge" as mentioned in paragraph-2 of the Fifth Schedule to Article 205, has its own connotation and significance which makes it abundantly clear that they all are entitled for pensionary benefits, but only the question of determination of quantum of pension is left with the President in

line with the spirit of paragraph-2 and nothing more. For this reason, in either of the two situations when paragraph-2 is read separately, independently and hermetically or together with paragraph-3, the claim of every retired judge of the High Court for pensionary benefits is fully established. In order to add force to his submissions about the entitlement of every judge of the High Court for pensionary benefits, he also laid stress upon Article 207 of the Constitution, which places an embargo on every honourable retired judge of the High Court from practicing within the territorial limits of the same High Court, wherein he has served as a permanent judge even for a single day. In between the lines, his submission was that when such an embargo becomes operative against honourable retired judges soon after their confirmation then the condition of five years minimum length of service for their entitlement to pension as judge of the High Court seems to be inconsistent, illogical, harsh and violative of Article 18 of the Constitution. He also made reference to the National Judicial Policy 2009 and 2012 and contended that even after retirement, honourable judges of the High Court are required to maintain befitting standard of living in the society, which may not be possible for them under financial constraints, thus, their claim for entitlement of pension even for less than five years actual service is fully justified and in accordance with law. However, he added that, indeed, retired judges of the High Court, who have rendered less than five years service as such and those who have rendered five years or more service, cannot be placed in the same category for the purpose of pensionary benefits. He also conceded to the position that as yet, not even once any determination regarding pensionary benefits of honourable retired judges, who have rendered less than five years service, has been made by the

President and such purported inaction on his part has never been challenged earlier in the history of the Sub-continent and our Country either under the dispensation of Government of India Act, 1935 or the Constitutions of 1956, 1962 and 1973, except the present litigation emanating from the case of Ahmed Ali U. Qureshi. In his further submissions learned ASC also dilated upon the concept of independence of the judiciary as a third pillar of the State, which, according to him, also covers its financial independence qua right to pension for every judge of the High Court irrespective of his length of service in the office.

10. Mr. Munir A. Malik, learned Sr. ASC in his further arguments, made reference to the office note dated 21.11.2012, submitted by the Registrar of Supreme Court of Pakistan for the perusal of Honourable Chief Justice of Pakistan, which formed basis of these proceedings and contended that no doubt vide judgment in the famous case of Sindh High Court Bar Association v. Federation of Pakistan (PLD 2009 SC 879), President's Orders No.8 of 2007 dated 14.12.2007 and Judges Pensionary Benefits Order 9 of 2007, have been declared to be *coram non judice* and nullity in the eyes of law, but on the basis of this case alone, the judgment under challenge cannot be set aside, as many other strong independent reasons have been recorded in its paragraphs 1 to 19, which still hold the field as alternate grounds for grant of pensionary benefits. Further submissions of Mr. Malik was that even if the Court comes to the conclusion about the non-entitlement of pensionary benefits for the honourable retired judges of the High Court, having rendered less than five years service, keeping in view their high status in the society and bonafide implementation of the judgment under challenge, any

order contrary to it, if passed, should be made operative prospectively and not retrospectively. During his further arguments, Mr. Munir A. Malik, made detailed reference of P.O No.9/1970, PO No.7/1991, P.O No.2/1993, P.O No.3/1995, P.O No.5/1995, P.O No.3/1997 and 12th Constitutional Amendment in an effort to show that it will be a legitimate and holistic approach if the claim of honourable retired judges of the High Court, who have rendered less than five years actual service, is looked into pragmatically and liberally in order to determine their right and quantum of pension, which exercise has not yet been undertaken by the President, though required under the mandate of the Constitution. Making reference to the case of one of the honourable retired judge of Sindh High Court Ms. Majida Rizvi, he also brought to our notice the judgment dated 1.7.2008 in C.P No.D-24/2002, which remained unchallenged till this date and has, thus, according to him, attained finality. In the end, he made reference to the principles of *locus poenitentiae* etc and cited the following cases:-

- a) Attiyya Bibi Khan v. Federation of Pakistan
(2001 SCMR 1161).
- b) M/s Haider Automobile Ltd v. Pakistan
(PLD 1969 SC 623).
- c) Elahi Cotton Ltd. v. Federation of Pakistan
(PLD 1997 SC 582).
- d) Amir Khatoon v. Faiz Ahmad (PLD 1991 SC 787).
- e) R v. A [2001 (3) All England Reporter 1 (17)].

11. In the case of Attiyya Bibi Khan, relating to some dispute between the students of a medical college and the educational institutions, the provisions of Article 25 of the Constitution were dilated upon and in that context it was held that the judgment

would be operative from the date of its announcement and would have no retroactive legal implications. In the case of M/s Haider Automobile Ltd (supra) and other connected case titled Province of West Pakistan versus Manzoor Qadir Advocate and another, dispute revolved around the availability of right of practice to a retired judge of the High Court of West Pakistan in view of the bar imposed by Ordinance II of 1964. The Court held that the legislature is competent to make a law and has full and plenary powers in that behalf and can even legislate retrospectively or retroactively. There is no such rule that even if the Legislature has, by the use of clear and unambiguous language, sought to take away a vested right, yet the Courts, must hold that such a legislation is ineffective or strike down the legislation on the ground that it has retrospectively taken away a vested right. After detailed discussion, the learned five members Bench of the apex Court unanimously held that the two learned former judges were debarred by Ordinance No. II of 1964 from practicing in the High Court of West Pakistan or any Court or tribunal subordinate to it. In the case of Elahi Cotton Ltd, discussing some broad principles of interpretation of statutes qua constitutional provisions view expressed by the Court was that the law should be saved rather than be destroyed and the Court must lean in favour of upholding the Constitutionality of a legislation, keeping in view that the rule of Constitutional interpretation is that there is a presumption in favour of the Constitutionality of the legislative enactments unless ex facie it is violative of a Constitutional provision. It was further held that where power is contained in the Constitution to legislate, one's approach while interpreting the same should be dynamic, progressive and oriented with the desire to meet the situation,

which has arisen, effectively. The interpretation cannot be narrow and pedantic, but the Court's efforts should be to construe the same broadly; so that it may be able to meet the requirements of an ever changing society. The general words cannot be construed in isolation but the same are to be construed in the context in which they are employed. In other words, their colour and contents are derived from their context. In the case of Amir Khatoon, in criminal proceedings, principle of interpretation of statute was discussed and it was held that if a provision of law is presenting some difficulty in interpretation, it has to be so interpreted as to harmonise with the other provisions of the Act of which it is a part and it is only when there is a manifest and established failure to harmonise it with the other provisions that it either prevails over other provisions or yields to the other provisions. It was further observed that provisions of any particular Act are to be so interpreted as to harmonise and to remain consistent with the other laws having a relevance or nexus with the law sought to be interpreted. In the case of R v A, involving criminal proceedings relating to some sexual offence, expressing his view on the principle of reading down, it was observed by a learned Member of the Bench that this principle is at least relevant as an aid to the interpretation of section 3 of the 1998 Act against the executive. As in accordance with the will of parliament reflected in section 3, it will sometimes be necessary to adopt an interpretation which linguistically may appear strained. The techniques to be used will not only involve the reading down of express language in a statute but also the implication of provisions. A declaration of incompatibility is a measure of last resort. It must be avoided unless it is plainly impossible to do so. If a clear limitation on

convention rights is stated in terms, such an impossibility will arise.

12. At this stage, Mr. Rafique Rijwana, learned ASC, who is representing honourable retired Justice Shah Abdul Rasheed in these proceedings, made his submissions. He gave relevant dates of his appointment and retirement to show that at the time of retirement on 11.2.1986, he had served as a judge of the High Court for 04-years, 07-months and 05-days. He did not advance any further arguments except adopting the arguments of Syed Iftikhar Hussain Gillani, learned senior ASC, who has already made his submission in this case, as noted above.

13. Mr. Hamid Khan, learned Sr. ASC, who is representing seven honourable retired judges of the High Court, at the commencement of his submissions, made reference to the material placed on record by him alongwith C.M.As No.847 to 853 of 2013 to give details regarding the service of each of the honourable retired judges represented by him, so as to show their actual length of service as judges of the High Court. For the purpose of clarity in his arguments, he divided the honourable retired judges represented by him into two categories i.e. Rana Muhammad Arshad Khan and Muhammad Jehangir Arshad, two honourable retired judges, who were elevated to the Bench from the bar and the remaining five retired judges, who before their elevation, had rendered about thirty years service in the District judiciary in different capacities. Details of these honourable retired judges and other judges in similar position, regarding service rendered by them, is being provided in the judgment separately in the form of a chart.

14. Mr. Hamid Khan, during his arguments, also placed on record written formulations, which read as under:-

1. "Para 2 of the schedule 5 has an independent existence from that of para 3 and cannot be read as superfluous or redundant, therefore, under the recognized principles of independence of the Constitution, the Court is called upon to give comprehensive meaning to this para.
2. Despite having independent existence para 2 has to be read with para 3 in order to give meaning of the former para, if read together they would cater for two distinct classifications, one of those who had put in five or more years of service and the other of those who have put in less than five years of service and finally within this formulation that those, who belonged to each of the classification, are entitled to pension and none of them can be deprived thereof.
3. Reading of two paragraphs together, it can also be construed that para 3 lays down a bench mark for those who are entitled to pension under para 2, this would lead to the exercise of principle of proportionality nevertheless it will not apply to the petitioners because such a principle can only be applied prospectively.
4. That having received pension under a judicial determination rights have been vested in favour of the petitioners which cannot be taken away at this stage under the established exception to the principle of *locus poenitentiae*.
5. Having once received pension under the judicial determination there is legitimate expectancy on the part of the petitioner to continue to receive such pensionary amounts, any deprivation at this stage would lead to privation and financial problems to the petitioners who are of advanced age.
6. There is a special case relating to judges elevated from the subordinate judiciary because:-
 - a. They had put a long service before they become Judges of the High Court;
 - b. They cannot be relegated to the position of those who retired as District Judges and so they cannot be given the pension of District and Session Judges.

c. Doing so would be against the independence of Judiciary and would undermine the office of a Judge of a High Court."

15. He contended that paragraph-2 of Fifth Schedule to Article 205 has an independent existence from paragraph-3, otherwise this paragraph would become superfluous and redundant, which status cannot be attributed to any piece of legislation, as under the well recognized principle of interpretation, every provision of law is to be given its comprehensive meaning. Following the arguments of earlier two learned ASCs, who have argued the case before him, he insisted that paragraph 2 of Fifth Schedule to Article 205 visualizes two categories of judges, but both of them are equally entitled for pensionary benefits under the President's Orders and in this regard power of determination conferred to the President is only confined to the quantum of pensionary benefits and not the determination of right to pension or otherwise. He further contended that reading of paragraph-2 together with paragraph-3 lays down benchmark for those who are entitled under paragraph-2 and in case no determination has been made by the President for entitlement of pension of retired judges of the High Court who have rendered less than five years of actual service, the principle of proportionality could be applied, but that too only prospectively, as the rights accrued and benefits already drawn by the honourable retired judges of the High Court through judgment under challenge cannot be withdrawn, being *stare decisis* and past and closed transaction under a judicial pronouncement. He further submitted that on account of such judicial determination, vested rights have accrued in favour of honourable retired judges, which cannot be taken away or withdrawn, being protected under the principle of *locus*

poenitentiae. To a question posed to him, whether on the principle of *locus poenitentiae*, retired judges represented by him seek protection of only those benefits which have already been drawn by them or also continuation of such benefits in future, his reply was that the principle of legitimate expectancy has accrued in their favour to continue receiving such pensionary benefits, which are even otherwise very necessary for them to meet their financial needs at this advanced age. Therefore, such benefits in their favour (honourable retired judges of the High Court) shall be continued, irrespective of any adverse pronouncement by this Court in the present proceedings. Making his further submissions, he also attempted to press into service the principle of past and closed transaction based on the premise that the judgment under challenge was announced on 6.3.2008 i.e. more than four years ago and has already been followed and implemented by the concerned government functionaries without any objection.

16. As to the claim of five honourable retired judges of the High Court, who were elevated to the bench after rendering more than thirty years service in District Judiciary in each case, before their elevation to the High Court, he further submitted that for grant of pensionary benefits, they cannot be relegated to the position of retired District and Sessions Judges as it will be a step against the independence of judiciary which will be undermining the status and office of the judge of a High Court. Making reference to Fifth Schedule to Article 205 of the Constitution of 1973, Learned senior ASC submitted that the original paragraph-3 in the Fifth Schedule was borrowed from the President' Order 9 of 1970, though in the different form, which was subsequently amended and introduced in the present form in the year 1991. When

confronted with a query that in case paragraph-2 (*ibid*) is to be read independently and separately, then it contains and denotes only one category of judges and not two, the learned Sr. ASC conceding to this position, criticized the language of paragraph-3 (*ibid*) by submitting that it has been grafted and drafted in the Constitution of 1973 in a crude form so as to leave the honourable retired judges, who have served the institution for a period of less than five years, without entitlement of any pensionary benefits. In this regard, he also made reference to some relevant Indian provisions of law and contended that there is no specific prohibition regarding the entitlement of payment of pension to the judges who have rendered less than five years service in the High Court before their retirement either in paragraph-2 or paragraph-3 of the Fifth Schedule to Article 205, therefore, the principle that whatever is not prohibited is permissible shall be applied on the principles of equity and fair-play to address the unforeseen difficulties of the honourable retired judges of the High Court. The pith and substance of his arguments was that looking to the constitutional provisions, status of honourable retired judges of the High Court in the society and their old age, a pragmatic approach may be followed by the Court in order to accommodate them for the purpose of granting them pensionary benefits, which is lacking determination in specific terms by the President under any of the earlier President's Orders issued from time to time.

17. Mr. Amir Alam Khan, learned ASC, who is appearing in this matter for five other honourable retired judges of High Court M/s Muhammad Nawaz Bhatti, Fazal-e-Miran Chohan, Syed Asghar Haider, Sheikh Javed Sarfraz and Tariq Shamim, JJ, in his arguments made reference of C.M.As No.803, 855, 856, 857 and

858 all of 2013, filed in the form of concise reply and also got recorded their respective dates of appointments as additional judge/permanent judge of the High Court, date of retirement/resignation as judge of the High Court, date of superannuation and the actual period of their respective length of service as judge of the High Court. He candidly stated before us that all the five honourable retired judges represented by him, are those, who, for one or the other reason, have not rendered actual service as a High Court Judge for five years or more and thus for the purpose of pension, they have availed the benefit of judgment under challenge.

18. As first limb of his arguments, Mr. Amir Alam Khan challenged the maintainability of this petition on the ground that adjudication made by a three member Bench of this Court in exercise of its appellate jurisdiction under Article 185(3) of the Constitution, has attained finality in all respect, rather it has been implemented by the concerned government functionaries in its letter and spirit more than four years ago. Thus, on any legal premise these proceedings cannot be subjected to interference, if considered to be proceedings under Article 184(3) of the Constitution, which confers only limited jurisdiction to this Court relating to the issues involving question of public importance and for the enforcement of fundamental rights guaranteed under the Constitution. He reiterated and added that the judgment under challenge is *stare decisis*, thus, final in all respect, and not open for reconsideration in any manner, therefore, these proceedings are not maintainable in the present form. Discussing the fallout of judgment under challenge, he also made reference of Article 203C(9) of the Constitution to show that not only retired judges of the High Court

having less than five years actual service to their credit have become entitled for pensionary benefits, but the Chief Justice and other honourable retired judges of the Federal Shariat Court have also become eligible and entitled for pensionary benefits despite being contract employees for a fixed term of three years. His further submission was that since a pragmatic and liberal approach has been followed by the Court in the judgment under challenge, its spirit may not be negated only on technical grounds or the fact that while interpreting the relevant provisions of the Constitution and President's Orders, another view of the matter prejudicial to the interest of the retired judges of the High Court, was also possible. Mr. Amir Alam Khan, when confronted with the question that in case judgment under challenge is found to be *per incuriam* then what will be its legal position, candidly stated that in that eventuality it will be a judgment liable to be ignored for all intent and purposes, thus, the ground urged by him for challenging the maintainability of these proceedings will not be an obstacle for the Court from adjudicating the case on merits.

19. Learned ASC also made reference to paragraph 178 of the judgment in the case of Sindh High Court Bar Association (supra) in support of his arguments that the judgment under challenge has been already protected by application of doctrine of *de facto* exercise of jurisdiction, and as such judgment has been passed by a 14 members Bench of the apex Court, therefore, such protection cannot be taken away by a five member Bench for denying its benefit to the retired judges of the High Court. Dilating upon the moral side of these proceedings, learned ASC also argued that all the honourable retired judges of the High Court, irrespective of their length of service, are highly respected segment of society, who

deserve extra compassionate consideration in the matter of grant of pension and other benefits, therefore, once a judgment of this Court has remained in the field for a period over four years and fully acted upon, it shall not be withdrawn so as to take away all its benefits retrospectively, being past and closed transaction. Advancing his further arguments with reference to the case of Fazal-e-Miran Chohan, J., learned ASC pointed out that after his elevation to the Bench as Additional Judge of the High Court w.e.f. 1.12.2004 and confirmation vide notification dated 30.11.2005, he resigned from the service under very special circumstances on 11.10.2009, though otherwise his date of superannuation was 25.12.2010. Leaving apart these facts, which need sympathetic consideration for extending him the pensionary benefits, in this manner he has actually served as Judge of the High Court for a period of 04-years, 10-months and 09-days. Thus, upon reading para 29 of President's Order No.3 of 1997, together with service regulation No.423 of the Civil Service Regulations (in short "CSR"), providing for automatic relaxation/concession of six months in case of short service of a civil servant, he is otherwise also entitled for pensionary benefits, independent to the ratio of judgment under challenge. In this context, he also placed reliance upon the cases Secretary Finance Division, Islamabad v. Muhammad Zaman, Ex-Inspector, I.B., Islamabad (2009 SCMR 769) and Muhammad Aslam Khan v. Agricultural Development Bank of Pakistan (2010 SCMR 522). In the first case of Secretary Finance Division (supra), with reference to regulation No.423 of CSR, of which benefit was claimed by the legal heirs of a deceased government employee/pensioner, it was held that regulation No.423 of CSR is without any qualification and is not restricted to

pensionary benefit of a widow. Of course, regulation No.423(2) empowers the competent authority to condone the deficiency of more than 6 months but less than one year where an officer has died while in service, or has retired under circumstances beyond his control. In this context, the case of Postmaster-General Eastern Circle (E.P.) Dacca and another v. Muhammad Hashim (PLD 1978 SC 61) was also referred wherein it was held that if the Rules were capable of bearing a reasonable interpretation favourable to the employee then that interpretation should be preferred. In the second case of Muhammad Aslam Khan (supra), again the scope of regulation No.423 of CSR was discussed with reference to the facts of the case, where a retired government servant, who had served for 31 years, 11 months and 14 days and was short of 17 days towards completion of 32 years, was claiming pensionary benefits for 32 years. The Court held that regulation No.423(1) of CSR under Chapter XVII with the heading "Condonation of Interruptions and Deficiencies" would undoubtedly suggest that the shortage of period not exceeding six months become automatically condoned, rather shortage of period exceeding six months was also condonable by competent authority, provided the conditions under regulation No.423(2) of CSR were fulfilled.

20. At the conclusion of his arguments he also pointed out the incident of plane crash, which took the life of honourable Justice Muhammad Nawaz Bhatti in the line of his duty on 10.7.2006, who otherwise would have reached the date of his superannuation on 31.8.2009, after rendering service of roughly 04-years and 09-months. In this context, he stressed for a merciful and lenient view in the matter for the widow and orphans of the deceased judge.

21. Mr. Muhammad Akram Sheikh, who is representing before us M/s Saeed-ur-Rehman Farrukh and Khan Riaz-ud-Din Ahmed, JJ, at the commencement of his arguments made reference of C.M.A No.871 and 872 of 2013 to give relevant dates of their appointment as Additional Judges/permanent judges of the High Court and date of their retirement on 31.7.1998 and 31.12.1997 respectively. According to his calculations, the actual period of service rendered by them, including the period of gap in their service, both of them have served as a Judge of the High Court for a period of more than five years and thus, their cases are not covered by the ratio of judgment under challenge and they are, therefore, not its beneficiary. Further, according to learned ASC, issuance of notice of these proceedings to them is uncalled for and liable to be withdrawn/set aside. However, when we have looked into some relevant factual aspects of the case in the context of their actual period of service as judge of the High Court, we have noticed that they have served as such for a period of about 03-years, 06-months and 12-days; and 04-years, 02-months and 28-days respectively, if the period when they remained out of service as Judge of the High Court is excluded from consideration in line with the definition of actual period of service given under paragraph-2 of President's Order No. 3 of 1997, which provides for only computing the actual service for eligibility and payment of pensionary benefits. Learned ASC making reference to Fifth Schedule to Article 205 of the Constitution, also attempted to show the element of discrimination in the matter of entitlement of pensionary benefits for a retired judge of the High Court and a retired judge of the Supreme Court, as separately provided in the said Schedule. In this regard, his submission was that no

minimum period of service as a judge of the Supreme Court is prescribed in the first part of the Schedule relating to right to pension while the condition of minimum five years service for entitlement of pensionary benefits has been discriminately made applicable for the retired judges of the High Court. Learned ASC, during his arguments, also made reference to the case of I.A Sharwani (supra), to lay stress to his arguments upon the right of pension to a retired civil servant.

22. In addition to the above, in his written submissions, learned ASC further reiterated as under:-

- a. Notice issued to the retired judges represented by him is not only uncharitable from its language, but also based on wrong premise.
- b. Pensionary benefits paid to the retired judges on the basis of judgment under challenge is past and closed transaction and *stare decisis*, thus, no order for its recovery can be made even if the said judgment is reviewed and put at naught.
- c. Though the principle of *stare decisis* has very limited application to the proceedings before the Supreme Court, being apex Court, but the rights and obligations determined under any proceedings shall be considered as a past and closed transaction, which has created vested rights under the judicial pronouncement in favour of some party.
- d. *Suo moto* exercise of jurisdiction in the present proceedings in any form are not maintainable under the law as held in the cases of Asif Saeed v. Registrar Lahore (PLD 1999 Lahore 350), Nusrat Elahi v. Registrar, Lahore

High Court (PLJ 1991 Lahore 471), Abdul Rehman Antulay v. Union of India (AIR 1984 SC 1358). In case the present proceedings are being entertained under Article 184(3) of the Constitution, then no violation or breach of any fundamental right of any citizen of this Country has been urged, which is *sine qua non* for exercise of such jurisdiction.

- e. Principle of *res judicata* is squarely applicable after lapse of five years of pronouncement of judgment in the case under consideration, as held in the cases of Abdul Jalil v. State of U.P. (AIR 1984 SC 882), Virundhunagar S.R. Mills v. Madras Govt. (AIR 1968 SC 1196) and Amalgamated Coalfields v. Janapada Sabah (AIR 1964 SC 1013).
- f. The honourable retired judges of the High Court received the pensionary benefits on the basis of judgment under challenge in good faith and the bonafide orders of the apex Court, therefore, question of its refund does not arise, even if the said judgment is reviewed or revisited.

23. At the conclusion of his arguments, with reference to the plea of *stare decisis*, Mr. Sheikh also read some passage from the book titled as "Fundamental Law of Pakistan" authored by Mr. A.K. Brohi, a prominent jurist of this country. In the context of past and closed transaction, he also placed reliance upon the cases of Miss Asma Jilani v. Government of the Punjab (PLD 1972 SC 139), Liaqat Hussain v. Federation of Pakistan (PLD 1999 SC 504), Jamat-i-Islami Pakistan versus Federation of Pakistan (PLD 2000 SC 111).

24. In the case of Miss Asma Jillani (supra), dealing with a criminal appeal wherein question arose, whether the High Court had jurisdiction under Article 98 of the Constitution of Pakistan (1962) to enquire into the validity of detention under the Martial Law Regulation No.78 of 1971 in view of the bar created by the provisions of the Jurisdiction of Courts (Removal of Doubts) Order, 1969 and the doctrine of law enunciated in the case of State versus Dosso (PLD 1958 S.C. (Pak.) 533), the successive manoeuvrings for usurpation of power under the Pseudonym of Martial Law were justified or valid, the Court while discussing various principles of interpretation of statutes held that: no duty is cast on the Courts to enter upon purely academic exercise or to pronounce upon hypothetical questions: Courts' judicial function; is to adjudicate upon real and present controversy formally raised before it by the litigant; Court would not suo moto raise a question or decide it; doctrine of *stare decisis* is not inflexible in its application; law cannot stand still nor can the Courts and Judges be made mere slaves of precedent. In this case finally upholding the doctrine of necessity it was further observed that the transactions which are past and closed may not be disturbed as no useful purpose can be served by reopening them.

25. In the case of Sh. Liaqat Hussain (supra) reviewing the jurisdiction of the Apex Court under Article 184 (3) of the Constitution, it was held that law if validly enacted cannot be struck down on the ground of *malafide* but the same can be struck down on the ground that it was violative of Constitutional provision. Further with reference to Article 6 of the Constitution, application of doctrine of necessity was rejected. Moreover, the concept of public importance within the meaning of Article 184 (3)

of the Constitution was discussed in detail and it was held that under Article 9 of the Constitution right of access to justice to all is a fundamental right guaranteed to every citizen of the country. However, in the end this petition and other connected petitions under Article 184(3) of the Constitution, challenging the Pakistan Armed Forces (Acting in Aid of the Civil Power) Ordinance 1998 promulgated on 20th November, 1998, thereby empowering the Military Courts to try civilians for civil offences, were dismissed in the terms as detailed in the short order dated 17.2.1999.

26. In the case of Jamat-i-Islami Pakistan (supra), it was held that a statute must be intelligibly expressed and reasonably definite and certain and it is the duty of the Court to find out the true meaning of a statute while interpreting the same. In the same context the underlining principle of doctrine of "*ejusdem generis*" was also enumerated. Finally it was held that where the words used in a statute are ambiguous and admit of two constructions and one of them leads to a manifest absurdity or to a clear risk of injustice and the other leads to no such consequence, the second interpretation must be adopted. It may also be added here that the other cases referred to by the learned Sr. ASC in paragraph "d" and "e" relating to the subject of maintainability and *res judicata* are premised on entirely different facts and circumstances, and thus have no relevancy or applicability to the present proceedings.

27. Mr. Gulzar Kiyani, learned Sr. ASC, who is representing Mr. Muhammad Muzammal Khan, J., another honourable retired judge of the High Court and beneficiary of the judgment under challenge, in his arguments firstly made reference to C.M.A No.801/2013, and gave relevant dates of appointment of Justice Justice Muhammad Muzammal Khan as additional Judge and

permanent Judge of the High Court and the date of his retirement, to show that admittedly before retirement he rendered actual service as a judge of the High Court for a period of 04-years, 05-months and 27-days. In his further arguments, learned Sr. ASC firmly disagreed with the submissions of many other learned ASCs, who earlier to him have argued the case, on the point of maintainability of this petition as well as about the interpretation of paragraphs-2 and 3 of Fifth Schedule to Article 205 of the Constitution. He contended that this Court, being the apex Court, has wide jurisdiction to exercise suo moto review powers and the principle of *stare decisis* is not application in this regard. To fortify his submissions in this regard, he placed reliance upon the case of Abdul Ghaffar-Abdul Rehman v. Asghar Ali (PLD 1998 SC 363).

28. Again, making reference to the language of paragraph-2 of Fifth Schedule to Article 205 of the Constitution, he strongly contended that there is only one category of judges of the High Court i.e. "*Every judge*" mentioned in this paragraph, either read it separately and independently or together with paragraph-3, whose right to pension are to be determined by the President from time to time and until so determined, they are entitled to the privileges, allowances and rights, to which immediately before its commencing day, the judges of the High Court were entitled. For this purpose, he also made reference to High Court Judges Order No.7 of 1937, President's Order No.9 of 1970 and President's Order No.3 of 1997, to show that even before partition of the sub-continent, the rights, qualifications and entitlement of the judges of the High Court for the purpose of pension were being regularly determined, but at no point in time, any judge of the High Court

who had served as such for a period of less than five years, was ever found eligible or entitled under any dispensation for payment of pension. It is only for this reason that right from the pre-partition days, till the decision by way of judgment under challenge, no retired judge of the High Court was found entitled for payment of pensionary benefits if he has served in the High Court for any period less than five years. He added that it looks strange and ridiculous that in case such right to pension was ever available to the retired judge of the High Court at any time during the last sixty years, still all of them, who were jurists in their own rights and adjudicators of law at the highest level, could not dare to interpret such Constitutional provisions or President's Orders issued in furtherance thereof in their favour, so as to avail the benefit of pension upon their retirement before completing actual service of less than five years. He also argued that paragraphs-2 and 3 of the Fifth Schedule to Article 205 of the Constitution are to be read together and in conjunction with the President's Orders issued under the said constitutional mandate from time to time and this scheme of law makes it clear beyond any shadow of doubt that there is no entitlement to pension for a judge of the High Court, who has served as such for actual period of less than five years.

29. Reverting to the case of his own client, learned senior ASC read before us paragraph 14, 15, 16 and 29 of the President's Order No.3 of 1997, the definition clause (b) and (g) from paragraph-2, relating to '*actual service*' and '*service for pension*' respectively, relevant for determination of pensionary rights of a High Court Judge, read with regulation No.423(b) of CSR, which in the first place provides automatic dispensation of deficiency upto six months

and further visualizes, subject to fulfillment of other conditions, the discretion for dispensation and relaxation of such period upto one year by the President. According to Mr. Kiyani, in such eventuality, by pressing into service these constitutional and sub-constitutional provisions of the law, having rendered service of four years, five months and twenty-seven days, his client has become entitled for the pensionary benefits, more so, as benefit of addition of another 30 days service period to his credit in terms of definition clause (g) of President's Order No. 3 of 1997 cannot be denied to him. He also cited the two earlier referred cases of Secretary Finance Division v. Muhammad Zaman and Muhammad Aslam Khan v. ADBP.

30. At the conclusion of his arguments, learned Sr. ASC submitted that in case the arguments advanced by him are not sustained and the judgment under challenge is reviewed/revisited, still the application of such judgment should be made prospectively, so as to save the benefits, which his client has already availed in the form of pension etc on the basis of judgment under challenge.

31. Raja Muhammad Ibrahim Satti, learned Sr. ASC, representing in these proceedings one honourable retired judge of the High Court, Mr. Mansoor Ahmed, J., also made reference of C.M.A No.873/2013, which is a reply on his behalf. He provided relevant details about the date of his appointment as additional judge of the High Court and the date of his retirement, which shows his actual period of service as 03-years, 02-months and 04-days. Learned ASC in his arguments strongly challenged the maintainability of this review petition on account of the fact that it has emanated from a note of the Registrar of the Supreme Court in

this regard, who has no judicial or administrative jurisdiction or authority at all to undertake such critical examination of an earlier judgment of the Supreme Court, which has become final, following the doctrine of *stare decisis*, and become past and closed transaction. He, however, in the same breath also candidly conceded about the unbridled jurisdiction of this Court to correct any legal error and submitted that indeed where there is a wrong there is a remedy is a well recognized principle of jurisprudence, so also the fact that when superstructure is built on wrong legal foundation, then upon its removal in any form, such superstructure is bound to collapse. The learned counsel further placed on record written formulations of his argument, which read as under:-

- "1. Whether the Registrar of this Court as defined in Order 1 Rule 2(1) and has been assigned certain powers and functions under Rule 1 of Order III and also Under Order V Rule 1, could in any way authorized or competent to monitor, supervise, scrutinize or having a watch over the Judicial Function of the Court and particularly to comment/point out legal flaws or defects in the judgments finally passed by the Court or any Bench of the Court.
2. Whether the Registrar who is Executive head of the Office has any role to get reopen the Final judgments of this Court which have attained finality and if this course is adopted it will disturb whole the Scheme of Constitution.
3. Whether even the note of Registrar is not misleading as apparently he based the note on total misconception as mentioned in para 5 of the Note that the judgment (PLD 2008 SC 522) is based on PO.NO.8 of 2007 and that PO.No.8 of 2007 has been declared void *ab-initio* in PLD 2009 SC 879, in fact the judgment is otherwise and it mainly based on interpretations of Article 25, 205, 207(3) Schedule V of the Constitution read with PO 2 of 1993, PO 3 of 1997 and reference has been made to PO 8/2007 in judgment which in fact removed the anomaly and Retired judges were entitled to pension even independent of P.O No.8 of 2007 and the said judgment is valid for other reasons as mentioned in judgment.

4. What prompted the Registrar to put up a note on judicial side after lapse of almost four years of the passing of judgment which had attained finality.
 5. Whether it was not proper to place the matter before an appropriate Bench to proceed with the matter if at all it was necessary whereas the Hon'ble Chief Justice had himself decided the fate of note that *prima facie* the note make out case of examination and accordingly issued Notices straightaway to the Retired Judges.
 6. Whether when a judgment is passed in regular jurisdiction under Article 185 the same can be reopened by recourse to other jurisdictions under Article 184, 186 of the Constitution, Human Right Forum or even *Suo Moto*.
 7. Whether the judgment is also not sustainable on additional ground qua discrimination amongst Judges of Superior Courts.
 8. Whether the retired Judge who never applied or party to the judgment can suffer for the Act of Court through which benefit is extended to them and at any rate recovery could be made for no fault of them.
 9. Whether in any case the re-visitation of the judgment would be operative retrospectively or prospectively.
 10. What should be effects and consequences and way-out regarding inaction of President of Pakistan for not determining the pension according to the schedule regarding the Judges of the High Court who had not completed five years as permanent service though he was empowered under the Constitution to do so."
32. In addition to the above, he contended that in case present proceedings are deemed to be in exercise of powers of review conferred upon this Court under Article 188 of the Constitution, read with Order XXVI of the Supreme Court Rules, 1980, in that eventuality the guiding principle for determining the parameters of review as laid down by this Court in the case of Abdul Ghaffar - Abdul Rehman (supra) are to be strongly adhered to. Reiterating his stance on the point of maintainability of this petition, he stated that in case the note of the Registrar is taken out of consideration and upon perusal of the judgment under challenge this Court feels it appropriate to proceed further with

this matter on its own conclusion, then of course, he has no legal objection as to the maintainability of these proceedings. In his submissions, Mr. Satti also placed reliance upon the case of Noor Jehan v. Federation of Pakistan (1997 SCMR 160) (paragraph-10) to show the limited scope of power of review available under the law. In this case, examining the scope of exercise of jurisdiction by the apex Court under Article 184(3) of the Constitution, while refusing to exercise such jurisdiction in that case for the detailed reasons incorporated in the judgment, it was held that the provisions of Article 184(3) of the Constitution indicate that the Supreme Court has been conferred with the power to entertain a petition under the above provision directly if the following two conditions are fulfilled:

- (i) The case involves a question of public importance; and
- (ii) The question so involved pertains to the enforcement of any of the Fundamental Rights contained in Chapter I of Part II of the Constitution.

In the end, he submitted that in case the judgment under challenge is reviewed by this Court and set at naught, then it should only be made applicable with prospective effect and not retrospectively, so as to protect the benefits already drawn by the retired judges, who have throughout acted in a bonafide manner and have received such pensionary benefits on the basis of judicial pronouncement of this Court and for no fault of their own.

33. Rana M. Shamim, learned ASC for another honourable retired Judge of the High Court Dr. Ghous Muhammad, J., during his submissions made reference to the contents of C.M.A No.742/2013, which is the reply of this petition on his behalf. He also gave details of services rendered by Dr. Ghous Muhammad as

judge of the District judiciary before his elevation as judge of the High Court of Sindh w.e.f. 10.5.1995 and confirmation on 30.9.1996. Advancing the case of his client, Rana M. Shamim, pointed out that the date of superannuation of Dr. Ghous Muhammad was 09.4.2001, by which time he would have easily completed actual period of his service of more than five years and six months, but to his misfortune, through an extra-constitutional measure i.e. P.C.O 1 of 2000, he was un-ceremonially removed from his office on 26.1.2000, when he was not invited to take oath under the new extra constitutional set up.

34. Learned ASC also placed reliance upon the language of para 29 of President's Order No.3 of 1997, read with regulation No.423 of CSR to show that despite shortage of less than two months in his actual length of service as Judge of the High Court, his case for retirement pension is fully matured on the strength of these provisions of law. In addition to it, he also made reference of Article 270AA(3)(b), which, according to him, provides complete redress to the grievance of his client relating to grant of pensionary benefits and protection of all other benefits, even in a situation when judgment under challenge is reviewed by this Court on any other legal premises. For ease of reference, the relevant part of this Article of the Constitution is reproduced as under:-

"Declaration and continuance of laws etc.

270AA. (1)

(2)

(3) Notwithstanding anything contained in the Constitution or clause (1), or judgment of any court including the Supreme Court or a High Court,---

(a)

(b) Judges of the Supreme Court, High Courts and Federal Shariat Court who not having been given

or taken oath under the Oath of Office of (Judges) Order, 2000 (I of 2000), and ceased to hold the office of a Judge shall, for the purposes of pensionary benefits only, be deemed to have continued to hold office under the Constitution till their date of superannuation."

35. Mrs. Asma Jehangir, representing Justice Tariq Mehmood, honourable retired judge of the High Court and the widow of late Justice Khiyar Khan, former Judge of the High Court, in her arguments firstly furnished relevant details about their career as a judge of the High Court, which reveal that the former served as a Judge of the High Court from 06.9.2000 to 6.4.2002 i.e. 01-year, 07-months and 04-days, while the late husband of latter, who was elevated as additional judge of the High Court on 16.9.1990 and reached the age of superannuation on 18.11.1994, had served for 04-years and 03-days. Arguing the case, she firmly questioned the maintainability of the petition in the present form as according to her, note of the Registrar cannot be taken as suo moto review petition against the judgment under challenge before this Court. Rather, such conduct of the Registrar is to be deprecated. She further argued that even if the discussion and observations contained in the judgment under challenge, with reference to Presidents Order No.8 of 2007, are totally discarded, still the said judgment on the basis of other sound reasons is sustainable in law and not open to interference under the limited scope of review. She further argued that in paragraph-2 of the Fifth Schedule to Article 205 of the Constitution word "every judge" also includes additional judges for the purpose of pensionary benefits. Lastly, supporting the judgment under challenge on the principle of *stare decisis*, she placed reliance upon the judgment in the case

of Bengal Immunity Co. v. The State of Bihar (AIR 1955 SC 661), which, *inter alia*, lays down that:-

"This Court has never committed itself to any rule or policy that it will not "bow to the lessons of experience and the force of better reasoning" by overruling a mistaken precedent..... This is especially the case when the meaning of the Constitution is at issue and a mistaken construction is one which cannot be corrected by legislative action. To give blind adherence to a rule or policy that no decision of this Court is to be overruled would be itself to overrule many decisions of the Court which do not accept that view.

But the rule of 'stare decisis' embodies a wise policy because it is often more important that a rule of law be settled than that it be settled right. This is especially so where as here, congress is not without regulatory power..... The question then is not whether an earlier decision should ever be overruled, but whether a particular decision ought to be. And before overruling a precedent in any case it is the duty of the court to make certain that more harm will not be done in rejecting than in retaining a rule of even dubious validity."

.....

It would be seen that in this case the Court acted upon the limitations which they have laid down in the course of their decisions, that reconsideration and overruling of a prior decision is to be confined to cases where the prior decision 'is manifestly wrong and' its maintenance is productive of great public mischief. The second is the case in -'G. Nkambule v. The King', 1950 AC 379 (Z37), where the Privy Council declined to follow its prior decision in - 'Tuumahole Bereng v. R.', 1949 AC 253 (X38). In this case, the Privy Council, while it reaffirmed the proposition that a prior decision upon a given set of facts ought not to be reopened without the greatest hesitation, explained why they, in fact, differed from the previous one in the following passage:

"From a perusal of the judgment in 'Tumahole's case', (Z38), it is apparent that the history of the adoption and promulgation of the various statutes and proclamations dealing with the effect of the evidence of accomplices in South Africa was only partially put before the Board, and much material which has now been ascertained was not presented to their Lordships on that occasion. The present case, therefore, is one in which fresh facts have been adduced which were not under consideration when Tumahole's case (Z38) was decided, and accordingly it is one in which, in their Lordships' view, they are justified in reconsidering the foundations on which that case was determined".

..... It will be noticed that the overruling of the prior decision in this case was based on the fact that important and relevant material was not placed before the Judicial Committee in the earlier case. These cases emphasize under what exceptional circumstances a prior decision or the highest and final court in a country is treated as not binding on itself."

36. Mr. Sadiq Leghari, another honourable retired judge of the High Court, who appeared in person, invited our attention to C.M.A No.686/2013, which is his reply to this petition. He gave relevant details of his appointment as a judge of the High Court before having served the District judiciary in Sindh for a period of over thirty years to show that his actual period of service as judge of the High Court is 03-years, 10-months and 04-days. He made reference to the operative part of the judgment under challenge to show that by this judgment, no unrestricted or open ended relief has been granted to the retired judges of the High Court, but only to those retired judges of the High Court, who have retired in terms of Article 195 of the Constitution. As per his formulations, para 33 of the judgment under challenge excludes the additional judges of the High Court from availing its benefit. He, while making reference to Article 188 of the Constitution, candidly stated that vast powers of review are available with this Court, which are aimed to foster the cause of justice and to undo any injustice or irregularity, legal or factual. Mr. Leghari also made reference to the judgment in the case of Muhammad Mubeen-us-Salam v. Federation of Pakistan (PLD 2006 SC 602) to fortify his submissions that benefit of judgment under challenge once received by him and other retired judges of the High Court has created a vested right in their favour and now it is a past and closed transaction, which can not be reopened; more over, the two parts of Fifth Schedule to Article 205 of the Constitution, relating

to the Supreme Court Judges and the High Court Judges, are discriminatory, thus, violative of Article 25 of the Constitution.

37. Sardar Muhammad Aslam, learned ASC for M/s M.K.N Kohli and Iftikhar Ahmed Cheema, two honourable retired judges of the High Court; and also for Mst. Begum Nusrat, widow of late Justice Muzaffar Ali Gondal, in his submissions made reference to C.M.As No.875/2013 and 1404/2013, which are their replies to these proceedings and also civil miscellaneous appeal No.176/2012, to show that retired Justice M.K.N Kohli, before his resignation, had served superior judiciary as a judge of the High Court for 04-years, 08-months, and 28-days. Therefore, besides the implication of judgment under challenge, his case was also qualified for pension in terms of paragraph-29 of the Presidents Order No.3 of 1997, read with Service Regulation No.423, and on the principle of rounding up of length of service. As regards the case of other retired judge, Justice Iftikhar Ahmed Cheema, he gave relevant dates of his joining of service as a Judge of the High Court and date of his retirement to show that after having served the District judiciary for over two/three decades, he also served the superior judiciary for 02-years, 07-months and 07-days, while late justice Muzaffar Ali Gondal, who retired as judge of Peshawar High Court on 06.5.1995, served as judge of the High Court for 04-years and 05-months. He conceded that as per the position as it stands today, all retired judges represented by him are beneficiaries of judgment under challenge, but for that, he adopted the arguments of other senior ASCs, who have earlier argued the scope of Article 205 read with Fifth Schedule to the Constitution regarding the pensionary rights of the judges of the High Court, who have retired

from their offices after having served for a period less than five years.

38. Mr. M. Afzal Siddiqui, learned ASC representing Mr. Najam-ul-Hassan Kazmi, honourable retired judge of the High Court, in his brief submissions made reference of CMA No.392/2013, filed in these proceedings and for the purpose of defending the pensionary right of his client, placed reliance upon the judgment in the case of Justice Hasnat Ahmed Khan v. Federation of Pakistan/State (PLD 2011 SC 680), at page 734, paragraph-43, which reads as under:-

"43. It is a matter of great satisfaction and encouragement for all the right men, who believe in the constitutionalism and are of the affirmed commitment that in our beloved country there should not be any rule except one under the Constitution, that is why the Parliament had not granted legitimacy or validity to the actions of 3-11-2007. In view of the past history and on plain reading of the constitutional provisions relating to the Armed Forces i.e. Articles 243, 244 and 245, discussed hereinbefore it is abundantly clear that Chief of Army Staff, who has been appointed by the President in consultation with the Prime Minister has no authority to hold the Constitution in abeyance, therefore, condonation has to be sought by adopting a legislative intervention, as per past practice, from the parliament. In absence of such validation, indemnification or legitimization, unconstitutional actions taken by a dictator would continue to charge not only to the person who had imposed Martial Law (Emergency) but also to others as well who had accepted new order imposed in the country beneficially. There is no cavil with the proposition that unconstitutional actions of General Pervez Musharraf (Retd.) taken on 3-11-2007 were declared unconstitutional on 31-7-2008 but still their consequences continue to exist because by no legislative intervention through Parliament, the legitimacy, indemnity or validity had been granted by the Parliament. It is to be seen that at the time of such unconstitutional Martial Law in the name of Emergency on 3-11-2007, the Parliament (National Assembly + Senate) was duly functioning until 15-11-2007 when the National Assembly completed its tenure but no legitimacy, validity or indemnity was obtained from the said

parliament. However, after dissolution of National Assembly, elections were held on 18-2-2008 and new National Assembly commenced its functions from 3rd week of March, 2008 onward. Meanwhile, Eighteenth and Nineteenth Constitutional Amendments were made by the parliament in pursuance whereof legislative actions of the Eighth Constitutional Amendment and Seventeenth Constitutional Amendments were also considered and all those legislative instruments, which found to be contrary to the Constitution, were weeded out of the Constitution. Interestingly the question of granting validity, indemnity and legitimacy in respect of Seventeenth Constitutional Amendment was also thoroughly examined and the Parliament unanimously indemnified, legitimized and validated the oath made by the Judges, under the PCO and Oath Order, 2000 by inserting sub Article 3 of the Article 270AA, which reads as under:--

"(3) Notwithstanding anything contained in the Constitution or clause (1), or judgment of any court including the Supreme Court or a High Court, -

- (a) *Judges of the Supreme Court, High Courts and Federal Shariat Court who were holding the office of a Judge or were appointed as such, and had taken oath under the Oath of Office (Judges) Order, 2000 (I of 2000), shall be deemed to have continued to hold the office as a Judge or appointed as such, as the case may be, under the Constitution, and such continuance or appointment, shall have effect accordingly.*
- (b) *Judges of the Supreme Court, High Courts and Federal Shariat Court who not having been given or taken oath under the Oath of Office (Judges) Order, 2000, (I of 2000), and ceased to hold the office of a Judge shall, for the purposes of pensionary benefits only, be deemed to have continued to hold office under the Constitution till their date of superannuation."*

The above provision in fact has replaced Article 270C inserted by the Seventeenth Constitutional Amendment, legitimizing, validating and condoning the oath taken by the then Judges under the PCO and Oath Order, 2000. Inasmuch as pensionary benefits were also extended to the Judges who had declined to take oath in pursuance of Emergency and PCO, 2000 read with Oath Order, 2000. A perusal whereof clearly indicates that by legislative intervention through Parliament, the Judges of the Supreme Court, High Courts and Federal Shariat Court who were holding the office of a Judge or were appointed as such, and had taken oath under the Oath of Office (Judges) Order, 2000 were deemed to have continued to hold the office as a Judge or appointed as such, as the case would be, under the Constitution, and such continuance or appointment, would have effect accordingly. However, Judges of the Supreme Court, High Courts and Federal Shariat Court who were not

given or taken oath under the Oath Order, 2000, and ceased to hold the office of a Judge were, for the purposes of pensionary benefits only, were deemed to have continued to hold office under the Constitution till their date of superannuation."

He added that in view of this clear enunciation of law by a six member Bench of the apex Court, pensionary rights of Mr. Najam-ul-Hassan Kazmi as a retired judge of the High Court are fully safeguarded like the case of honourable retired Justice Dr. Ghous Muhammad from the High Court of Sindh, whose case is identical and at par to his case.

39. Mr. Abdul Aziz Kundi, a former judge of the Peshawar High Court, who appeared before us in person and also for Mst. Roshan Bibi, widow of late Justice Sher Bahadur Khan, a former judge of the Peshawar High Court, contended that every permanent judge of the High Court is entitled for the pensionary benefits under paragraph-2 of Fifth Schedule to Article 205 of the Constitution, subject to determination by the President and until then, as per earlier arrangements. He also argued that when he was elevated to the Bench as a judge of the Peshawar High Court, the judgment under challenge was applicable and followed with full force in favour of all the retired judges of the High Courts for grant of pensionary benefits irrespective of their length of service, therefore, he had legitimate expectancy for grant of all the pensionary benefits upon his retirement, which had taken place on 31.10.2010, after he having served as a Judge of the Peshawar High Court for a period of 01-year, 03-months and 24-days. He also outlined the difficulties faced by him upon elevation as additional judge of the High Court as a result whereof, he had to close down his office and wind up his flourishing practice. He, therefore, while adopting the arguments of other learned senior

ASCs, urged that in his case retrospective application of the judgment of this Court, in case it decides to review the judgment under challenge, shall not be made as his case is distinguishable on the principle of legitimate expectancy. Arguing the case of Mst. Roshan Bibi, widow of late Justice Sher Bahadur Khan, he mentioned that the deceased was appointed as additional judge of the High Court on 7.4.1967 and he retired as confirmed Judge of the High Court on 1.7.1970, after having served for 03-years, 08-months and 14-days, and thereafter he passed away on 30.12.1970, but in view of the ratio of the judgment under challenge, his widow has been found entitled for all the pensionary benefits in terms of paragraph-4 of Fifth Schedule to Article 205 of the Constitution.

40. Mr. Mehmood A. Sheikh, learned ASC on behalf of Justice Muhammad Aslam Arain, honourable retired judge of the High Court, in his arguments made reference of C.M.A No.1829 of 2013. He also gave relevant dates to show that before his retirement as Judge of the High Court on 11.5.1995, retired Justice Muhammad Aslam Arain had served as such for 04-years and 06-months, thus, apart from the implication of judgment under challenge, he is entitled for pensionary benefits in terms of paragraph-29 of the President's Order No.3/1997, read with Service Regulation No.423, which provides for automatic rounding up and relaxation of such short period of service upto six months to make it five years of service for entitlement of pensionary benefits.

41. Mr. Salim Khan, another honourable retired judge of the High Court, who appeared in person to argue his case, made reference to C.M.A No.1274/2013, filed by him and also gave

relevant dates of his joining as Additional Judge of the High Court and date of his retirement as 31.1.2008, to show that he, before his retirement, had served as judge of the High Court for a period of 03-years and thus entitled for the benefit of judgment under challenge on the basis of arguments advanced in this regard by other senior ASCs, which he also adopts.

42. Mr. Hamid Farooq Khan, honourable retired judge of the High Court, who also appeared in person, gave relevant dates of his joining as Additional Judge/permanent judge of the High Court and date of his resignation/retirement to show that he actually served as judge of the High Court for a period of 03-years and 07-months before his resignation under compelling circumstances, otherwise his date of superannuation was upto 15.10.2020. He pointed out that as a result of unforeseen circumstances resulting in his resignation/retirement, now he is barred under Article 207 of the Constitution from practicing in the Peshawar High Court. In the end, adopting the arguments of other senior ASCs, he placed reliance upon the case of Sindh High Court Bar Association (*supra*). It will be worthwhile to mention here that during the proceedings in the above cited case before a fourteen member Bench of the apex Court, almost all the judgments/case law cited in the present proceedings, was discussed at length in the manner that eventually, as detailed therein, all illegal actions of a dictator General Pervez Musharraf so also the earlier judgment of the Court in Tikka Iqbal Muhammad Khan case, were struck down/set aside. Not only this, but a review petition against such judgment tilted Justice Khurshid Anwar Bhinder and others v. Federation of Pakistan (PLD 2010 SC 483), heard by equal number of judges,

was also dismissed with the observation that the Supreme Court has unfettered powers under Article 187 and 188 of the Constitution, read with Order XXVI of the Supreme Court Rules, to do ultimate justice for which earlier review petitions were very much maintainable.

43. Mr. Muhammad Munir Peracha, learned ASC, who is appearing in this case on behalf of M/s Sheikh Abdul Rashid, Chaudhry Mushtaq Ahmed Khan, Chaudhry Abdul Mannan and Munib Ahmed Khan, JJ, honourable retired judges of the High Court, at the commencement of his arguments made reference to C.M.As No.724, 836 and 835 of 2013, filed on behalf of these honourable retired judges of the High Court, containing their respective dates of appointment as additional judges/permanent judges and of their retirement/date on which they ceased to hold the office as High Court Judges. He stated that insofar as Mr. Justice Munir Ahmed Khan is concerned, he has not filed any CMA in reply to these proceedings. From the submissions made before us, we have noted that Sheikh Abdul Rashid, before his retirement on 31.5.2006, had served as a High Court Judge for 02-years, 08-months and 28-days; Chaudhry Mushtaq Ahmed Khan, who was affectee of the fallout of Al-Jehad Trust v. Federation of Pakistan (PLD 1996 SC 324) case, ceased to remain a judge of the High Court w.e.f 30.9.1996, but by that time, he had served the judiciary for 04-years, 01-month and 04-days; Chaudhry Abdul Mannan, who never remained permanent judge of the High Court, had served as High Court Judge for a period of 03-years, 02-months and 15-days; before his resignation and its acceptance by the President on 19.10.2009; while Mr. Munib Ahmed Khan had

served as a High Court Judge for 03-years, 11-months and 25-days. Learned ASC, making reference to Article 205 and Fifth Schedule to the Constitution qua the judgment under challenge, submitted that it is a judgment in *rem* through which all the honourable retired judges, who have rendered less than five years service as a High Court Judge, are entitled to avail its benefit, thus, no exception could be taken to the claim of respondents represented by him. In the same context, he also made reference of Article 25 of the Constitution and the case of Hameed Akhtar Niazi v. Secretary, Establishment Division, Government of Pakistan (1996 SCMR 1185), which in its terms prohibit discrimination amongst the persons placed in the similar position and entitle others the benefit of earlier judgment, when applicable to their case. He further submitted that judgment under challenge is one which is not fit to be reviewed by this Bench for any technical reasons and if this Court still comes to a contrary conclusion and forms its view about the maintainability of these proceedings in the positive, then it should be made applicable only prospectively and not retrospectively to save the benefits which have been already availed by the honourable retired judges of the High Court in a bonafide manner. In order to gain support to the case of Chaudhry Abdul Mannan, J., who never remained permanent judge of the High Court, he also made reference to the definition of 'Judge', under Article 260 of the Constitution, which also includes an additional judge. He summed up his submissions on the note that all the honourable retired judges, who have rendered less than five years actual service as a High Court Judge, being respectable class of the society, having held constitutional post, deserve a

sympathetic and lenient view in the matter, which may not be prejudicial to their interest.

44. Mr. Afnan Karim Kundi, learned ASC for honourable retired Justice Raza Ahmed Khan, before making his submissions, in order to give relevant dates of his appointment as additional judge, permanent judge and retirement of his client, made reference of C.M.A No.1419/2013, to show that he had actually served as High Court judge for a period of 03-years, 05-months and 04-days, before his retirement on attaining the age of superannuation on 05.3.1992. He contended that law relating to pensionary benefits is now well developed and provides that such benefit to a retired government servant is his hard earned right and no more a bounty of the State for certain individuals, therefore, an additional judge of the High Court is not entitled for any pensionary benefit, but only the permanent judges. He also made reference to the language of paragraph-2 of Fifth Schedule to Article 205 of the Constitution and argued that opening words of this paragraph "*every judge*" are to be given widest meaning in order to extend pensionary benefits to all the honourable retired judges of the High Court, irrespective of their length of service as such. He added that for fair determination of quantum of pension, any reasonable and equitable formula can be drawn by the President on the basis of rationalization of pensionary benefits to those honourable retired judges of the High Court, who have rendered less than five years service, as right now no such scheme is provided either in the President's Order No.9 of 1970 or President's Order No.3 of 1997.

45. Justice Muhammad Azam Khan, another honourable retired judge of the High Court, who appeared in person, made reference of C.M.A No.743/2013 to show that he was appointed as additional judge of the High Court on 13.6.1998 and was made to retire under the PCO of 2000 w.e.f 26.1.2000, after rendering total service of 01-year, 07-months and 12-days, thus, he is entitled for the benefit of Article 270AA(3)(b), which adequately protects his right to pension as affectees of PCO of 2000, resulting in his unceremonial and unconstitutional removal from service as High Court Judge. He, however, conceded that even if he had not been removed under the said PCO, on attaining the age of superannuation he would have retired on 17.3.2001 after rendering total service of less than 03 years. He also made reference of C.M.A No.940/2008, to show that he was one of the contesting party before the Supreme Court in the earlier proceedings wherein the judgment under challenge was passed. In the end, he stated that on other legal aspects of the matter, he adopts the arguments advanced by senior ASC Mr. Iftikhar Hussain Gillani.

46. Mr. Abdul Rahim Bhatti, learned ASC, who is representing Justice Abdul Ghani Sheikh, honourable retired judge of the High Court, made reference of C.M.A No.854/2013, to show various relevant dates of appointment and retirement of Mr. Sheikh after rendering actual service of 03-years and 15-days in aggregate. He made reference to the cases reported as Muhammad Mubeen-us-Salam (supra) and Muhammad Idrees v. Agricultural Development Bank of Pakistan (PLD 2007 SC 681) in support of his submission that even if the judgment under challenge is set

aside, then its applicability can only be made prospectively and not retrospectively. More so, when it is a past and closed transaction as the judgment under challenge has been fully implemented by the official respondents.

47. Mr. Farhat Nawaz Lodhi, learned ASC for retired Justice Amjad Ali Sheikh, a honourable retired judge of the High Court, also gave relevant dates of his appointment and retirement to show that at the time of his retirement on 22.6.1999, retired Justice Amjad Ali Sheikh, has served as a judge of the High Court for a period of 02-years, 06-months and 10-days. He further adopted the arguments of Mr. Amir Alam Khan, learned ASC on the question of maintainability of these proceedings emanating from the note of the Registrar, being malicious.

48. At this stage, with leave of the Court, M/s Gulzar Kiyani and Iftikhar Hussain Gillani, learned Sr. ASCs, made their further submissions wherein Mr. Kiyani, dilating upon the powers of review vested with this Court, made reference to the judgment in the case of Pir Bakhsh v. Chairman Allotment Committee (PLD 1987 SC 145) and also briefly discussed the principles of *res judicata, stare decisis* and prospective and retrospective application of various judgments announced by this Court to show that these principles are not attracted in the present case, which is to be adjudicated upon its own merits, more particularly, when these proceedings relate to public exchequer, thus, falling within the domain of public interest litigation. He also contended that in a case where constitutional provisions are clear in language, no doctrine of legitimate expectation can be applied in order to support or protect some wrong doing. For this purpose, he also

made reference to the High Court Judges Pension Order, 1937, President's Order No.9/1970 and President's Order No.03/1997, to show that earlier to the adjudication vide judgment under challenge, it was otherwise also a convention religiously followed by all the retired judges of the High Court having rendered less than five years service that no claim for pension for such short period of service was to be made. In the end, to fortify his submissions, he cited following cases.

- a. Abdul Ghaffar-Abdul Rehman's case (supra).
- b. State of West Bengal v. Corporation of Calcutta (1967 AIR SC 997)
- c. Bengal Immunity Co.'s case (supra)
- d. A.R. Antulay v. R.S. Nayak (AIR 1988 SC 1531.)

In the case of State of West Bengal (supra), examining the effect of Article 141 of the Constitution of India, it was held by a nine member Bench of the Indian Supreme Court that there is nothing in the Constitution which prevents Supreme Court from departing from its previous decision, if it is satisfied of its error and its baneful effect on general interests of public. In Constitutional matters which effect evolution of country's polity, Supreme Court must more readily correct itself than in other branches of law as perpetuation of a mistake will be harmful to public interest, while continuity and consistency are conducive to smooth evolution of rule of law, hesitancy to set right deviation will retard its growth. To fortify this view, reference to the case of Bengal Immunity Co. (supra) was also made.

In the case of A.R Antulay (supra), with reference to the facts of the case, it was held that where the relevant statutory provisions were not brought to the notice of the Supreme Court, which precluded it

to exercise power in a case, than it cannot be said that the judgment was not *per incuriam*. In this context reference was also made to the case of State of West Bengal v. Anwar Ali (AIR 1952 SC 75). In addition to it, the maxim "***Actus Curiae Neminem Gravabit***" (an act of the Court shall prejudice no man) was discussed and it was held that this maxim is founded upon justice and good sense and affords a safe and certain guide for the administration of the law; this maxim is not a source of general power to reopen and rehear adjudications which have otherwise assumed finality, as this maxim operates in a different and narrow area. It was illustrated that if owing to the delay in what, the Court should, otherwise, have done earlier but did later, a party suffers owing to events occurring in the interregnum, the Court has the power to remedy it.

49. Mr. Iftikhar Hussain Gillani, in his further submissions reiterated that the judgment under challenge cannot be termed as a judgment *per incuriam*, therefore, the benefits already drawn or claimed by the honourable retired judges of the High Court, though they having rendered less than five years actual service, cannot be reclaimed from them.

50. Khawaja Muhammad Haris, learned senior ASC, one of the *amici curiae* in this case, strongly supported the maintainability of these *suo moto* proceedings and contended that it may be that these proceedings have emanated from the note of the Registrar of this Court, but for according legitimacy to these proceedings it is the knowledge or notice taken by the Court, which is material and not its source. Once this Court finds that some law has been wrongly enunciated, it is its prime duty to correct the law irrespective of its fallout or effect upon its beneficiaries. He, while

criticizing the judgment under challenge, strongly contended that there are many legal mistakes floating on the surface of the record with reference to the judgment under challenge, thus, it can be termed nothing but a judgment *per incuriam*, and by applying the principle of *stare decisis*, it cannot be saved. He added that even otherwise, the rule of *stare decisis* is not strictly applicable to the Supreme Court. Making reference to the High Court Judges Pension Order, 1937, President's Order No.09/1970 and Presidents Order No.03/1997, he argued that no holistic or fair view was taken by this Court while passing its judgment under challenge and in this regard even prevalent convention and usage since the year 1937, having the force of law, were overlooked. He further argued that Fifth Schedule to Article 205 of the Constitution is not a sub-constitutional legislation, but a part of the Constitution in terms of Article 205 of Constitution, thus, it is to be read as such and when it is read in the context of prevalent President's Orders from time to time, it makes it very clear that length of service of High Court judges has always remained prime consideration for grant of pensionary benefits to them or otherwise. He also dilated upon the language of paragraph-3 of the Fifth Schedule to Article 205 of the Constitution to show its relevancy and importance in the matter of determining the entitlement for pension of judges of the High Court, who have served for less than five years as such. He conceded that of course, paragraph-3 of the Fifth Schedule to Article 205 of the Constitution will not control its paragraph-2, but at the same time when the whole Schedule is read in conjunction with the President's Order inforce at the relevant time, there remains no ambiguity that all those honourable retired judges, who have rendered less than five years

actual service, excluding those cases which are found entitled for the benefit of paragraph-29 (*ibid*), read with Service Regulation No.423, are not entitled for any pensionary benefits. He again made reference to various provisions of Judges Order/President's Orders right from the year 1937 till date to show undisturbed convention of over 75 years that no judge of the High Court, having served less than five years, ever objected to or raised the claim of pensionary benefit for a lesser period of service by advancing the interpretation of the relevant provisions of law in the manner as accepted in the judgment under challenge. Re-agitating the applicability of principle of *per incuriam* to the judgment under challenge, learned ASC read before us its paragraphs No.9 to paragraph No.22, one by one, to highlight several patent deficiencies in it, which brings it within the ambit of judgment *per incuriam* as per the law laid down by this Court in its various judgments. He further argued that since the very language of judgment under challenge gives its benefit to many others, who were not even party to such proceedings before the apex Court, therefore, the judgment under challenge is a judgment in *rem* and not a judgment in *personam*. In the same context, he also made reference to Article 203C, paragraph-9 of the Constitution, which has widened the applicability of the judgment under challenge to the judges of the Federal Shariat Court also. Here he also made reference to the case of Mahmood Khan Achakzai v. Federation of Pakistan (PLD 1997 SC 426) to express his point of view on the scope and application of "*De facto*" doctrine. In this case "*De facto*" doctrine was discussed as under:-

"The doctrine of *de facto* is a well recognized doctrine embedded in our jurisprudence. Under this doctrine bona fide acts in public interest performed by persons assuming authority,

which turns out to be illegal, are assumed to have been performed by a de jure authority/person and binding. This doctrine is intended to avoid dislocation, instability and confusion while declaring a *de facto* authority illegal. In order to create stability, regularity and to prevent confusion in the conduct of public business and in security of private rights the acts of the officers *de facto* are not suffered to be questioned because of want of legal authority except by some direct proceeding instituted for the purpose by the State or someone claiming office *de jure*.

The doctrine of *de facto* is based on considerations of policy and public interest. For good order and peace of society the title of persons in apparent authority is to be respected and obeyed until their title is investigated in some regular mode prescribed by law.

The acts of the officers *de facto* performed by them within the scope of their assumed official authority in the interest of the public or third persons and not for their own benefit are generally as valid and binding as if they were the acts of officers *de jure*. This doctrine can be applied if the Parliament is declared to be illegally constituted and Enactment passed by such Parliament is declared unconstitutional. It is only in such situation that to preserve continuity, prevent disorder and protect private rights, this doctrine can be pressed in service."

51. In the context of paragraph-29 of the President's Order No.03/1997, he supported the claim of those former judges of the High Court, who have though rendered less than five years service, but are entitled for the benefit of paragraph-29 read with Service Regulation No.423. In support of his other submissions, particularly on the point of *per incuriam*, he further cited following cases.

- i) Sindh High Court Bar Association's case (supra)
- ii) Gulshan Ara v. State (2010 SCMR 1162)
- iii) Fasih-ud-Din Khan v. Government of Punjab (2010 SCMR 1778)
- iv) Abdul Ghaffar-Abdul Rehman's case (supra).
- v) Asad Ali v. Federation of Pakistan (PLD 1998 SC 161)
- vi) Federation of Pakistan v. Qamar Hussain Bhatti (PLD 2004 SC 77).

In the case of Gulshan Ara (*supra*) relating offence under the Control of Narcotic Substances Act, 1997, the principle of *per incuriam* was discussed with reference to its dictionary meaning in Halsbury's Laws of England, Fourth Edition, volume 26 in paras 557-558, and comments on the judgment *per incuriam* were recorded as under:-

"A decision is given *per incuriam* when the Court has acted in ignorance of previous decision of its own or of a Court of coordinate jurisdiction which covered the case before it in which case it must decide which case to follow or when it has acted in ignorance of House of a Lords' decision, in which case it must follow that decision or when the decision is given in ignorance of the terms of statute or rule has statutory force."

In the case of Fasih-ud-Din Khan (*supra*), also, the meaning of phrase *per incuriam* were dilated with reference to the case of Sindh High Court Bar Association (*supra*) and it was observed that connotation of *per incuriam* is "carelessness". In the case of Asad Ali (*supra*), the scope of Article 184(3) of the Constitution was discussed in detail and, *inter alia*, it was held that Constitutional Convention once established has the same binding effect as a Constitutional provision, therefore, any breach of such Convention can be treated by the Court as a breach of the Constitution to which the Convention relates. It was further held that Constitution being the basic organic document, which is of a permanent character and is not subject to frequent changes, such a basic document is necessarily a reflection of the aspirations of its people. The Constitution, therefore, is not an imprisonment of the past but it takes care of the present and is also alive to the future. The cardinal rule of interpretation of a basic document like Constitution is that it should be liberally construed and unless the context clearly implies a restricted construction, the words and

expressions used in the Constitution are to be given widest connotation. Moreover, discussing the legal implication of retrospectivity or prospectivity of a statute touching the vested rights of the parties, it was observed that a new or amending statute touching the vested rights of the parties operates prospectively unless the language of the legislation expressly provides for its retrospective operation. However, the presumption against the retrospective operation of a statute is not applicable to statutes dealing with the procedure as no vested right can be claimed by any party in respect of a procedure. The only exception to the retrospective operation of a procedural law is that if by giving it a retrospective operation, the vested right of a party is impaired then to that extent it operates prospectively. The above principle applicable to a new or an amending statute, however, cannot be applied strictly to the law declared by the Courts through interpretative process. The Courts, while interpreting a law, do not legislate or create any new law or amend the existing law. By interpreting the law, the Courts only declare the true meaning of the law which already existed. Therefore, to that extent the law declared by the Court is applicable from the date the law is enacted.

In the case of Federation of Pakistan (supra) dealing with the case of civil servant qua the concept of judgments in "rem" and "personam", reference to the definition of these phrases was made from Black's Law Dictionary Sixth Edition; the ratio of Hameed Akhtar Niazi v. Secretary, Establishment Division (1996 SCMR 1185) was also discussed with reference to the scope and applicability of Article 25 of the Constitution and based on these reasons/legal principles, benefit was also extended to those other

persons who were equally placed and found entitled for similar benefit through an earlier pronouncement of the Court.

52. Mr. Salman Akram Raja, the other amicus curiae appointed by the Court, during his submissions read before us second part of Fifth Schedule to Article 205 of the Constitution, relating to High Court Judges and contended that indeed in terms of paragraph-2 every judge of the High Court is entitled for pensionary benefits, but subject to determination of such right by the President, which is the basic requirement and only thereafter the question of quantum of pensionary benefits could be considered/decided by the President for determination. After reading paragraph-2 and 3 of the Fifth Schedule to Article 205 of the Constitution word-by-word, he contended that the word "*determination by the President*" has two facets; one about the right of every judge; and, the other about the quantum of pensionary benefits of every judge. When in this background, the Fifth Schedule relating to High Court Judges is read in line with the language of either High Court Judges Order, 1937 or President's Order No.09/1970 or President's Order No.03/1997, it clearly shows that determination made by the President regarding pensionary benefit of the honourable retired judges of the High Court, who have served as such for less than five years, is zero pension, for which no further clarification or illustration is needed in case President's Order is read harmoniously with the Fifth Schedule. Making reference to the principle of rationality or proportionality in the matter of pensionary benefits, he further contended that this Court cannot sit over or regulate the powers of the President in this regard, therefore, no such observation or

directions can be issued to the President, who has already determined the right of the judges of the High Court, having rendered less than five years service as "Zero". He also made reference to the judgment in the case of Sindh High Court Bar Association (supra) to show that the judgment under challenge is mainly based on the President's Order No.08/2007 dated 14.12.2007, which has been already declared *ultra vires* and void *ab initio*, and it also contain relevant observations striking down the opinion of the Attorney General for Pakistan in that case. He further made reference of Article 184(3), 187 and 188 of the Constitution in support of his arguments that suo moto proceedings in the present form are very much competent, particularly in the circumstances when question of public exchequer is involved and the fallout of judgment under challenge is huge burden over it, which has brought this case within the domain of public interest litigation. In the end, he referred the case of Hussain Badshah v. Akhtar Zaman (2006 SCMR 1163) to conclude his submissions that if the judgment under challenge is reviewed, its applicability shall be made prospectively so that the pensionary benefits already availed by the former/retired Judges of the High Court, having less than five years service to their credit, are not disturbed. He also made a statement before the Court that he will further provide written synopsis of his arguments to show number of glaring deficiencies in the judgment under challenge, which makes it a judgment *per incuriam*.

53. Mr. Azam Khan Khattak, Additional Advocate General, Balochistan, when came at the rostrum, simply adopted the arguments of learned Attorney General for Pakistan, although by

that time, the learned Attorney General for Pakistan has not even made his arguments in the case. When confronted with this position, he submitted that he knows that what the learned Attorney General for Pakistan is going to argue in this case, therefore, without waiting for his submissions, he is making such statement before the Court.

54. Mr. Muhammad Qasim Mirjat, learned Additional Advocate General Sindh argued that only confirmed/permanent judges of the High Court are entitled for pensionary benefits and not those who had performed only as additional judges of the High Court. He further argued that the scheme under the Constitution with reference to Article 205 of the Constitution, read with its Fifth Schedule and the President's Order 9 of 1970 or 3 of 1997, is quite clear, therefore, he would not support the claim of the honourable retired judges of the High Court, who have rendered less than five years service as such and now claiming pensionary benefits on the basis of the judgment under challenge.

55. Mr. Hanif Khatana, learned Additional Advocate General, Punjab conceded to the jurisdiction of this Court in entertaining and deciding the present petition on merits, however, making reference to the language of paragraph-2 of Fifth Schedule to Article 205 of the Constitution, he submitted that every judge of the High Court, irrespective of his length of service is entitled for pensionary benefits.

56. Mr. Zaheer Bashir Ansari, ASC, who appeared in this case on behalf of his late brother Justice Tanvir Bashir Ansari, retired judge of the High Court, was unable to give exact date of his appointment and retirement, but pointed out that on his

retirement date i.e. 25.6.2005, late Justice Tanvir Bashir Ansari has served as a Judge of the High Court for a period of 04-years, 01-month and few days. He further adopted the arguments advanced by other senior ASCs in this case.

57. Syed Arshad Hussain Shah, Additional Advocate General, KPK in his arguments, stressed upon the definition of word "every" and in this context, referred the case of Abrar Hassan v. Government of Pakistan (PLD 1976 SC 315). In this case, in a petition in the nature of quo warranto, one of the question involved was that whether a writ of such nature could be issued against a High Court Judge. In that context, it was observed that often terms "Judge" and "Court" are used interchangeably as synonymous yet this does not obliterate distinction between a Judge as an individual and Court as seat of justice as an institution. In the end, prayer for grant of writ of quo warranto against the judge was declined and the petitioner was, therefore, dismissed. He contended that these *suo moto* proceedings in order to examine the legality and propriety of the judgment under challenge on the touchstone of *per incuriam*, etc are very much maintainable, however, in the peculiar facts and circumstances, he supported the judgment under challenge as well as the claim of every retired judge of the High Court for pensionary benefits, irrespective of his actual length of service as such.

58. Mr. Irfan Qadir, learned Attorney General for Pakistan, in his arguments boldly asserted that judges cannot be made judge of their own cause for the purpose of determining their pensionary benefits. Thus, neither he is supporting these *suo moto* proceedings, nor the judgment under challenge, as determination

of right to pension in terms of the clear language of paragraph-2 of the Fifth Schedule to Article 205 of the Constitution is exclusive domain of the President of Pakistan. He further contended that from the definition of word “*Judge*” given under Article 260 of the Constitution, even the additional judges of the High Court, if the President so determines, could be entitled for pensionary benefit irrespective of the bar under Article 207 of the Constitution. Expressing his view about some other legal aspects of the judgment under challenge, he firstly argued that even wrong law declared by this Court cannot be corrected under any constitutional jurisdiction vested with the Supreme Court, however, at a later stage, he conceded that Supreme Court has unfettered powers under the Constitutional mandate to ensure correct interpretation of law and its applicability to all the citizen of the Country and no palpable wrong pronouncement of law could hold the field once it has come to the notice of the Court and necessary proceedings have been initiated for this purpose. He further argued that judgment under challenge is not entirely dependent upon the discussion made in its paragraph-20, relating to President's Order No.08/2007, which has been set at naught and declared to be void ab initio in the case of Sindh High Court Bar Association (supra). He also brought to our notice that as per his information, another President's Order based on the summary of Ministry of Law for determining the right to pension of the honourable retired judges of the High Court, having rendered less than five years service, is in the pipeline. However, till the conclusion of these proceedings and announcement of our short order in Court on 11.4.2013, no such President's Order has seen the light of the day.

59. For a short while, Justice Abdul Ghani Sheikh, with the permission of the Court, also came at the rostrum to make his submissions. He read before us paragraph-2 & 3 of the Fifth Schedule to Article 205 of the Constitution to advance his case for pensionary benefits irrespective of his length of service and in support of his submission, placed reliance upon the cases of State Bank of Pakistan v. Mst. Mumtaz Sultana (2010 SCMR 421) and Pakistan through Secretary Ministry of Finance v. Muhammad Himayatullah Farukhi (PLD 1969 SC 407). In the case of State of Bank of Pakistan (supra), dealing with some dispute relating to Voluntary Golden Handshake Scheme floated by the State Bank of Pakistan through Circular No.9 of 1997, dated 23.10.1997, while outlining the distinction between a judgment in rem and judgment in personam as also highlighted in the case of Pir Bakhsh and others v. The Chairman, Allotment Committee and others (PLD 1987 SC 145), it was held that the benefit allowed to one group of employees cannot be denied to another group of employees in similar position, even if they were not party to the earlier proceedings, as the State Bank of Pakistan was bound by the earlier decision to redress their grievance accordingly. In the other case of Pakistan through Secretary Ministry of Finance (supra), in depth discussion as regards the Principle of *locus poenitentiae* (power of receding till a decisive step taken) was made and it was held that the authority that has power to make an order has also the power to undo it, but subject to the exception that where the order has taken legal effect, and in pursuance thereof certain rights have been created in favour of any individual, such order cannot be withdrawn or rescinded to the detriment of his rights.

60. It may be mentioned here that some other senior ASCs/ASCs and honourable retired judges, who appeared during the proceedings of this case on some dates, did not come forward to make their submissions, though before conclusion of the proceedings on 11.4.2013, right to audience was extended to all, that if any one of them intends to argue the case, he may come at the rostrum to make his submissions.

61. When we look at the detailed submissions of the learned senior ASCs, ASCs, the Additional Advocate Generals of four Provinces, the Attorney General for Pakistan, some of the retired judges of the High Court, who appeared in person and the two *amici curiae*, as noted above, we find that for proper adjudication of all these factual and legal controversies, framing of three moot points for consideration covering the gamut of these submissions will be useful, which are accordingly framed as under:-

- (a) Whether the present *suo moto* proceedings, emanating from the office note of the Registrar dated 21.11.2012, are not maintainable on the basis of various legal contentions raised before us qua the powers of this Court vested under Articles 184, 185, 187 and 188, in Chapter-1, Part-VII of our Constitution?
- (b) What could be the correct interpretation of Article 205, its Fifth Schedule in the Constitution, read with applicable President's Orders No.09 of 1970 / 03 of 1997?
- (c) Whether under any legal principle, pensionary benefits, etc, already availed by the honourable retired judges of the High Court on the basis of judgment under challenge could be retained by them, or they are liable to

return/restore/refund all such benefits to the public exchequer?

62. As to the question of maintainability of this petition, from the arguments advanced by the learned ASCs etc, we find that the first objection as to its maintainability is raised in the context of jurisdiction and powers of the Registrar of this Court for submission of the note dated 21.11.2012, which formed basis for the subsequent order of the Honourable Chief Justice for fixation of this petition before the larger Bench. The other objections as to the maintainability are with reference to the powers of this Court under Articles 184(3), 187 and 188 of the Constitution qua applicability of the principles of "*stare decisis*", "*res judicata*", "*locus poenitentiae*" and "past and closed transaction". In this regard, when we have confronted the learned ASCs with a simple but important question, that if for any reason the note of the Registrar dated 21.11.2012 is improper and its contents are discarded, but at the same time when the issue in relation to the illegality of a judgment, which has taken the form of a precedent laying down an incorrect law, and its colossal fallout on the public exchequer, which has brought it within the domain of public interest litigation, has come to our notice in any form, whether for some technical reasons alone, the Court should still desist from exercising its jurisdiction vested under Articles 184(3), 187 and 188 of the Constitution, the unanimous answer to this question was in the negative i.e. in exercise of powers under the constitutional provisions, this Court has unlimited jurisdiction to reopen, revisit or review, and for this purpose examine any judgment earlier pronounced by this Court to set the law correct,

to cure injustice, save it from becoming an abuse of the process of law and this judicial system. The Attorney General for Pakistan, during his arguments, at one stage stated that under no circumstances does this Court have jurisdiction to examine or review the judgment under challenge, but later on, he also conceded to this legal position. Although some of the learned ASCs still reiterated their arguments for pressing into service the principle of *stare decisis, res judicata* and "past and closed transaction" and cited some judgments in support thereof, but at the conclusion of the proceedings, none of them could dispute that the principle of *stare decisis, res judicata*, or past and closed transaction in their literal form are not applicable to the proceedings before the apex Court in a situation when the very judgment under challenge is found "*per incuriam*".

63. In order to exhibit some of the powers of this Court, which could be exercised to consider a question of public importance with reference to enforcement of any fundamental right; for doing complete justice in any case or matter pending before it, and powers of review available to the Supreme Court, it will be useful to reproduce hereunder Articles 184(3), 187 and 188 of the Constitution respectively and also to discuss few celebrated judgments, enunciating some broad principles of law in this regard. For this purpose, reference is made here to the judgments in the cases of Abdul Ghaffar- Abdul Rehman (supra), Sindh High Court Bar Association (supra) and Justice Khurshid Anwar Bhinder (supra).

Article 184(3) of the Constitution.

"184. Original jurisdiction of Supreme Court.-(1) The Supreme Court shall, to the exclusion of every other Court, have original jurisdiction in any dispute between any two or more Governments.

Explanation.-In this clause, "Governments" means the Federal Government and the Provincial Governments.

- (2) In the exercise of the jurisdiction conferred on it by clause (1), the Supreme Court shall pronounce declaratory judgments only.
- (3) Without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter I of Part II is involved, have the power to make an order of the nature mentioned in the said Article."

Article 187 of the Constitution.

"187. Issue and execution of processes of Supreme Court.-(1)

Subject to clause (2) of Article 175, the Supreme Court shall have power to issue such directions, orders or decrees as may be necessary for doing complete justice in any case or matter pending before it, including an order for the purpose of securing the attendance of any person or the discovery or production of any document.

(2) Any such direction, order or decree shall be enforceable throughout Pakistan and shall, where it is to be executed in a Province, or a territory or an area not forming part of a Province but within the jurisdiction of the High Court of the Province, be executed as if it had been issued by the High Court of that Province.

(3) If a question arises as to which High Court shall give effect to a direction, order or decree of the Supreme Court, the decision of the Supreme Court on the question shall be final."

Article 188 of the Constitution.

"188. Review of judgments or orders by the Supreme Court.-

The Supreme Court shall have power, subject to the provisions of any act of Majlis-e-Shoora (Parliament) and of any rules made by the Supreme Court, to review any judgment pronounced or any order made by it."

Excerpt from the Abdul Ghaffar-Abdul Rehman (supra)'s case. (PLD 1998 SC 363).

"14. Article 188 of the Constitution confers power on this Court subject to the provisions of any Act of the Parliament and any rules made by the Supreme Court to review any judgment pronounced or any order made by it. Whereas' Order XXVI, rule 1 of the Rules lays down that subject to the law and practice of the Court, the Court may review its judgment, order of any civil proceeding, on ground similar to those mentioned in Order XLVII, rule 1 of C.P.C. and any criminal proceeding on the ground of an error apparent on the face of the record.

It may be observed that Order XLVII, rule 1 of C.P.C. gives a right to a party to apply for review if he is aggrieved by the orders or decrees, or decisions mentioned in sub-clauses (a), (b),

(c) of rule 1 on the three grounds, namely, discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason.

15. We may now refer to the judgments relied upon by the learned counsel for the parties. Mr.S. Sharifuddin Pirzads has referred to the following cases:-

- (i) Lt.-Col. Nawabzada Muhammad Amir Khan v. The Controller of Estate Duty, Government of Pakistan, Karachi and others (PLD 1962 SC 335).
- (ii) Fida Hussain v. The Secretary, Kashmir Affairs and Northern Affairs Division, Islamabad and another (PLD 1995 SC 701),
- (iii) Suba through Legal Heirs v. Fatima Bibi through Legal Heirs and others (1996 SCMR 158);
- (iv) Mian Rafiq Saigol and another v. Bank of Credit and Commerce International (Overseas) Limited and another (PLD 1997 SC 865).
- (v) Unreported order in Civil Review Petition No.I-K of 1989 (Begum Asfar Saeed and others v. Ch.Abdul Aziz) rendered by this Court on 10-3-1991.

In the above first case, Cornelius C.J. made the following observation as to the scope of review:

"For the present purpose, the emphasis should, in my opinion, be laid upon the consideration that, for the doing of "complete justice", the Supreme Court is vested with full power, and I can see no reason why the exercise of that full power should be applicable only in respect of a matter coming up before the Supreme Court in the form of a decision by a High Court or some subordinate Court. I can see no reason why that purpose in its full scope, should not also be applicable for the purpose of reviewing a judgment delivered by the Supreme Court itself: provided that thereby found a necessity within the meaning of the expression "complete justice" to exercise that power. It must, of course, be borne in mind that by assumption, every judgment pronounced by the Court is a considered and solemn decision on all points arising out of the case, and further that every reason compels towards the grant of finality in favour of such judgments delivered by a Court which sits at the apex of the judicial system. Again, the expression "complete justice" is clearly not to be understood in any abstract or academic sense. So much is clear from the provision in Article 163(3) that a written order is to be necessary for the purpose of carrying out the intention to dispense "complete justice". There must be a substantial or material effect to be produced upon the result of the case if, in the interests of "complete justice"

the Supreme Court undertakes to exercise its extraordinary power of review of one of its own considered judgments. If there be found material irregularity, and yet there be no substantial injury consequent thereon, the exercise of the power of review to alter the judgment would not necessarily be required. The irregularity must be of such a nature as converts the process from being one in aid of justice to a process that brings about injustice. Where, however, there is found to be something directed by the judgment of which review is sought which is in conflict with the Constitution or with a law of Pakistan there it would be the duty of the Court unhesitatingly to amend the error. It is a duty which is enjoyed upon every Judge of the Court by the solemn oath which he takes when he enters upon his duties, viz., to "preserve, protect and defend the Constitution and law of Pakistan."

In the above report, Kaikaus, J., who rendered his separate opinion made the following observations:-

"to permit a review on the ground of incorrectness would amount to granting the Court the jurisdiction to hear appeals against its own judgments or perhaps a jurisdiction to one Bench of the Court to hear appeals against other benches; and that surely is not the scope of review jurisdiction. No mistake in a considered conclusion, whatever the extent of that mistake, can be a ground for the exercise of review jurisdiction. On a proper consideration it will be found that the principles underlying the limitations mentioned in Order XLVII, rule 1, Civil Procedure Code, are implicit in the nature of review jurisdiction. While I would prefer not to accept those limitations as if they placed any technical obstruction in the exercise of the review jurisdiction of this Court I would accept that they embody the principles on which this Court would act in the exercise of such jurisdiction. It is not because a conclusion is wrong but because something obvious has been overlooked, some important aspect of the matter has not been considered, that a review petition will lie. It is a remedy to be used only in exceptional circumstances."

In the second case this Court comprising the then learned Chief Justice and four companion Judges entertained a suo motu review and allowed the same for the following reasons:-

"11. The above case supports the petitioner's stand. Another aspect which escaped notice of this Court in the judgment under review is that some of the other civil servants/employees placed in the same position as the petitioner was had been considered for promotion to BPS-17 and in fact were promoted, whereas the petitioner was denied the above benefit which amounted to violation of inter alia Article 25 of the Constitution of the Islamic Republic of Pakistan, 1973. In this regard, reference may

be made to the case of I.A. Sharwani and others v. Government of Pakistan through Secretary, Finance Division, Islamabad and others 1991 SCMR 1041

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14. The upshot of the above discussion is that the judgment under review is liable to be recalled as it proceeded on wrong premises. We would, therefore, allow the above Suo Motu Review Petition and recall the above judgment. In consequence thereof, petitioner's Civil Appeal No. 216 of 1991 is allowed and the judgment of the Tribunal is set aside and the respondents are directed to consider the petitioner's case for promotion to BPS-17."

In the third case this Court, while accepting a review petition, made following observations:-

"From the above discussed legal position, it emerges that a petition for review before this Court would lie on grounds, which are analogous to those embodied in Order XLVII, Rule 1, C.P.C. The review petition would also be competent if something which is obvious in the judgment has either been overlooked and that if it would have been considered by the Court, the final result of the case would have been otherwise. No review petition, however, would lie on the ground of a wrong decision by the Court or that another view is possible on reconsideration."

In the fourth case also the scope of review was succinctly discussed by this Court after referring the relevant case-law and in this regard the following observations were made:-- '

"From the preceding discussion it follows that review proceedings cannot partake re-hearing of a decided case. Therefore, if the Court has taken a conscious and deliberate decision on a point of law or fact while disposing of a petition or an appeal, review of such judgment or order cannot be obtained on the grounds that the Court took an erroneous view or that another view on reconsideration is possible. Review also cannot be allowed on the ground of discovery of some new material, if such material was available at the time of hearing of appeal or petition but not produced. A ground not urged or raised at the hearing of petition or appeal cannot be allowed to be raised in review proceedings. Only such errors in the judgment/order would justify review, which are self-evident, found floating on the surface, are discoverable without much deliberations, and have a material bearing on the final result of the case."

In the last unreported order of this Court in the case of Begum Asfar Saeed and others v. Ch. Abdul Aziz, after referring a number of cases, the following conclusion was recorded as to the scope of a review:-

"From an examination of the aforesaid precedents of this Court, it seems settled that overlooking some important aspect of the matter from consideration or an erroneous assumption of a material fact affecting the conclusion reached in the judgment are valid grounds on which the review of a judgment can be permitted. In view of what is stated it is not necessary to refer to the judgments cited by the respondent on the scope of review, because mostly the cases relate to reargument of an appeal in review jurisdiction which is not permissible, or to the raising of pleas which were not agitated at the hearing of the appeal or contained a reassertion of the law as laid down in the case of Muhammad Amir Khan v. Controller of Estate Duty (PLD 1962 SC 335) on which the respondent himself relied."

16. We may now refer to the following cases relied upon by Mr. Gulzar Kiani, learned Advocate Supreme Court for the respondents: --

- (i) Sajjan Singh and others v.. The State of Rajasthan and others (AIR 1965 SC 845);
- (ii) The Keshav Mills Co. Ltd., Petlad v. The Commissioner of Income Tax, Bombay North, Ahmedabad (AIR 1965 SC 1636);
- (iii) Pillani Investment Corporation Ltd. v. The Income-tax Officer, A Ward, Calcutta and another (AIR 1972 SC 236);
- (iv) Sow Chandra Kanta and another v. Sheikh Habib (AIR 1975 SC 1500)
- (v) M/s. Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi (AIR 1980 SC 674);
- (vi) Col. Avtar Singh Sekhom v. Union of, India and others (AIR 1980 SC 2041);
- (vii) A.R. Antulay, v. R.S. Nayak and another (AIR 1988 SC 1531)

In the above first case, the India Supreme Court while dilating upon Article 141 of the Indian Constitution relating to the power of review of the Supreme Court observed that the Constitution does not place any restriction on the power of the Supreme Court to review its earlier decision or even to depart from them and any matters relating to the decision of Constitutional points which have significant impact on the fundamental rights of citizens, it would be prepared to review its earlier decision in the interest of public good and that the doctrine stare decisis may not be strictly applied in this context. It was further observed that this doctrine will not be permitted to perpetuate erroneous decisions announced by the Supreme Court to the detriment of the general welfare. It was also observed that

the question, whether different view is to be taken, would depend on the nature of infirmity alleged in the earlier decision, its impact on public good and the validity and compelling character of situations urged in support of the contrary view.

In the second case the Indian Supreme Court examined the scope as to when it should change its previous view in the following words:-

"When it is urged that the view already taken by this Court should be reviewed and revised it may not necessarily be an adequate reason for such review and revision to hold that though the earlier view is a reasonably possible view, the alternative view which is pressed on the subsequent occasion is more reasonable. In reviewing and revising its earlier decision, this Court should ask itself whether in the interests of the public good or for any other valid and compulsive reasons, it is necessary that the earlier decision should be revised. When this Court decides questions of law, its decisions are, under Article 141, binding on all Courts within the territory of India, and so, it must be the constant endeavour and concern of this Court to introduce and maintain an element of certainty and continuity in the interpretation of law in the country. Frequent exercise by this Court of its power to review its earlier decisions on the ground that the view pressed before it later appears to the Court to be more reasonable, may incidentally tend to make law uncertain and introduce confusion which must be consistently avoided. That is not to say that if on a subsequent occasion, the Court is satisfied that its earlier decision was clearly erroneous, it should hesitate to correct the error; but before a previous decision is pronounced to be plainly erroneous, the Court must be satisfied with a fair amount of unanimity amongst its members that a revision of the said view is fully, justified. It is not possible or desirable, and in any case it would be inexpedient to lay down any principles which should govern the approach of the Court in dealing with the question of reviewing and revising its earlier decisions. It would always depend upon several relevant considerations:-- What is the nature of the infirmity or error on which a plea for a review and revision of the earlier view is based? On the earlier occasion, did some patent aspects of the question remain unnoticed, or was the attention of the Court not drawn to any relevant and material statutory provision, or was any previous decision of this Court bearing on the point not noticed? Is the Court hearing such plea fairly unanimous that there is such an error in the earlier view? What would be the impact of the error on the general administration of law or on public good? Has the earlier decision been followed on subsequent occasions either by this Court or by the High Courts? And, would the reversal of the earlier decision lead to public inconvenience, hardship or mischief? These

and other relevant considerations must be carefully borne in mind whenever this Court is called upon to exercise its jurisdiction to review and revise its earlier decisions. These considerations become still more significant when the earlier decision happens to be a unanimous decision of a Bench of five learned Judges of this Court."

In the third case it was urged by the Indian Supreme Court that when it was not shown that the earlier judgment of the Supreme Court was erroneous or that any vital point was not considered, the Supreme Court would decline to review its earlier judgment.

In the fourth case, Krishna Iyer, J. made the following weighty observations as to the scope of review:--

"Mr. Daphtary, learned counsel for the petitioners, has argued at length all the points which were urged at the earlier stage when we refused special leave thus making out that a review proceeding virtually amounts to a re-hearing. May be we were not right in refusing special leave right in the first round but, once an order has been passed by this Court, a review thereof must be subject to the rules of the game and cannot be lightly entertained. A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. A mere repetition through different counsel of old and overruled arguments, a second trip over ineffectually covered ground or minor mistakes of inconsequential import are obviously insufficient. The very strict need for compliance with these factors is the rationale behind the insistence of counsel's certificate which should not be a routine affair or a habitual step. It is neither fairness to the Court which decided nor awareness of the precious public time lost what with a huge back-log of dockets waiting in the queue for disposal, for counsel to issue easy certificates for entertainment of review and fight over again the same battle which has been fought and lost."

In the fifth case, Krishna Iyer, J. of the Indian Supreme Court again enunciated the scope of a review by holding that a party is not entitled to seek a review of the judgment delivered by the Supreme Court merely for the purpose of re-hearing and a fresh decision of the case. It has been pointed out that the normal principle is that a judgment pronounced by the Court is final and departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary to do.

In the sixth case, Krishan Iyer, J. again reiterated that review is not a routine procedure but the material error should be manifest on the face of the earlier order resulting in miscarriage of justice and must be proved.

In the seventh case, the Indian Supreme Court highlighted that there is no distinction as to the power between Benches of the Supreme Court because of the number of Judges constituted the same, in the following words:-

"It is time to sound a note of caution. The Supreme Court under its Rules of Business ordinarily sits in divisions and not as a whole one. Each Bench, whether small or large, exercises the powers vested in the Court and decisions rendered by the benches irrespective of their size are considered as decisions of the Court. The practice has developed that a larger Bench is entitled to overrule the decision of a smaller Bench notwithstanding the fact that each of the decisions is that of the Court. That principle, however, would not apply in the instant case and a Bench of Seven Judges is not entitled to reverse the decision of the Constitution Bench,. Overruling when made by a larger Bench of an earlier decision of a smaller one is intended to take away the precedent value of the decision without affecting the binding effect of the decision in the particular case."

17. From the above case-law, the following principles of law are deductible:

- (i) That every judgment pronounced by the Supreme Court is presumed to be a considered, solemn and final decision on all points arising out of the case;
- (ii) that if the Court has taken a conscious and deliberate decision on a point of fact or law, a review petition will not lie;
- (iii) that the fact the view canvassed in the review petition is more reasonable than the view found favour with the Court in the judgment/order of which review is sought, is not sufficient to sustain a review petition;
- (iv) that simpliciter the factum that a material irregularity was committed would not be sufficient to review a judgment/order but if the material irregularity was of such a nature, as to convert the process from being one in aid of justice to a process of injustice, a review petition would lie;
- (v) that simpliciter the fact that the conclusion recorded in a judgment/order is wrong does not warrant review of the same but if the conclusion is wrong because something obvious has been overlooked by the Court or it has failed to consider some important aspect of the matter, a review petition would lie;

- (vi) that if the error in the judgment/order is so manifest and is floating on the surface, which is so material that had the same been noticed prior to the rendering of the judgment the conclusion would have been different, in such a case a review petition would lie;
- (vii) that the power of review cannot be invoked as a routine matter to rehear a case which has already been decided nor change of a counsel would warrant sustaining of a review petition, but the same can be pressed into service where a glaring omission or patent mistake has crept in earlier by judicial fallibility;
- (viii) that the Constitution does not place any restriction on the power of the Supreme Court to review its earlier decisions or even to depart from them nor the doctrine stare decisis will come in its way so long as review is warranted in view of the significant impact on the fundamental rights of citizens or in the interest of public good;
- (ix) that the Court is competent to review its judgment/order suo motu without any formal application;
- (x) that under the Supreme Court Rules, it sits in divisions and not as a whole. Each Bench whether small or large exercises the same power vested in the Supreme Court and decisions rendered by the Benches irrespective of their size are decisions of the Court having the same binding nature.

Excerpt from Sindh High Court Bar Association (supra)'s case.
(PLD 2009 SC 879)

"167. At this stage, it is necessary to elucidate through our own jurisprudence and that of other jurisdictions the principle of trichotomy of powers and the power of judicial review vested in the superior Courts. Case-law from the Indian jurisdiction is particularly instructive on account of the common origins of constitutionalism springing from the Government of India Act, 1935 read with the Indian Independence Act, 1947. The Supreme Court of India, in the case of *Minerva Mills Ltd v. Union of India* (AIR 1980 SC 1789) held that the judiciary was the interpreter of the Constitution and was assigned the delicate task of determining the extent of the power conferred on each branch of the government, its limits and whether any action of that branch transgressed such limits. It may be advantageous to reproduce below relevant excerpts from the judgment of the Indian Supreme Court delivered by Bhagwati J, in the said case: -

"92.....Parliament too, is a creature of the Constitution and it can only have such powers as are given to it under the

Constitution. It has no inherent power of amendment of the Constitution and being an authority created by the Constitution, it cannot have such inherent power, but the power of amendment is conferred upon it by the Constitution and it is a limited power which is so conferred. Parliament cannot in exercise of this power so amend the Constitution as to alter its basic structure or to change its identity. Now, if by constitutional amendment, Parliament were granted unlimited power of amendment, it would cease to be an authority under the Constitution, but would become supreme over it, because it would have power to alter the entire Constitution including its basic structure and even to put an end to it by totally changing its identity. It will therefore be seen that the limited amending power of Parliament is itself an essential feature of the Constitution, a part of its basic structure, for if the limited power of amendment were enlarged into an unlimited power, the entire character of the Constitution would be changed. It must follow as a necessary corollary that any amendment of the Constitution which seeks, directly or indirectly, to enlarge the amending power of Parliament by freeing it from the limitation of unamendability of the basic structure would be violative of the basic structure and hence outside the amendatory power of Parliament.

93. It is a fundamental principle of our constitutional scheme, and I have pointed this out in the preceding paragraph, that every organ of the State, every authority under the Constitution, derives its power from the Constitution and has to act within the limits of such power. But then the question arises as to which authority must decide what are the limits on the power conferred upon each organ or instrumentality of the State and whether such limits are transgressed or exceeded. Now there are three main departments of the State amongst which the powers of Government are divided; the Executive, the Legislature and the Judiciary. Under our Constitution we have no rigid separation of powers as in the United States of America, but there is a broad demarcation, though, having regard to the complex nature of governmental functions, certain degree of overlapping is inevitable. The reason for this broad separation of powers is that "the concentration of powers in any one organ may" to quote the words of Chandrachud, J. (as he then was) in Smt. Indira Gandhi's case (AIR 1975 SC 2299) "by upsetting that fine balance between the three organs, destroy the fundamental premises of a democratic Government to which we are pledged." Take for example, a case where the executive which is in charge of administration acts to the prejudice of a citizen and a question arises as to what are the powers of the executive and whether the executive has acted within the scope of its powers. Such a question obviously cannot be left to the executive to decide and for two very good reasons. First, the decision of the question would depend upon the interpretation of the Constitution and the laws and this would pre-eminently be a matter, fit to be decided by the judiciary, because it is the judiciary which alone would be possessed of expertise in this field and secondly, the constitutional and legal protection afforded to the citizen would become illusory if it were left to the executive to determine the legality of its own action. So also if the legislature makes a law and a dispute arises whether in making the law the legislature has acted outside the area of its legislative competence or the law is violative of the fundamental rights or of any other provisions of the Constitution, its resolution cannot, for the same reasons, be, left to the determination of the legislature. The Constitution has, therefore, created an independent machinery for resolving these disputes and this independent machinery is the judiciary which is vested with the power of judicial review to determine the legality of executive action and the validity of legislation passed by the legislature. It is the solemn duty of the judiciary under the Constitution to keep the different organs of the State such as the executive and the legislature within the limits of the power conferred upon them by the Constitution. This power of judicial

review is conferred on the judiciary by Articles 32 and 226 of the Constitution. Speaking about draft Article 25, corresponding to present Article 32 of the Constitution, Dr. Ambedkar, the principal architect of our Constitution, said in the Constituent Assembly on 9th December, 1948:

"If I was asked to name any particular article in this Constitution as the most important - an article without which this Constitution would be a nullity - I could not refer to any other article except this one. It is the very soul of the Constitution and the very heart of it and I am glad that the House has realized its importance". (CAD debates, Vol. VII, p. 953) It is a cardinal principle of our Constitution that no one howsoever highly placed and no authority however lofty can claim to be the sole judge of its power under the Constitution or whether its action is within the confines of such power laid down by the Constitution. The judiciary is the interpreter of the Constitution and to the judiciary is assigned the delicate task to determine what is the power conferred on each branch of Government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits. It is for the judiciary to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of the rule of law, which inter alia requires that "the exercise of powers by the Government whether it be the legislature or the executive or any other authority, be conditioned by the Constitution and the law". The power of judicial review is an integral part of our constitutional system and without it, there will be no Government of laws and the rule of law would become a teasing illusion and a promise of unreality. I am of the view that if there is one feature of our Constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review and it is unquestionably, to my mind, part of the basic structure of the Constitution. Of course, when I say this I should not be taken to suggest that however effective alternative institutional mechanisms or arrangements for judicial review cannot be made by Parliament. But what I wish to emphasise is that judicial review is a vital principle of our Constitution and it cannot be abrogated without affecting the basic structure of the Constitution. If by a Constitutional amendment, the power of judicial review is taken away and it is provided that the validity of any law made by the Legislature shall not be liable to be called in question on any ground, even if it is outside the legislative competence of the legislature or is violative of any fundamental rights, it would be nothing short of sub-version of the Constitution, for it would make a mockery of the distribution of legislative powers between the Union and the States and render the fundamental rights meaningless and futile. So also if a constitutional amendment is made which has the effect of taking away the power of judicial review and providing that no amendment made in the Constitution shall be liable to be questioned on any ground, even if such amendment is violative of the basic structure and, therefore, outside the amendatory power of Parliament, it would be making Parliament sole judge of the constitutional validity of what it has done and that would in effect and substance, nullify the limitation on the amending power of Parliament and affect the basic structure of the Constitution. The conclusion must therefore inevitably follow that clause (4) of Article 368 is unconstitutional and void as damaging the basic structure of the Constitution.

94. That takes us to clause (5) of Article 368. This clause opens with the words "For the removal of doubts" and proceeds to declare that there shall be no limitation whatever on the amending power of Parliament under Article 368. It is difficult to appreciate the meaning of the opening words "For the removal of doubts" because the majority decision in Kesavananda Bharati's case (AIR 1973 SC 1461) clearly laid down and left no doubt that

the basic structure of the Constitution was outside the competence of the mandatory power of Parliament and in Smt. Indira Gandhi's case (*supra*) all the Judges unanimously accepted theory of the basic structure as a theory by which the validity of the amendment impugned before them, namely, Article 329A(4) was to be judged. Therefore, after the decisions in Kesavananda Bharati's case and Smt. Indira Gandhi's case, there was no doubt at all that the amendatory power of Parliament was limited and it was not competent to Parliament to alter the basic structure of the Constitution and clause (5) could not remove the doubt which did not exist. What A clause (5) really sought to do was to remove the limitation on the amending power of Parliament and convert it from a limited power into an unlimited one."

In A.K. Kaul v. Union of India (AIR 1995 SC 1403), justiciability of an action of an authority functioning under the Indian Constitution was discussed as under: -

"The extent of those limitations on the powers has to be determined on an interpretation of the relevant provisions of the Constitution. Since the task of interpreting the provisions of the Constitution is entrusted to the Judiciary, it is vested with the power to test the validity of an action of every authority functioning under the Constitution on the touchstone of the constitution in order to ensure that the authority exercising the power conferred by the Constitution does not transgress the limitations placed by the Constitutions on exercise of that power. This power of judicial review is, therefore, implicit in a written Constitution and unless expressly excluded by a provision of the Constitution, the power of judicial review is available in respect of exercise of powers under any of the provisions of the Constitution. Justiciability relates to a particular field falling within the purview of the power of judicial review. On account of want of judicially manageable standards, there, may be matters which are not susceptible to the judicial process. Such matters are regarded as non-justiciable. In other words, during the course of exercise of the power of judicial review it may be found that there are certain aspects of the exercise of that power which are not susceptible to judicial process on account of want of judicially manageable standards and are, therefore, not justiciable."

168. In the case of Raja Ram Pal v. Speaker, Lok Sabha [(2007) 3 SCC 184] while dilating upon the role of the Supreme Court of India, it was held that it was the solemn duty of the Court to protect the fundamental rights guaranteed by the Constitution zealously and vigilantly. Relevant portion from the judgment is reproduced below: -

"651. We have a written Constitution which confers powers of judicial review on this Court and on all High Courts. In exercising power and discharging duty assigned by the Constitution, this Court has to play the role of a 'sentinel on the qui vive' and it is the solemn duty of this Court to protect the fundamental rights guaranteed by Part III of the Constitution zealously and vigilantly.

652. It may be stated that initially it was contended by the respondents—that this Court has no power to consider a complaint against any action taken by Parliament and no such complaint can ever be entertained by the Court. Mr. Gopal Subramaniam, appearing for the Attorney General, however, at a later stage conceded (and I may say, rightly) the jurisdiction of this Court to consider such complaint, but submitted that the Court must always keep in mind the fact that the power has been exercised by a coordinate organ of the State which has the jurisdiction to

regulate its own proceedings within the four walls of the House. Unless, therefore, this Court is convinced that the action of the House is unconstitutional or wholly unlawful, it may not exercise its extraordinary jurisdiction by re-appreciating the evidence and material before Parliament and substitute its own conclusions for the conclusions arrived at by the House.

653. In my opinion, the submission is well-founded. This Court cannot be oblivious or unmindful of the fact that the Legislature is one of three organs of the State and is exercising powers under the same Constitution under which this Court is exercising the power of judicial review. It is, therefore, the duty of this Court to ensure that there is no abuse or misuse of power by the Legislature without overlooking another equally important consideration that the Court is not a superior organ or an appellate forum over the other constitutional functionary. This Court, therefore, should exercise its power of judicial review with utmost care, caution and circumspection."

It was further held as under: -

"656. In this connection, I may only observe that in *Searchlight* [Pandit Sharma (1)] as well as in *Keshav Singh*, it has been observed that there is no doubt that Parliament/State Legislature has power to punish for contempt, which has been reiterated in other cases also, for instance, in *State of Karnataka v. Union of India*, (1977) 4 SCC 608, and in *P. V. Narasimha Rao v. State*, (1998) 4 SCC 626. But what has been held is that such decision of Parliament/State, Legislature is not 'final and 'conclusive'. This Court in all earlier cases held that in view of power of judicial review under Articles 32 and 226 of the Constitution, the Supreme Court and High Courts have jurisdiction to decide legality or otherwise of the action taken by State- authorities and that power cannot be taken away from judiciary. There lies the distinction between British Parliament and Indian Parliament. Since British Parliament is also 'the High Court of Parliament', the action taken or decision rendered by it is not open to challenge in any court of law. This, in my opinion, is based on the doctrine that there cannot be two parallel courts, i.e. Crown's Court and also a Court of Parliament ('the High Court of Parliament') exercising judicial power in respect of one and the same jurisdiction. India is a democratic and republican. State having a written Constitution which is supreme and no organ of the State (Legislature, Executive or Judiciary) can claim sovereignty or supremacy over the other. Under the said Constitution, power of judicial review has been conferred on higher judiciary (Supreme Court and High Courts)."

In the case of *I.R. Coelho v. State of Tamil Nadu* (AIR 2007 SC 861), while referring to *L. Chandra Kumar v. Union of India* [(1997) 3 SCC 261] and *S.R. Bommai v. Union of India* [(1994) 3 SCC 1], it was held that the judicial review was a basic feature of the Constitution and that the power of judicial review was a constituent power which could not be abrogated by judicial process of interpretation. It was further held that it was a cardinal principle of the Constitution that no one could claim to be the sole judge of the 'power given under the Constitution and that its actions were within the confines of the powers given by the Constitution.

169. On the above survey of the case-law, it is clear that the power of judicial review is a cardinal principle of the Constitution. The Judges, to keep the power of judicial review strictly judicial, in its exercise, do take

care not to intrude upon the domain of the other branches of the Government. It is the duty of the judiciary to determine the legality of executive action and the validity of legislation passed by the Legislature. At this stage, reference may also be made to our own jurisdiction where a robust defence of judicial review has been expounded:--

Government of Balochistan through Additional Chief Secretary v. Azizullah Memon and 16 others (PLD 1993 SC 341 at p. 369)

"The Constitution provides for separation of Judiciary from the Executive. It aims at an independent Judiciary which is an important organ of the State within the Constitutional sphere.

The Constitution provides for progressive separation of the Judiciary and had fixed a time limit for such separation. It expired in the year 1987 and from then onwards, irrespective of the fact whether steps have been taken or not, judiciary stands separated and does not and should not seek aid of executive authorities for its separation. Separation of judiciary is the cornerstone of independence of judiciary and unless judiciary is independent, the fundamental right of access to justice cannot be guaranteed. One of the modes for blocking the road of free access to justice is to appoint or hand over the adjudication of rights and trial of offence in the hands of the Executive Officers. This is merely a semblance of establishing Courts which are authorised to decide cases and adjudicate the rights, but in fact such Courts which are manned and run by executive authorities without being under the control and supervision of the judiciary can hardly meet the demands of Constitution. Considering from this point of view we find that the impugned Ordinance II of 1968 from the cognizance of the case till the revision is disposed of, the entire machinery is in the hands of the executive from Naib-Tehsildar to the official of the Government in the Ministry: Such a procedure can hardly be conducive to the administration of justice and development of the area nor will it achieve the desired result of bringing law and order, peace and tranquility or economic prosperity and well-being. The Constitution envisages independent Judiciary separate from the Executive. Thus any Tribunal created under the control and superintendence of the executive for adjudication of civil or criminal cases will be in complete conflict with Articles 175, 9 and 25.

"The lower judiciary is a part of the judicial hierarchy in Pakistan. Its separation and independence is to be equally secured and preserved as that of the superior judiciary. The lower judiciary is more dependent and prone to financial dependence and harassment at the hands of the executive. In practice and effect the separation of judiciary is the main problem of the lower judiciary which under several enactments and rules is practically, under the control and supervision of the executive. Articles 175 and 203 lay down that the judiciary including lower judiciary shall be separated from the executive and 'High Court shall supervise and control all Courts subordinate to it'. Such control and supervision can be achieved only when the judiciary is administratively and financially separate from the executive. The next step should be taken to devise proper scheme and frame rules dealing with financial problems within the framework of the Constitution. So long financial independence is not achieved, it will be difficult to improve the working conditions, accommodation, building and expansion to meet the growing needs of the people."

Al-Jehad Trust v. Federation of Pakistan (PLD 1996 SC 324)

"Adverting to the above second peculiar feature that our country

has Federal system of Government which is based on trichotomy of power, it may be observed that each organ, of the State is required to function/operate within the bounds specified in the Constitution though one can say that the Judiciary is the weakest limb as it does not have the resources or power which the Legislature or the Executive enjoy but it has been assigned very important and delicate role to play, namely, to ensure that none of the organs or the Government functionaries acts in violation of any provision of the Constitution or of any other law and because of the above nature of the work entrusted to the Judiciary, it was envisaged in the Constitution that the Judiciary shall be independent. I may reiterate that the independence of Judiciary is inextricably linked and connected with the Constitutional process of appointment of Judges of the superior Judiciary. The relevant Constitutional provisions are to be construed in a manner which would ensure the independence of Judiciary. At this juncture, it may be stated that a written Constitution, is an 'organic document designed and intended to cater the need for all times to come. It is like a living tree, it grows and blossoms with the passage of time in order to keep pace with the growth of the country and its people; Thus, the approach, while interpreting a Constitutional provision should be dynamic, progressive and oriented with the desire to meet the situation, which has arisen, effectively. The interpretation cannot be a narrow and pedantic. But the Court's efforts should be to construe the same broadly, so that 'it may be able to meet the requirement of ever changing society. The general words cannot be construed in isolation but the same are to be construed in the context in which, they are employed. In other words, their colour and contents are derived from their context.

"24. The above principles will have to be kept in view while construing the, provisions of the Constitution relating to the appointments/transfers of Judges of the superior Judiciary.

"The Constitution contemplates trichotomy of power inter se the pillars of the State, namely, Legislature, Executive and the Judiciary, each of the organs of the State has to function within the limits provided in Constitution. The Constitutional provisions relating to the appointments transfers of Judges of the superior Courts, therefore, need to be examined in light of the Islamic concept of justice. Islam had always attached unparalleled importance to the concept of justice."

Mehram Ali and others v. Federation of Pakistan (PLD 1998 SC 1445)

"(v) That the hallmark of our Constitution is that it envisages separation of the Judiciary from the Executive (which is founded on the Islamic Judicial System) in order to ensure independence of Judiciary and, therefore, any Court or Tribunal which is not subject to judicial review and administrative control of the High Court and/or the Supreme Court does not fit in within the judicial framework of the Constitution;

"(vi) That the right of 'access to justice to all' is a fundamental right, which right cannot be exercised in the absence of an independent Judiciary 'providing impartial, fair' and just adjudicatory framework i.e. judicial hierarchy. The Courts/Tribunals which are manned and run by Executive Authorities without being under the control and supervision of the High Court in terms of Article 203 of the Constitution can hardly meet the mandatory requirement of the Constitution;

"(vii) That the independence of judiciary is inextricably linked and connected with the process of appointment of Judges and the security of their tenure and other terms and conditions."

Liaquat Hussain v. Federation of Pakistan (PLD 1999 SC 504)

"Now take up the main controversy arising in these petitions, whether setting up of Military Courts for trial of civilians for offences not connected with the Armed Forces, is constitutionally valid? As stated above, our Constitution is based on the theory of trichotomy of power which makes the three limbs of the State, the Legislature, the Executive and the Judiciary, independent of each other in their respective spheres. Chapter I of Part VII of the Constitution deals with the judicature. The judicature according to Article 175(1) of the Constitution, consists of the Supreme Court, a High Court for each Province and such other Courts as may be established by law. The Courts created under Article 175(1) (*ibid*) exercise such jurisdiction which is conferred on them either by the Constitution or by or under any law as provided in Article 175(2) *ibid*. The judicature stands separated from the executive as provided in Article 175(3) of the Constitution. Creation of Courts outside the control and supervision of Supreme Court or the High Courts, therefore, not only militates against the independence of Judiciary but it also negates the principle of trichotomy of power which is the basic feature of the Constitution."

Syed Zafar Ali Shah v. General Pervez Musharraf (PLD 2000 SC 869)

"It is also mentioned in the Objectives Resolution that principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam shall be enabled to order their lives in accordance with teachings and requirements of Islam as set out in the Holy Qur'an and Sunnah and independence of judiciary shall be fully secured. Objectives Resolution was even retained in the Interim Constitution of 1972 as Preamble.

"Independence of Judiciary is a basic principle of the Constitutional system of governance in Pakistan. The Constitution of Pakistan contains specific and categorical provisions for the independence of Judiciary. The Preamble and Article 2A state that "the independence of Judiciary shall be fully secured"; and with a view to achieve this objective. Article 175 provides that "the Judiciary shall be separated progressively from the executive".

"In a system of constitutional governance, guaranteeing Fundamental Rights, and based on principle of trichotomy of powers, such as ours, the Judiciary plays a crucial role of interpreting and applying the law and adjudicating upon disputes arising among governments or between State and citizens or citizens' *inter se*. The Judiciary is entrusted with the responsibility for enforcement of Fundamental Rights. This calls for an independent and vigilant system of judicial administration so that all acts and actions leading to infringement of Fundamental Rights are nullified and the rule of law upheld in the society.

The Constitution makes it the exclusive power/responsibility of the Judiciary to ensure the sustenance of system of "separation of powers" based on checks and balances. This is a legal obligation assigned to the Judiciary. It is called upon to enforce the Constitution and safeguard the Fundamental Rights and freedom of individuals. To do so, the Judiciary has to be properly organized and effective and efficient enough to quickly address and resolve public claims and grievances; and also has to be strong and independent enough to dispense justice fairly and impartially. It is such an efficient and independent Judiciary which can foster an appropriate legal and judicial environment

where there is peace and security in the society, ,safety of life, protection of property and guarantee of essential human rights and fundamental freedoms for all individuals and groups, irrespective of any distinction or discrimination on the basis of cast; creed, colour, culture, gender or place of origin, etc. It is indeed such a legal and judicial environment, which is conducive to economic growth and social development."

170. The exercise of suo motu powers has been dwelt at length by the superior Courts of Pakistan in a large number of cases. Reference may usefully be made to the following cases: -

Darshan Masih v. State (PLD 1990 SC 513 at page 544)

"It is necessary at this stage to clarify certain aspects of this case. It is indeed necessary because, this being the first case of its nature, the procedural and other elements thereof are likely in due course, to come under discussion.

(i) True, a telegram, it has never been earlier made the basis by the Supreme Court of Pakistan for action, as in this case; but, there is ample support in the Constitution for the same. Under Article 184(3) "Without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter I of Part II is involved, have the power to make an order of the nature mentioned in the said Article." The questions of procedural nature relating to the entertainment of proceedings and/or cognizance of a case under this provision, have been dealt with in the case of Miss Benazir Bhutto (PLD 1988 SC 416). The acceptance of a telegram in this case is covered by the said authority as also by the due extension of the principles laid therein. Such extension/s would depend upon the fact and circumstances of each case and nature of public interest involved and importance thereof. The element of "public importance" in this case now stands demonstrated by the resume (a part only) of the proceedings, given earlier.

It needs to be mentioned that in our Supreme Court, though letters and telegrams are sent to individual Judges, but it is not considered as an appropriate and proper method of initiating proceedings. Some times it leads to embarrassment. Accordingly such an information has to go to the Hon'ble Chief Justice for initiating proceedings. In this case the telegram was addressed directly to him and he marked it to me.

As to what other form/s of taking cognizance of a matter under Article 184 (3) are possible, will depend upon the nature and importance thereof.

(ii) The "nature" of the orders which can be passed in such cases is also indicated in Article 184 (3); that is: such as can be passed under Article 199. Even if for the time being it be assumed that the "nature" of the order is confined only to the Orders under sub-clause (c) of Article 199(1) and not to the other Orders under "Article 199", it would be seen that any conceivable just and proper order can be passed in a case like the present one. The principle of extension involved in the relevant phrase used in Art. 199(1)(c): "an order giving such directions to any person or authority ----- as may be appropriate for the enforcement of the Fundamental Rights cannot be abridged or curtailed by the law. As to how far it can be extended, will depend upon each case.

It is so also because of the other provisions of the Constitution, the rules of this Court and the principles and Rules comprising

the Constitutional set up of Pakistan. For instance, "according to Article 187 (1) this Court some times has to satisfy the dictates of "Complete Justice". What goes with it, is the subject or ample authority as well as of future application in given cases. When this power is exercised the Court will have the necessary additional power to "issue such directions, orders or decrees as may be necessary." Besides the binding effect of the judgment/order of this Court on all other "Courts" when it "decides" a question of law or it is based upon or enunciates a principle of law under Article 189; another provision Art. 190, gives a similar command to all executive and judicial "authorities" throughout Pakistan": This is, so as to act "in aid of Supreme Court". When Art. 199(1) (c) is read together with Articles, 187, 189 and 190, as stated above, it becomes clear that in a fit case of enforcement of Fundamental Rights, the Supreme Court has jurisdiction, power and competence to pass all proper/ necessary orders as the facts justify.

(iii) The question as to whether this is a case of enforcement of Fundamental Right/s has not been raised. Everybody accepted that it is so. The provisions of Article 9 relating to security of person; Article 11 in so far as it relates to forced labour, traffic in human beings and child labour; Article 14 relating to dignity of man; Article 15 ensuring freedom of movement; Article 19 relating to freedom of trade, business or profession; and Article 25 relating to equality, particularly in the protection of law and bar against discrimination on the basis of sex, as also the safeguards for women and children, amongst others, are applicable to the various aspects of the matter. However, it is a different matter that some Fundamental Rights are more directly attracted than the others and some elements involved in any one of them are relevant while the others are meant for other situations. In view of lack of contest on this issue it is not necessary to go into a detailed discussion in this behalf. It is, however, remarked that for purposes of convenience of all concerned, it might be necessary to define the expression "forced labour with illustrations of its different forms"; in such a manner, so as to minimize any confusion about its real purport as also the resultant unproductive litigation. For the same purpose the other important elements in these Fundamental Rights may be collected together and put in a self-contained Code. It might cover all aspects of human dignity, deprivations and misery, including those rights in this behalf which are ensured, in addition, as basic human rights in Islam. This Court has in the Shariat jurisdiction dealt with some of them. There is no bar in the Constitution to the inclusion in such law of these rights, in addition to the Fundamental Rights contained in Chapter I Part II thereof. This comprehensive law should deal with the compulsory education of the classes concerned for making them aware of their rights; the detection of the infringement thereof as the duty of the State; and providing remedial mechanism also at the instance of the State whenever the will to assert or exercise them is lacking on the part of a citizen. These aspects of the enforcement of Fundamental Rights guaranteed by the Constitution and other basic human rights ensured by Islam can, by law be made also into an independent inalienable right, with self-operating mechanism for enforcement as well.

Muhammad Nawaz Sharif v. President of Pakistan (PLD 1993 Supreme Court 473 at page 805)

"First, we may understand the nature of Article 184(3). This provision confers power on the Supreme Court to consider questions of public importance which are referable to the enforcement of any Fundamental Rights guaranteed by the Constitution and enumerated in Chapter 1 of Part II. This power is without prejudice to the provisions of Article 199 which confer similar power with certain restrictions on the High Court. The

power conferred depends upon two questions; one, that the case sought to be heard involves question of public importance and two, the question of public importance relates to the enforcement of Fundamental Rights. It is not every question of public importance which can be entertained by this Court, but such question should relate to the enforcement of Fundamental Rights. This provision confers a further safety and security to the Fundamental Rights conferred and guaranteed by the Constitution. This shows the importance which Fundamental Rights have in the scheme of the Constitution. They cannot be curtailed or abridged and any provision of law or action taken which violates Fundamental Rights conferred by the Constitution shall be void. The nature of jurisdiction and the relief which can be granted under this Article is much wider than Article 199. It confers a power to make an order of the nature mentioned in Article 199. The word 'nature' is not restrictive in meaning but extends the jurisdiction to pass an order which may not be strictly in conformity with Article 199 but it may have the same colour and the same scheme without any restrictions imposed under it. Article 184 is an effective weapon provided to secure and guarantee the Fundamental Rights. It can be exercised where the Fundamental Right exists and a breach has been committed or is threatened. The attributes of Article 199 of being an aggrieved person or of having an alternate remedy and depending upon the facts and circumstances even laches cannot restrain the power or non-suit a petitioner from filing a petition under Article 184 and seeking relief under it. The relief being in the nature mentioned in Article 199 can be modified and also consequential reliefs can be granted which may ensure effective protection and implementation of the Fundamental Rights. Even disputed questions of facts which do not require voluminous evidence can be looked into where Fundamental Right has been breached. However, in case where intricate disputed questions of facts involving voluminous evidence are involved the Court will desist from entering into such controversies. Primarily, the questions involved are decided on admitted or *prima facie* established facts which can be determined by filing affidavits evidence in support of allegations can be taken orally in very exceptional cases where the breach is of a very serious nature affecting large section of the country and is of great general importance.

Shehla Zia v. WAPDA (PLD 1994 SC 693 at page 712)

"The learned counsel for the respondent has raised the objection that the facts of the case do not justify intervention under Article 184 of the Constitution. The main thrust was that the grid station and the transmission line are being constructed after a proper study of the problem taking into consideration the risk factors, the economic factors and also necessity and requirement in a particular area. It is after due- consideration that planning is made and is being executed according to rules. After taking such steps possibility of health hazards is ruled out and there is no question of affecting property and health of a number of citizens nor any Fundamental Right is violated which may warrant interference under Article 184. So far the first part of the contention regarding health hazards is concerned, sufficient discussion has been made in the earlier part of the judgment and need not be repeated. So far the Fundamental Rights are concerned, one has not to go too far to find the reply.

Article 9 of the Constitution provides that no person shall be deprived of life or liberty save in accordance with law. The word 'life' is very significant as it covers all facets of human existence. The word 'life' has not been defined in the Constitution but it does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities and facilities which a person born in a free country, is entitled to enjoy with dignity, legally and.

constitutionally. For the purposes of present controversy suffice to say that a person is entitled to protection of law from being exposed to hazards of electromagnetic fields or any other such hazards which may be due to installation and construction of any grid station, any factory, power station or such like installations. Under the common law a person whose right of easement, property or health is adversely affected by any act of omission or commission of a third person in the neighbourhood or at a far off place, he is entitled to seek an injunction and also claim damages, but the Constitutional rights are higher than the legal rights conferred by law, be it municipal law or the common law. Such a danger as depicted, the possibility of which cannot be excluded, is bound to affect a large number of people who may suffer from it unknowingly because of lack of awareness, information and education and also because such sufferance is silent and fatal and most of the people who would be residing near, under or at a dangerous distance of the grid station or such installation do not know that they are facing any risk or are likely to suffer by such risk. Therefore, Article 184 can be invoked because a large number of citizens throughout the country cannot make such representation and may not like to make it due to ignorance, poverty and disability. Only some conscientious citizens aware of their rights and the possibility of danger come forward and this has happened so in the present case.

13. According to Oxford dictionary, 'life' meant state of all functional activity and continual change peculiar to organised matter and specially to the portion of it constituting an animal or plant before death and animate existence."

In Black's Law Dictionary, 'life' means "that state of animals, humans, and plants or of an organised being in which its natural functions and motions are performed, or in which its organs are capable of performing their functions. The interval between birth and death, the sum of the forces by which death is resisted, "life" protected by the Federal Constitution includes all personal rights and their enjoyment of the faculties, acquiring useful knowledge, the right to marry, establish a home and bring up children, freedom of worship, conscience; contract, occupation, speech, assembly and press".

The Constitutional Law in America provides an extensive and wide meaning to the word 'life' which includes all such rights which are necessary and essential for leading a free, proper, comfortable and clean life. The requirement of acquiring knowledge to establish home, the freedoms as contemplated by the Constitution, the personal rights and their enjoyment are nothing but part of life. A person is entitled to enjoy his personal rights and to be protected from encroachments on such personal rights, freedom and liberties. Any action taken which may create hazards of life will be encroaching upon the personal rights of a citizen to enjoy the life according to law. In the present case this is the complaint the petitioners have made. In our view the word 'life' constitutionally is so wide that the danger and encroachment complained of would impinge Fundamental Right of a citizen. In this view of the matter the petition is maintainable.

Dr. Pervez Hasan, learned counsel has referred to various judgments of the Indian Supreme Court in which the term 'life' has been explained with reference to public interest litigation. In Kharak Singh v. State of UP (AIR 1963 SC 129) for interpreting the word 'life' used in Article 21 of the Indian Constitution, reliance was placed on the judgment of Field, J. in Munn v. Illinois (1876) 94 US 113 at page 142 where it was observed that 'life' means not merely the right to the continuance of a person's animal existence but a right to the possession of each of his organs --his arms and legs etc." In Francis Corgi v. Union Territory of Delhi (AIR 1981 SC 746) Bhagvati, J. observed that

right to life includes right to live with human dignity and all that goes along with it, namely, the bare necessities of 'life' such as adequate nutrition, clothing and shelter and facilities for reading and writing in diverse form". Same view has been expressed in *Olga Tellis and others v. Bombay Municipal Corporation* (AIR 1986 SC 180) and *State of Himachal Pradesh and another v. Umed Ram Sharma and others* (AIR 1986 SC 847). In the first case right to life under the Constitution was held to mean right to livelihood. In the latter case the definition has been extended to include the "quality of life" and not mere physical existence. It was observed that "for residents of hilly areas, access to road is access to life itself. Thus, apart from the wide meaning given by US Courts, the Indian Supreme Court seems to give a wider meaning which includes the quality of life, adequate nutrition, clothing and shelter and cannot be restricted merely to physical existence. The word 'life' in the Constitution has not been used in a limited manner. A wide meaning should be given to enable a man not only to sustain life but to enjoy it. Under our Constitution, Article 14 provides that the dignity of man and subject to law the privacy of home shall be inviolable. The fundamental right to preserve and protect the dignity of man under Article 14 is unparalleled and could be found only in few Constitutions of the world. The Constitution guarantees dignity of man and also right to 'life' under Article 9 and if both are read together, question will arise whether a person can be said to have dignity of man if his right to life is below bare necessity like without proper food, clothing, shelter, education, health care, clean atmosphere and unpolluted environment. Such questions will arise for consideration which can be dilated upon in more detail in a proper proceeding involving such specific questions.

Dr. Pervaz Hasan has also referred to several judgments of the Indian Supreme Court in which issues relating to environment and ecological balance were raised and relief was granted as the industrial activity causing pollution had degraded the quality of life. In *Rural Litigation and Entitlement Kendra and others v. State of UP and others* (AIR 1985 SC 652) mining operation carried out through blasting was stopped and directions were issued to regulate it. The same case came up for further consideration and concern was shown for the preservation and protection of environment and ecology. However, considering the defence need and for earning foreign exchange some queries were allowed to be operated in a limited manner subject to strict control and regulations. These judgments are reported in AIR 1987 SC 359 and 2426 and AIR 1988 SC 2187 and AIR 1989 Sc 594. In *Shri Sachidanand Pandey and another v. The State of West Bengal and others* (AIR 1987 SC 1109) part of land of zoological garden was given to Taj Group of Hotels to build a five-star hotel. This transaction was challenged in the High Court without success. The appeal was dismissed. Taking note of the fact that society's interaction with nature is so extensive that "environmental question has assumed proportion affecting all humanity", it was observed that: --

"Obviously, if the Government is alive to the various considerations requiring thought and deliberation and has arrived at a conscious decision after taking them into account, it may not be for this Court to interfere in the absence of mala fides. On the other hand, if relevant considerations are not borne in mind and irrelevant, considerations influence the decision, the Court may interfere in order to prevent a likelihood of prejudice to the public."

In *M.C. Mehta v. Union of India* (AIR 1988 SC 1115) and *M.C. Mehta v. Union of India* (AIR 1988 SC 1037) the Court on petition filed by a citizen taking note of the fact that the municipal sewage and industrial effluents from tanneries were being thrown in River Ganges whereby it was completely polluted, the tanneries

were closed down. These judgments go a long way to show that in cases where life of citizens is degraded, the quality of life, is adversely affected and health hazards are created affecting a large number of people, the Court in exercise of its jurisdiction under Article 184(3) of the Constitution may grant relief to the "extent of stopping the functioning of factories which create pollution and environmental degradation.

Employees of the Pak. Law Commission v. Ministry of Works
(1994 SCMR 1548 at page 1551)

"Before dealing with the merits of the case, it seems necessary to first dispose of the preliminary objection raised by the learned Standing Counsel. The learned counsel for the respondents contended that the Court has no jurisdiction to grant the relief under Article 184(3) of the Constitution and the present case is not covered by the said provision. The scope and object of Article 184(3) has been comprehensively discussed in several judgments of this Court including Ms. Benazir Bhutto's case (PLD 1988 SC 416) and Mian Muhammad Nawaz Sharif's case (PLD 1993 SC 473). It is now well-settled that if there is violation of Fundamental Rights of a class of persons who collectively suffer due to such breach and there does not seem to be any possible relief being granted from any quarter due to their inability to seek or obtain relief, they are entitled to file petition under Article 184(3). The dispute should not be mere an individual grievance, but a collective grievance which raises questions of general public importance. In Benazir Bhutto's case it was observed as, follows:-

"The plain language of Article 184(3) shows that it is open-ended. The Article does not say as to who shall have the right to move the Supreme Court nor does it say by what proceedings the Supreme Court may be so moved or whether it is confined to the enforcement of the Fundamental Rights of an individual which are infracted or extends to the enforcement of the rights of a group or a class of persons whose rights are violated."

It was further observed that "the inquiry into law and life cannot, in my view, be confined to the harrow limits of the rule of law in the context of constitutionalism which makes a greater demand on judicial functions. Therefore, while construing Article 184(3), the interpretative approach should not be ceremonious observance of the rules or usages of interpretation, but regard should be had to the object and the purpose for which this Article is enacted, that is, this interpretative approach must receive inspiration from the triad of provisions which saturate and invigorate the entire Constitution, namely the Objectives Resolution (Article 2A), the Fundamental Rights and the directive principles of State Policy so as to achieve democracy, tolerance, equality and social justice according to Islam". While further dilating upon the provisions of the Constitution, particularly Articles 3, 37 and 38 of the Constitution, which enshrine socio-economic principles, it was observed that "these provisions become in an indirect sense enforceable by law and " thus, bring about a phenomenal change in the idea of co-relation of Fundamental Rights and directive principles of State Policy". In this background it was observed as follows: --

"The liberties, in this context, if purposefully defined will serve to guarantee genuine freedom; freedom not only from arbitrary restraint of authority, but also freedom from want, from poverty and destitution and from ignorance and illiteracy. That this was the purport of the role of the rule of law which was affirmed at Lagos in 1961 in the World Peace Through Law Conference:

'Adequate levels of living are essential 'for full enjoyment of

individual's freedom and rights. What is the use of freedom of speech to under-nourished people or of the freedom of press to an illiterate population? The rule of law must make for the establishing of social, economic and cultural conditions which promote men to live in dignity and to live with aspirations'."

"The Court will be in a position, if the procedure is flexible, to extend the benefits of socio-economic change through this medium of interpretation to all sections of the citizens.

"This approach is in tune with the era of progress and is meant to establish that the Constitution is not merely an imprisonment of the past, but is also alive to the unfolding of the future. It would thus, be futile to insist on ceremonious interpretative approach to Constitutional interpretations as hitherto undertaken which only served to limit the controversies between the State and the individual without extending the benefits of the liberties and the Principles of Policy to all the segments of the population.

"It is thus clear that Article 9 of the Constitution which guarantees life and liberty according to law is not to be construed in a restricted and pedantic manner. Life has a larger concept which includes the right of enjoyment of life, maintaining adequate level of living for full enjoyment of freedom and rights. In this background the petitioners' claim to be provided accommodation during tenure of service, which is necessary for maintaining adequate level of living, in our opinion, is covered by Article 9. It is true that the terms and conditions of service perhaps do not require the respondents to provide residential accommodation to the petitioners, but if other Government servants similarly placed are being provided accommodation there is no reason to deprive the petitioners from such relief. In this view of the matter petition under Article 184(3) is competent."

General Secretary v. Director, Industries (1994 SCMR 2061 at page 2071)

"It is well-settled that in human rights cases/public interest litigation under Article 184(3), the procedural trappings and restrictions, precondition of being an aggrieved person and other similar technical objections cannot bar the jurisdiction of the Court. This Court has vast power under Article 184(3) to investigate into questions of fact as well independently by recording evidence, appointing commission or any other reasonable and legal manner to ascertain the correct position. Article 184(3) provides that this Court has the power to make order of the nature mentioned in Article 199. This is a guideline for exercise of jurisdiction under this provision without restrictions and restraints imposed on the High Court. The fact that the order or direction should be in the nature mentioned in Article 199, enlarges the scope of granting relief which may not be exactly as provided under Article 199, but may be similar to it or in the same nature and the relief so granted by this Court can be moulded according to the facts and circumstances of each case."

Asad Ali v. Federation of Pakistan (PLD 1998 SC 161 at 294)

"It is obvious from the language of Article 184(3) that it provides a direct access to the highest judicial forum in the country for the enforcement of Fundamental Rights. It caters for an expeditious and inexpensive remedy for the protection of the Fundamental Rights from Legislative and Executive interference. It gives the Court very wide discretion in the matter of providing an appropriate order or direction including declaratory order to suit the exigencies of particular situation. There can be no doubt that declaration of Fundamental Rights is meaningless unless there is an effective machinery for the enforcement of the rights. It is the

'remedy' that makes the right real. It is often said that without 'remedy' there is no right. It is for this reason that Constitution makers provided a long list of Fundamental Rights and the machinery for their enforcement. That machinery is the Superior Courts, namely, the High Courts so far as the Provincial territory is concerned, and the Supreme Court at the apex having jurisdiction over the entire length and breadth of Pakistan.

Masroor Ahsan v. Ardesir Cowasjee (PLD 1998 SC 823 at page 1005)

"It will not be out of context at this stage to observe that our country has a Federal System of Government which is based on trichotomy of power, each organ of the State is required to function/operate within the bounds specified in the Constitution. Though one can say that Judiciary is the weakest limb as it does not have the resources or powers which the Legislature or the Executive enjoy, but it has been assigned very important and delicate role to play, namely, to ensure that none of the organs or the Government functionaries acts in violation of any provision of the Constitution or any other law and because of the above nature of work entrusted to the Judiciary, the framers of the Constitution envisaged an independent Judiciary. However, I may add that the Judiciary is also constitutionally obliged to act within the limits of its jurisdiction as delineated by the Constitution inter alia in Article 175 thereof. Clause (2) of the above Article provides that no Court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by under any law. In this view of the matter, the relevant Constitutional provisions are to be construed in a manner that neither the Judiciary nor the Legislature transgresses its own limit and an equilibrium is to be maintained inter se between the three organs of the State. However, at the same time, it should not be overlooked that our Constitution has enshrined and emphasised independence of Judiciary and, therefore, the relevant provisions are to be construed in a manner which would ensure the independence of Judiciary. We have a written Constitution, which is an organic document designed and intended to cater to the needs for all times to come. It is like a living tree; it grows and blossoms with the passage of time in order to keep pace with the growth of the country and its people. Thus the approach while interpreting a Constitutional provision should be dynamic, progressive and oriented with the desire to meet the situation, which has arisen effectively. The interpretation cannot be narrow and pedantic but the Courts' efforts should be to construe the same broadly, so that it may be able to meet the requirements of an ever changing society. The general words cannot be construed in isolation but the same are to be construed in the context in which they are employed. In other words, their colour and contents are derived from the context."

Watan Party v. Federation of Pakistan (PLD 2006 SC 697 at page 717)

"19. Syed Sharif-ud-Din Pirzada learned counsel for the Privatization Commission contended that to invoke jurisdiction of this Court under Article 184(3) of the Constitution, two conditions are required to be fulfilled namely infringement of the Fundamental Rights and absence of alternate remedy. In the case in hand no fundamental right has been infringed and under the scheme of Privatization Commission Ordinance No. LII, 2000 (hereinafter referred to as "Ordinance"), two alternate remedies are available in terms of section 27 and section 28 of the Ordinance. According to learned counsel the judgment relied

upon by the petitioner in S.P. Gupta's case ibid, in the circumstances of the instant case is not applicable because thereafter the Indian Supreme Court in the case of BALCO Employees Union (Regd.) v. Union of India (AIR 2002 SC 350) has explained the scope of the public interest litigation.

"20. Learned Attorney General, however, at the outset contended that after hearing the case at length by this Larger Bench for a long period, it will not be fair on his part to say that, "no point of public importance is involved in this case", therefore, he will not be questioning locus standi of the petitioners particularly in view of the judgments in the cases of Multiline Associates and Ardesir Cowasjee ibid.

"21. This Court in the referred cases and the Indian Supreme Court in the case of S.P. Gupta ibid have laid down a rule namely that any member of the public having sufficient interest can maintain an action for judicial redress of public injury arising from breach of the public duty or from violation of some provision of the Constitution or the law and for enforcement of such public duty and observance of such Constitutional provision.

"In the case of Benazir Bhutto ibid, it was held that only when the element of public importance is involved, the Supreme Court can exercise its power to issue the writ while sub Article 1(c) of Article 199 of the Constitution has a wider scope as there is no such limitation therein.

"In Al-Jehad Trust ibid, it has been held that, "question of locus standi is relevant in a High Court but not in the Supreme Court when the jurisdiction is invoked under Article 184(3) of the Constitution.

"In Malik Asad Ali ibid it was observed that under Article 184(3) of the Constitution, this Court is entitled to take cognizance of any matter which involves a question of public importance with reference to the enforcement of any of the fundamental rights conferred by Chapter I Part II of the Constitution even *suo motu*, without having any formal petition.

"In Multiline Associates ibid this Court held that requirement of the locus standi in the case of *pro bono publico* (public' interest litigation is not so rigid) has extended scope. This principle has been reiterated in Wukala Mahaz Barai Tahafuz Dastoor v. Federation of Pakistan (PLD 1998 SC 1263)."

At page 739, it is further held -

"Thus it is held that in exercise of the power of judicial review, the courts normally will not interfere in pure' policy matters (unless the policy itself is shown to be against Constitution and the law) nor impose its own opinion in the matter. However, action taken can always be examined on the well established principles of judicial review."

171. It is clear from the above survey of the case law 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. This expansion of jurisdiction is for securing and safeguarding the rights of the people against the violations of the law by the executive and not for personal aggrandizement of the courts and Judges. It is to this end that the power of judicial review was being exercised by the judiciary before 3rd

November, 2007. Indeed the power of judicial review was, and would continue to be, exercised with strict adherence governing such exercise of power, remaining within the sphere allotted to the judiciary by the Constitution.

172. Though the exercise of suo motu powers and alleged consequential erosion of trichotomy of powers enshrined in the Constitution was made a ground for imposing the unconstitutional and illegal Proclamation of Emergency, which was upheld in Tikka Iqbal Muhammad Khan's case, not a single case taken up suo motu was referred to, or discussed in the detailed reasons of the said decision - except a bald reference in Para 2(ii) of the short order - to point to any undue interference in the functioning of the other branches of the government. In any event, it was open to the Federation in all such cases to have availed the remedy provided under the Constitution and the law against the judgments of the Supreme Court. But, no such step was ever taken in any case whatsoever. Surprisingly, Abdul Hameed Dogar, J, and others held in Tikka Iqbal Muhammad Khan's case that the suo motu actions were destructive of the constitutional principle of trichotomy of power, but he himself continued to take similar actions from time to time, which fact was established from the record of the Supreme Court after 3rd November, 2007. It was a contradiction in terms."

Excerpt from Justice Khurshid Anwar Bhinder (*supra*)'s case.
(PLD 2010 SC 483)

24. First of all we intend to deal with the prime contention of Mr. Wasim Sajjad, learned Senior Advocate Supreme Court that in view of the provisions as enumerated in Article 188 of the Constitution and Order XXVI of the Supreme Court Rules these C.M.As. are maintainable and the applicants cannot be knocked out on sheer technicalities which has always been considered undesirable. Article 188 of the Constitution is reproduced herein below for ready reference:--

"188. Review of judgments or orders by the Supreme Court.--The Supreme Court shall have power, subject to the provisions of any Act of (Majlis-e-Shoora (Parliament)] and of any rules made by the Supreme Court, to review any judgment pronounced or any order made by it".

25. A bare perusal would reveal that it has been couched in a very simple and plain language hardly necessitating any scholarly interpretation. It, inter alia, provides that the Supreme Court has power to review its judgment or order subject to the provisions of any Act of Parliament and any rule made by the Supreme Court itself. (The contention whether Supreme Court Rules, 1980 are subservient to the Constitution have been discussed in later part of this judgment) It is to be noted that no Act of Parliament whatsoever has been promulgated and thus it can reasonably be inferred that legislature does not want to restrict or impose any condition on the powers conferred upon this Court under Article 188 of the Constitution. In fact the words "subject to the provisions of any Act of (Majlis-e-Shoora/Parliament) and of any rules made by the Supreme Court" are indicative of the fact that indirectly the powers so conferred have been enhanced and there was absolutely no intention for curtailment of such powers

conferred upon this Court under Article 188 of the Constitution. The point under discussion has been examined by this Court in case titled Evacuee Trust Property Board v. Hameed Elahi (PLD 1981 SC 108) with the following observations:-

"6. Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. Now, as we observed, "a litigant should not suffer on account of the mistakes or errors of the Court, and the corollary of this principle is that the Court should have the inherent power to correct its errors. The said rule only clarifies in terms that this Court has the inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court." There is no ambiguity about these words, and if the respondent's plea be true, he has brought his case within the meaning of the said rule.

Additionally, the said rule was not framed for first time by this Court. It is almost verbatim reproduction of section 151 of the Civil Procedure Code and of section 561-A of the Criminal Procedure Code, and these two sections (which in turn are in pari materia with each other) have been part of our procedural laws for generations, so that there is no ambiguity about our procedural laws for generations, so that there is no ambiguity about them, because they have been repeatedly construed by the superior Courts. Thus, for example, taking first, section 151 of the Civil Procedure Code, the Indian Supreme Court held in Keshardeo Chamaria v. Radha Kissen Chamaria and others (AIR 1953 SC 23) that a Court could in the exercise of its powers under section 151 re-call an order passed by it without notice to the parties concerned. Next, as to section 561-A of the Criminal Procedure Code this Court held in Gulzar Hassan Shah v. Ghulam Murtaza and 4 others (PLD 1970 SC 335) that a Court was competent under section 561-A to re-call an order passed by it without notice to the parties concerned. However, as this judgment was pronounced long after the rules of this Court had been framed in 1956, the case-law on section 561-A before 1950 would be more relevant. We say 1950 and not 1956, because the said rule was originally enacted as rule 6 of Order LIII of the Federal Court Rules of 1950. And on the repeal of those rules of 1956, the same provision was reenacted in the present rules as the said rule."

26. We are conscious of the fact the principles of C.P.C. also need to be examined and thus the provisions as enumerated in Order XLVII, Rule 1 of C.P.C. would require consideration qua its application which is reproduced herein below for ready reference:--

"1. Application for review of judgment.--(1) Any person considering himself aggrieved

- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,
- (b) by a decree or order from which no appeal is allowed, or
- (c) by a decision on a reference from a Court of Small

Causes,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review."

27. A bare perusal would reveal that the salient features of Order XLVII, C.P.C. are as under :--

- (i) discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by the petitioner at the time when the decree was passed or order made; or
- (ii) on account of some mistake or error apparent on the face of the record; or
- (iii) for any other sufficient reason. [2003 CLC 1355]

28. We have examined the salient features and grounds as enumerated in Order XLVII, Rule 1. C.P.C. and we are of the view in so far as these C.M.As. are concerned that neither there is discovery of new important fact nor some mistake or error has been pointed out and besides that no sufficient reasoning has been advanced on the basis whereof the principle as enunciated in Order XLVII, Rule 1, C.P.C. can be made applicable. It may not be out of place to mention here that "sufficient cause" is not susceptible of an exact definition and no hard and fast rule can be laid down to cover all possible cases. Each case must be judged upon its merits and its peculiar circumstances. The words "sufficient cause" mentioned in O. XLVII, R.1 of the Code do not mean any and every cause but it means any reason sufficient on ground at least analogous to those stated in the rule. The view that the "sufficient grounds" need not necessarily be construed ejusdem generis with the words preceding cannot be accepted as laying down the correct law." Suruj Mian v. Asst. Manager, Govt. Acquired Estate (PLD 1960 Dacca 1045). None of the grounds urged by the petitioners attracted the provisions as enumerated in Order XLVII, C.P.C. and thus C.M.As cannot be declared competent. A similar proposition was examined in Yusuf Ali v. State (PLD 1971 SC 508) with the following observations:--

"The right of review granted by Article 62 of the Constitution of 1962 is subject not only to the provisions of any Act of the Central Legislature but also to the provisions of any rules made by the Supreme Court and the Rules of the Court specifically provide by Order XXVI that "subject to the law and practice of the Court, the Court may review its judgment or order in a civil

proceeding on grounds similar to those mentioned in Order XLVII, rule 1 of the Code and in a criminal proceeding on the ground of an error apparent on the face of the record". Where none of the grounds urged by the petitioner come within the ambit of this rule no valid ground could be said to have been made out for the review of the judgment." (Emphasis provided)

29. It may be mentioned that the words "any other sufficient reasons" used in Order XLVII, Rule (1)(c), C.P.C. means a reason sufficient on grounds at least analogous to those mentioned in a categoric manner in clauses (a), (b), and (c) of Rule 1 of Order XLVII, C.P.C. "A review, as has been pointed out by this Court in the case of Lt. Col. Nawabzada Mohammad Amir Khan v. The Controller of Estate Duty Government of Pakistan, Karachi and another (PLD 1962 SC 335) is by its very nature not an appeal or a rehearing merely on the ground that one party or another conceives himself to be dissatisfied with the decision of this Court. It can only be granted for some sufficient cause akin to those mentioned in Order XLVII, rule 1 of the Code of Civil Procedure the provisions whereof incorporate the principles upon which a review can be granted." In this regard we are fortified by the dictum laid down in the following authorities:

- (i) Chhaju v. Neki (AIR 1922 PC 112),
- (ii) Iftikhar Hussain Shah v. Azad Govt. of The State of J & K (PLD 1984 SC AJ&K 111),
- (iii) Muhammad Ghaffar v. State (1969 SCMR 10)

30. In our view decision once given cannot be reviewed subject to certain legal exceptions pursuant to the provisions as enumerated in Order XLVII, Rule 1, C.P.C., scope whereof can neither be enlarged nor it can be farfetched in such a manner as argued by the learned Advocate Supreme Courts for the petitioners in view of the language as employed in Order XLVII, Rule 1, C.P.C. its application would be only up to that limited extent and it cannot be unlimited. As mentioned above, the powers of review are not wide but definite and limited in nature. "It has to be confined to the four corners of the relevant rules or the phrase or for any other sufficient reason even the review jurisdiction as visualized must be traced to Order XLVII which contains the prescribed conditions and limitations in terms of the requirement of the section and more so power to review is not an inherent power. On a proper consideration it will be found that the principles underlying the limitations mentioned in Order XLVII, rule 1, Civil Procedure Code, are implicit in the nature of review jurisdiction and cannot be equated to that of a technical obstruction." In this regard the case law as enunciated in the following cases can be referred:--

Jalal Din v. Mohd. Akram Khan (PLD 1963 (WP) Lah. 596), Prahlad Krishna Kurne AIR 1951 Bom. 25, Hajee Suleman v. Custodian Evacuee Property (AIR 1955 Madhya Bharat 108, Rukan Din and others v. Hafiz-ud-Din and another (PLD 1962 Lah. 161), Mohd. Amir Khan v. Controller of Estate Duty PLD (1962 SC 335) Abdul Jabbar v. Collector of Central Excise and Land Customs Review Application No.15 of 1959 (Quetta) unreported considered.

31. Mr. Justice Pir Hamid (as he then was) while discussing the provisions as enumerated in Order XLVII; Rule 1; C.P.C. has opined that "I for my part would be inclined to hold that a review is by its very nature not an appeal or a rehearing merely

on the ground that one party or another conceives himself to be dissatisfied with the decision of this Court, but that it should only be granted for some sufficient cause akin to those mentioned in Order XLVII, rule 1 of the Code of Civil Procedure, the provisions whereof incorporate the principles upon which a review was usually granted by Courts of law in England. The indulgence by way review may no doubt be granted to prevent remediable injustice being done by a court of last resort as where by some inadvertence an important statutory provision has escape notice which, if it had been noticed, might materially have affected the judgment of the Court but in no case should a rehearing be allowed upon merits." (Emphasis provided). (Muhammad Amir Khan v. Controller of Estate Duty PLD 1962 SC 335, Young v. Bristol Aeroplane Company Limited (1944) 1 K B 718, Gower v. Gower (1950) 1 A E R 804 distinguished).

32. Mr. Justice Ghulam Mujaddid Mirza (as he then was) has also examined the provisions as enumerated in section 114, C.P.C. and Order XLVII, Rule 1, C.P.C. in the light of dictum laid down in H. M. Saya & Co. Karachi v. Wazir Ali Industries Ltd. Karachi and another (PLD 1969 SC 65) as under:--

"2. I called upon Mr. K. H. Khurshid, learned counsel for the petitioners to first convince me as to how this petition was competent when the petitioners were not a party to the writ proceedings. Learned counsel submitted that as the petitioners had been adversely affected by the order of this Court dated the 5th of December 1973, they are, therefore, aggrieved persons and hence have a locus standi to file this petition in the present form. Learned counsel relied on PLD 1971 SC 130, in order to prove that the petitioners were aggrieved persons but in my view this authority would not be of much help to him because in this case the question examined was as to who would be the person aggrieved within the ambit of Article 98 of the late Constitution of Islamic Republic of Pakistan whereas in the instant case the petitioners have to bring their case within the purview of Order XLVII, rule 1, C.P.C. Learned counsel tried to avail of section 114, C.P.C. which deals with the power of review and argued that the words "any person considering himself aggrieved" were wide enough to include even those persons who initially were not a party to the proceedings but at a later stage were affected by an order adverse to their interest. My attention was invited to Order XLVII, rule 1, C.P.C. and it was submitted that even in this provision the above mentioned words have been repeated, and the learned counsel, therefore, emphasized that these words would cover the case of even a stranger, the only essential requisite being that he must consider himself to be an aggrieved person, the test for which, according to the learned counsel would be subjective. Reliance was also placed on H.M. Saya & Co., Karachi v. Wazir Ali Industries Ltd. Karachi and another (PLD 1969 SC 65) with special reference to the following observations:

There can be no dispute that the only party which was adversely affected by the order of ad interim injunction was respondent No.1. We are satisfied that Saya & Co., deliberately omitted to make them parties with the intention of avoiding a contest. They knew fully well that the relief sought were really directed against Wazir Ali Industries Limited, and their bankers. A stranger to a suit or a proceeding is not prohibited by the Code of Civil Procedure from filing an appeal from an order passed therein. It is true that there is no express provision

permitting such party to prefer an appeal against such an order. This omission, however, cannot be understood to amount to prohibition. The Court ought not to act on the principle that every procedure is to be taken as prohibited unless it is expressly provided for. To give such a meaning to the omission would result in grave injustice. The facts of this case are clear example in point. The Court should proceed on the principle that every procedure which furthers administration of justice is permissible even if there is no express provision permitting the same. Section 96 of the Civil Procedure Code deals with appeals from decrees and section 104 deals with appeals from orders. These provisions do not in terms say who is entitled to prefer an appeal. The Code, however, lays down that it is the decree or the order that has to be appealed against. If the decree or order appealed from adversely affects a person he should be permitted to challenge the same in appeal even if he was not made a party to the original suit for proceeding."

and it was argued that the principle laid down in this case was fully applicable to the present petition and hence not only that the petition was competent but also that the order dated the 5th of December 1973, of this Court deserves to be reviewed.

3. I have very carefully gone through this decision and find that the law laid down by the Supreme Court is only with regard to the appellate proceedings, whereas the scope of review is much different and the review jurisdiction is substantially and materially different to the appellate jurisdiction because it can be only utilized on the specific grounds mentioned in Order XLVII, rule 1, C.P.C. (Emphasis provided). In this connection it would be worthwhile to reproduce in extenso rule 1 of Order XLVII, C.P.C. which is to the following effect:-

"(1) Any person considering himself aggrieved--

- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,
- (b) by a decree or order from which no appeal is allowed, or
- (c) by a decision on a reference from a Court of Small Causes,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him may apply for a review of judgment to the Court which passed the decree or made the order."

The important words to be noted in this connection are "desires to obtain a review of the decree passed or order made". These words leave no room for doubt that the remedy of review could be availed of only by a person who initially was a party to the proceedings in which either a decree had been passed or an order had been made against him, otherwise the very essence of the grounds on which a review would be competent, would be rendered ineffective. It is, therefore, obvious that a stranger to the proceedings would not be permitted to avail of the grounds on which a review petition would be

competent. I, therefore, do not agree with the contention of the learned counsel that a wider interpretation of the words "any person considering himself aggrieved" would be the only proper and reasonable interpretation. On the other hand, I find that these words would have to be read and interpreted in the light of the main rule and when so done in my view their operation would be restricted and would cover the case of only those persons who initially were party to the proceedings." (Emphasis provided). (*Qaim Hussain v. Anjuman Islamia* PLD 1974 Lah. 346).

64. From the above discussion it will be seen that depending upon the peculiar facts and circumstances of each case, which enables the Court to form its opinion, all the above discussed jurisdictions conferred to the apex Court under the scheme of the Constitution are closely interlinked, rather, overlapping in some areas, therefore, without entering into the intricacies of such technicalities, this Court is competent to pass any order to foster the cause of justice; eliminating the chances of perpetuating illegality and to save an aggrieved party from being rendered remedy less. If any further case law is needed to fortify this view, reference can also be made to number of other cases referred by the learned ASC's in their respective arguments and discussed in the earlier part of this judgment as well as the cases of Syed Wajihul Hassan Zaidi v. Government of the Punjab and others (PLD 2004 SC 801) and Mrs. Shahida Zahir Abbasi v. President of Pakistan (PLD 1996 SC 632), which further lays down as under:-

Excerpt from the Wajihul Hassan Zaidi (supra)'s case.

17. Admittedly, we are not Sitting in appeal over the judgment rendered by a Full Bench of this Court and the scope of review is very restricted within the parameters laid down by this Court in *Abdullah Khan v. Nisar Muhammad Khan* (PLD 1965 SC 690), *Arif Shah v.; Abdul Hakeem Qureshi* (PLD 1991 SC 905) and *Abdul Ghaffar Abdul Rehman v. Asghar Ali* (PLD 1998 SC 363). We are of the considered view that even if the view taken by this Court in the decision of the appeal be erroneous, it does not warrant revisiting by this Bench in the exercise of review jurisdiction, which can only be exercised when an error or

mistake is manifestly shown to float on the face of record, which is patent and if allowed to remain intact would perpetuate illegality and gross injustice. Basic object behind the conferment of power of judicial review on superior Courts essentially is to foster justice and eliminate chances of perpetuating illegality. Principal aim and spirit underlying judicial review of orders passed or actions taken by executive or quasi-judicial forums is to respect law and to enforce primacy of the Constitution and the law. There can be no cavil with the proposition that writ jurisdiction is completely discretionary in nature and invocable in order to meet blatant illegalities, total lack of jurisdiction, unwarranted exercise of authority otherwise not conferred by law or preventing retention of ill-gotten gains. Discretion exercised within the contemplation of Articles 185 & 187 of the Constitution by this Court is a too wide in nature and stands at a higher pedestal. It is obligatory for this Court to ensure that apart from legal requirements broad equitable principles of law are not infringed so that complete justice can be dispensed with if equitable situation demands and legal formulations do not take the controversy to its logical end. This Court would be grossly failing in duty if it over-looks equitable considerations and alters the final verdict in the exercise of its extraordinary jurisdiction."

Excerpt from Mrs. Shahida Zahir Abbasi (*supra*)'s case.

From above-quoted passages, it is quite clear that whether a particular case involved the element of "public importance" is a question which is to be determined by this Court with reference to the facts and circumstances of each case. There is no hard and fast rule that an individual grievance can never be treated as a matter involving question of public importance. Similarly it cannot be said that a case brought by, a large number of people should always be considered as a case of "public importance" because a large body of persons is interested in the case. The public importance of a case is determined as observed by this Court in Manzoor Ellahi's case, *supra*, by decision on questions affecting the legal rights and liberties of the people at large, even though the individual who may have brought the matter before the Court is of no significance. Similarly, it was observed in Benazir Bhutto's case, *supra*, that public importance should be viewed with reference to freedom and liberties guaranteed under Constitution, their protection and invasion of these rights in a manner which raises a serious question regarding their enforcement, irrespective of the fact whether such infraction of right, freedom or liberty is alleged by an individual or a group of individuals. In the case of Employees of Pakistan Law Commission v. Ministry of Works 1994 SCMR 1548, Saleem

Akhtar, J., relying on the observations in Benazir Bhutto's case, supra, on the scope of Article 184(3) of the Constitution observed as follows:--

"In Benazir Bhutto's case it was observed as follows:

The plain language of Article 184(3) shows that it is open-ended. The Article does not say as to who shall have the right to move the Supreme Court nor does it say by what proceedings the Supreme Court may be so moved. or whether it is defined to the enforcement of the Fundamental Rights of an individual which are infracted or extends to the enforcement of the rights of a group or a class of persons whose rights are violated. "

.....
.....

From the above discussion, it is quite clear that this Court while construing the provisions of Article 184(3) of the Constitution did not follow the conventional interpretative approach based on technicalities and ceremonious observance of rule or usage of interpretation. Keeping in view the avowed spirit of the provision, this Court, preferred the interpretative approach which received inspiration from the triad of provision which saturated and invigorated the entire Constitution, namely, the Objectives Resolution (Article 2A), the Fundamental Rights and Directive Principles of State Policy so as to achieve, democracy, tolerance, equality and social justice according to Islam. This liberal interpretative approach opened the door of "access to justice to all".

65. As a result of above discussion with detailed reference to some celebrated judgments of this Court, we have no hesitation to hold that this petition is very much competent and maintainable, thus, no exception could be taken to its maintainability on any of the grounds urged by the learned Sr.ASCs/ASCs and the retired judges of the High Court.

66. To proceed further, as the whole controversy in the present proceedings originates and revolves around the "right to pension" of honourable retired judges of the High Court, before examining the above noted point No.2, as a next step it will be appropriate rather useful to dilate upon the true connotation and concept of pension, which has undergone radical changes in the

last century. In this regard, it will be useful to reproduce hereunder few definitions of word "*pension*" from some authoritative books/dictionaries and thereafter to reproduce some discussion from the judgment in the case of I.A Sharwani (*supra*), which is quite pertinent on this subject.

Black's Law Dictionary.

"Pension. Retirement benefit paid regularly (normally, monthly), with the amount of such based generally on length of employment and amount of wages or salary of pensioner. Deferred compensation for services rendered."

In the New Encyclopedia Britannica Vol.9, 15th Edition at p.266 the following is laid down for the term "Pension":-

"Pension: Series of periodic money payments made to a person who retires from employment because of age, disability, or the completion of an agreed span of service. The payments generally continue for the remainder of the natural life of the recipient, and sometimes to a widow or other survivor. Military pensions have existed for many centuries; private pension plans originated in Europe during the 19th century. Eligibility for and amounts of benefits are based on a variety of factors, including length of employment, age, earnings, and, in some cases, past contributions."

In Law Laxican defined "pension" as follows:-

Pension defined, Act 21, 1886, S.2-241C803 a periodical payment made by a Government, company or, any employer or labour in consideration of past services or the relinquishment of rights; claims or emoluments; regular payments to persons in order that they may maintain themselves. Art.112(3)(d)(i) Const.

I.A Sharwani's case (*supra*).

"15. Having dealt with the above legal preliminary objections, we may now revert to the merits of the case. Before dealing with the respective contentions of the learned counsel for the parties, we may first refer to the definition and *raison d'etre* of the term "pension" and the nature of right in respect thereof. In this

regard, reference may be made to Encyclopaedia Britannica, Volume 17, 1963 Edition, page 488, Corpus Juris Secundum, Volume 67, pages 763 and 764, Corpus Juris Secundum, Volume 70, page 423, American Jurisprudence, Volume 40, pages 980 and 981, and para. 29 from the judgment in the case of D.S. Nakara and others v. Union of India (*supra*), which read as follows:--

Extract from Encyclopaedia Britannica Vol. 17 1963

Edition Page 488.--"Pensions are periodic payments, usually for the natural life of a person who retires because of age or disability. Sometimes the term refers to, periodic payments to wives, widows or children of a primary or deceased person or pensioner; occasionally, a pension will be conveyed solely as an honour for conspicuous service or valour. Pensions are provided by Government in three guises: (1) as compensation or recompense to war veterans and families for old age or for disability or death, usually from service causes; (2) as disability or old age retirement benefits for civilian employees of government; (3) as social security payments for the aged, disabled or deceased citizenry based on past employment history or subject to current evidence of need. Pensions are also provided by many non-Governmental employers as a means of protecting workers retiring for age or disability and for relieving the payroll of superannuated personnel. They are sometimes provided by union-management welfare funds, associations or trusteeships. Only rarely do employees in groups, associations or unions undertake their own pension programme without employer or Government assistance."

Extract from Corpus Juris Secundum. Vol. 67. pages

763-764.--"Except as limited by the Constitution the establishment of a pension system is within the scope of the legislative power. The granting of pensions to public officers or public employees serves the public purpose, and is designed to induce competent persons to enter and remain in the public' service or employment, and to encourage the retirement from public service of those who have become incapacitated from performing their duties as well as they might be performed by younger or more vigorous persons. It has also been stated that a pension system is intended to promote efficient, continued and faithful service to the employer and economic security to the employees and their dependents, by an arrangement

under which, by fulfilment of specified eligibility requirements, pensions become property of the individual as a matter of right upon the termination of public service."

Extract from Corpus Juris Secundum. Vol. 70, page 423.--"A pension is a periodical allowance of money granted by the Government in consideration or recognition of meritorious past services, or of loss or injury sustained in the public service. A pension is mainly designed to assist the pensioner in providing for his daily wants, and it presupposes the continued life of the recipient."

Extract from American Jurisprudence, Vo1.40, pages 980 and 981.--"The right to a pension depends upon statutory provisions therefore, and the existence of such right in particular instances is determinable primarily from the terms of the statute under which the right or privilege is granted. The right to a pension may be made to depend upon such conditions. as the grantor may see fit to prescribe. Thus, it has been held that it may be provided, in a general Pension Act, that any person who accepts the benefits thereof shall forfeit his right to a special pension previously granted."

Para. 29 from the judgment in the case of D.S. Nakara and others v. Union of India (supra).--"Summing-up it can be said with confidence that pension is not only compensation for loyal service rendered in the past, but pension also has a broader significance, in that it is a measure of socio-economic justice which inheres economic security in the fall of life when physical and mental prowess is ebbing corresponding to aging process and, therefore, one is required to fall back on savings. One such saving in kind is when you give your best in the hey day of life to your employer, in days of invalidity, economic security by way of periodical payment is assured. The term has been judicially defined as a stated allowances or stipend made in consideration of past service or a surrender of rights or emoluments to one retired from service. Thus the pension payable to a Government employee is earned by rendering long and efficient service and therefore can be said to be a deferred portion of the compensation for service rendered. In one sentence one can say that the most practical raison d'etre for pension is the inability to provide for oneself due to

old-age. One may live and avoid unemployment but not senility and penury if there is nothing to fall back upon."

16. It seems that there are various kinds of pension schemes which are obtaining in various countries of the world. However, the same can be divided into two broad categories, namely, (i) Government Pension Schemes; (ii) Non-Government Pension Schemes. Each of the above category can be sub-divided into a number of sub-categories according to the object for which a particular scheme is designed. In the instant case, we are mainly concerned with the pension schemes meant for public employees/public officers, who are known in the Sub-Continent as civil servants.

A pension is intended to assist a retired civil servant in providing for his daily wants so long he is alive in consideration of his past services, though recently the above benefit has been extended inter alia in Pakistan to the widows and the dependent children of the deceased civil servants. The *raison d'etre* for pension seems to be inability to provide for oneself due to old-age. The right and extent to claim pension depends upon the terms of the relevant statute under which it has been granted.

17. In the Sub-Continent during the British Rule since it was considered that the salary which a -civil servant drew was a bounty, the same view was held in respect of the pension. However, the above controversy has been settled inasmuch as this Court in more than one case; has held that the concept that the salary which a civil servant drew was a bounty, was no longer the law of the country. Reference may be made to the case of The State of Pakistan and another v. Mehrajuddin (P L D 1959 S C (Pak.) 147). As regards the right to claim pension, the controversy has been set to rest by this Court inter alia in the case of The Government of N.W.F.P. through The Secretary to the Government of N.-W.F.P.. Communication and Works Departments, Peshawar v. Muhammad Said Khan and another (P L D 1973 S C 514), wherein the following view has been taken:--

"It must now be taken as well-settled that a person who enters Government service has also something to look forward after his retirement, to what are called retirement benefits, grant of pension being the most valuable of such benefits. It is equally well-settled that pension like salary of a civil servant is no longer 'a bounty but is a right acquired after putting in satisfactory service for the prescribed minimum period. A fortiori, it cannot be reduced or refused arbitrarily except to the extent and in the manner provided

in the relevant rules. Conversely full pension admissible under the rules is not to be given as a matter of course unless the service rendered has been duly approved. (See Article 470, Civil Service Regulations). It is equally well-settled that if the service has not been thoroughly satisfactory, the authority sanctioning the pension is empowered under the said Article to make such reduction in the amount as it may deem proper. This power is however exercisable only before pension is actually sanctioned."

The same view has been taken by the Indian Supreme Court in the case of Deokinandan Prasad v. State of Bihar and others (AIR 1971 SC 1409) and the case of State of Punjab and another v. Iqbal Singh (AIR 1976 SC 667).

[Also see: D.S. Nakara and others v. Unionof India (AIR 1983 SC 130) and Kerala State Road Transport Cooperation v. K.O Varghese and others (AIR 2003 SC 3966)]

67. The gist of the discussion made in the above cited cases on the subject of pension is that it is a right which the Government servants or employees in different positions and different capacities earn in terms of the relevant statutory provisions applicable to their case, mostly depending upon their length of service. In any case it is not a State bounty which can be awarded to any individual outside the scope of the applicable statute, as a favour.

68. After the above discussion, when we move forward to dilate upon, discuss and adjudicate the second point relating to the interpretation of Article 205, read with Fifth Schedule to the Constitution and applicable President's Order in the light of submissions made before us and the law, we deem it appropriate to firstly, discuss the concept of interpretation of statutes, particularly the constitutional provisions; briefly trace out the history of legislation in this context; reproduce hereunder the relevant statutory provisions commencing from Government of India Act, 1935; various Orders/President's Orders relating thereto in sequence, and also to give a brief resume/ comment on the

statutory provisions of some other countries regulating pensionary benefits of the honourable retired judges of the superior Courts in those countries, with specific reference to the requirement of minimum length of service to earn the right to pension, as they are somewhat "*pari materia*" to the constitutional provisions and the President's Order in vogue in our country.

69. As regards the concept of interpretation, we find that it is a method by which the true sense or meaning of the word is traced out and understood. The process by which a Judge or a person or a lawyer associated in the search of meaning of a statute, constructs from the word of statute book a meaning, which he either believes to be intent of the legislature or which he proposes to attribute to it, is called "interpretation". Salmond in his famous book on the Interpretation of Statutes, describes interpretation or construction as the process by which Courts seek to ascertain the meaning of the legislature through the medium of authoritative forms in which it is expressed. Other renowned jurists and legal experts have designated the principle of interpretation of statute as '*an art of proliferating a purpose*', or a science by itself and the purpose behind interpretation is to seek the intention of its law maker. In the same context, when we revert to some well recognized principles of interpretation of statute, we find the following basic principles outlined for this purpose.

- a. That the entire Constitution has to be read as an integrated whole.
- b. No one particular provision should be so construed as to destroying the other, but each sustaining the other provision. This is the rule of harmony, rule of completeness and exhaustiveness.
- c. Interpretation to be consistent with the Injunctions of Islam.

- d. It must always be borne in mind that it is only where the words are not clear, or the provision in question is ambiguous, that is, it is fairly and equally open to diverse meanings, that the duty of interpretation arises.
- e. Intention to be gathered from the language of the enactment, otherwise known as the 'plain meaning rule'.
- f. It is elementary rule of construction that it is to be assumed that the words and phrases of technical legislation are used in their technical meaning, if they have acquired one, and otherwise in their ordinary meaning. Critical and subtle distinctions are to be avoided and the obvious and popular meaning of the language should, as a general rule, be followed.
- g. It is a cardinal rule of construction of statutes that no words are to be added or omitted or treated as surplusage or redundant.
- h. That the words of written Constitution prevail over all unwritten conventions, precedents and practices to the contrary.
- i. Legislative history is relevant for interpreting constitutional provisions."

70. Having discussed above the concept of "Pension" and "interpretation of statutes", for ready reference, now we reproduce in sequence the relevant constitutional provisions, President's Orders etc as under:-

Government of India Act, 1935.

"Salaries, &c.
of judges

221. The judges of the several High Courts shall be entitled to such salaries and allowances, including allowances for expenses in respect of equipment and travelling upon appointment, and to such rights in respect of leave and pensions, as may from time to time be fixed by His Majesty in Council:

Provided that neither the salary of a judge, nor his rights in respect of leave of absence or pension, shall be varied to his disadvantage after his appointment."

THE HIGH COURT JUDGES ORDER, 1937

.....AND WHEREAS by section two hundred and twenty-one of the Act it is provided that the Judges of the several High Courts

shall be entitled to such salaries and allowances, including allowances for expenses in respect of equipment and travelling upon appointment, and to such rights in respect of leave and pensions, as may from time to time be fixed by His Majesty in Council:

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PENSIONS

17.—(1) Subject to the provisions of this Order, a pension shall be payable to a Judge on his retirement if, but only if, either –

- (a) he has completed not less than 12 years' service for pension; or
- (b) he has completed not less than 7 years' service for pension and has attained the age of sixty; or
- (c) he has completed not less than 7 years' service for pension and his retirement is medically certified to be necessitated by ill-health.

(2) the President may for special reasons direct that any period not exceeding three months shall be added to a Judge's service for pension.

Provided that a period so added shall be disregarded in calculating any additional pension under Part I or Part II of the Third Schedule to this Order."

THE CONSTITUTION OF INDIA, 1949

(Pre 54th Amendment)

"221. Salaries, etc., of Judges.—(1) There shall be paid to the Judges of each High Court such salaries as are specified in the Second Schedule.

(2) Every Judge shall be entitled to such allowances and to such rights in respect of leave of absence and pension as may from time to time be determined by or under law made by Parliament and, until so determined, to such allowances and rights as are specified in the Second Schedule:

Provided that neither the allowances of a Judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment."

(Post 54th Amendment)

"221. Salaries, etc., of Judges.—(1) There shall be paid to the Judges of each High Court such salaries as may be determined by Parliament by law and, until provision in that

behalf is so made, such salaries as are specified in the Second Schedule.

(2) Every Judge shall be entitled to such allowances and to such rights in respect of leave of absence and pension as may from time to time be determined by or under law made by Parliament and, until so determined, to such allowances and rights as are specified in the Second Schedule:

Provided that neither the allowances of a Judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment.

"Salaries".—The salaries received by the High Court/the Supreme Court Judges are "salaries" and are taxable under the Income Tax Act, though the Judges are Constitutional functionaries having no employer."

The Constitution of the Islamic Republic of Pakistan, 1956.

"175.—(1) The remuneration and other conditions of service of a Judge of the Supreme Court or of a High Court shall not be varied to his disadvantage during his tenure of office.

(2) Subject to Article 151, the conduct of a Judge of the Supreme Court or of a Judge of a High Court shall not be discussed in the National or a Provincial Assembly.

176.

177. Until other provisions in that behalf are made by Act of Parliament, the provisions of the Third Schedule shall apply in relation to the Supreme Court and High Courts in respect of matters specified therein.

THIRD SCHEDULE (Articles 159 and 177) The Judiciary

PART I THE SUPREME COURT

1. *Salary and allowances of Judges.* –

PART II

THE HIGH COURTS

4. *Salaries of Judges.*—(1) There shall be paid to the Chief Justice of a High Court a salary of Rs.5,000 per mensem, and to every other Judge of that Court a salary of Rs.4,000 per mensem.

(2) Every Judge of a High Court shall be entitled to such other privileges and allowances, including allowances for expenses in respect of equipment and travelling upon first appointment, and to such rights in respect of leave of absence and pensions as may be determined by the President, and until so determined to the allowances, privileges and rights which immediately before the Constitution Day, were admissible to the Judges of the High Court, and the provisions of the Government of India (High Court Judges) Order, 1937, shall, subject to the provisions of the Constitution, apply."

The Constitution of the Islamic Republic of Pakistan, 1962.

"CHAPTER-3.—THE CENTRAL AND PROVINCIAL JUDICATURES.
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124. The remuneration and other terms and conditions of service of a Judge of the Supreme Court or of a High Court shall be as provided in the Second Schedule.

SECOND SCHEDULE

Article 124 Remuneration and Terms and Conditions of Service of Judges

THE SUPREME COURT

1. There shall be paid to the Chief Justice of the Supreme Court a salary of Rs.5,500 *per mensem*, and to every other Judge of the Supreme Court a salary of Rs.5,100 *per mensem*.

2. Every Judge of the Supreme Court shall be entitled to such privileges and allowances, and to such rights in respect of leave of absence and pension, as may be determined by the President, and until so determined, to the privileges, allowances and rights to which, immediately before the commencing day, the Judges of the Supreme Court of Pakistan were entitled.

THE HIGH COURTS

1. There shall be paid to the Chief Justice of a High Court a salary of Rs.5,000 *per mensem*, and to every other Judge of a High Court a salary of Rs.4,000 *per mensem*.

2. Every Judge of a High Court of a Province shall be entitled to such privileges and allowances, and to such rights in respect of leave of absence and pension, as may be determined by the President, and until so determined, to the privileges, allowances and rights to which, immediately before the commencing day, the Judges of the High Court of the Province were entitled."

**"PRESIDENT'S ORDER 9 OF 1970
HIGH COURT JUDGES (LEAVE, PENSION AND PRIVILEGES)
ORDER, 1970**

PART I-PRELIMINARY

1. Short title and *commencement*.—(1) This Order may be called the High Court Judges (Leave, Pension and Privileges) Order, 1970.

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PART III – PENSION

13. *Conditions of admissibility of pension*.—A Judge shall, on his retirement, resignation or removal, be paid a pension in accordance with the provisions of this Order if he has –

- (a) completed not less than five years of service for pension and attained the retiring age; or
- (b) completed not less than ten years of service for pension and, before attaining the age, resigned; or
- (c) completed not less than five years of service for pension and, before attaining the retiring age, either resigned, his resignation having been medically certified to be necessitated by ill-health, or been removed for physical or mental incapacity:

Provided that, for the purpose of clause (a) of Part I of the First Schedule a deficiency of three months or less in the service for pension as Judge shall be deemed to have been condoned.

14. *Determination of pension*.—Subject to the provisions of this Order, the pension payable to a Judge who, on his retirement, is entitled to a pension under this Order shall be calculated—

- (a) in the case of a Judge who is not a member of a service in Pakistan or who immediately before his appointment as a Judge did not hold any other pensionable civil post in connection with the affairs of the Centre or of a Province, in accordance with the provisions of Part I of the First Schedule;
- (b) in case of a Judge who is a member of a civil service in Pakistan or who immediately before his appointment as a Judge held any other pensionable civil post in connection with the affairs of the Centre or of a Province, in accordance with the provisions of Part II of the First Schedule, unless he elects to receive pension under Part I of the said Schedule.

15. *Pension of Judges not covered by paragraph 13*.—A Judge who immediately before his appointment as such was a member of a civil service in Pakistan or was holding a post in connection with the affairs of the Centre or of a Province and who does not fulfill the conditions laid down in paragraph 13 shall, on retirement, be entitled to such pension as would have been admissible to him in his service or post, had he not

been appointed a Judge, his service as a Judge being treated as service for the purpose of calculating that pension."

Constitution of the Islamic Republic of Pakistan, 1973

PART VII THE JUDICATURE

CHAPTER 4-GENERAL PROVISIONS RELATING TO THE JUDICATURE

205. Remuneration, etc., of Judges. The remuneration and other terms and conditions of service of a Judge of the Supreme Court or of a High Court shall be as provided in the Fifth Schedule.

FIFTH SCHEDULE [Article 205]

Remuneration and Terms and Conditions of Service of Judges.

THE SUPREME COURT

1. There shall be paid to the Chief Justice of Pakistan a salary of Rs.9,900 per mensem, and to every other Judge of the Supreme Court a salary of Rs.9,500 per mensem, or such higher Salary as the President may, from time to time determine.

2. Every Judge of the Supreme Court shall be entitled to such privileges and allowances, and to such rights in respect of leave of absence and pension, as may be determined by the President, and until so determined, to the privileges, allowances and rights to which, immediately before the commencing day, the Judges of the Supreme Court of Pakistan were entitled.

3. The pension payable to a retired Judge of the Supreme Court per mensem shall not be less or more than the amount specified in the table below, depending on the length of his service as Judge in that Court or a High Court:

Provided that the President may, from time to time, raise the minimum or maximum amount of pension so specified:-

Judge	Minimum amount	Maximum amount
Chief Justice	Rs. 7,000	Rs. 8,000
Other Judge	Rs. 6,250	Rs. 7,125

4. The widow of a Judge of the Supreme Court shall be entitled to a pension at the following rates, namely:-

- (a) if the Judge dies after retirement - 50 per cent of the net pension payable to him; or
- (b) if the Judge dies after having rendered not less than three year's service as Judge and while still serving as such - 50 per cent of the pension admissible to him at the minimum rate.

5. The pension shall be payable to the widow for life or, if she remarries, until her marriage.

6. If the widow dies, the pension shall be payable:-

- (a) to the sons of the Judge who are less than twenty-one years of age, until they attain that age; and

- (b) to the unmarried daughters of the Judge who are less than twenty-one years of age, until they attain that age or are married, whichever first occurs.

THE HIGH COURT

1. There shall be paid to the Chief Justice of a High Court a salary of Rs. 9,400 per mensem, and to every other Judge of a High Court a salary of Rs. 8,400 per mensem, or such higher salary as the President may, from time to time, determine.

2. Every Judge of a High Court shall be entitled to such privileges and allowances, and to such rights in respect of leave of absence and pension, as may be determined by the President, and until so determined, to the privileges, allowances and rights, to which, immediately before the commencing day, the Judges of the High Court were entitled.

3. The Pension payable per mensem to a Judge of a High Court who retires after having put in not less than five years service as such Judge shall not be less or more than the amount specified in the table below, depending on the length of his service as Judge and total service, if any, in the service of Pakistan:

Provided that the President may, from time to time, raise the minimum or maximum amount of pension so specified:-

Judge	Minimum amount	Maximum amount
Chief Justice	Rs. 5,640	Rs. 7,050
Other Judge	Rs. 5,040	Rs. 6,300

4. The widow of a Judge of the High Court shall be entitled to a pension at the following rates, namely:-

- (a) if the Judge dies after retirement - 50 per cent of the net pension payable to him; or
- (b) if the Judge dies after having rendered not less than five years' service as Judge and while still serving as such - 50 per cent of the pension admissible to him at the minimum rate.

5. The pension shall be payable to the widow for life, or, if she remarries until her marriage.

6. If the widow dies, the pension shall be payable:-

- (a) to the sons of the Judge who are less than twenty-one years of age, until they attain that age; and
- (b) to the unmarried daughters of the Judge who are less than twenty-one years of age, until they attain that age or are married, whichever first occurs.

High Court Judges (Leave, Pension and Privileges) Order, 1997

PRESIDENT'S ORDER 3 OF 1997

"PART I-PRELIMINARY

1. **Short title and commencement.**-(1) This Order may be called the High Court Judges (Leave, Pension and Privileges) Order, 1997.

(2) It shall come into force at once and paragraph 15 shall be deemed to have taken effect on the 27th day of July, 1991.

2. **Definitions.—**

- (a)
 - (b) "actual service" means the time spend by a Judge on duty as such or in the performance of such other functions as he may be required under any law to perform or may be requested by the President or the Governor to discharge and includes vacation (but excluding any time during which the Judge is absent on leave) and joining time on transfer from—
 - (i) a High Court to the Supreme Court;
 - (ii) the Supreme Court to a High Court;
 - (iii) one High Court to another;
 - (iv) one permanent seat of a High Court to another permanent seat ;
 - (v) a High Court to the place where he is required under any law to perform any function; and
 - (vi) from a place where he is required under any law to perform any function to another such place or to a High Court;
 - (c) "Additional Judge" means a Judge appointed by the President to be an Additional Judge;
 - (d-e)
 - (f) "Judge" means a Judge of High Court and include the Chief justice, and Acting Chief Justice and an Additional Judge;
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PART III. PENSION

14. **The condition or admissibility of pension.**—A Judge shall, on his retirement, resignation or removal, be paid a pension in accordance with the provisions of this Order if he has—

- (a) completed not less than five years of service for pension and attained the retiring age; or
- (b) completed not less than five years of service for pension and before attaining the age, resigned or sought retirement; or
- (c) completed not less than five years of service for pension and, before attaining the retiring age, either resigned, his resignation having been medically certified to be necessitated by ill-health or been removed for physical or mental incapacity or been allowed by the President for sufficient cause to retire.

15. **Payable Pension.**— The Chief Justice and a Judge on his retirement, resignation or removal as provided in paragraph 14 shall be entitled to the minimum amount of pension equal to seventy per cent of the salary determined by the President from time to time payable to the Chief Justice, or as the case may be, a Judge on the completion of five years service for pension as Judge, and therefore an extra pension at the rate of two per cent of such salary for each subsequent completed year of service as the Chief Justice or, as the case may be, the Judge, including his service if any, in the service of Pakistan the maximum pension not exceeding eighty per cent of the said salary.

Provided that for the period between twenty-seventh day of July, 1991 and the thirty-first day of May, 1994 the minimum and the maximum amounts shall refer to the amounts specified in the Pension of Judges of Superior Courts Order, 1993 (P.O.2 of 1993).

Explanation.—The expression 'salary' means the salary referred to in paragraph 1 of the Fifth Schedule to the Constitution of the Islamic Republic of Pakistan or such higher salary as the President may determine from time to time and shall include Superior Judicial allowance but shall not include any allowance or amount representing any other privilege or facility.

15A.

16. **Pension of Judges not covered by paragraph 14.**—A Judge who immediately before his appointments as such was a member of a civil service in Pakistan or was holding a post in connection with the affair of the Federation or of a Province and who does not fulfill the conditions laid down in paragraph 14 shall, on retirement, be entitled to such pension as would have been admissible to him in service or post. Had he not been appointed a Judge, his service as Judge being treated as service for the purpose of calculating that pension."

29. **Subsidiary conditions of service.**—Subject to the provisions of this Order and such other provisions as the President may make in this behalf, the other privileges and rights of a Judge shall be determined by the rules for the time being applicable to an officer appointed by the President and holding the rank of secretary to the Government of Pakistan:

Provided that nothing in this paragraph shall have effect so as to give to a Judge who is a member of a civil service less favourable terms in respect of his conditions of service than those to which he would have been entitled as a member of such service if he had not been appointed as a Judge, his service as Judge

being treated as service for the purpose of determining those privileges and rights."

(Underlining in the above reproductions is ours, which is made for emphasis)

71. A careful reading of above reproduced relevant constitutional provisions; Article 221 of the Government of India Act, 1935; Article 221 of the Constitution of India, 1949; Article 175 of the Constitution of Islamic Republic of Pakistan, 1956; Article 124 of the Constitution of Islamic Republic of Pakistan, 1962; and, Article 205 of the Constitution of Islamic Republic of Pakistan, 1973, read with relevant Schedules to the Constitution, reveals that they are "*pari materia*" to the extent of entitlement to privileges and allowances and to such rights in respect of leave of absence and pension, and in this context, from time to time, High Court Judges Order 1937, President's Order 9 of 1970 and President's Order 3 of 1997, were issued to determine the moot question as to their right to pension. Here a reference to some repealed provisions of the Constitution and the High Court Judges Order/President's Orders has been made only to show that in the High Court Judges Order 1937, condition of minimum length of service for a High Court Judge for his entitlement/right to pension, in the normal course, was 12 years and on attaining the age of sixty years, it was seven years, so also in the cases where retirement was medically certified to be necessitated due to ill-health, while the President was further conferred with power that for special reasons, he may direct that any period not exceeding three months shall be added to a Judge's service for pension. The relevant provision of President's Order 9 of 1970, dated 17.6.1970, paragraph 23 whereof repealed the earlier High Court Judges Order 1937, was its paragraph 13, which provided one clear condition for entitlement of right to pension as minimum length of actual service of five years on attaining the

retiring age in the normal course and in case of resignation not less than ten years service. Further, paragraph 15 of this President's Order contained provision as regards the right to pension of other Judges, who were not covered by paragraph 13. In the President's Order 3 of 1997, introduced in the year 1997 and brought into force at once, except to the extent of its paragraph 15, which was made effective from 27.7.1991, in the definition clause, meaning of '*actual service*', '*additional judge*' and '*judge*' were specifically provided, while section 14 dealt with the condition of admissibility of pension of the retired judges. A bare reading of President's Order 3 of 1997 clearly spells out that every Judge of the High Court, having completed not less than five years of actual service as such on attaining the retiring age, is entitled for pensionary benefits. This provision is further subject to paragraph 29 of the President's Order 3 of 1997, relating to the "subsidiary conditions of service". A close look at the Fifth Schedule to Article 205 of the Constitution of Islamic Republic of Pakistan, 1973, which is an important integral part of the constitutional mandate, applicable to the present case, further reveals that paragraphs-2 and 3 relating to High Court, are the two relevant provisions of the Constitution, which in unequivocal term provide that in terms of paragraph-2 "*EVERY JUDGE*" of a High Court shall be entitled to such "*PRIVILEGES*", "*ALLOWANCES*", and to such "*RIGHTS*" in respect of leave of absence and "*PENSION*" as may be determined by the President, and until so determined, with the privileges, allowances and rights, to which immediately before the commencing day, the judges of the High Court were entitled. From the language of paragraph-2, it is also clear that it only refers to one category of judges of the High Court i.e. "*Every Judge*". To put

it in other words, there are no two categories of judges specified therein as many senior ASCs and retired judges of the High Court have argued before us while supporting their claim despite they having rendered less than five years actual service as such. What is important to notice here is that firstly right to pension is to be determined by the President for every judge of the High Court and until such determination, the privileges, allowances and rights already in-force before the commencing day, are to be availed by all of them. Keeping in view this clear and unambiguous language of paragraph-2 (*ibid*), when we revert to the provisions of paragraph 13 of the President's Order 9 of 1970, relating to conditions of admissibility of pension, we find that till its repeal vide paragraph 30 of President's Order 3 of 1997, rights of every Judge of the High Court were already determined in the manner that unless they had completed not less than five years of service before retiring age, they were not eligible or entitled to any pensionary benefits. It was in this background that none of the retiring honourable judge of the High Court, having less than five years service as such to his credit, ever ventured to agitate such claim. In the year 1997, when the President's Order 3 of 1997 was promulgated with immediate effect (except its section 15, which was made applicable retrospectively w.e.f. 07.7.1991), under paragraph 14, a similar condition of not less than five years service before attaining the retiring age was engraved, and the position under paragraph 17 of the High Court Judges Order, 1937 (repealed on 17.6.1970) was also not much different, except that requirement of length of service to earn right to pension at that time was minimum 12 years service in the normal course or in case of attaining the age of sixty years, not less than seven years.

72. Reverting to the language of paragraph-3 of Fifth Schedule to Article 205 of the Constitution of 1973, we find that in its original text, paragraph-3 had different phraseology, but it was subsequently amended in the present form by 12th amendment Act of 1991. However, in both the situations, right to pension of a retired High Court Judge was made conditional to not less than five years actual service, while a further table was provided for increase in the percentage of pension depending upon the length of his service as a Judge of the High Court upto the maximum of 80 percent of his salary. Thus, the two paragraphs 2 and 3 of Fifth Schedule to Article 205 of the Constitution either read separately/conjunctively or disjunctively, do not alter/change in any manner the requirement of minimum five years length of actual service for every Judge of the High Court as one of the basic condition to earn the right to pension. The arguments of learned ASCs based on the principle of reading down etc are, thus, of no avail in this regard.

73. Reference to Article 207 of the Constitution, debarring the honourable retired Judges of the High Court to plead or act in any Court or before any authority within the jurisdiction of the High Court they have served in that capacity, arguments advanced by some of the learned ASCs in order to strengthen the case of those honourable retired Judges of the High Court, who retired before completing a period of minimum five years actual service as such, are equally without force. Firstly, for the reason that in view of the reasonable classification to the extent that they are not debarred from practicing before the High Courts of other Provinces and the Supreme Court, such limited restriction is not in conflict with the spirit of Article 18 of the Constitution relating to freedom of trade,

business or profession. Secondly, all the Judges who retired or resigned before completing their actual service as a High Court Judge for a minimum period of five years, knew well in advance at the time of their elevation to this high office that their total length of service upon appointment, looking to their date of birth qua retirement will be less than five years, therefore, as per Constitutional mandate and seventy five years old convention/usage, they will not be entitled to any pensionary benefit. In such circumstances, with profound respect, all these honourable retired Judges of High Court are estopped from agitating such grievance at this belated stage. This view, further gains support from the fact that except few honourable retired High Court Judges, who have now availed the benefit of judgment under challenge, though they retired in 70s, 80s, 90s and upto the passing of judgment under challenge, no one ever put up his claim on the basis of interpretation of Article 205 read with Fifth Schedule and President orders No.3 of 1997, 9 of 1970, as now made applicable to their cases with reference to judgment under challenge. After all they all were highly skilled and qualified professional in the field of law and jurists in their own rights. Thus, any plea of ignorance of law or misinterpretation of the relevant Constitutional provisions for over seven decades doesn't appeal to reason.

74. Besides, the base line of minimum five years actual service to become entitled for pensionary benefits and to deny the right to pension to other retired High Court Judges, who have not served as such for five years or more, applying the principles of interpretation of statutes as summarized in the preceding paragraph 69 and reading the Constitutional provisions and P.O's

as a whole, gain full support from the language of High Court Judges Order 1937 (Repealed), President Orders i.e. President Order No.9 of 1970 (Repealed) and President Order No.3 of 1997, which also provide for a special provision for relaxation of such period upto certain limit by the President in hardship cases, where the required period of minimum five years service has remained short by few days or few months. For the argument sake, in case determination of right to pension of such category of Judges, who from time to time rendered less than five years actual service to their credit and retired, was yet to be made by the President then there was no necessity for insertion of such provision in both the President's Order, as otherwise those hardship cases, having deficiency of few months, could have been separately dealt with during such process of determination. This view of the matter gains further support from the fact that in case right to pension as regards honourable retired Judges of the High Court, having less than five years actual service was yet to be determined, then why since the year 1937 upto now, neither any such representation was made nor any legal remedy was followed by the honourable retired Judges allegedly qualifying for pension in that category. In this regard, we also confronted many learned Sr. ASCs to show us a single instance either of pre-partition days or thereafter wherein such interpretation of law was advanced or such grievance was ever agitated by any honourable retired Judge of the High Court falling in this category or earlier to judgment under challenge, any judge of the High Court was ever granted right to pension/pensionary benefits on the basis of his length of service as such for a period of few months or few years, irrespective of minimum required length of actual service, as has been held

through the judgment under challenge. In reply, they frankly conceded that they have not come across any such instance. All these facts taken together leave us in no doubt to hold that the judgment under challenge is outcome of improper assistance to the Court due to which number of relevant provisions of law necessary for a just and fair adjudication of this issue were entirely overlooked and the findings were built on entirely wrong premises.

75. Another aspect of the case, which has been argued before us with vehemence by some of the learned ASCs, is the legal status of the judgment under challenge "as to whether it is a judgment in "*personam*" or a judgment in "*rem*". In this regard some of the learned ASCs have also made reference to the cases Pir Bukhsh versus Chariman, Allotment Committee (PLD 1987 S. C. 145) and Federation of Pakistan versus Qamar Hussain Bhatti (PLD 2004 S.C. 77), which laid down the test of distinction between a "judgment in rem" and "judgment in personam". In order to dilate upon the true meaning of these two legal phrases, some reproduction from the case of Pir Bukhsh (*supra*) will be useful, which reads as under:-

"The terms "*in rem*" and "*in personam*" are of Roman law used in connection with *actio*, that is, *actio in rem* and *actio in personam* to denote the nature of actions, and with the disappearance of the Roman forms of procedure, each of the two terms "*in rem*" and "*in personam*" got tagged with the word judgments to denote the end-products of actions in *rem* and actions *in personam*. Thus, according to the civil law an *actio* in which a claim of ownership was made against all other persons was an action *in rem* and the judgment pronounced in such action was a judgment *in rem* and binding upon all persons whom the Court was competent to bind, but if the claim was made against a particular person or persons, it was an action *in personam* and the decree was a decree *in personam* and binding only upon the particular person or persons against whom the claim was preferred or persons who were privies to them."

76. However this aspect has hardly any relevancy to the facts of the present proceedings, as while dealing with this issue, we have felt no difficulty in forming our view, as from the very language of the judgment under challenge, particularly, from its paragraphs 31 to 34, as reproduced below, it is clear that for all intent and purpose appeal against a private person challenging the judgment of the High Court regarding his individual grievance was widened in scope and treated as a judgment in rem, benefit whereof was open endedly extended even to other honourable retired Judges who were not party to the said appeal and even to those who were at one stage of the proceedings party through some miscellaneous applications, but had earlier withdrawn the same during its pendency. In addition to it, benefit of the judgment under challenge was also extended to the honourable retired Judges of the Federal Shariat Court of Pakistan, though *prima-facie* no such issue was involved in the proceeding. For ease of reference, such paragraphs of judgment under challenge are reproduced as under:-

"31. Before parting with this judgment, we deem it proper to point out that Chief Justice and Judges of Federal Shariat Court are also entitled to the grant of pension and pensionary benefits available to the retired Judges of the Supreme Court and High Courts under the Constitution. The appointment of the Chief Justice and Judges-of the Federal Shariat Court is made by the President under Article 203-C of the Constitution and the terms and conditions of service of the Judges of the said Court are also determined by the President, therefore, notwithstanding the fixed tenure of the Chief Justice and Judges of the Federal Shariat Court, they are entitled to the terms and conditions of service and remunerations including pension and pensionary benefits at par to the Judges of the Supreme Court and High Courts, by virtue of Article 203-C(9) of the Constitution which provides as under:--

"(9) A Chief justice who is not a Judge of the Supreme Court shall be entitled to the same remuneration, allowances and privileges as are admissible to a Judge of the Supreme Court and a Judge who is not a Judge of a High Court shall be entitled to the same

remuneration, allowances and privileges as are admissible to a Judge of a High Court:

Provided that where a Judge is already drawing a pension for any other post in the service of Pakistan, the amount of such pension shall be deducted from the pension admissible under the clause."

32. The Chief Justice or a Judge of Federal Shariat Court shall be entitled to the same salary, pension, allowances, privileges, including grant of leave/LPR and other benefits as are allowed to a Judge of the Supreme Court and High Court respectively. The plain reading of Article 203-C of the Constitution read with Article 205 and Fifth Schedule of the Constitution would show that right of pension and pensionary benefits of the Chief Justice and Judges of Federal Shariat Court notwithstanding the length of service or fixed term of tenure is recognized under the Constitution and consequently, this judgment subject to the Constitution, shall be equally applicable in respect of the right of pension and pensionary benefits admissible to the Chief Justice and Judges of the Federal Shariat Court.

33. In the light of foregoing reasons, we hold that all retired Judges of the High Courts who retire as such Judge in terms of Article 195 of the Constitution of Islamic Republic of Pakistan and the Chief Justices and Judges of the Federal Shariat Court notwithstanding the tenure appointment, are entitled to the pension and pensionary benefits in terms of Article 205 read with Fifth Schedule of the Constitution read with P.O. No.8 of 2007 and Article 203-C of the Constitution and all other enabling provisions of the Constitution as well as President's Order No.2 of 1993 and P.O.No.3 of 1997, irrespective of their date of retirement and length of service. The Miscellaneous Applications bearing No.940 in C.A. 1021 (filed by Justice (R.) Muhammad Azam Khan), 968/05 in C.A. 1021/95 (filed by Syed Sharif Hussain Bokhari and Muhammad Aqil Mirza, retired Judges of Lahore High Court, 1004/05 in C.A. 1021/95 (filed by Ghulam Muhammad Qureshi), 1176/05 in C.A. 1021/95 (filed by Mr. Riaz Kayani retired Judge of Lahore High Court, 1190/05 in C.A. 1021/95 (filed by Rao Iqbal Ahmed Khan), retired Judge of Lahore High Court, 1368/05 in C.A. 1021/95 (filed by Dr. Munir Ahmad Mughal), retired Judge of Lahore High Court, 2079/06 in C.A. 1021/95 and 1273/06 in Const. P. 10/01 (both filed by Justice (R.) Saeed-ur-Rehman Farrukh), involving similar questions of fact and law, containing the prayer for impleadment of the applicants in the constitution petition as co-petitioner and in civil appeal as respondent, have already been allowed.

34. In consequence to the above discussion, the Constitution Petitions Nos. 8/2000, 10/2001, 26/2003, 34/2003, 04/2004 and 26/2007, filed by the retired Judges of the High Courts are allowed and the petitioners/ applicants in these petitions and miscellaneous applications, along with all other retired Judges of the High Courts, who

are not party in the present proceedings, are held entitled to get pension and pensionary benefits with other privileges admissible to them in terms, of Article 205 of the Constitution read with P.O.No.8 of 2007 and Article 203-C of the Constitution read with paras 2 and 3 of Fifth Schedule and P.O. No.2 of 1993 and P.O.3 of 1997 from the date of their respective retirements, irrespective of their length of service as such Judges.”.

77. As a corollary of above discussion, it is also imperative and significant to mention here that the judgment under challenge was passed by a learned three member Bench of this Court consisting of M/s Muhammad Nawaz Abbasi, Muhammad Qaim Jan Khan and Muhammad Farrukh Mahmood, JJ on 06.3.2008, at a time when the whole superior judiciary of the Country was in kayos, crises and disarray due to unconstitutional measures taken by the then President/dictator General (Retired) Pervez Musharraf of Pakistan, who by hook or crook wanted to remain in power and in that perspective attempted to destroy the institutions in the Country, particularly targeted the superior judiciary, to bring them under his thumb and control. The discussion regarding this aspect of the case in the present proceedings is enough to this extent. However, in this context if any further detailed discussion is felt orderly, reference can be made to the judgment of a full Bench of this Court in the case of Sindh High Court Bar Association (supra), wherein this aspect has been extensively discussed and aptly attended to.

78. It is pertinent to mention here that while taking cognizance in these *suo moto* proceedings, we have exercised all care and caution to intimate all the Honourable Retired Judges of the High Court, who, in one or the other capacity have availed the benefit of judgment under challenge, to afford them due opportunity of hearing and for this purpose notices were also issued to the legal heirs of late Mr. Justice Ahmed Ali U. Qureshi.

Besides, offices of the Accountant General of all the four Provinces were also directed to bring on record all the relevant facts and figures in order to afford opportunity of hearing to all the concerned, but, as the judgment under challenge was given the status of judgment in *rem*, therefore, it is further made clear that irrespective of the fact whether some Honourable Retired Judges had notice or they participated in these proceedings or not, each one of them will be bound by the fallout of this judgment in the same manner as if they were party to these proceedings. This clarification is necessary as, particularly, the office of Accountant General Sindh and Balochistan have not come up before this Court in response to our order dated 3.4.2013, with clean hands, so much so that at one stage of these proceedings we had to initiate contempt proceedings against Deputy Accountant General Sindh for his negligent and irresponsible conduct in responding to our queries.

79. There is yet another aspect of this case, which has been argued before us by some of the learned ASCs and Honourable Retired Judges of the High Court, who have been either elevated or have resigned from their offices after the judgment under challenge. They have contended that since at the relevant time of their elevation/resignation judgment under challenge was in full force applicable and implemented, therefore, valuable rights have accrued in their favour on the principle of *locus poenitentiae*/legitimate expectancy which cannot be taken away lightly by way of some observations in this case. Indeed, such submissions of some of the newly elevated or honourable retired Judges of the High Court are in line with the ratio of the judgment

under challenge, but at the same time it is to be noticed that the Honourable Judges, who have resigned from their office before completion of minimum five years service as such have to bless their own stars for this purpose because their mere oral assertion that they had to resign from their office under compelling circumstances, cannot be legally accepted. As regards the other Judges, who have taken oath of their office as High Court Judge after the judgment under challenge, suffice it to observe that since the said judgment has been declared by this Court as *per incurium*, null and void, therefore, any benefit on the principle of legitimate expectancy cannot hold the field, more so, when as to their pensionary rights they are to be governed by the law in force at the relevant time i.e. Article 205 of the Constitution read with its Fifth Schedule and President's Order No.9 of 1970 or 3 of 1997, regarding which a detailed discussion has already been made in the preceding paragraphs of this judgment, and not by the dicta laid down in the judgment under challenge, which has been declared "*per incuriam*".

80. Another angle for looking at the interpretation of the relevant Constitutional provision and the President's Order, to view the right to pension of the honourable retired Judges of the High Court, having less than five years actual service, is admitted long standing convention/usage of its interpretation which has given it a status of statutory backing on the principle of "*Optima Est Legis Interpres Consuetudo*", which is defined in Black's Law Dictionary Sixth Edition as under:-

"Custom is the best interpreter of the law"

81. Discussing this legal principle as a rule of construction in the case of *Sheppard v. Gosnold* (1672 Vangham 159, P-169),

Vaughan, C.J. observed that where the penning of a statute is dubious, long usage is just a medium to expound it by; for *jus et norma loquondi* is governed by usage, and the meaning of things spoken or written must be as it hath constantly been received to be by common acceptation. General usage under a statue may make for a practical construction of it which will be accorded great consideration by the courts. General usage, of long duration therefore unquestioned, will frequently be of great assistance in the search of legislative meaning. The meaning publicly given by contemporary or long professional usage, is presumed to be a true one, even when the language has etymologically or popularly a different meaning. It is obvious that the language of a statute must be understood in the sense in which it was understood when it was passed, and those who lived at or near the time when it was passed, may reasonably be supposed to be better acquainted than their descendants with the circumstances to which it had relation, as well as with the sense then attached to legislative expressions. This view of the matter is fortified from the case of National and Grindlays Bank Ltd. v. Municipal Corporation for Greater Bombay (AIR 1969 SC 1048) and also from the judgment of this Court in the case of Asad Ali (supra), which lays down as under:-

"95.a constitutional convention once established has the same binding effect as a Constitutional provision. We may, however, add that in the case of an unwritten Constitution, conventions play a more prominent and dominant role in the interpretation of Constitutional provisions than in the case of written Constitution. Therefore, while explaining the Constitutional provision of a written Constitution on the basis of a convention, it must be shown that either a convention has developed with the passage of time side by side with the enforcement and interpretation of the Constitution or a convention already existing on the date of enforcement of a written Constitution, has either received a statutory recognition

in the Constitutional document or has been established as a Constitutional convention on account of conscious and deliberate obedience of the convention by those who are charged with the duty of interpreting or enforcing the Constitution. Therefore, when an already existing convention is followed in interpreting a provision of a written Constitution consistently and consciously over a length of time by those who are responsible under the Constitutional mandate to interpret and enforce the said provision of Constitution, the convention is established as a Constitutional convention and any breach thereof may be treated by the Courts as a breach of the provision of the Constitution to which the convention relates."

82. Indeed, right to pension of every honourable retired Judge of the High Court in our country is to be determined strictly in line with applicable Article 205, its Fifth Schedule read with applicable P.O No.9 of 1970 or P.O. No.3 of 1997, but for our better understanding, we have also attempted to further divulge into the question of condition of minimum length of service for honourable retired Judges of High Court as one of the basic requirement to earn the right to pension. For this purpose, we have over seen some relevant Constitutional and statutory provisions in force on this subject in the neighbouring countries, India, Bangladesh and Sri Lanka, which are in substance *pari materia* to ours and noticed that in each of these countries without any exception there is requirement of length of service of minimum five years or more for acquiring such right as a retired Judge of the High Court, while in some other countries it is stretched upto 10/12 years, and this long standing convention, having the force of law, is being religiously adhered to.

83. In so far as the arguments of Rana M. Shamim, learned ASC who represented honourable retired Justice Dr. Ghous Muhammad and Mr. Afzal Siddiqui, learned ASC who represented honourable retired Justice Syed Najmul Hassan Kazmi, with

reference to Article 270AA 3(b) of the Constitution, are concerned, we find much force in their contentions that they shall be deemed to have retired on attaining their respective age of superannuation and as such both of them have completed minimum five years actual service to their credit as Judge of the High Court, which has made them entitled for the benefit of pension irrespective of the judgment under challenge. Thus, for this purpose, they have their own entitlement for pension, independent of judgment under challenge.

84. The submissions made by some of the learned ASCs that "Additional Judges" of the High Court, being covered with the definition of "Judge" as defined under Article 260(1)(c) of the Constitution, are equally entitled for right to pension like permanent judges of the High Court, have much force as at one place the definition of 'Judge' in the above referred Article of the Constitution clearly defines that in relation to the High Court, a person who is an Additional Judge of the High Court, is also included in the definition of a Judge and at the other place under Article 197 of the Constitution, relating to appointment of Additional Judges also, no discrimination is identified for the purpose of holding them disentitled for right to pension like any permanent judge of the High Court, who, in terms of Article 195 of the Constitution, will retire on attaining the age of 62 years, unless he resigns sooner or removed from the office in accordance with the Constitution. It will be also pertinent to mention here that under paragraph-2 of the President's Order 3 of 1997, "Additional Judge" and "Judge" of the High Court have been separately defined as under:-

"2(c) "Additional Judge" means a Judge appointed by the President to be an Additional Judge."

"2(f) "Judge" means a Judge of High Court and include the Chief Justice, and Acting Chief Justice and an Additional Judge."

From the reading of above two definitions, again it is clear that definition of a Judge of the High Court also includes additional judge, therefore, no exception could be taken in determination of his right to pension for the reason that he has not yet been appointed as permanent judge of the High Court in terms of Article 193 of the Constitution. Another added reason in support of this conclusion emerges from the combined reading of paragraph-2 of the Fifth Schedule to Article 205 of the Constitution, speaking about "every judge", and the definitions of "judge" under Article 260(1)(c)(b) of the Constitution and paragraph-2(f) of President's Order 3 of 1997, which leave no room for exclusion of "Additional Judge" from the category of "every judge" within the meaning of paragraph-2 (*ibid*). However, it is necessary to state and clarify here that in such eventuality, for claiming right to pension a retired judge of the High Court "additional judge" will also have to have minimum five years actual service to this credit.

85. In view of the foregoing discussion, we find that Additional Judge of the High Court will be entitled for equal treatment like a permanent Judge of the High Court for his right to pension, but subject to subsisting determination of such right by the President in terms of Article 205, read with Fifth Schedule of the Constitution and the applicable President's Order.

86. When we go into further details of this litigation, which earlier ended up in the form of judgment under challenge, we find that on 19.10.1994, retired Justice Ahmed Ali U. Qureshi, who had initially joined Sindh Judiciary on 11.6.1953 as sub-Judge,

thereafter elevated as Additional Judge of the High Court of Sindh in July, 1985, wherfrom he retired on 25.10.1988, after rendering actual service in that capacity for a period of three years and four months approximately, upon his retirement was found entitled for pension at the rate of Rs.4,200/- per month, as retired District Judge. The payment of this pension amount was in addition to a sum of Rs.2,100/- as cost of living allowance payable to a judge of the High Court under paragraph 16-B of the President's Order 9 of 1970, as amended by President's Order 5 of 1988. The pension of the petitioner was revised from time to time, but when the petitioner approached the Accountant General Sindh, Karachi to avail the benefit of President's Order 2 of 1993, he was denied such benefit on the ground that since he had not put up minimum five years actual service as Judge of the High Court, therefore, he was not entitled for its benefit.

87. In the above discussed background, in order to avail the benefit of President's Order 2 of 1993, the petitioner had brought the said petition before the High Court in person with the following prayers:-

- "a) To declare the P.O. 9 of the 1970 so far its provision in Part III with regard to pension are repugnant to the Constitution of the Islamic Republic of Pakistan are void.
- b) To order the Respondents to pay the Petitioner maximum pension payable to a Judge of the High Court under P.O. 2 of 1993 alongwith arrears or in alternative.
- e) To order the Respondents to fix the pension of the Petitioner at Rs.8,190/- per month admissible to him as Civil Servant, add to it increments in pension allowed from time to time and pay all the arrears alongwith markup for the period this amount is illegally retained by Respondent No.4."

88. This petition was strongly resisted by the respondents on various legal grounds regarding disentitlement of the petitioner,

however, narration of facts was not disputed. It was in this background of the litigation that learned Division Bench of the High Court of Sindh, wherein one of its member was Justice Ms. Majida Rizvi (as she then was), delivered its judgment in the following terms.

"11. In the result, the petition is allowed and the respondents are liable to fix the petitioner's pension at the maximum pension as allowed under President's Order No.2 of 1993. The parties are left to bear their own costs."

89. A perusal of this judgment of the High Court of Sindh dated 08.2.1995, which was subsequently impugned before the apex Court in the earlier proceedings, reveals that the main ground which found favour for grant of such relief to the petitioner was the principle laid down in the case of I.A Sharwani v. Government of Pakistan (1991 SCMR 1041) was attracted, operative part whereof reads as under:-

"9. We are, consequently, of the view that rights and privileges admissible to the petitioner in respect of his pension are now governed under President's Order No.2 of 1993. As has been held by the Supreme Court in I.A. Sharwani's case, instruments such as P.O. 2 of 1993 are constitutional instruments, therefore, full effect must be given to them. We, therefore, find no force in the contentions raised on behalf of the respondents. Learned Standing Counsel has also adopted the arguments advanced by the learned A.A.G. but as we have just pointed out, we are unable to agree with his contentions.

10. Although, it has also been contended by the petitioner in the alternative that, in any case, he is entitled to a pension of Rs.8,190 in accordance with the Civil Servants Rules, but since we have accepted his plea that P.O. 2 of 1993 is applicable to the petitioner, it is not necessary for us to consider the second contention of the petitioner. However, it will always be open for the petitioner to take such a plea in the future if the circumstances so require."

90. After scanning the whole record in this case, we are somewhat surprised to see that nowhere in the judgment dated 08.2.1995, which was subsequently challenged by the Accountant General Sindh before the apex Court, question of entitlement of

pension to every judge of the High Court, irrespective of his length of service, was involved or decided by the High Court, rather, it was held that at the time of retirement of the petitioner from service as Judge of the High Court, the rights and privileges as to his pension had not yet been determined by the President in pursuance of paragraph 2 of the Fifth Schedule, but as was provided by said paragraph, till such rights and privileges were determined by the President, a Judge of the High Court was entitled to such privileges, allowances and rights, to which he was entitled immediately before the commencing day, while such day has been specified by Article 265 of the Constitution as the 14th day of August, 1973. In our opinion, remaining oblivious of all these legal and factual deficiencies and the limited scope of appeal against the impugned judgment, floating on the surface of record, is yet another strong ground to justify declaring the judgment under challenge *per incuriam*.

91. At the cost of repetition, it will be worthwhile to reproduce here paragraph-2 of Fifth Schedule to Article 205 of the Constitution as all along it has been the center point of arguments advanced in this case on behalf of honourable retired judges of the High Court etc, who have been the beneficiary of the judgment under challenge.

"FIFTH SCHEDULE
[Article 205]

Remuneration and Terms and Conditions of Service of Judges.

THE SUPREME COURT

THE HIGH COURT

1.

2. Every Judge of a High Court shall be entitled to such privileges and allowances, and to such rights in respect of leave of absence

and pension, as may be determined by the President, and until so determined, to the privileges, allowances and rights, to which, immediately before the commencing day, the Judges of the High Court were entitled"

In the first place, simple reading of this paragraph alongwith corresponding language of Article 221 of the Government of India Act, 1935; relevant paragraph of the High Court Judges Order, 1937; Article 221(2) of the Constitution of India, 1949 (pre 54th amendment and post 54th amendment); paragraph 4(2) relating to High Court Judges in the Third Schedule to the Constitution of Islamic Republic of Pakistan, 1956; Article 124 read with paragraph-2 of the Second Schedule to the Constitution of Islamic Republic of Pakistan, 1962, relating to High Court; and above reproduced paragraph-2 of the Fifth Schedule to Article 205 of the Constitution of 1973, read with President's Order 9 of 1970 or President's Order 3 of 1997, leads us to an irresistible conclusion that these provisions for the purpose of determination of right to pension of the honourable retired judges of the High Court are "*pari materia*" for all intent and purposes. In this background when we proceed further to look into the language of the High Court Judges Order, 1937, President's Order 9 of 1970 and President's Order 3 of 1997, we find no ambiguity at all that the determination, as to the right to pension required to be made by the President under the Constitution, was made from time to time for every judge of the High Court. Therefore, to say that determination of right to pension for the honourable retired judges of the High Court, who have rendered less than five years actual service is yet to be made is absolutely fallacious and misconceived. This view of the matter gains further support from the fact that the determination of right to pension to be made on each occasion,

was to be made for every judge of the High Court at one go and not in piecemeal; and this is what exactly through all these instruments his Majesty in Council and the President have done in unequivocal terms that at all times minimum length of service, (now five years), was the bottom line to earn the right to pension. Not only this, but a combined reading of all the three orders i.e. High Court Judges Order, 1937, President's Order 9 of 1970 and President's Order 3 of 1997 in sequence also reveals that such determination of "right to pension" of "every judge" of the High Court was always made and continued without break since 1937 upto today.

92. To add force to the above interpretation of paragraph 2 of the Fifth Schedule to Article 205 of the Constitution, we also cannot overlook two maxims of similar nature "***Expressum Facit Cessare Tacitum***" meaning thereby that "what is expressed makes what is implied to cease", and "***expressio unis est exclusio alterius***" meaning thereby that "the express mention of one thing implies the exclusion of another". Thus, where a statute contains express covenants or mention of things and contingencies no other implication of any covenant or contingency on the same subject matter can be raised. In other words, where the legislature postulates and specifies some thing for some category of persons only, it, inline with these maxims, impliedly exclude others. Indeed, the principle propounded in these two maxims, in certain situations, can have dangerous repercussions, therefore, it is to be applied with extra care and caution, but in the present case, there is absolutely no dispute or denial of the fact that right from the year 1937, while exercising powers, his Majesty in Council or the

President, as the case may be, have from time to time laid down the criteria for entitlement of pensionary benefits for every retired judge of the High Court, and for this purpose, the relevant provisions of Judges Order 1937 or two President's Order, which are "*pari materia*", give a clear meaning of exclusion from the entitlement of pensionary benefits, all those honourable retired judges of the High Court, who have, under the order of 1937 or President's Orders 9 of 1970 and 3 of 1997, not completed minimum twelve/five years actual service to earn right to pension. A reading of paragraph 2 and 3 in any manner, conjunctive or disjunctive, makes it abundantly clear that the President at the time of determination of right to pension for a retiring honourable judge of the High Court has made not less than five years actual service as bottom line for his entitlement/right to pension with full intent and, thus, excluded all those who have not met this minimum threshold of actual service. But in some cases subject to other prescribed and applicable provisions like proviso to paragraph-13(c) of President's Order No.9 of 1970 or paragraph 29 of the President's Order 3 of 1997, read with S.R No.423 (*ibid*), relating to automatic or otherwise addition of certain period in it to make up deficiency in hardship cases. The arguments advanced by some of the learned ASCs that Fifth Schedule to Article 205 of the Constitution is a sub-constitutional legislation, in our opinion, are also meritless, therefore, any argument built on these premises are devoid of force. At the cost of repetition, we may mention here that right to determine conferred to the President under paragraph 2 (*ibid*) is not a right limited to the extent of determination of quantum of pension for every judge, but in the first place, President has to determine the criteria for honourable retired judge of the High Court to earn right

to pension, which exercise has been already undertaken explicitly and in unambiguous terms in both the earlier President's Order 9 of 1970 and President's Order 3 of 1997 (reproduced above). To put it in other words, it is the President who has been exclusively delegated with the power, in the first place to determine the entitlement/right to pension of every honourable retired judge of the High Court; and, in the second place, to determine the quantum of such pensionary benefit, which exercise has been repeatedly undertaken by him in very clear terms. While discussing the issue relating to entitlement of pensionary benefits of honourable retired judges of the High Court, having less than five years service, another strong ground which has emerged for our consideration from admitted facts, and carries force of convention/usage is that learned ASCs addressing the Court despite specific suggestions to this effect, could not cite a single instance from the Sub-continent where the honourable retired judges of the High Court, having rendered less than the minimum required period of actual service, envisaged as condition for entitlement for right to pension under the High Court Judges Order 1937, President's Order 9 of 1970 or President's Order 3 of 1997, ever claimed or got pension on the basis of interpretation of paragraph 2 and 3 read with applicable President's Order in the manner as erroneously interpreted in the judgment under challenge. We, therefore, have no hesitation to hold that for the preceding reasons and further reasons to be recorded hereinafter, the judgment under challenge falls in the category of *per incuriam* and makes it without jurisdiction and nullity in the eyes of law, as if it never existed at all.

93. After having answered the first two moot points, when we come to the last point relating to the fate of pensionary benefits

already availed by the honourable retired judges of the High Court, though having less than five years actual service to their credit, on the basis of the judgment under challenge, we deem it proper that before undertaking any further discussion in this regard, to prepare a statement in the form of a chart, containing the relevant dates and financial repercussions, as noted hereunder.

Calculation/Statement of Accounts pertaining to Pension of Hon'ble Judges of High Courts

Lahore High Court

S.No.	Name of Hon'ble Judge/ or widows of Hon'ble Judges	Date of retirement/ resignation/ removal	Actual Length of Service (Y-M-D)	Total Pension Drawn including Commutation	Per month Pension	Annual Pension Amount
1	Mr. Justice (Retd) Abdul Ghafoor Khan Lodhi	1-Jul-81	04-05-20	24,907,339	-	-
2	Mr. Justice (Retd) Mian Ghulam Ahmad	2-Feb-95	02-05-04	26,845,284	515,652	6,187,824
3	Mr. Justice (Retd) Sh. Abdul Mannan	6-Nov-95	03-02-06	25,850,871	550,422	6,605,064
4	Mr. Justice (Retd) Rana Muhammad Arshad Khan	1-Oct-96	02-01-23	25,281,378	535,133	6,421,596
5	Mr. Justice (Retd) Ch. Mushtaq Ahmad Khan	1-Oct-96	04-01-23	24,386,404	528,002	6,336,024
6	Mr. Justice (Retd) Khan Riaz-ud-Din Ahmad	1-Jan-98	03-02-23	23,275,729	533,944	6,407,328
7	Mr. Justice (Retd) Muhammad Aqil Mirza	4-Apr-97	02-07-26	24,048,779	528,002	6,336,024
8	Mr. Justice (Retd) Abdul Hafeez Cheema	1-Oct-97	03-01-23	28,802,381	610,287	7,323,444
9	Mr. Justice (Retd) Ghulam Sarwar Sh.	10-Dec-98	02-00-00	25,986,075	594,663	7,135,956
10	Mr. Justice (Retd) Syed Sharif Hussain Bukhari	15-Jun-98	03-10-07	24,615,969	527,950	6,335,400
11	Mr. Justice (Retd) Muhammad Islam Bhatti	22-Dec-98	03-02-11	26,184,753	608,654	7,303,848
12	Mr. Justice (Retd) Rao Iqbal Ahmad Khan	12-Jan-99	02-01-00	24,793,480	519,535	6,234,420
13	Mr. Justice (Retd) Mian Saeed ur Rehman Furrukh	1-Aug-98	03-06-12	24,392,330	527,950	6,335,400
14	Mr. Justice (Retd) Sh. Amjad Ali	22-Jun-99	02-06-11	24,233,654	608,654	7,303,848
15	Mst. Shahida Khurshid w/o Mr. Justice (Retd) Raja Muhammad Khurshid	24-Aug-99	03-10-13	13,662,023	297,012	3,564,144
16	Mr. Justice (Retd) Syed Najam ul Hassan Kazami	27-Jan-00	02-07-29	24,027,865	519,172	6,230,064
17	Mr. Justice (Retd) Iftikhar Ahmad Cheema	1-Jul-01	02-07-07	29,708,666	441,273	5,295,276
18	Mr. Justice (Retd) Dr. Munir Ahmad Mughal	7-Jul-01	04-06-26	26,364,853	594,023	7,128,276
19	Mr. Justice (Retd) Riaz Kayani	6-Aug-01	03-02-15	23,770,477	519,173	6,230,076

20	Mr. Justice (Retd) Ghulam Mahmood Qureshi	8-Oct-01	04-04-10	23,119,482	519,172	6,230,064
21	Mr. Justice (Retd) Mansoor Ahmad	7-Mar-04	03-02-04	22,601,149	510,436	6,125,232
22	Mr. Justice (Retd) Pervaiz Ahmad	10-Apr-04	02-01-05	26,222,120	583,356	7,000,272
23	Mr. Justice (Retd) Farrukh Latif	10-Jun-05	03-03-05	23,143,378	606,077	7,272,924
24	Mr. Justice (Retd) Rustam Ali Malik	10-Sep-05	03-06-05	23,605,888	574,113	6,889,356
25	Mr. Justice (Retd) Sh. Abdul Rashid	1-Jun-06	02-08-28	22,297,141	571,932	6,863,184
26	Mst. Parveen Nawaz w/o Mr. Justice (Retd) Muhammad Nawaz Bhatti	11-Jul-06	01-07-10	13,343,486	267,566	3,210,792
27	Mr. Justice (Retd) Muhammad Jahangir Arshad	4-Nov-07	02-11-02	20,578,426	488,459	5,861,508
28	Mr. Justice (Retd) Sh. Javaid Sarfraz	13-Feb-08	03-02-11	22,760,620	488,460	5,861,520
29	Mr. Justice (Retd) Muhammad Muzammal Khan	29-Feb-08	04-05-27	22,096,799	488,459	5,861,508
30	Mr. Justice (Retd) Tariq Shamim	12-Oct-09	03-07-10	26,598,475	440,299	5,283,588
31	Mr. Justice (Retd) Fazal-e-Miran Chowhan	11-Oct-09	04-10-09	24,587,585	440,299	5,283,588
32	Mr. Justice (Retd) Syed Asghar Haider	12-Oct-09	03-07-09	29,458,843	440,299	5,283,588
33	Mr. Justice (Retd) Sh. Ahmad Farooq	10-Feb-12	01-11-20	26,826,640	436,235	5,234,820
34	Mr. Justice (Retd) Ch. Shahid Saeed	3-Oct-12	02-07-13	24,480,676	364,567	4,374,804
35	Mst. Shahnaz Ansari w/o Mr. Justice (Retd) Tanveer Bashir Ansari	26-Jun-05	04-01-few	9,102,366	188,768	2,265,216
36	Mr. Justice (Retd) Sagheer Ahmad Qadri	11-Feb-13	03-04-26	26,174,540	416,649	4,999,788
Sub-Total (Lahore High Court)				858,135,924	17,384,647	208,615,764

Peshawar High Court

S.No.	Name of Hon'ble Judge/ or widows of Hon'ble Judges	Date of retirement/ resignation/ removal	Actual Length of Service (Y-M-D)	Total Pension Drawn including Commutation	Per month Pension	Annual Pension Amount
1	Widow of late Justice (Retd) Sher Bahadar Khan	1-Jun-94	03-8-14	7,919,104	256,277	3,075,324
2	Mr. Justice (Retd) Raza Ahmad Khan	6-Mar-92	03-5-04	25,648,302	535,132	6,421,584
3	Mr. Justice (Retd) Muhammad Khiyar Khan	18-Nov-94	04-00-13	14,269,686	267,566	3,210,792
4	Mr. Justice (Retd) Shah Abdur Rashid	2-Dec-84	04-07-05	23,111,683	535,710	6,428,520
5	Mr. Justice (Retd) Salim Khan	1-Jan-08	02-11-28	23,740,207	407,359	4,888,308
6	Mr. Justice (Retd) Abdul Aziz Kundi	1-Jan-11	01-3-24	36,132,633	331,918	3,983,016
7	Mr. Justice (Retd) Hamid Farooq Durrani	3-Nov-09	03-06-28	39,701,383	321,762	3,861,144
8	Mr. Justice (Retd) Muhammad Azam Khan	27-Jan-00	01-07-14	23,818,108	519,172	6,230,064

9	Mr. Justice (Retd) Fazal-ur-Rehman	1-Mar-07	04-05-18	18,513,679	208,667	2,504,004
10	Mr. Justice (Retd) Salim Dil Khan	1-Oct-96	02-09-16	13,599,009	260,437	3,125,244
11	Mr. Justice (Retd) Muhammad Raza Khan	8-Aug-08	03-07-04	26,189,176	481,828	5,781,936
12	Mr. Justice (Retd) Attaullah Khan	4-Jun-12	02-08-26	36,224,227	311,595	3,739,140
13	Mr. Justice (Retd) Muhammad Daud Khan	1-Jan-82	04-11-11	17,510,692	267,566	3,210,792
14	Mr. Justice (Retd) Said Maroof Khan	2-Nov-09	03-06-29	30,864,089	399,655	4,795,860
15	Mr. Justice (Retd) Raj Muhammad Khan	15-May-08	02-01-11	24,930,879	390,558	4,686,696
16	Mr. Justice (Retd) Abdur Rehman Khan Kaif	27-Jul-91	03-07-08	11,782,192	225,794	2,709,528
17	Mr. Justice (Retd) Oazi Hamid ud Din	11-Oct-96	02-08-26	23,587,385	456,045	5,472,540
18	Mr. Justice (Retd) Miftah-ud-Din Khan		03-05-05		0	

Sub-Total (Peshawar High Court) **397,542,434** **6,177,041** **74,124,492**

Balochistan High Court

S.No.	Name of Hon'ble Judge/ or widows of Hon'ble Judges	Date of retirement/ resignation/ removal	Actual Length of Service (Y-M-D)	Total Pension Drawn including Commutation	Per month Pension	Annual Pension Amount
1	Mr. Justice (Retd) Tariq Mehmood	17-Apr-02	01-07-04	22,186,772	489,133	5,869,596
2.	Mr. Justice (Retd) Mehta Kelash Nath Kohli	25.8.2009	04-08-10	23,979,696	519,536	6,234,432

Sub-Total (Balochistan High Court) **46,166,468** **1,008,669** **12,104,028**

Sindh High Court

S.No.	Name of Hon'ble Judge/ or widows of Hon'ble Judges	Date of retirement/ resignation/ removal	Actual Length of Service (Y-M-D)	Total Pension Drawn including Commutation	Per month Pension	Annual Pension Amount
1	Mr. Justice (Retd) Ghulam Muhammad Kourejo	31-Jul-82	02-02-14	22,807,356	350,546	4,206,552
2	Mr. Justice (Retd) Munawar Ali Khan	19-Jun-86	04-06-12	22,546,187	350,546	4,206,552
3	Mr. Justice (Retd) Muhammad Aslam Arain	11-May-95	04-06-00	24,750,995	457,234	5,486,808
4	Mr. Justice (Retd) Majida Rizvi	18-Jan-99	04-07-12	23,635,293	441,274	5,295,288
5	Mr. Justice (Retd) Dr. Ghous Muhammad	26-Jan-00	04-09-16	23,675,698	441,273	5,295,276
6	Mr. Justice (Retd) Amanullah Abbasi	4-Mar-00	04-11-23	23,552,083	441,274	5,295,288
7	Mr. Justice (Retd) Abdul Ghani Sheikh	11-Nov-00	03-00-13	24,156,529	519,173	6,230,076
8	Mr. Justice (Retd) S.A. Rabbani	5-Jun-02	03-01-16	26,034,663	515,350	6,184,200
9	Mr. Justice (Retd) M. Sadiq Leghari	30-Jun-06	03-10-03	25,118,860	502,245	6,026,940
10	Justice (Retd) Mrs. Qaiser Iqbal	11-Oct-09	03-11-16	28,631,048	503,199	6,038,388

11	Mr. Justice (Retd) Nadeem Azher Siddiqui	11-Oct-09	03-11-16	29,358,946	362,400	4,348,800
12	Mr. Justice (Retd) Munib Ahmed Khan	11-Oct-09	03-11-16	22,790,717	414,172	4,970,064
13	Mr. Justice (Retd) Ali Sain Dino Metlo	11-Oct-09	03-11-16	27,786,518	414,172	4,970,064
14	Mr. Justice (Retd) Shahid Anwar Bajwa	4-Oct-12	03-00-19	20,440,437	303,806	3,645,672
Sub-Total (Sindh High Court)				345,285,330	6,016,664	72,199,968
Grand Total				1,647,130,156	32,604,359	391,252,308

(Note: All the details and particulars incorporated in this chart are based on the data collected from the case record and the statement of accounts furnished before this Court by the office of Accountant Generals of all the four Provinces, thus, any reference to above chart in this judgment shall not be deemed as final adjudication as regards facts and figures incorporated therein.)

94. Now taking up the issue of applicability and effect of this judgment after the implementation of judgment under challenge, so as to see whether it should have prospective or retrospective applicability, the first thing to be noted is that in our short order dated 11.4.2013 we have declared that the law enunciated in the judgment under challenge is "*per incuriam*". The fallout of such declaration is that it is a judgment without jurisdiction, thus, for all intent and purposes not to be quoted as precedent, rather liable to be ignored. A useful discussion on the concept and import of "*per incuriam*" finds place in the case of Sindh High Court Bar Association (*supra*), which reads as under:-

"(ii) MAXIM "PER INCIURIUM".

37. 'Incuria' literally means "carelessness". In practice per incurium is taken to mean per ignoratium and ignored if it is rendered in ignoratium of a statute or other binding authority.

38. What is mean by giving a decision per incurium is giving a decision when a case or a statute has not been brought to the attention of the court and they have given the decision in ignorance or forgetfulness of the existence of that case or that statute or forgetfulness of some inconsistent statutory provision or of some authority binding on the court, so that in such cases some part of the decision or some step in the reasoning on which it was based was on that account demonstrably wrong, so that in such like cases, some part of the decision, or some step in the reasoning on which it is based, is found, on that account to be

demonstrably wrong. See Nirmal Jeet Kaur's case {2004 SCC 558 at 565 para 21), Cassell and Co. Ltd.'s case (LR 1972 AC 1027 at 1107, 1113, 1131), Watson's case {AELR 1947 (2) 193 at 196, Morelle Ltd.'s case (LR 1955 QB 379 at 380), Elmer Ltd.'s case {Weekly Law Reports 1988 (3) 867 at 875 and 878), Bristol Aeroplane Co.'s case {AELR 1944 (2) 293 at page 294} and Morelle Ltd.'s case {AELR 1955 (1) 708).

39. The ratio of the aforesaid judgments is that once the Court has come to the conclusion that judgment was delivered per incuriam then Court is not bound to follow such decision on the well known principle that the judgment itself is without jurisdiction and per incuriam, therefore, it deserves to be overruled at the earliest opportunity. In such situation, it is the duty and obligation of the apex Court to rectify it. The law has to be developed gradually by the interpretation of the Constitution then it will effect the whole nation, therefore, this Court, as mentioned above, is bound to review such judgments to put the nation on the right path as it is the duty and, obligation of the Court in view of Article 4, 5 (2) read with Article 189 and 190 of the Constitution."

95. Apart from the above, it will be seen that there can be no two views about the powers of legislature to legislate any law and to make it applicable prospectively or retrospectively or from any particular date, with clear/express intendment in this regard. However the procedural law, even though not expressly provided for, normally holds its applicability retrospectively as no one can claim vested right in the matter of procedure. There are number of precedents where the law has been so legislated or amended and made applicable retrospectively to destroy the vested rights of certain individuals and such actions when challenged, have been upheld by the Court, to be legal. If any case law is needed to fortify this view, reference can be made to the case of Asad Ali (supra) as under:-

"135. It is a well-settled law that a new or an amending statute touching the, vested rights of the parties operates prospectively unless the language of the legislation expressly provides for its retrospective operation. However, the presumption against the retrospective operation of a statute is not applicable to statutes dealing with the procedure as no vested right can be claimed by any party in respect of a procedure. The only exception to the

retrospective operation of a procedure law is that if by giving it a retrospective operation, the vested right of a party is impaired then to that extent it operates prospectively. The above principles applicable to a new or an amending statute, however, cannot be applied strictly to the law declared by the Courts through interpretative process. The Courts while interpreting a law do not legislate or create any new law or amend the existing law. By interpreting the law, the Courts only declare the true meaning of the law which already existed. Therefore, to that extent the law declared by the Court is applicable from the date the law is enacted. However, as under the Constitution only the decision- of this Court on a question of law or in so far it enunciates a principle of law is binding on all Courts, and Authorities, the possibility that a provision of law or Constitution before it came up for interpretation before this Court, was interpreted or understood differently could not be ruled out. Therefore, if as a result of interpretation of a law or a Constitutional provision by this Court, the existing interpretation or meaning of the law is changed, then it is more of a matter of public policy based on justice, equity and good conscious than a rule of law, that an innocent person who acting bona fide on the prevailing interpretation or meaning of law created a liability or acquired a right, be protected against the change brought about in the existing state of law as a result of its interpretation by this Court. However, where a person or authority acts in defiance of a clear provision of law or Constitution or the interpretation by the Court does not have the effect of changing the prevailing understanding of the meaning of the provision of law or the Constitution, the question of, protecting any one against the effect of such interpretation by the Court on the principle that the effect of interpretation by given prospective operation, does not arise. For example, if a particular provision of law or the Constitution has not come up for interpretation before any Court and the functionaries responsible for giving effect to it have consistently interpreted the said provision and understood it in a particular scene and acted upon it accordingly over a length of time, but all of a sudden the functionaries decide to follow a new practice by changing the interpretation of that provision. However, when the matter is brought before the Court, the solitary deviation by the functionaries made on the basis of changed interpretation is struck down by the Court as illegal and unconstitutional and the previous interpretation and practice followed by the functionaries is upheld being in accordance with the law and Constitution. In that event, neither the functionaries nor the person deriving any benefit on the basis of the new practice founded on the changed interpretation of the provision of law or the Constitution could

defend the illegality or unconstitutionality of the action on the principle that the interpretation given by the Courts be applied prospectively and not retrospectively, as in such a case the Court is striking down the very first deviation of the functionaries on the ground that the deviation from the previous practice/interpretation is illegal and unconstitutional. The principle that the change in the state of law as a result of interpretation by this Court is to be given effect to from the date the Court interpreted the law is also not applicable in those cases which could be brought under challenge in accordance with the law before or after the interpretation of the provision by this Court. Even otherwise, as pointed out by us earlier, this Court while adopting an interpretation of the provision of the law or the Constitution which is at variance from the existing view, it is only declaring the correct law as an apex Court. By doing so, it neither legislates any new law nor amends the existing law. Therefore, while interpreting a provision of law or the Constitution, this Court can also provide the date from which the interpretation given by it is to come into effect, keeping in view the nature of the provision it is interpreting, the likelihood of possible prejudice which may be caused to an individual or a body of individual and the requirement of justice in the case."

[Also see: Golak Nath v. State of Punjab (AIR 1967 SC 1643) and Messrs Haider Automobile Ltd v. Pakistan (PLD 1969 SC 623)]

96. Similarly, depending upon the facts and circumstances of a case, the Supreme Court, having vast powers, while delivering its judgment or making an order can lay down the parameters for its implementation including the option of its retrospective applicability from any particular date, so as to make sure its effective fallout, as the situation in a particular case may demand. For doing so, one of the underlining principle is "***Actus Curiae Neminem Gravabit***" (an act of the Court shall prejudice no man). As, no body should suffer due to any act, omission or mistake of the Court. Similarly no body should take undue advantage or benefit of any act, omission, mistake or legal error committed by the Court and to avoid adverse effect of such judgment, powers are to be exercised by the Court in the manner to save it from

becoming an abuse of the process of law. In the present proceedings as highlighted earlier, due to judgment under challenge public exchequer has been unjustly burdened with the liability of Rs.1,647,130,156/-,besides additional payment of Rs.32,604,359/- towards monthly pension, thus, in all fairness such mistake of law is to be cured in a manner to repair such huge financial loss to the public exchequer.

97. While discussing the fallout of the judgment under challenge having been declared *per incurium*, we find that this Court, in exercise of its jurisdiction under Articles 184(3), 187 and 188 of the Constitution, in order to do complete justice and stick to the norms of equity and fair play is not denuded of its powers to order implementation of this judgment retrospectively from the date of the judgment under challenge. Dilating further upon the maxim "***Actus Curiae Neminem Gravabit***" (an act of the Court shall prejudice no man), we find that concept of "prejudice no man" visualized in it, includes not only individual parties before the Court but also any juristic person such as corporations, banks, government functionaries, including Federal or Provincial Government. Thus, in the instant proceedings due to the act or mistake of the Court no prejudice should be caused to the interest of the Federal or Provincial Government like any other ordinary litigant before the Court. Moreover, when we have declared the judgment under challenge "*per incurium*", its natural fallout is that whosoever has availed its benefit in any form he is bound to restore it in favour of the other, whose interest has been prejudiced due to such act of the Court. It is also to be noted here that all the sums so paid by the Government to honourable retired judges, exceeding Rs.1.64 billion (Rs.1,647,130,156/-) have been paid

from the public exchequer, which is otherwise a sacred public trust, therefore, its improper use or mishandling in any form is to be checked and controlled at all costs.

98. The discussion made in the last two paragraphs of this judgment gains full support from the case of South Eastern Coalfields Ltd. v. State of M.P. (AIR 2003 SC 4482), wherein after detailed discussion with reference to several other cases on the doctrine of "*actus curiae neminem gravabit*", the Indian Supreme Court observed as under:-

"26. That no one shall suffer by an act of the Court is not a rule confined to an erroneous act of the Court; the 'act of the court' embraces within its sweep all such acts as to which the court may form an opinion in any legal proceedings that the Court would not have so acted had it been correctly apprised of the facts and the law. The factor attracting applicability of restitution is not the act of the Court being wrongful or a mistake or error committed by the court; the test is whether on account of an act of the party persuading the Court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage which it would not have otherwise earned or the other party has suffered an impoverishment which it would not have suffered but for the order of the Court and the act of such party. The quantum of restitution, depending on the facts and circumstances of a given case, may take into consideration not only what the party excluded would have made but also what the party under obligation has or might reasonably have made. There is nothing wrong in the parties demanding being placed in the same position in which they would have been had the Court not intervened by its interim order when at the end of the proceedings the Court pronounces its judicial verdict which does not match with and countenance its own interim verdict. Whenever called upon to adjudicate, the Court would act in conjunction with what is the real and substantial justice. The injury, if any, caused by the act of the Court shall be undone and the gain which the party would have earned unless it was interdicted by the order of the court would be restored to or conferred on the party by suitably commanding the party liable to do so. Any opinion to the contrary would lead to unjust if not disastrous consequences. Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to approach the Courts, persuading the court to

pass interlocutory orders favourable to them by suits are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim orders even though the battle has been lost at the end. This cannot be countenanced. We are, therefore, of the opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated by award of interest at a suitable reasonable rate for the period for which the interim order of the Court withholding the release of money had remained in operation."

[Also see: *Jai Berham v. Kedar Nath Marwari* (AIR 1922 P.C 269)]

99. Besides, it is germane to observe here with reference to the arguments of some learned ASCs, insisting for only prospective applicability of this judgment, that this Court has not legislated or laid down any new law through its judgment in hand, but only interpreted and enunciated correctly an existing law, which is in force in the form of Article 205 of the Constitution with its Fifth Schedule and President's Order 3 of 1997, since the year 1973 and 1997 respectively. Therefore, premised on these admitted facts there is no tenable legal ground to hold the applicability of this judgment prospectively and not retrospectively, so as to curb the mischief of earlier erroneous enunciation/interpretation of law.

100. From the earlier discussion as regards the scope and applicability of paragraph No.29 of President's Order 3 of 1997 (as reproduced earlier) read with regulation No.423 of CSR, we find that, *prima facie*, the honourable retired Judges shown in the above reproduced chart, at serial No.18,20,29,31 & 35 (M/s Justice Dr. Munir Ahmad Mughal, Justice Ghulam Mahmood Qureshi, Justice Muhammad Muzammal Khan, Justice Fazal-e-Miran Chowhan, and Mst. Shahnaz Ansari w/o Late Justice Tanveer Bashir Ansari) from the Lahore High Court; serial No.9 & 13 (M/s Justice Fazal-ur-Rehman, and Justice Muhammad Daud

Khan) from the Peshawar High Court; serial No.2 (Mr. Justice Mehta Kelash Nath Kohli) from the Balochistan High Court; and, serial No.4,5&6 (M/s Justice Majida Rizvi, Justice Dr. Ghous Muhammad, and Justice Amanullah Abbasi) from the Sindh High Court, having actually served for different periods, but for more than four years or four years nine months (as the case may be) in each case and in some cases just few days less than five years, are eligible to lay their claim for pensionary benefit before the competent authority (President) by following due process of law in line with paragraph-29 of President's Order 3 of 1997 and applicable regulation No.423 of CSR, which reads as under:-

"423. (1) A deficiency of a period not exceeding six months in the qualifying service of an officer shall be deemed to have been condoned automatically.

(2) The authority competent to sanction pension may condone a deficiency of more than six months but less than a year subject to the following conditions, namely:-

- (a) The officer has died while in service, or has retired under circumstances beyond his control, such as on invalidation or the abolition of his post, and would have completed another year of service if he had not died or retired.
- (b) The service rendered by him had been meritorious."

101. However, those honourable retired judges of the High Court, who have retired as such before coming into force of President's Order 3 of 1997 on 12.2.1997, for the purpose of making up similar deficiency will be governed by the proviso to paragraph-13(c) of President's Order 9 of 1970, providing for making up deficiency upto three months or less and not by paragraph-29 of the President's Order 3 of 1997 read with regulation No.423 of CSR. We, therefore, expect that if any such

representations or fresh representations are made by the honourable retired judges qualified under either of the two categories of retired judges, before the President of Pakistan, he will decide the same within two month so as to fairly adjudicate and safeguard the interest of these honourable retired Judges in accordance with applicable law.

102. Since during his arguments, Mr. Munir A. Malik, learned Sr. ASC made reference to a subsequent judgment of the High Court of Sindh dated 1.7.2008, in C.P No.D-24/2002 (Re: Mrs. Majid Rizvi v. Federation of Pakistan and others) relating to the same controversy, passed in favour of one honourable retired Judge of the High Court and also placed on record copy of said Petition under Article 199 of the Constitution, alongwith the copy of judgment passed therein, it became imperative for us to discuss this aspect of the case also. A perusal of contents of the said petition reveals that though in the petition a reference to the earlier judgment of a Division Bench of the High Court dated 02.2.1995 in C.P No.D-2308/1994 (Re: Ahmed Ali U. Qureshi v. Federation of Pakistan and others) was made, but the prayers made by the petitioner were for seeking directions to the President of Pakistan for condonation of deficiency in her length of service and to determine the payable pension of the petitioner as a retired judge of the High Court notwithstanding her length of service; as before her retirement she had served as a Judge of the High Court for a period of 04-years, 07-months and 12-days. The learned Division Bench of the High Court, while passing its judgment dated 1.7.2008, had not made any independent discussion on the merits of the contentions raised before it by the petitioner, but simply

placed reliance upon the judgment under challenge dated 6.3.2008, which was referred before it. In such circumstances, it goes without saying that as the above referred judgment has now been declared *per incuriam*, therefore, as its corollary, the judgment dated 1.7.2008 in C.P No.D-24/2002, is also liable to be set aside and the petition has to be dismissed. We accordingly order so. However, it will be open for the honourable retired Justice Majida Rizvi that she may apply afresh to the President of Pakistan for availing the benefit of relevant provisions of President Order No.3 of 1997 applicable to her case; paragraph-29 whereof, read with regulation No.423 of CSR, *inter alia*, provides for automatic making up of deficiency in the length of service upto six months.

103. As some of the learned ASCs on behalf of the Honourable Retired Judges have also attempted to present their case on the cardinal principle of independence of judiciary, including financial independence, and National Judicial Policies (NJP) 2009 and 2012, we may mention here that indeed the "JUDICIARY", as a third pillar of the State needs to be independent in all respects, including its financial matters, but at the same time such independence is subject to the mandate of the Constitutional provisions. A bare reading of Part VII Chapters 1 to 4 i.e. Articles 175 to 212 together with Article 2-A and some other relevant constitutional provisions define such independence of the judiciary, thus, it cannot be argued that the issue regarding right to pension for retired Judges of the High Court, which is the crucial point under consideration in the present proceedings, has as such any nexus to the financial independence of judiciary as a

institution. Similarly, reference to National Judicial Policies 2009 & 2012 confer or create no right to pension beyond the intent of the legislature, as evident from the plain reading of Article 205 read with Fifth Schedule of the Constitution and the applicable President's Orders 9 of 1970 or 3 of 1997.

104. Apart from various Constitutional provisions and Presidential orders reproduced and discussed above, some of the learned ASCs have also made reference of other Presidential Orders Nos.1 of 1968, 5 of 1983, 3 of 1990, 2,6,7 & 9 of 1991, 1 & 2 of 1993, 1&2 of 1994, 3&5 of 1995, 2 of 1997, 1,2&3 of 1998, 2&3 of 2000, 1,2&3 of 2001, 2 of 2004, 1 to 4 of 2005, and 2&3 of 2006. However, in our opinion, in so far as the issue regarding review of judgment under challenge is concerned except interpretation of relevant Constitutional provisions and President's Orders 9 of 1970 and 3 of 1997, on the subject of right to pension of honourable retired Judges of the High Court, having less than five years actual service as such, no detailed discussion on these Presidential Orders is required. More so, as all these President's Orders relate to the increase in salaries and other benefits of the judges of the superior judiciary or grant of some additional facilities to them from time to time while in actual service or after retirement, as the case may be. But have no nexus to the determination of right to pension by the President in terms of paragraph-2 of the Fifth Schedule to Article 205 of the Constitution.

105. When we look at the individual cases of some of the honourable retired Judges of the High Court, we find that M/s Mian Saeed ur Rehman Farrukh and Khan Riaz-ud-Din Ahmad, JJ, are the two affectees of judgment of the Apex Court in the case

of Al-Jehad Trust, (*supra*). In this case when the question of appointment of judges in the superior judiciary came up for consideration before a five member Bench, *inter alia*, following discussion was made:-

"The independence of Judiciary is inextricably linked and connected with the constitutional process of appointment of Judges of the superior Judiciary. The relevant constitutional provisions are to be construed in a manner which would ensure the independence of Judiciary. A written Constitution is an organic document designed and intended to cater the need for all times to come. It is like a living tree, it grows and blossoms with the passage of time in order to keep pace with the growth of the country and its people. Thus, the approach, while interpreting a constitutional provision should be dynamic, progressive and oriented with the desire to meet the situation, which has arisen, effectively. The interpretation cannot be a narrow and pedantic. But the Court's efforts should be to construe the same broadly, so that it may be able to meet the requirement of ever changing society. The general words cannot be construed in isolation but the same are to be construed in the context in which, they are employed. In other words, their colour and contents are derived from their context.

The above principles will have to be kept in view while construing the provisions of the Constitution relating to the appointments/transfers of Judges of the superior Judiciary.

Courts, while construing a constitutional provision, can press into service an established constitutional convention in order to understand the import and the working of the same, if it is not contrary to the express provision of the Constitution."

More over, as regards few earlier appointments of the judges in the High Courts, which were found to be violative of the scheme of the Constitution, some parameters were laid down and following directions were issued:-

That upon the appointment of the permanent Chief Justices in the High Courts where there is no permanent incumbent or where there are permanent incumbents already, they shall process the cases of the High Courts' Judges in terms of the above declaration No. 13 within one month from the date of this order or within one month from the date of assumption of office by a permanent incumbent whichever is later in time and to

take action for regularising the appointments/confirmation of the Judges recently appointed/confirmed inter alia of respondents Nos.7 to 28 in Civil Appeal No.805/95 in the light of this short order. In like manner, the Chief Justice of Pakistan will take appropriate action for recalling permanent Judges of the Supreme Court from the High Courts where they are performing functions as Acting Chief Justices and also shall consider desirability of continuation or not of appointment in the Supreme Court of Ad Hoc/Acting Judges.

106. This being the position, despite their effective service as Additional Judges or otherwise for any period, since their appointments were neither legal nor regularized, they cannot be even considered as Judges of the High Court. Besides, calculations as regards their actual period of service as retired judges of the High Court, made by the learned Sr. ASC during his arguments, to bring their case within the category of Judges, who have served as a Judge of the High Court for five years or more, are entirely misconceived, inasmuch as, from no stretch of imagination intervening period, when they had not served as High Court judges, could form part of their actual period of service for the purpose of such relief.

107. Arguments of some of the learned Sr. ASCs with reference to the observations of this Court contained in paragraph No.178 of the judgment in the case of Sindh High Court Bar Association (*supra*) are also without force, as applying the principle of exercise of *de facto* jurisdiction, only judicial proceedings were saved, but these observations had not conferred or blessed any sanctity to the findings in the judgments passed during such proceedings nor protected them from being challenged in accordance with law. To make this view more clear the relevant paragraph No.178 is reproduced as under:-

178. However, the judgments and orders passed, and proceedings taken in the cases of other litigants involving their rights and interests in civil, criminal and other matters, any function performed under the Constitution including administering of oath to the President, and other acts, whether administrative or financial, done or performed by Abdul Hameed Dogar, J, and such other Judges or by any authority, or by any person, whether in the Supreme Court or a High Court, which were passed, taken, done or performed, or purported to have been passed, taken, done or performed under the Constitution or law from 3rd November, 2007 to 31st July, 2009, i.e. the date of this judgment would not be affected on the principle laid down in Asad Ali's case (supra).

108. Considering the claim/case of the widows/legal heirs of some of the Honourable Retired Judges, we may mention here that the ratio of judgment under challenge is of no help to their claim, as their cases are to be dealt with by the President strictly in terms of paragraphs No.4 to 6 relating to the Supreme Court and the High Court in the Fifth Schedule to Article 205 of the constitution.

109. Inspired by the maxim "*salus populi est suprema lex*" (public welfare is the supreme law), to which all other maxims of public policy must yield, another important aspect of the case, on which much arguments have not been advanced by the learned ASCs is that as a result of judgment under challenge, erroneously giving it a status of judgment in *rem*, this Court has hugely burdened the public exchequer with uncalled for financial liability. Therefore, being custodian of public interest and public welfare, looking at this controversy from another angle, we consider it just, fair and equitable to treat these proceedings as public interest litigation to protect the rights of every citizen of this country qua public exchequer and to lay down correct law for this purpose.

110. While arguments with reference to principle of past and closed transaction were being advanced before us repeatedly, we also enquired from the learned ASCs as to whether such principle,

if at all found applicable to the present case, should not have been in the first place conversely made applicable to the case of those honourable retired Judges of the High Court, who stood retired during the period from 1970 onwards upto the date of judgment under challenge, as they never agitated such claim during this long period after their retirement from time to time. None of the learned ASCs could offer any satisfactory reply to this query, except that the right to pension has accrued in their favour on the basis of judgment under challenge. This reply on their behalf is not only frail and meritless but negates their other contention that right to pension was otherwise available in their favour on the basis of Article 205 read with Fifth Schedule of the Constitution and President's Order 9 of 1970 or President's Order No.3 of 1997. Undeniably, the right to pension of every Judge of the High Court is to be determined and regulated in terms of Paragraphs-2 and 3 of Fifth Schedule to Article 205 of the Constitution, which is the basic instrument for this purpose, together with applicable President's Order No.9 of 1970 or 3 of 1997. Thus, the judgment under challenge confers no independent right to pension for them. Needless to mention here that where the superstructure is built on altogether faulty factual or legal foundation, upon its removal, it is bound to collapse as a whole.

111. Considering the question of indulgence or sympathetic consideration of the case of the honourable retired Judges of the High Court, having been already benefited from the judgment under challenge, we cannot lose sight of the fact that the heavy sums paid to them, as partly reflected in the above reproduced chart, were made from public exchequer, which is a sacred trust. Thus all care and caution is required to see whether a mistake or

illegality committed by the Court could make them entitled for payment of more than Rs.1,647,130,156/- and further liability of payment of Rs.32,604,359/- towards monthly pension. In view of our discussion in this context made in the foregoing paragraphs, we have no option but to hold that all the sums paid to each of the honourable retired judges, who were made entitled for pensionary benefits in terms of the judgment under challenge, are liable to be recovered from them.

112. It is necessary to mention here so as to make the things more clear that admittedly before his retirement as a Judge of the High Court on 19.10.1994, retired Justice Ahmed Ali U. Qureshi had served as such for a period of 03-years and 04-months (approximately) and since by this judgment the Constitutional Petition No.D-2308 of 1994 filed by retired Justice Retied Ahmed Ali U. Qureshi before the High Court of Sindh has also been dismissed, therefore, all the benefits, except as per his entitlement as a retired District Judge qua paragraph 15 of President's Order 9 of 1970, availed under the said judgment of the Sindh High Court and the judgment under challenge are to be recovered from the legal heirs of the deceased to the extent of their liability in this regard, but in accordance with law.

113. There is yet another aspect of this case, which has been argued before us by some of the learned ASCs and honourable retired Judges of the High Court, who were either elevated or had resigned from their offices after the judgment under challenge. They had contended that since at the time of their elevation/resignation judgment under challenge was in full force applicable, followed and implemented, therefore, valuable rights have accrued in their favour on the principle of legitimate

expectancy which cannot be done away lightly by way of some observations in this case. Indeed, such submissions of some of the newly elevated or honourable retired Judges of the High Court are in line with the ratio of the judgment under challenge, but at the same time it is to be noticed that the Honourable Judges, who have resigned from their office before completion of minimum five years actual service as such have to bless their own stars for this purpose because their mere oral assertion that they had to resign from their office under compelling circumstances, cannot be legally accepted as a valid defence. As regards the other Judges, who have taken oath of their office as High Court Judge after the judgment under challenge, suffice it to observe that since the said judgment has been declared *per incuriam*, and become null and void, therefore, any claim based on the principle of *locus poenitentiae* or legitimate expectancy cannot hold the field. More so, when as to their right to pension honourable retired judges are to be governed by the law in force at the relevant time i.e. Article 205 of the Constitution read with its Fifth Schedule and President Order No.3 of 1997, regarding which a detailed discussion has already been made in the preceding paragraphs of this judgment, and not by the dicta laid down in the judgment under challenge. The honourable retired judges of the High Court also cannot claim any benefit on account of its implementation by the respondents on the principle of past and closed transaction or on the principle estoppel, as on one hand it is a continuing liability over the public exchequer to the tune of approximately Rupees Thirty million per month, thus giving recurring cause of action; and, on the other hand, being judgment of the apex Court, the respondents had no option but to implement it in its letter and spirit or to face penal consequences of non-compliance, including contempt proceedings.

114. It is pertinent to mention here that the principle of *locus poenitentiae*, which refrains from rescinding, if a decisive step is taken in furtherance of some action, is mainly confined to administrative actions and not to the judicial pronouncements, as rescinding in the form of review, recalling, varying or amending the earlier order or judgment will have statutory backing in the form of Article 188 of the Constitution and section 21 of the General Clauses Act 1897. Thus, the principle of *locus poenitentiae* cannot placidly take away the authority of the apex Court to undo a wrong occasioned due to the act of the Court. If a contrary view of the matter is taken, then these provisions of law will become a farce, meant only for the purpose of academic discussion without power to repair the loss caused to an aggrieved party due to a judgment *per incuriam*, null and void in nature. Here, in order to understand the principle of *locus poenitentiae* more clearly, reference to the cases of Engineer-in-Chief Branch v. Jalaluddin (PLD 1992 SC 207) and Abdul Haq Indhar v. Province of Sindh (2000 SCMR 907), will also be useful. In the case of Engineer-in-Chief Branch (supra), it was held that *locus poenitentiae* is the power of receding till a decisive step is taken but it is not a principle of law that order once passed becomes irrevocable and past and closed transaction. If the order is illegal then perpetual rights cannot be gained on the basis of such an illegal order. In the other case of Abdul Haq Indhar (supra), discussing the principle of *locus poenitentiae*, provisions of section 21 of General Clauses Act were also considered and it was affirmed that the authority which can pass an order, is entitled to vary, amend, add to or to rescind that order, as *locus poenitentiae* is the power of receding till a decisive step is taken, but it is not a principle of law that order once passed becomes irrevocable and past and closed transaction. If the order is illegal then perpetual rights cannot be

gained on the basis of such an illegal order. Thus, mere bonafide of the beneficiaries of the judgment under challenge, as claimed, which carry a big question mark due to their legal background and post retirement conduct, as discussed earlier, is not enough to dilute the effect of the judgment in hand.

115. As regards the honourable retired judges of the High Court, who have opted to resign or have retired after the judgment under challenge, here a reference to the case of Justice Hasnat Ahmed Khan v. Federation of Pakistan/State (PLD 2011 SC 680) is also necessary wherein the consequence of unconstitutional P.C.O 1 of 2007, dated 3.11.2007 qua its implications on the superior judiciary were examined in detail with reference to an order passed by a seven member Bench of the Supreme Court on the same day, and as regards the judges who have either taken oath under the P.C.O 1 of 2007 or had violated the said order of the Court dated 3.11.2007, following observations were made:-

"Appellant and others shall be entitled for the service and pensionary benefits upto 20.4.2010 when 18th Constitutional Amendment was passed; however if ultimately they are found to be guilty of contempt of the Court by the Supreme Court, their cases for affecting the recovery of pensionary benefits in future shall be dealt with accordingly."

In these circumstances, to say that some judges of the High Court, who resigned from their office after the judgment under challenge, could legitimately claim right to pension without meeting the threshold of minimum five years actual service, has no legal foundation.

116. As regards the issue of recovery of pensionary benefits availed by some honourable retired judges of the High Court in terms of judgment under challenge, when we look at the recent pragmatic approach employed by this Court to safeguard public interest qua securing public exchequer, we find that in the case of

Syed Mehmoor Akhtar Naqvi versus Federation of Pakistan (PLD 2012 SC 1054) and Syed Mehmoor Akhtar Naqvi versus Federation of Pakistan (PLD 2012 SC 1089), wherein declaration was issued against number of elected MNAs, MPAs and Senators for their disqualification from being Members of Majlis-e-Shoora (Parliament), Provincial Assemblies and the Senate, because of holding dual nationalities and consequent disqualification under Article 63(1)(c) of the Constitution, despite they having served their respective Institution (Parliament) during the intervening period, Court ordered that all these Members of the Parliament and Provincial Assemblies etc being declared disqualified are also directed to refund all monetary benefits drawn by them for the period during which they kept the public office and have drawn their emoluments etc. from the public exchequer, including the remuneration, T.A./D.A., facilities for accommodation alongwith other perks which shall be calculated in terms of the money by the Secretaries of the National Assembly, Senate and Provincial Assemblies accordingly.

117. In another case of similar nature titled Muhammad Yasin versus Federation of Pakistan (PLD 2012 SC 132), relating to appointment of Chairman, OGRA, which was declared illegal and *void ab initio*, it was further ordered that all salaries, value of perquisites and benefits availed from the date of his appointment till the date of the judgment shall be recovered by the Government from the beneficiary Chairman at the earliest. In contrast the facts of these two cases, the beneficiaries of judgment under challenge (the honourable retired judges of the High Court) during the intervening period have not worked or undertaken any assignment so as to make their cases worth consideration for some concession or relief on this ground.

118. The above discussed recent trend adopted by this Court to safeguard public exchequer from being misused has persuaded us to follow a similar course in the present case. More so, as this principle can not be deviated merely for the reason that this time the affectees of this judgment are some honourable retired judges of the High Court, who are very respectable citizens of the Country. Rather, adoption of this course in the present proceedings is all the more necessary to strengthen the inbuilt process of self accountability, which is necessary to earn public confidence in our judicial system.

119. Leaving apart the principles of English jurisprudence qua the intricacies of the legal principles discussed hereinabove, when we simply look at the principles of Islamic jurisprudence, having special significance in our judicial system by virtue of Article 2-A of the Constitution, in the context of moot point No.(c) of paragraph-61 (*ibid*), we find that there is no legal notion under the Islamic dispensation of justice, furnishing any reasonable justification for the honourable retired judges of the High Court to retain the financial benefits availed by them under the guise of pension on the basis of judgment under challenge, which we have already declared *per incuriam*, null and void.

120. While dealing with a lis at any level and in any form, every Court has to keep in mind the golden principle that all laws in any form, may be constitutional provisions, including fundamental rights provided in Part-II of the Constitution or the sub-Constitutional legislations of different nature are based on one broad principle of equal dispensation of justice for all, for which every citizen of this country enjoys similar legal status, thus, he cannot be discriminated on any high moral ground. We have no

hesitation to further clarify that interest of public at large is to be given priority and preference over the interest of individuals, therefore, interest of public at large cannot be sacrificed to extend profane benefits to some individuals. Thus, to say that this Court looking to the peculiar facts and circumstances emerging from the judgment under challenge, shall take a lenient view of the matter so as to protect the benefit of the judgment under challenge already availed by some honourable retired High Court Judges has absolutely no legal or moral force. As a matter fact, all honourable retired judges of the High Court, who had less than minimum five years actual service to their credit as such and beneficiary of judgment under challenge, are legally and morally bound to restore all such gains to the public exchequer so as to set an example for the society about their high morals and conduct, which is expected from all those who are supposedly role model for the society.

121. Before parting with this judgment, we also record a note of our appreciation for M/s Khawaja Haris Ahmed and Salman Akram Raja, the two learned *amici curiae* appointed in this case, for their valuable assistance in this matter.

Judge

Judge

Judge

Islamabad, the
11th April, 2013.
Approved for reporting.

صداقت ﴿ ﴾

Judge

Judge

MIAN SAQIB NISAR, J.- Pursuant to the short order dated 11.4.2013 consensually passed by this Bench in the noted matter, my learned brother Anwar Zaheer Jamali, J. has composed the detailed reasons. I have the privilege of going through such exposition and to an extent agree thereto, however, with due deference to the honourable Judge, where my reasons are otherwise or I hold an opinion different on any of the proposition(s) (*involved herein*), it shall be duly reflected in this discourse.

2. The facts of the matter; the submissions made at the podium by all the concerned and the laws cited in that context, have been extensively and elaborately given in the judgment of my learned brother, however, still though at the cost of repetition, but with an object to facilitate the comprehension of my present determinant I shall make a brief mention of such facts which are absolutely relevant, in that:- these proceedings having emanated from a note dated 21.11.2012, put up by the Registrar of this Court to the Hon'ble Chief Justice of Pakistan stating therein, in some detail, the background of the verdict rendered by this Court in **Accountant-General, Sindh and others Vs. Ahmed Ali U. Qureshi and others (PLD 2008 SC 522)** (hereinafter referred to as "**The Judgment**") and specifying that, the entitlement of the pensionary rights (*benefits*) of the honourable retired Judges of the High Courts (hereinafter referred to as the **Judges**), in such decision, *inter alia*, have been based upon P.O.8/2007, which was promulgated by the President of Pakistan on 14.12.2007, but such order (PO) has been declared unconstitutional, *ultra vires* and void *ab initio* vide judgment of this Court dated 31.7.2009 passed in **Sindh High Court Bar Association through its Secretary and**

another Vs. Federation of Pakistan through Secretary, Ministry of Law and Justice, Islamabad and others (PLD 2009 SC 879)

, besides, "the judgment" otherwise is wrong in law, therefore, it was suggested "*the matter is therefore of great public importance as huge public money is being expended without any legal justification despite the fact that the basis of the judgment itself has lost its validity. It is therefore a fit case for Suo Moto Review.*". Upon the said note, the Hon'ble Chief Justice passed an order dated 23.11.2012 to the following effect:-

"Perusal of the above note prima facie makes out a case for examination of points raised therein. Therefore, instant note be registered as Suo Moto Misc. Petition and it may be fixed in Court in the week commencing from 03.12.2012. Notice to Hon'ble Retired Judges, who are beneficiaries of the judgment dated 6.3.2008 be issued. Office shall provide their addresses. Notice to Attorney General for Pakistan may also be issued."

This is how the noted matter has come up for hearing before the Court and vide order dated 29.1.2013, the Bench seized of the matter, appointed M/s Makhdoom Ali Khan (*not appeared*), Khawaja Haris Ahmed and Salman Akram Raja, learned ASCs to assist the Court as amicus curiae. In the context of the above, the epitome of the submissions made by all the concerned before the Court are:

(1) whether the present proceedings are maintainable or otherwise; in this regard the authority/action of the Registrar of this Court upon whose note these proceedings were initiated has been seriously questioned (2) whether (*in the context of maintainability*) "the judgment", which was passed in the appellate jurisdiction of this Court under Article 185 of the Constitution, and/or under Article

184(3) thereof can (*or cannot*) be reviewed, revisited and set aside by this Court, in the instant suo moto proceedings (*note: as while arguing from the Judges side it is the plea of almost all, that these proceedings predominantly have nexus to Article 184(3) of the Constitution*) **(3)** whether these proceedings qualify (*or do not qualify*) the test and the principles set out by law (*including the law enunciated by this Court*) for the purposes of review of a judgment, either under Article 188 of the Constitution or even while exercising suo moto jurisdiction by this Court **(4)** whether "the judgment" is founded upon valid, proper, due and correct consideration, application and interpretation of relevant provisions of law, i.e. Article 205 of the Constitution of Islamic Republic of Pakistan 1973 (hereinafter referred to as the **Constitution**) read with the Fifth Schedule thereto, and various (*certain*) Presidential Orders **(5)** whether a vested right(s) stand created in favour of the Judges on the basis of "the judgment", which cannot be stultified vide the instant proceedings, even if "the judgment" is *per incuriam*, and such right(s) is protected by the rules of **past and closed transaction**, the **locus poenitentiae**, and **legitimate expectation** **(6)** whether in the facts of the matter any protection is available to the Judges on the rule of equality as enshrined by Article 25 of the Constitution **(7)** without prejudice to the above, if this Court comes to the conclusion, that "the judgment" is *per incuriam* and thus it should be set aside, whether such decision shall have prospective or retroactive effect. And the right of the Judges to receive pension in future shall not be affected on account of such (*this*) decision; and in any case, the amounts so far received by them, under "the judgment" cannot be directed in law to be recovered (*from them*).

MAINTAINABILITY
(Questions No. 1, 2 and 3)

3. My learned brother has exhaustively dealt with the question of maintainability, which is a threshold proposition of the matter, and in this behalf extensive reference to the case law has also been made. I therefore have no intention to add any superfluity to that, however, my approach to the proposition is quite simple, plain and facile, in that, the Supreme Court of Pakistan is the apex Court of the country. It is the final, the utmost and the ultimate Court, *inter alia*, in relation to, (a) resolving disputes *inter se* the parties before it, (b) securing and enforcing the fundamental rights of the citizen/person, when those (*rights*) are in issue before the Court, in any of its jurisdiction, either original or appellate or *suo moto*, (c) the interpretation and the enunciation of the law of the land, (d) examining and adjudging the legislative Acts and the executive order/actions of the State, in the exercise of its power of judicial review, (e) the exercise of original jurisdiction as per the mandate of Article 184 of the Constitution, (f) the advisory jurisdiction within the parameter of Article 186 of the Constitution, (g) the review of its decision (*judgments*) (*see Article 188*) (h) a special jurisdiction conferred upon this Court by any law. And above all the power to do complete justice (*see Article 187*). In terms of Article 189 of the Constitution, “*Any decision of the Supreme Court shall, to the extent that it decides question of law or is based upon or enunciates a principle of law, (emphasis supplied) be binding on all other courts in Pakistan*”. Moreover, according to Article 190 “*All executive and judicial authorities throughout Pakistan shall act in aid of the Supreme Court*”.
4. The aforestated legal position explains and highlights

the true magnitude and the supremacy of this Court in regard to the dispensation of justice in the country and the enunciation and the declaration of the law by it. As the law laid down by the (*apex*) Court, and the order(s) passed by it, being the paramount and ultimate in nature, has to be imperatively and mandatorily followed, obeyed and adhered to by all the concerned. Reading Articles 189 and 190 conjointly, and while keeping in view the scheme of the constitution, the very purpose, the pivotal position and the status of this Court (*prescribed above*), it is expedient that correct law should be pronounced by the apex Court. And pursuant to the above object and due to the venerated position of this Court, the Court is cumbered with, inviolable responsibility, and a sacred duty, to interpret, declare and enunciate the law correctly, so that it should be followed, obeyed and adhered to purposively and in letter and spirit, by all the other organs of the State (*including all other Courts in Pakistan*) strictly consonance with the true aim of the aforementioned Articles. It may be pertinent to mention here, that any invalid enunciation of law, shall contravene and impugn the very character, and attribute(s) of this Court and such bad/wrong law shall cause drastic adverse affects on the socio-economic, political, geographical, ethnic, cultural aspects and dynamics of the nation, the society, the people at large and the State *in presentee* or *in futurio*. In the above context, reference can also be made to Article 4 of the Constitution which enshrines (*inter alia*) an inalienable right of every citizen to be dealt with in accordance with the law, obviously this shall mean the law that is, correctly laid down by this Court. As it is a cardinal principle of justice, that the law should be worn by the Judge in his sleeves

and justice should be imparted according to the law, notwithstanding whether the parties in a *lis* before the Court are misdirected and misplaced in that regard. Therefore, if any law which has been invalidly pronounced and declared by this Court, which in particular is based upon ignorance of any provisions of the Constitution, and/or is founded on gross and grave misinterpretation thereof; the provisions of the relevant law have been ignored, misread and misapplied; the law already enunciated and settled by this Court on a specific subject, has not been taken into account, all this, *inter alia*, shall constitute a given judgment(s) as *per incuriam*; and inconsistent/conflicting decision of this Court shall also fall in that category. Such decision undoubtedly shall have grave consequences and repercussions, on the State, the persons/citizens, the society and the public at large as stated above. Therefore, if a judgment or a decision of this Court which is found to be *per incuriam* (*note: what is a judgment per incuriam has been dealt with by my brother*), it shall be the duty of this Court to correct such wrong verdict and to set the law right. And the Court should not shun from such a duty (*emphasis supplied*). For the support of my above view, I may rely upon the law laid down in the dicta Lt. Col. Nawabzada Muhammad Amir Khan Vs. The Controller of Estate Duty, Government of Pakistan, Karachi and others (PLD 1962 SC 335 at page 340):

"Where, however, there is found to be something directed by the judgment of which review is sought which is in conflict with the Constitution or with a law of Pakistan, there it would be the duty of the Court, unhesitatingly to amend the error. It is a duty which is enjoined upon every Judge of the Court by the solemn oath which he takes when he enters upon his duties, viz., to "preserve, protect and

defend the Constitution and laws of Pakistan" But the violation of a written law must be clear."

M. S. Ahlawat Vs. State of Haryana and another (AIR 2000 SC 1680):-

"15. To perpetuate an error is no virtue but to correct it is a compulsion of judicial conscience."

Bengal Immunity Co. Ltd., Vs. State of Bihar and others (AIR 1955 SC 661):-

"19. Reference is made to the doctrine of finality of judicial decisions and it is pressed upon us that we should not reverse our previous decision except in cases where a material provision of law has been overlooked or where the decision has proceeded upon the mistaken assumption of the continuance of a repealed or expired statute and that we should not differ from a previous decision merely because a contrary view appears to us to be preferable.

It is needless for us to say that we should not lightly dissent from a previous pronouncement of this court. Our power of review, which undoubtedly exists, must be exercised with due care and caution and only for advancing the public well being in the light of the surrounding circumstances of each case brought to our notice but we do not consider it right to confine our power within rightly fixed limits as suggested before us.

If on a re-examination of the question we come to the conclusion, as indeed we have, that the previous majority decision was plainly erroneous then it will be our duty to say so and not to perpetuate our mistake even when one learned Judge who was party to the previous decision considers it incorrect on further reflection (emphasis supplied by me).

In Superintendent and Remembrancer of Legal Affairs, west Bengal Vs. Corporation of Calcutta (AIR 1967 SC 997) it is held:-

"If the aforesaid rule of construction accepted by this Court is inconsistent with the legal philosophy of our Constitution, it is our duty to correct ourselves and lay down the right rule (emphasis supplied by me). In constitutional matters which affect the evolution of our policy, we must more readily do so than in other branches of law, as perpetuation of a mistake will be harmful to public interests. While continuity and consistency are conducive to the smooth evolution of the rule of law, hesitancy to set right deviations will retard its growth. In this case, as we are satisfied that the said rule of construction is inconsistent with our republican polity and, if accepted, bristles with anomalies, we have no hesitation to reconsider our earlier decision."

The question, however, shall be as to how this duty should be discharged and the object of correcting the wrong law, and setting it (*the law*) right should be achieved. One of the obvious ways of doing so is, when a party to the *litis* seeks review of the wrong judgment in terms of Article 188 of the Constitution. But what, if that remedy is not availed for any reason, or even if availed by the concerned, is discarded by the Court (*again by committing an another wrong*). Whether thereafter, such a wrong decision on the point of law, cannot be remedied and interfered with, revisited or set aside at all or in other words, even if a judgment which is patently *per incuriam*, infinitely should be left outstanding, allowing it to become the liability of this Court and our legal/judicial system, for all future times. And the (*this*) Court and the system should be fettered by it, and held as a captive thereto, leaving it intact to pervade and permeate serious prejudice in perpetuity to the persons/citizens of the country and even the State, compelling them, to be dealt with by a wrong/invalid law, despite it having come to the notice of the Court, through any means whatsoever,

that such decision suffers from patent and gross vice, and it is vividly a judgment *per incuriam* by all references. The answer is "No". In my candid view the approach to leave such a decision to stay intact shall be ludicrous and shall lead to drastic effects as indicated above. Rather in such a situation this Court, having special position in our judicature (*judicial system as highlighted above*) shall have the inherent, intrinsic and inbred power (*jurisdiction*) vested in it, (a) to declare a judgment *per incuriam*; (b) decline to follow the same as a valid precedent, (c) and/or to set it aside. For the exercise of jurisdiction in that regard and for the discharge of the duty as mentioned earlier, it is absolutely irrelevant and immaterial vide (*via*) which source it (*decision*) has come to the notice of the Court. The Court once attaining the knowledge of such a blemished and flawed decision has the sole privilege, to examine the same and to decide about its fate, whether it is *per incuriam* or otherwise. In this context, it may be mentioned, for example, if while hearing some case, it is brought to the attention of the Court by the member(s) of the Bar; or during the hearing of any matter, the Court itself finds an earlier judgment to be *per incuriam*; or if a Judge (*Judge of this Court*) in the course of his study or research, comes across any judgment which in his view is *per incuriam* or if any information through the Registrar of the Court is passed on to the honourable Chief Justice of the Court or to any other Judge (*of this Court*), by any member of the Bar, or the member of the civil society (*any organization/group of the society*) that a judgment is *per incuriam* (*note: without the informant having any right or locus standi of hearing or the audience, until the matter is set out for hearing in the Court and the Court deems it proper to hear him*), the Court in exercise of its inherent suo moto

power and the duty mentioned above (*emphasis supplied*) shall have the due authority and the empowerment to examine such a judgment, in order to ascertain and adjudge if the law laid down therein is incorrect or otherwise. And if the judgment is found to be *per incuriam*, it shall be dealt with accordingly. In such a situation (*as earlier stated*) it shall not be of much significance, as to who has brought the vice of the judgment to the notice of the Court or through which channel it has reached there. Rather, the pivotal aspect, the object, the concern and the anxiety of this Court should be to examine the judgment and if it is *per incuriam* to set the law right with considerable urgency.

5. In the instant matter, as stated in the beginning, these proceedings have genesis in the note put forth by the Registrar of this Court, to which serious objection has been raised from the Judges' side; in this behalf it may be held that though there is no specific provision in the Supreme Court Rules, 1980, enabling the Registrar to put up such note to the honourable Chief Justice of Pakistan, but at the same time there is no bar or clog upon the Registrar, being the principle officer of the court, not to bring to the notice of the Chief Justice of Pakistan or the Court as the case may be, that any decision earlier rendered by the Court is *per incuriam* or needs to be reviewed. Therefore, in view of what has been discussed, the objections about the maintainability of the present proceedings and the jurisdiction of this Court are overruled. And it is categorically held that judgments/decisions of this Court which are *per incuriam* are a class apart, to which the limitations or the rider of the Review (*Article 188*) or of the provisions of Article 184(3) are inapplicable and not attracted. These Articles and the

limitations thereof shall have no nexus for the exercise of the inherent jurisdiction of this Court and the discharge of its duty as prescribed above for the correction of the decisions *per incuriam*. Before parting with the topic, however, I feel urged to make a reference to a full Court meeting of this Court, (*presumably held on 26.4.2010*) in which pursuant to an agenda item, in the context of conflicting judgments by various Benches of the Supreme Court, the office had put up a note envisaging that as the Supreme Court provides guidance to all the Courts in the country and its judgments are also binding upon them (*Courts*) thus, and any conflict in its judgments shall have far reaching effect (*note: obviously conflicting judgments, shall fall within the purview of per incuriam*). Upon the above note, it was resolved by the full Court that the Librarian and R&ROs of the Court should carry out an exercise in the matter and point out instances of the conflicting judgments, and while doing so, they may consult with eminent lawyers to take benefit of their experience. Data should be prepared and the matter be placed before the Hon'ble Chief Justice of Pakistan, who may like to constitute a larger Bench to resolve the conflicting issues. It was further resolved, if during the course of hearing of any case, an instance of conflicting judgments comes to the notice of the Bench, the Hon'ble Judges may refer the same to the Hon'ble Chief Justice for constitution of a larger Bench to resolve the conflict. This resolution of the full Court duly fortify my above point of view, that it is the duty of this Court to declare and discard a judgment as *per incuriam* and for this neither the source of its knowledge nor the confines of ordinary Review and/or Article 184(3) are of much relevance.

ENTITLEMENT TO PENSION
(Question No.4)

6. On the aspect of entitlement to the right of the Judges to receive pension, I am of the view that for the purposes of adjudging the same, and for the interpretation of the relevant provision of the Constitution i.e. Article 205 and Fifth Schedule thereto, and the apposite Presidential Orders; the legislative history of the law on the subject; the nature and object of pension; the (*constitutional*) convention and previous practice, and the contemporaneous understanding (*prior to the case of Ahmed Ali U. Qureshi*) of the law are quite germane factor (*note: my brother has also highlighted the above concept but may be differently*). However, as the requisite history and the text of laws has been comprehensively reproduced in the main judgment of my brother, therefore, by relying thereupon, I shall primarily restrict to the interpretation of such provisions (*note: however, whenever required a part of such text shall be reproduced*), by making reference to the laws in a chronological order.

7. For the first time in the Subcontinent the honourable retired Judges of the High Court were held entitled to receive pension as per Article 221 of the Government of India Act, 1935, but the Article only prescribed that they “*shall be entitled to such rights* (*emphasis supplied*) *in respect of leave and pension as may from time to time be fixed* (*emphasis supplied*) *by His Majesty*”. From the aforesaid it is clear that the authority and the prerogative for the fixation of the entitlement was conferred upon His Majesty; meaning thereby that His Majesty was mandated to fix i.e. assess and settle such right and the entitlement. Pursuant to the above, the High Court Judges Order, 1937 was accordingly enforced on 18th March, 1937, and vide clause 17 thereof, the right of pension was fixed, but restricted

to those Judges only, who fulfilled the required criteria laid therein, e.g. (*relevant being*) upon the completion of service tenure of not less than 12 years. There can be no cavil, that without the above mandate of law, no retired Judge otherwise was entitled to receive the pension. And for the purposes of acquiring said right, or in other words to qualify for the pension, the test and the criteria prescribed in Order 1937 (*ibid*) was *sine qua non*, signifying that the right or entitlement to receive pension was subjected to and was conditioned by the requirement of a specific tenure. After the emergence of Pakistan, the entitlement to pension of the Judges remained to be governed by the said laws (*note: till 1956*). However, Article 221 of the Indian Constitution 1949, prescribes “*Every Judge shall be entitled to such allowances and to such rights in respect of leave of absence and pension as may from time to time to be determined by or under law made by Parliament and, until so determined, to such allowances and rights as are specified in the Second Schedule* (*emphasis supplied*)”. It is manifest from the above that despite some change in language the entitlement again is dependent upon the determination by the law (*note:- until the law, by Second Schedule*). When the Constitution of 1956, was enforced in our country, the relevant provisions therein are quite analogous to the Indian provisions, inasmuch as quite significantly the Third Schedule thereto (*of 1956 Constitution*) stipulates “*Every Judge of a High Court shall be entitled to such other privileges and allowances for expenses in respect of equipment and traveling upon first appointment, and to such rights in respect of leave of absence and pension as may be determined by the President* (*emphasis supplied by me*).”

The only main difference in the Indian provision and our constitutional dispensation was, that there (*India*) the determination of entitlement by or under the law by Parliament was made,

(otherwise by Schedule), while in Pakistan determination had to be made (done) by the President (note: and until then under Order 1937). After the abrogation of 1956, the Constitution 1962 came into force and as per relevant Article (it is prescribed) “**124. Remuneration, etc., of Judges.**—*The remuneration and other terms and conditions of service of a Judge of the Supreme Court or of a High Court shall be as provided in the Second Schedule.*”.

The relevant part of the Schedule provides:-

“2. Every Judge of a High Court of a Province shall be entitled to such privileges and allowances, and to such rights in respect of leave of absence and pension, as may be determined by the President, and until so determined, to the privileges, allowances and rights to which, immediately before the commencing day, the Judges of the High Court of the Province were entitled.”

It is obvious from the above, that the authority, of determination of the entitlement to the pension of the Judges as per the Constitutional command, was conferred and bestowed upon the President, i.e. it shall be the President who shall decide, about their entitlement. Pursuant thereto, Presidential Order P.O.1/1968 was issued, prescribing (see clause 13) the qualifications and the criteria for the said entitlement, which vividly and unmistakably is dependent upon the length of service of the Judges. Anyhow, on account of the annulment of the 1962 Constitution and upon proclamation of emergency on 25th day of March, 1969, a Provisional Constitutional Order dated 14th April, 1969, was introduced, whereunder the President of Pakistan enforced P.O.9/1970, wherein the entitlement (*right*) of the Judges in respect of their pension was stipulated as under:-

“**13. Condition of admissibility of pension.**—A Judge shall, on his retirement, resignation or removal, be

paid a pension in accordance with the provisions of this Order if he has---

- (a) *completed not less than five years of service for pension and attained the retiring age; or*
- (b) *completed not less than five years of service for pension and, before attaining the age, resigned; or*
- (c) *completed not less than five years of service for pension and, before attaining the retiring age, either resigned, his resignation having being medically certified to be necessitated by ill-health or been removed for physical or mental incapacity:*

Provided that, for the purpose of clause (a) of Part I of the First Schedule a deficiency of three months or less in the service for pension as Judge shall be deemed to have been condoned."

In the interim Constitution of Pakistan 1972 as per Article 207, the entitlement of every retired Judge remained conditional to the determination by the President (*emphasis supplied*).

8. On the promulgation of the "the Constitution" no vital and important change was introduced (*therein*) about the entitlement of the retired Judges, as no departure from the earlier law was visibly made. And Fifth Schedule (*note: the interpretation of the Fifth Schedule is critical*) to Article 205 prescribed:-

"I.....

2. *Every Judge of a High Court shall be entitled to such privileges and allowances, and to such rights in respect of leave of absence and pension, as may be determined by the President, and until so determined, to the privileges, allowances and rights to which, immediately before the commencing day, the Judges of the High Court were entitled.*

3. *The pension payable to a retired Judge of the Supreme Court shall not be less than Rs.1,500 per*

mensem or more than Rs.1,950 per mensem, depending on the length of his service as Judge in that Court or a High Court:”

However, by virtue of the Constitution (Twelfth Amendment) Act 1991 dated 27.7.1991, Paragraph 3 was substituted to read as below:-

“3. The Pension payable per mensem to a Judge of a High Court who retires after having put in not less than five years service as such Judge shall not be less or more than the amount specified in the table below, depending on the length of his service as Judge and total service, if any, in the service of Pakistan:

Provided that the President may, from time to time, raise the minimum or maximum amount of pension so specified”

Then came into force P.O.2/1993 on 19th October, 1993 and it is quite significant to point out, that this P.O. has been issued under proviso to 3rd Paragraph of the Fifth Schedule (*Paragraph 3 which was added by aforestated twelfth amendment*); in this regard the title of the P.O. reads as “*Whereas, the proviso to third paragraph of the Fifth Schedule to the Constitution of the Islamic Republic of Pakistan relating to the remuneration of the Judges of the Supreme Court and High Courts provides that the President may, from time to time, raise the minimum or maximum amount of pension so specified in the said paragraph*”. Whereas the pension related part of P.O.2/1993 is:-

*“2. **Pension.**---(1).....
 (2) The minimum and maximum monthly pension of the Chief Justice of a High Court shall be Rs.9,800 and Rs.12,250 respectively and that of every other Judge of a High Court shall be Rs.8,722 and Rs.10,902 respectively.”*

Finally P.O.3/1997 was enforced on 12.2.1997, which has been issued under Paragraph 2 of the Fifth Schedule, and it contains the provisions about the entitlement and the admissibility (*emphasis supplied*) of pension of retired Judges of the High Courts as below:-

“14. Condition or admissibility of pension.—A Judge shall, on his retirement, resignation or removal, be paid a pension in accordance with the provisions of this Order if he has---

- (a) completed not less than five years of service for pension and attained the retiring age; or
- (b) completed not less than five years of service for pension and, before attaining the age, resigned or sought retirement; or
- (c) completed not less than five years of service for pension and, before attaining the retiring age, either resigned, his resignation having being medically certified to be necessitated by ill-health or been removed for physical or mental incapacity or been allowed by the President for sufficient cause to retire.”

The above in a sequence accomplish the legislative history, in respect of the genesis, and the evolution of the pensionary right and the entitlement of the Hon'ble retired Judges of the High Courts throughout. And as stated earlier it is in the context of this legal backdrop and the development; the nature and purpose of pension; the convention etc.; and contemporaneous understanding of the law, that the evaluation of the right/entitlement of pension of the Judges should be made and the provision(s) of Article 205 and Fifth Schedule thereof, and P.O.3/1997 (*alongwith other relevant P.Os.*)

has to be applied and construed.

9. Since the Government of India Act, 1935 which is the origin of the retired Judge's right to receive pension, and from all the laws that have followed, it is vivid from the contents, the text, the letter and spirit thereof (*such laws*) that the said right is neither absolute nor unqualified. Here I would briefly mention that the pension is not the bounty from the State/employer to the servant/employee, but it is fashioned on the premise and the resolution that the employee serves his employer in the days of his ability and capacity and during the former's debility, the latter compensates him for the services so rendered. Therefore, the right to pension has to be earned and for the accomplishment thereof, the condition of length of service is most relevant and purposive. In the case of the employments which are governed by the service rules, there are provisions laying down the criteria and the qualification for that purpose; and where the employments are regulated by the contracts, it is so specified in the terms and conditions of such contracts. Until such qualifications are met and the contractual stipulations are satisfied (*note: as the case may be*), no servant/employee is entitled to pension. And the Judges are no exception to the above rule. Therefore, a Judge *per se* on the basis of his appointment shall not become entitled to the pension, rather he has to earn that right by meeting the qualifications and by fulfilling the requirements stipulated by the legal instruments in force at the relevant point of time (*or from time to time*). In all the laws mentioned above, there are some very important words and expressions which have been used, and for the comprehension and interpretation of such provisions and for the purposes of resolving

the issue, it is imperative that meaning of the words/expressions should be ascertained. The first in the chain is such, which means, that, as/that, of the type to be mentioned, or that kind; unmistakably meaning, that it is only that kind of the right which has been fixed and determined either by the law or the authority designated in the law, therefore, these two words are of immense importance. According to various dictionary meaning **fix** is defined as, to assess, to determine, to settle (*see e.g. MS Dictionary*), whereas, the word **determine** connotes; to fix conclusively and authoritatively; to come to a decision, to settle, to resolve, to fix the form or character before hand; ordain; to find out the nature, limit, dimension and scope (*see MS Dictionary and Merriam and Webster Dictionary*). In view of the aforestated position, I have wee hesitation to hold that these two (*words*) are analogous and interchangeable terms/words. Thus from the above it is clear that, it is only such right which is determined by the President which entitles the Judges to pension; if there is no determination there is no right and if the determination is qualified, the right is not absolute, but conditional thereto. Therefore, in the context of the instant proposition, it is hereby conclusively held that such right is subject to, dependent upon, and circumscribed by the condition of determination; and when the said determination has prescribed certain qualifications and the requirements for the conferment and/or for acquiring the (*such*) rights, the right shall only be created, as is mandated by law, and the conditions laid down therein (*the law*) are first satisfied. I find myself in agreement with the plea raised from the Judges side, that the provisions of Paragraph 2 of the Fifth Schedule are independent of Paragraph 3, but none, as repeatedly queried, was

able to answer and point out if the President has ever made any determination about the entitlement/right to receive pension with respect to those Judges who have the term of service less than five years. Undoubtedly while considering the contents of Paragraph 3 of the Fifth Schedule and also the relevant provisions of P.O.3/1997, the determination of the right and the entitlement is only restricted to, with respect to those Judges who have served for five or more years and for none else. I am absolutely unimpressed by the argument from the Judges side that the determination has been made as per the provisions of P.O.2/1993 reproduced above; or for that purpose Paragraph 3 of the Fifth Schedule or clause 14 of P.O.3/1997 should be enlarged or read down (*note: Mr. Munir A. Malik, ASC, has argued this point*); it is my candid opinion that P.O.2/1993 has nothing to do with the determination contemplated by Paragraph 2 of the Fifth Schedule, rather it (*P.O.2/1993*) is pursuant to Paragraph 3 of the Schedule, as it is so clear from the title thereof and such Presidential Order is only meant for and caters for the Judges, whose right have been determined as per the force of Paragraph 2 of the Fifth Schedule. Now considering the right to pension in terms of the convention etc. There has not been a single instance (*present case is an exception*) in the Subcontinent that a retired Judge who had not completed the requisite term of service would ask for or was granted the pension, which thus had developed into a convention and this was also the contemporaneous understanding of the law, that is why the legal illuminorions of their time, who had lesser term of service than required never pressed for pension (*this aspect has also been highlighted by my brother*). Before parting with the proposition, passingly it may be mentioned that in India, almost in

a similar factual scenario, an akin issue, cropped up, and in view of the provision of Article 221 *ibid* and Section 14 of the Indian (*relevant*) law, which prescribed a particular tenure for the entitlement to pension of the High Court Judges; the Court seized of the matter in that case reported as **Pana Chand Jain Vs. Union of India and others (AIR 1996 Rajasthan 231)** held:-

“Reading the aforesaid provisions (Section 14) with Part-I of the First Schedule to ‘the Act’ it is evident that the amount of pension payable to a Judge of the High Court is linked with the length of service rendered by him. This very basis of fixation of amount of pension is challenged by the petitioner.....”

“Thus, framers of the Constitution, who laid down the eligibility criteria in Article 217 of the Constitution made distinction while determining the amount of pension and other allowances payable to the High Court Judges. That is why they made separate provision by enacting Sub-Clause (2) of Article 221. The leave of absence and the pension and other allowances payable to High Court Judges was left to be determined by Parliament by enactment of law. The framers of the Constitution did not take upon the task of fixing the amount of pension themselves as they undertook this task while fixing the amount of salary. The very scheme of the Constitution suggests that the amount of pension to be payable to a High Court Judge is to be left to the wisdom of the Parliament. This is the mandate of the Constitution. Therefore, the contention based on the provisions of Constitution and particularly the provisions of Article 217 is misconceived. If the argument is accepted, it would lead to absurd result inasmuch we may have to come to the conclusion that the framers of the Constitution were not aware about the distinction introduced and made by themselves in Article 221(2) in respect of leave of absence and pension payable to the High Court Judges. Therefore, there is no merit in the argument that the provision of Section 14 of the Act is contrary to law or

violative of Articles 217 and 221 of the Constitution.”

**WHETHER “THE JUDGMENT” IS PER INCURIAM AND
THE NEXUS OF THE PRINCIPLES OF LOCUS
POENITENTIAE AND LEGITIMATE EXPECTATION ETC.**
(Question No.5)

10. For adjudging the validity of the law laid down in “the judgment” (*PLD 2008 SC 522*), it seems expedient to make a brief probe into the facts of that case. Justice (Retd.) Ahmed Ali U. Qureshi retired as a Judge of the Sindh High Court, without having a period of five years to his service credit (*as High Court Judge*). He (*in the year 1994*) filed a writ petition in the Sindh High Court, claiming entitlement to the pension, notwithstanding the length of his service, which claim of the learned (Retd) Judge was accepted by the learned High Court vide its judgment dated 2.2.1995 (*reported as PLD 1995 Kar 223*) **holding** “*We are, consequently of the view that rights and privileges admissible to the petitioner in respect of his pension are now governed under President's Order 2 of 1993*”..... “*In the result, the petition is allowed and the respondents are liable to fix the petitioner's pension at the maximum pension as allowed under President's Order No. 2 of 1993*”. This verdict has been affirmed by this Court in “the judgment” (*PLD 2008 SC 522*) and in relation to the proposition, about the entitlement of the pension of the Judges, while interpreting Article 205 of the Constitution and the Fifth Schedule thereto, this Court came to the conclusion that Paragraphs 2 and 3 of the Schedule are two independent provisions (*note: no cavil with the above*). Besides, under Paragraph 2 (*of the Schedule*) ‘Every Judge’ is entitled to pension, irrespective of his length of service and Paragraph 3 only relates to those Judges who have served for more than five years; the latter Paragraph in no manner debars and/or preclude the other Judges,

who have served for less than five years to receive pension. In this regard with an object to justify that the entitlement of such Judges (*with less than five years term*) has been determined by the President, strenuous reliance was placed on P.O.2/1993 and also on the factum that this entitlement has been affirmed and recognized by P.O.7/2008. This Court also implied (*in that decision*) that the expression "every Judge" appearing in Paragraph 2 of the Fifth Schedule, as against the lack of or the omission of the expression 'a Judge' therein, is significant and therefore the entitlement of "every Judge" notwithstanding P.O.3/1997 is absolute and established. In my view "the judgment" (*PLD 2008 SC 522*) is ***per incuriam*** and for this purpose my opinion/exposition on Question No.4 (*ibid*) should be read as integral part herein, and in the light thereof, I hereby enumerate the fundamental errors of "the judgment" which has rendered it *per incuriam*: **(a)** the legislative history of the law on the field has been ignored and overlooked by the Court **(b)** the true nature, the concept and the purpose of the pension has been disregarded **(c)** the convention and the previous practice which has the force of law, in that, no pension was ever paid or claimed by the Judges who did not qualify the test of the law, has been elided **(d)** the most important and crucial words/expression of the relevant laws **such right** and **fix/determination** of such right, by the President has not been adverted to at all **(e)** once holding that the provisions of Paragraphs 2 and 3 of the Fifth Schedule are independent, still the justification of entitlement has been founded upon either of the two Paragraphs by erroneously reading those with P.O.3/1993 **(f)** P.O.2/1993 undisputedly was issued under Paragraph 3 of the Fifth Schedule,

yet it has been misconceived that the determination by the President has been made on the basis thereof which could only be in the context of the Paragraph 2. In this behalf conspicuous omission has been committed, by not adverting to and taking in account (*reproducing*) the title part of P.O.2/1993, which reads as “*Whereas, the proviso to third paragraph of the Fifth Schedule to the Constitution of the Islamic Republic of Pakistan relating to the remuneration of the Judges of the Supreme Court and High Courts provides that the President may, from time to time, raise the minimum or maximum amount of pension so specified in the said paragraph*” which clearly contemplated that the P.O. was only restricted to Paragraph 3 (g) P.O.7/2008 was resorted to, which was subsequently declared as *ultra vires* and *non est* by this Court in the Sindh High Court Bar Association case (h) the contemporaneous understanding of law and the factor that during the long period of about around 50 years, no Judge having a lesser tenure than the one prescribed by law for the time being in force, ever claimed or approached the Court, for the pension have grossly eluded the attention of the Court.

11. Now attending to the proposition raised from the Judges side, that as a vested right has been created in their favour, on account of the judgment thus on the basis of the doctrine of past and closed transaction, *locus poenitentiae*, and legitimate expectation, such right cannot be stultified and taken away which stands protected in perpetuity; suffice it to say that as per the settled law, no perpetual right can be created in favour of a citizen/a person, which (*right*) is against the law. The right to pension, which the judges claim to have been created in their favour, undoubtedly is founded upon “the judgment” (PLD 2008 SC

522). Obviously, this right has to sustain and cease with the fate of the said judgment. If the law declared in "the judgment", is pronounced to be *per incuriam* (*as has been done in the matter*) "the judgment", and the law enunciated therein stand extinguished and with the annihilation of "the judgment", the right also vanish and the judges cannot claim, under any principle of law (*quoted above*), that they still should be paid the pension in future. Even though, the said judgment being *per incuriam* has been set aside by this Court.

In the context of the plea that the right of pension can sustain, I intend to analyze the doctrine of *locus poenitentiae*; my learned brother in his judgment has defined and elucidated the principle of *locus poenitentiae*, however at the cost of repetition, it is held that *locus poenitentiae* conceptually connotes, that authority which has the jurisdiction to pass an order and take an action, has the due authority to set aside, modify and vary such order/action, however there is an exception to this rule i.e. if such order/action has been acted upon, it creates a right in favour of the beneficiary of that order etc. and the order/action cannot thereafter be set aside/modified etc. so as to deprive the person of the said right and to his disadvantage. However, it may be pertinent to mention here, that as pointed out in the preceding part, no valid and vested right can be founded upon an order, which by itself is against the law. In this regard, reference can be made to the judgment reported as **The Engineer-in-Chief Branch through Ministry of Defence, Rawalpindi and another Vs. Jalaluddin (PLD 1992 SC 207)**, the relevant part whereof reads as under:-

"It was further observed that locus poenitentiae is the power of receding till a decisive step is taken but it is not a principle of law that order once passed becomes irrevocable and past and closed transaction. If the order is illegal then perpetual rights cannot be gained on the basis of such an illegal order."

Further dictas in this behalf are:- **Abdul Haque Indhar and others Vs. Province of Sindh through Secretary Forest, Fisheries and Livestock Department, Karachi and 3 others** (2000 SCMR 907) and **M/s Excell Builders and others Vs. Ardeshir Cowasjee and others** (1999 SCMR 2089). Besides, the principle of *locus poenitentiae* (*with its exception*), in my view, primarily has the nexus and application to administrative orders and actions, and would not apply to the judicial decisions. The judicial decision can only be invalidated, quashed and annulled, through the process of appeal, revision and review, if such remedies are available to an aggrieved party under the express provisions of law. And once such decision has attained finality it operates as *res judicata inter se* the parties to the *litis* (*note: the decisions however rendered by the superior Courts in so far enunciating the law has the binding effect also on all the concerned*). Therefore, such a decision until the law declared therein is altered in the appropriate jurisdiction of the Court or the decision is declared as *per incuriam*, and is squashed it shall have the due effect. But where the judgment is set aside as in this case; the rule of *locus poenitentiae*, alongwith the exception, shall not be applicable, because as mentioned earlier, the doctrine primarily belongs to the administrative domain of the State and is restricted to administrative orders/actions alone. In this context, reference can

be made to Clause 21 of the General Clauses Act, 1887, which provision is reproduced as below:-

“Power to make, to include power to add to, amend, vary or rescind, orders, rules or bye-laws. Where, by any Central Act or Regulation, a power to issue notifications, orders, rules, or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions (if any), to add to, amend, vary or rescind any notifications, orders, rules or bye-laws so issued.”

While interpreting such provision, it has been held by Sindh High Court in **Sheikh Liaquat Hussain Vs. The State (1997 P.Cr.L.J. 61)**

“The word "orders" has been used alongwith the words "notifications, rules, and bye-laws", and will thus be interpreted ejusdem generis, meaning thereby that it will be taken to be in the sense of an order issued by the Legislature or the Executive. Moreover, as a rule of construction the words used in a statute must be construed according to their context and as such other provisions in that statute would be very much relevant. Section 21 should, therefore, be read in the light of sections 14 to 20 and sections 22 to 24 and then it will be clear that the word "order" in that section refers to Legislative or Executive orders and not a judicial order. I am fortified in my opinion by a Full Bench decision of Nagpur High Court reported as Venkatesh Yashwant Deshpande v. Emperor AIR 1938 Nag. 513. I will reproduce with advantage the following observations in this judgment:--

“The meaning of the word 'orders' becomes clear when section 21 is read in conjunction with section 24. These considerations make it clear that the word 'order' used in section 21,

General Clauses Act, is a legislative or statutory order, that is an order having the force of law. The order passed under section 401 granting remission of punishment falls in a category different from the order contemplated in section 21, General Clauses Act. The applicability of that section is, therefore, highly doubtful."

A learned Single Judge of the Lahore High Court also took the view that section 21 of the General Clauses Act could not be pressed into service in relation to orders passed in a judicial capacity. Reference in this connection may be made to the case of Muhammad Ibrahim and 2 others v. Municipal Committee, Chiniot through its Chairman 1990 ALD 655."

In this behalf, reliance can also be placed upon the judgment reported as **Venkatesh Yeshwant Deshpande Vs. Emperor (AIR 1938 Nagpur 513)** wherein it has been held as under:-

"It is a well recognized rule of construction that the words used in a statute must be interpreted according to their context. Section 21 of the General Clauses Act, must therefore be read in light of Ss 14 to 20 which precede Ss 22 to 24 which follow. These considerations make it clear that the word 'orders' used in section 21 is a legislative or statutory order, that is an order having force of law."

Moreover, in the A.I.R. Manual, 5th Edition 1989 by V.R. Manohar and W.W. Chitaley; the query at hand is addressed at on page 143 of its book. It states that Section 21 of the General Clauses Act does not apply to a decision as to the rights of parties made by particular judicial or quasi judicial or administrative authority. Orders spoken in the section are those in the nature of subordinate legislation.

My own reading of the provisions of clause 21 of the General Clauses Act with reference to the object and purpose of the Act and its various provisions leads me to form a view that, the rule of *locus poenitentiae*, for the purposes of the protection of the rights under the said clause, is only restricted to the administrative or executive orders/actions, and in no way is attracted to the judicial decisions, particularly where a decision is declared as *per incuriam* and is specifically set aside. Upon the above principles, and the reasoning the doctrine of past and closed transaction, shall also not attract hereto, specially because no right can in perpetuity either be created or be continued on the basis of a law, which has ceased to exist and has been annulled.

As far as the rule of legitimate expectation is concerned, such rule is not a part of any codified law, rather the doctrine has been coined and designed by the Courts primarily for the exercise of their power of judicial review of the administrative actions. As per Halsbury's Laws of England, Volume 1(1), 4th Edition, para 81, at pages 151-152, it is prescribed:-

"A person may have a legitimate expectation of being treated in certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise from a representation or promise made by the authority including an Implied representation or from consistent past practice."

In R. Vs. Secretary of State of Transport Exporte Greater London Council (1985)3 ALL. ER 300, it is propounded that:-

"Legitimate, or reasonable, expectation may arise from an express promise given on behalf of a public authority or from the existence of a regular practice which the

claimant can reasonably expect to continue. The expectation may be based on some statement or undertaking by or on behalf of the public authority which has the duty of taking decision.”

In the judgment reported as Union of India Vs. Hindustan Development Corporation (1993)3 SCC 499 at 540, it has been held:-

“The legitimacy of an expectation can be inferred only if it is founded on the sanction of law or custom or established procedure followed in regular and natural sequence. It is also distinguishable from a genuine expectation. Such expectation should be justifiably legitimate and protectable. Every such legitimate expectation does not by itself fructify into a right and therefore it does not amount to a right in the conventional sense.”

It is thus clear from the above that the doctrine only has nexus to administrative decisions and actions, and no one can have resort to it, for the purposes of claiming any right found upon any decisions of this Court, which decision and the law laid down therein is found by the Court to be *per incuriam*. Therefore, I do not find any merit in the plea raised by the Judges side, that their right to receive pension in future is protected on the principle of legitimate expectation despite the fact that “the judgment” has been declared *per incuriam* and set aside.

WHETHER ANY PROTECTION IS AVAILABLE TO THE JUDGES ON THE RULE OF EQUALITY AS ENSHRINED BY ARTICLE 25 OF THE CONSTITUTION
(Question No.6)

12. For the above question, it has been argued from the Judges side that they shall be discriminated qua the Judges of this

Court as also the Judges of the High Courts who are entitled to pension in terms of Paragraph 3 of the Fifth Schedule and also clause 14 of P.O.3/1997, as having served for a term of five years or more. There can be no two opinions, that the reasonable classification and differentia is permissible under Article 25 of the Constitution. The Judges of this Court have been treated by the Constitution itself as a class apart from the Judges of High Courts for the purpose of pension, and by no conceivable reason, it can be held that both the categories of the Judges i.e. Supreme Court and High Court forms part of one and the same class. Therefore, the plea with reference to the Judges of this Court has no force. Now examining the argument in relation to those Judges who have completed five years tenure; it may be mentioned that they are again qualified to receive the pension under the mandate of the Constitution and in this behalf Paragraph No.2 of the Fifth Schedule to the Constitution, and clause 14 of P.O.3/1997 are very much clear; and I have already held (*see discussion on entitlement*) that the right to receive the pension is not absolute; it has to be earned and it also is not a bounty. Therefore, the Judges lacking the qualification prescribed by law for acquiring the right cannot compete with those who fulfill the requirement. It may be pertinent to state here that some of the Judges have a service tenure of one year/two years/three years; how conceivably they can compare themselves, with those who have the prescribed tenure of five years and plead discrimination. Therefore, the submission made is unfounded and is hereby discarded.

**WHETHER THIS JUDGMENT SHALL HAVE
PROSPECTIVE OR RETROSPECTIVE EFFECT**
(Question No. 7)

13. While assessing this question I have the privilege and advantage of going through the note of my learned brother Muhammad Ather Saeed, J. and agree thereto, therefore I shall not repeat what my brother has already expressed. However I would like to add; that in the ordinary course, the judgment(s) pronounced by this Court declaring and enunciating law has prospective effect, but still, the prospective or the retrospective application of a particular judgment depends upon the facts and circumstances of each case, and it is for the Court to decide (*in each case*), if the judgment should be made applicable prospectively or otherwise. In forming this opinion, I am fortified by the law laid down in the case reported as Malik Asad Ali and others Vs. Federation of Pakistan through Secretary, Law, Justice and Parliament Affairs, Islamabad and others (PLD 1998 SC 161 at page 346) (*on which reliance has also been placed by my learned brother in his judgment*) the relevant part whereof reads “*Even otherwise, as pointed out by us earlier, this Court while adopting an interpretation of the provision of the law or the Constitution which is at variance from the existing view, it is only declaring the correct law as an apex Court. By doing so, it neither legislates any new law nor amends the existing law. Therefore, while interpreting a provision of law or the Constitution, this Court can also provide the date from which the interpretation given by it is to come into effect, keeping in view the nature of the provision it is interpreting, the likelihood of possible prejudice which may be caused to an individual or a body of individual and the requirement of justice in the case* (*emphasis supplied*)”. In Malik Asad Ali’s case (*supra*), quite a few precedents on the subject have been cited. In my view the present

decision warrants prospective application i.e. from the date of its pronouncement and I have reasons to form such an opinion. However, before propounding those reasons I intend to state that a judgment *per incuriam* is not a judgment without jurisdiction and thus it is neither void nor nullity in the eyes of law therefore, the fallout of a void verdict/order shall neither follow nor can be resorted to; moreover in the context of this case, I find no relevance, to compare the interest of the Judges with the State and/or the public interest, on the touchstone of the maxim “*salus populi est supreme lex*” or on the rule that the individual interest has to give way to the public welfare and interest. Be that as it may, my reasons for giving this judgment prospective effect are:- majority of the Judges have not even approached this Court to seek the relief for the grant of pension, rather it is only in terms of paragraph No.34 of “the judgment” which provides “*In consequence to the above discussion, the Constitution Petitions Nos. 8/2000, 10/2001, 26/2003, 34/2003, 04/2004 and 26/2007, filed by the retired Judges of the High Courts are allowed and the petitioners/applicants in these petitions and miscellaneous applications, along with all other retired Judges of the High Courts, who are not party in the present proceedings, are held entitled to get pension and pensionary benefits with other privileges admissible to them in terms, of Article 205 of the Constitution read with P.O.No.8 of 2007 and Article 203-C of the Constitution read with paras 2 and 3 of Fifth Schedule and P.O. No.2 of 1993 and P.O.3 of 1997 from the date of their respective retirements, irrespective of their length of service as such Judges* (emphasis supplied)” that they were contacted by the Registrar of the respective High Courts (*as this is the stand taken by them and I have no reasons to disbelieve*) and they were offered the pension. Some of the beneficiaries of “the judgment” are the widows of the retired Judges. It is nobody’s case that they have practiced and played any

fraud or committed some foul in gaining and procuring the pension, so as to disentitle them to retain such gain, on the known principle, that no one should be allowed to hold the premium of his wrong/fraud and/or retain ill gotten gains. Rather to the contrary they have received the monies under the judicial dispensation by the apex Court, which was considered as valid enunciation of law, till the present decision and the pension was paid and received by them in bona fide belief of the entitlement; none of the concerned, ever pointed out the **depravity** and the **vice** of "the judgment", though "the judgment" was known at all the levels of the High Court(s) and also in other judicial circles, rather it was a **publicly known fact**, yet the verdict was left outstanding for a considerably long period, thereby allowing the Judges to derive benefit of "the judgment"; I am not persuaded that the Registrar of this Court or for that matter all the concerned, at all the levels, including the learned Members of this Bench, who graced the respective High Courts of the country as the Chief Justices were unaware of "the judgment", but still no timely action was initiated to set the wrong law, right and the time was allowed to pass. If a wrong and an error has been committed in the declaration of law (*PLD 2008 SC 522*), the responsibility rests on this Court and it is fundamental rule of law and justice, that the act of the Court shall prejudice none; in my view this principle tilts in favour of the Judges, rather the **State**. Because on account of the lapse of considerable time, most of the Judges might have spent and consumed the amount received by them, as they are expected to have decent living after their retirement; the amount so received might have expended on the education and marriages of their children; the possibility that

they might have acquired an abode to spend rest of their life to avoid dependency on their scion cannot be ruled out. This amount might have been utilized on their daily expense and sustenance and in the discharge of their other social and financial obligations. And if now the amount is ordered to be recovered from them they might have to sell their assets (*shelter*) and belongings. Those who have no assets or saving might be compelled and constrained to entreat others or borrow which would definitely not behove with their status and position as the retired Judges; baring few, most of them are of old age and I am not sure they have the ability and capacity, at such an advance age to generate the requisite amount for the refund. Enforcing the refund of the amount upon them may cause innumerable predicament for them and may lead to a very pathetic and a ludicrous situation for them. And all those who have once graced the superior judiciary, might in this scenario be rendered destitute and precarious and deprived of even a modest life and living in future. But for the commission of no wrong, fraud, foul and fault on their part. Rather as stated earlier an error and mistake perpetrated by this Court. Therefore, I am of the considered view that the present judgment be given prospective effect.

14. I also do not find that in this matter the principle of **restitution**, which in the normal situation where a decision is reversed should apply because the judgment is not being set aside on the approach of any aggrieved party, but on its own motion by this Court for the purposes of setting the wrong law correct. Furthermore, I am not impressed by a thought that as "the judgment" was rendered during the period when the real judicial

set up was lacking in country, therefore the recovery is justified, because to my mind all such decisions made and verdicts given in between the period of 3rd March, 2007 and 23rd March, 2009 have been saved as per the doctrine of defacto jurisdiction (*see para 178 of the Sindh High Court Bar Association case*) however without debaring in any manner this Court in its appropriate/proper jurisdiction, including its suo moto jurisdiction to examine such decisions and to set aside those, *inter alia*, on the basis of rule of *per incuriam*; and "the judgment" is no exception to it, however, it shall be perilous to impute motives to the Judges in rendering the judgments. Be that as it may, in not conferring retrospective effect to the present judgment and I am persuaded by the law laid down by this Court in **The Engineer-in-Chief Branch through Ministry of Defence, Rawalpindi and another Vs. Jalauddin (PLD 1992 SC 207)** (*to which reference has also been made by my learned brother in his judgment*) wherein while considering the aspects of *locus poenitentiae* and past and closed transaction, with regard to an order involved in that case, which was declared to be illegal, it has been held as under:-

"Locus poenitentiae is the power of receding till a decisive step is taken. But it is not a principle of law that order once passed becomes irrevocable and it is past and closed transaction. If the order is illegal then perpetual rights cannot be gained on the basis of an illegal order. In the present case the appellants when came to know that on the basis of incorrect letter, the respondent was granted Grade-11, they withdrew the said letter. The principle of locus poenitentiae would not apply in this case. However, as the respondent had received the amount on the bona fide belief, the appellant is not entitled to recover the amount drawn by the respondent during this period when the letter remained in the field."

Therefore following the above dictum, I hold that the amount so far received by the Judges should not be recovered, from them, as it shall be oppressive and more prejudicial to the Judges, as against the respondent of the case i.e. (*of PLD 2008 SC 522*) and the State, which (*State*) even never ever filed any review against "the judgment", even after the success of the movement for the restoration of real judiciary. And even now the recovery has not been pressed for before us by the State. However, as now the judicial verdict (*PLD 2008 SC 522*) under which the Judges had and have been receiving the pension, is declared *per incuriam* and is set aside, obviously their right to receive the pension has ceased and come to an end, rather they are disentitled to receive pension in future. And as mentioned earlier, such right for the future receipt of pension is not protected under any principle, rule and on jurisprudential plain.

15. While summation of my this discourse, I want to state that in the judgment authored by my brother Anwar Zaheer Jamali, J. it has been held that for the purposes of the entitlement to pension, there is no distinction between "a Judge" and an "Additional Judge" of the High Court. In this behalf, my brother has taken into account the definition of a "Judge" provided in Article 260 of the Constitution and reference to certain P.Os. have also been made, the definition of remuneration etc. has also been considered, but with due deference to my learned brother, I am not inclined to endorse such a view and the reasoning; because in my humble estimate, the object and purpose of such appointment (*see Article 197*) is different and the definitions are only meant for the purposes of the functions/privileges and remuneration of an

"Additional Judge" during the course of his service as Additional Judge, but does not entitle him for pension even if he has served for five years. Anyhow as in the present scenario, in my view the above question is only rendered academic and as we have not received much assistance on the point, therefore, I shall leave the issue open and left to be resolved in some appropriate matter.

JUDGE

EJAZ AFZAL KHAN,J:- I have gone through the judgment authored by my brother Mr. Justice Anwar Zaheer Jamali. Though I agree with the judgment yet I would like to record reasons of my own on certain points.

2. The entire argument of the learned counsel appearing to defend the judgment rendered in the case of "Accountant General, Sindh and others. Vs. Ahmed Ali U. Qureshi and others" (PLD 2008 SC 522) hinges on the words "every judge of a High Court" used at the start of paragraph 2 of Fifth Schedule to the Constitution of the Islamic Republic of Pakistan, 1973. The main thrust of their argument is that when it has been provided in the said paragraph that every judge of a High Court shall be entitled to such privileges and allowances and to such rights in respect of leave of absence and pension the legislature in its wisdom can never be said to have conditioned the incidence of such rights with having put in not less than five years of service as such judge. It, according to them, recognized the entitlement of every judge to the privileges and allowances and such rights in respect of leave of absence and pension irrespective of their length of service, therefore, it has to be determined by the President and that failure to do so will not culminate in the extinguishment of such rights. These arguments so to speak, evince an element of ingenuity but when all the paragraphs of the Schedule are read in their correct perspective, these arguments appear to be fallacious both legally and logically. What paragraph-2, in simple words, provides is that every judge of a High Court shall be entitled to such privileges and allowances and to such rights in respect of leave of absence and pension as may be determined by the President and until so determined the judges of the High Court would get what they were, immediately before the commencing day, entitled to. Now the question arises what the judges of the High Court entitled to before the commencing day of the Constitution. The answer can well be found in paragraph-13 of Order IX of 1970. The relevant provisions of the Ordinance read as under:-

"13. *Conditions of admissibility of pension.* – A Judge shall, on his retirement, resignation or removal, be paid a pension in accordance with the provisions of this Order if he has ----

- a) completed not less than five years of service for pension and attained the retiring age; or
- b) completed not less than ten years of service for pension and, before attaining the age, resigned; or
- c) completed not less than five years of service for pension and, before attaining the retiring age, either resigned, his resignation having been medically certified to be necessitated by ill-health, or been removed for physical or mental incapacity;

Provided that, for the purpose of clause (a) of Part I of the First Schedule a deficiency of three months or less in the service for pension as Judge shall be deemed to have been condoned.

14. *Determination of pension.* --- Subject to the provisions of this Order, the pension payable to a Judge who, on his retirement, is entitled to a pension under this Order shall be calculated ---

- a) in the case of a Judge who is not a member of a service in Pakistan or who immediately before his appointment as a Judge did not hold any other pensionable civil post in connection with the affairs of the Centre or of a Province, in accordance with the provisions of Part I of the First Schedule;
- b) in the case of a Judge who is a member of a civil service in Pakistan or who immediately before his appointment as a Judge held any other pensionable civil post in connection with the affairs of the Centre or of a Province, in accordance with the provisions of Part II of the First Schedule, unless he elects to receive pension under Part I of the said Schedule.

15. *Pension of Judges not covered by paragraph 13.* --- A Judge who immediately before his appointment as such was a member of a civil service in Pakistan or was holding a post in connection with the affairs of the Centre or of a Province and who does not fulfill the conditions laid down in paragraph 13 shall, on retirement, be entitled to such pension as would have been admissible to him in his service or post, had he not been appointed a Judge, his service as a Judge being treated as service for the purpose of calculating that pension".

2. An identical provision can be found in the Constitution of 1962 and that of 1956 in the same words which provided that every judge

of a High Court shall be entitled to such privileges and allowances and to such rights in respect of leave of absence and pension as may be determined by the President and unless so determined to the privileges, allowances and rights to which immediately before the commencing day the judges of the High Court were entitled. What was the instrument regulating the entitlement of the judges to the privileges and allowances and to such rights in respect of leave of absence and pension immediately before the commencing day of the aforesaid Constitution. The answer can be found in the relevant provisions of The High Court Judges Order 1937 which read as under:-

"Pension. 17--- (1) Subject to the provisions of this Order, a pension shall be payable to a Judge on his retirement if, but only if, either –

- a) he has completed not less than 12 years' service for pension; or
- b) he has completed not less than 7 years' service for pension and has attained the age of sixty; or
- c) he has completed not less than 7 years' service for pension and his retirement is medically certified to be necessitated by ill-health".

2) The [President] may for special reasons direct that any period not exceeding three months shall be added to a Judge's service for pension:

Provided that a period so added shall be disregarded in calculating any additional pension under Part I or Part II of the Third Schedule to this Order".

3. All provisions of the orders reproduced above show that a Judge shall have a right to pension only if he has put in the prescribed qualifying service. Mere appointment as a Judge will not entitle him to pension. Many instruments regulating the entitlement of judges of the High Court to privileges and allowances and rights in respect of leave of absence and pension like Order II of 1993 and Order IX of 1970 have been enforced but none of them entitles them to rights to pension if they have put in less than five years of service. It, thus, clinches the matter once and

for all and leaves no doubt that rights of the judges to pension who have put in less than five years of service also stand determined. What was required to be enforced under the enabling provision of the Fifth Schedule stood enforced in the form of Order II of 1993 and Order III of 1997 which have been extensively reproduced in the main judgment. When this being the case, we don't understand where do the rights to pension of the judges who have put in less than five years of service come from. It was argued by one of the counsel representing the retired judges that if the rights of the judges to pension who have put in less than five years of service, have been recognized by the Constitution, it could not be denied due to inaction of the President as the very conferment of the power enabling him to determine such rights would invariably call for its exercise. But this argument, to say the least, appears to be misconceived as there has not been any inaction on the part of the President at any stage or at any point of time, inasmuch as, he enforced Order II of 1993 and Order III of 1997 determining such rights in clear and unambiguous terms. Once these rights have been determined pursuant to paragraph 2 of Fifth Schedule of the Constitution, we don't think any judge who has put in less than five years service can be left with a hope or an occasion to wait for yet another order determining the rights in accordance with his wishful thinking.

4. The provision recorded in the judgment rendered in the case of "**Accountant General, Sindh and others. Vs. Ahmed Ali U. Qureshi and others**" (*supra*) entitling a Judges to pension who have put in less than five years of service is paragraph 4 of Order VIII of 2007 but when this and the paragraph succeeding it are read together and each word used therein is given due meaning, it does not tend to support the deductions drawn therefrom. None of the words used in the aforesaid paragraphs could lead to the meaning wrung and wrested therefrom in the judgment under review. It appears that the aforesaid paragraphs have not been read carefully nor were they interpreted in their correct perspective.

5. When asked whether the Judges who have put in less than five years of service could retain the benefits they have received in case the judgment rendered in the case of "Accountant General, Sindh and others.

Vs. Ahmed Ali U. Qureshi and others" (*supra*) is set at naught, learned counsel representing the Judges submitted that it being a transaction past and closed cannot be reopened because a subsequent decision being prospective in operation cannot be applied retrospectively. But when asked how the Judges who have put in less than five years service, could retain the benefits they have received or continue to receive if the judgment furnishing basis for grant of such benefits is set at naught and thus rendered non-existent, no satisfactory reply was given by any of the counsel representing them. Granted that a subsequent precedent overruling a previous one being prospective in operation cannot be applied retrospectively but this principle will not apply when the judgment furnishing a basis for a right or entitlement stands annulled on having been reviewed. Therefore, a judgment reversing or declaring a judgment per *incuriam* in review cannot be treated at par with a judgment overruling or declaring a precedent in another case as per *incuriam*. As for example, a pre-emptor, succeeding to get a decree from a Court, in a pre-emption case without having a superior right of pre-emption and without making demands which are sine qua non for the enforcement of such right, cannot claim any right or benefit much less vested on the basis of such decree when it is annulled by the Court granting it in the exercise of its review jurisdiction. Retention of a benefit or right thus acquired cannot be justified under any cannons of law, justice and propriety. It cannot be justified on the plea of bonafide either. What is illegal would remain illegal. It cannot be changed into legal by pleading bonafide.

6. When learned counsel for the respondents could not find any statutory basis to shield the benefits the latter received, they sought to shield them behind the principle of *locus poenitentiae* by arguing that an order extending a right cannot be rescinded, revoked or recalled if it is

acted upon and in consequence a right has accrued. This principle cannot help them firstly because it is not applicable to judicial proceedings and secondly because it cannot be applied in a vacuum without considering the import of provisions contained in section 21 of the General Clauses Act. According to the aforesaid provision, the authority passing such order, in the first instance must have a power to pass, and then recall, revoke or rescind it. Where the authority passing the order has no power to pass it, its recall, revocation or rescindment can't be precluded on the ground that it has been acted upon and in consequence a valuable right has accrued. An order passed without a power, would be just non-est. The judgment rendered in the case of **"Accountant General, Sindh and others. Vs. Ahmed Ali U. Qureshi and others"** (*supra*), when read with open eyes does not appear to have been based on and backed by any order, instrument or any statutory provision worth the name. It, therefore, has no basis altogether. If at all it had any by any stretch of imagination, it vanished and withered away on having been reviewed. Needless to say, that fall of basis would call for the fall of the superstructure raised thereon. Effect of the judgment in Constitution Petition No. 127 of 2012 declaring the judgment rendered in the case of **"Accountant General, Sindh and others. Vs. Ahmed Ali U. Qureshi and others"** (*supra*) as per *incuriam* would be prospective as well as retrospective when the existence of the latter on having been reviewed has been reduced into non-existence unlike the judgments overruled or dissented from inasmuch as they for having been rendered in different cases do not reopen the matters past and closed.

7. I have also been deliberating since the commencement of hearing of their case till the writing of this note to find some justification for the retention of the benefits received by the learned Judges but could not find any. In case I create or contrive one in this behalf, I cannot find any reason to deny the same relief to the others whose case is either in the pipeline or who have yet to retire. I also could not find any intelligible

differentia for a classification amongst the Judges who have received the benefits and those who have yet to receive notwithstanding they are similarly placed. Even otherwise, a benefit extended in derogation of the law cannot be justified to be retained simply because it has been received as such.

Judge

MUHAMMAD AATHER SAEED, J.- I have had the pleasure of perusing the very elaborate judgment written by my lord Anwar Zaheer Jamali, J. and I fully agree with him that the matter regarding pension of Judges was not correctly enunciated by the judgment of three Members Bench of this Court in the case of *Accountant General Sindh and others v. Ahmed Ali U. Qureshi* reported in **PLD 2008 SC 522** and I am also a signatory to the short order passed on 11.4.2013 whereby we have declared that the above judgment is per-incurred. My lord has very ably discussed the entire law on the subject in respect of the short order. He has also given detail reasons for arriving at the conclusion that the pensionary benefits derived by the Hon'ble Judges who in our present judgment have been declared as not being entitled to the receipt of pensionary benefits should be restored to the public exchequer as the act of this Court in passing the judgment in Ahmed Ali case quoted supra has prejudiced the public exchequer which is held for the benefit of the general public of Pakistan. I have very carefully perused the reasons given by my lord in respect of this aspect of the case and with great respect to my lord I have been unable to bring myself to agree with his decision on this aspect.

2. My lord has initiated his discussion with the concept and import of word 'per-incurred' as discussed in the celebrated judgment of this Court in the case of *Sindh High Court Bar Association v. Federation of Pakistan* reported as **PLD 2009 SC 879** and he has reproduced paragraphs 37, 38 and 39 of the above judgment. In para 39 this Court has observed that once the Court has come to the conclusion that the judgment was delivered per-incurred then the Court is not bound to follow such decision on the well known principle that the judgment itself is without jurisdiction and per-incurred, therefore, it deserves to be overruled at the earliest opportunity and in

such situation it is the duty and obligation of the apex court to rectify it. However, in this judgment this Court has not discussed or given any finding as to what will be the after effect of overruling such per incuriam judgment and what will be the fate of any action which has been taken in pursuance of the judgment under Article 189 of the Constitution of Islamic Republic of Pakistan 1973 which provides that any decision of this Court deciding the question of law or enunciating the principle of law is binding on all the Courts and authorities in Pakistan.

3. My lord has also relied on the judgment of this Court in the case of Malik Asad Ali and others v. Federation of Pakistan and others reported in **PLD 1998 SC 161**. From a perusal of the extracts reproduced by my lord it is seen that the following observations also forms part of the extract.

"Therefore, if as a result of interpretation of a law or a Constitutional provision by this Court, the existing interpretation or meaning of the law is changed, then it is more of a matter of public policy based on justice, equity, and good conscious than a rule of law, that an innocent person who acting bona fide on the prevailing interpretation or meaning of law created a liability or acquired a right, be protected against the change brought about in the existing state of law as a result of its interpretation by this Court."

4. He has also relied on the judgment of the Indian Supreme Court in the case of South Eastern Coalfields Ltd. v. State of MP reported in **AIR 2003 SC 4482**. The perusal of the extracts reproduced in the judgment reveals that the India Supreme Court has held as under:-

"The factor attracting applicability of restitution is not the act of the Court being wrongful or a mistake

or error committed by the Court; the test is whether on account of an act of the party persuading the Court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage which it would not have otherwise earned or the other party has suffered and impoverishment which it would not have suffered but for the order of the Court and the act of such party..”

Even otherwise this case is apparently in respect of an interim order which had been acquired on account of act of the parties in persuading the Court to pass the order held at the end as not sustainable and in the judgment which has been termed per incuriam the Court has not been wrongly persuaded by the party but on its own examination of the relevant law reached the wrong conclusion.

5. My lord has relied on the judgments in the cases of Engineer-in-Chief Branch v. Jalaluddin reported in **PLD 1992 SC 207** and Abdul Haq Indhar v. Province of Sindh reported in **2000 SCMR 907** and has mentioned that in the cases it was held as under:-

In the first case

*“It was held that locus poenitentiae is the power of receding till a decisive step is taken but it is not a principle of law that order once passed becomes irrevocable and past and closed transaction. If the order is illegal then perpetual rights cannot be gained on the basis of such an illegal order. In the other case of Abdul Haq Indhar (*supra*), discussing the principle of locus poenitentiae, provisions of section 21 of General Clauses Act were also considered and it was affirmed that the authority which can pass an order, is entitled to vary, amend,*

add to or to rescind that order, as locus poenitentiae is the power of receding till a decisive step is taken, but it is not a principle of law that order once passed becomes irrevocable and past and closed transaction. If the order is illegal then perpetual rights cannot be gained on the basis of such an illegal order."

The important word in these judgments is the word 'perpetual'. This word has been defined in Oxford Dictionary to mean continuous, therefore, the interpretation of these judgments will be that no continuing or continuous right or benefit can be gained from an illegal order. There can be no cavil to this proposition but this does not mean that benefits gained during the validity of an illegal judgment cannot be retained.

6. My lord has also relied on the short order and the judgment in the case of Syed Mehmood Akhtar Naqui v. Federation of Pakistan reported in **PLD 2012 SC 1054 and 1089**, where a declaration was issued against the eligibility and qualification of MNAs, Senators and MPAs for being members of the Majlis-e-Shoora because of holding dual nationality and they had been directed to refund all monetary benefits drawn by them during the period they kept public office and had drawn emoluments.

7. He has also relied on the judgment of this Court in case of Muhammad Yasin v. Federation of Pakistan reported in **PLD 2012 SC 132** in which the appointment of Chairman OGRA was declared illegal and it was further ordered that all salaries, value of perquisites and benefits availed from the date of his appointment till the date of judgment shall be recovered by the Government from the beneficiary chairman.

8. In my humble opinion these judgments are distinguishable from the present case. In these cases the public representatives had filed false affidavits and have failed to disclose their status of dual nationality and therefore were subjected to disqualification under Articles 62 and 63 of the Constitution of Islamic Republic of Pakistan 1973 and Chairman OGRA was illegally and unlawfully appointed by the Government but in the present case the Hon'ble Judges have not done any thing illegal in drawing pensionary benefits in view of the judgment in the case of Ahmed Ali quoted supra and in the most of the cases the various High Courts had themselves asked the Hon'ble Judges to apply for pensionery benefits in view of the dictum quoted above. My lord has also observed that the case of Hon'ble Judges is at a lower pedestal then the case of the public legislators and Chairman OGRA as they had been working as public legislators and Chairman OGRA and drawing salary for their work whereas the Hon'ble Judges were not doing any work. I am of the view that the pensionery benefits are given after retirement not for working after retirement but for the services rendered during the post retirement period. It has held in Asad Ali's case quoted supra that if on the basis of enunciation of law by this Court certain innocent persons have acquired any right, those persons should be protected.

9. I am, therefore, of the considered view that our judgment declaring earlier judgment per incuriam should be given prospective effect and the pensionary benefits being paid to these Judges should be stopped forthwith but no direction should be given to them for returning the pensionery benefits they had acquired till the passing of this judgment.

Judge

Iqbal Hameedur Rahman, J: - I have the honour and privilege of going through a very lucid judgment expounded by my lord Justice Anwar Zaheer Jamali, J, as well as additional notes of my lords Justice Mian Saqib Nisar and Justice Muhammad Ather Saeed, JJ, wherein very persuasive and elaborate interpretation has been given with clarity in pursuance to our short order dated 11.04.2013, whereby the judgment rendered by this Court in the case of **Accountant-General, Sindh and others vs. Ahmed Ali U. Qureshi and others** (PLD 2008 SC 522) has been declared to be per-incuriam.

2. Both my lords, Justice Anwar Zaheer Jamali and Justice Mian Saqib Nisar, JJ, have in exhaustive manner dealt with the contentions raised by respondents-Judges and the law alongwith the interpretation of constitutional provisions extensively with clarity and reasoning supported by celebrated judgments and I fully concur with the reasoning and conclusions being propounded by my lords by holding the judgment in the case of **Accountant-General, Sindh and others vs. Ahmed Ali U. Qureshi and others** per-incuriam. There is no cavil to the same and I fully agree with the same, but with due reverence and humility to my lord Justice Anwar Zaheer Jamali, J, I find myself not in consonance with the view that the judgment should take retrospective effect rather, on this issue, I concur with my lords Justice Mian Saqib Nisar and Justice Muhammad Ather Saeed that the judgment should take prospective effect, and in this regard I am fully in accord with the reasons given by my lord Justice Mian Saqib Nisar, J, which reads as under: -

“13. Be that as it may, my reasons for giving this judgment prospective effect are:- majority of the Judges have not even approached this Court to seek the relief for the grant of pension, rather it is only in terms of paragraph No.34 of “the judgment” which provides “*In consequence to the above discussion, the Constitution Petitions Nos. 8/2000, 10/2001, 26/2003,*

*34/2003, 04/2004 and 26/2007, filed by the retired Judges of the High Courts are allowed and the petitioners/applicants in these petitions and miscellaneous applications, along with all other retired Judges of the High Courts, who are not party in the present proceedings, are held entitled to get pension and pensionary benefits with other privileges admissible to them in terms, of Article 205 of the Constitution read with P.O.No.8 of 2007 and Article 203-C of the Constitution read with paras 2 and 3 of Fifth Schedule and P.O. No.2 of 1993 and P.O.3 of 1997 from the date of their respective retirements, irrespective of their length of service as such Judges (emphasis supplied)” that they were contacted by the Registrar of the respective High Courts (*as this is the stand taken by them and I have no reasons to disbelieve*) and they were offered the pension. Some of the beneficiaries of “the judgment” are the widows of the retired Judges. It is nobody’s case that they have practiced and played any fraud or committed some foul in gaining and procuring the pension, so as to disentitle them to retain such gain, on the known principle, that no one should be allowed to hold the premium of his wrong/fraud and/or retain ill gotten gains. Rather to the contrary they have received the monies under the judicial dispensation by the apex Court, which was considered as valid enunciation of law, till the present decision and the pension was paid and received by them in bona fide belief of the entitlement; none of the concerned, ever pointed out the **depravity** and the **vice** of “the judgment”, though “the judgment” was known at all the levels of the High Court(s) and also in other judicial circles, rather it was a **publicly known fact**, yet the verdict was left outstanding for a considerably long period, thereby allowing the Judges to derive benefit of “the judgment”; I am not persuaded that the Registrar of this Court or for that matter all the concerned, at all the levels, including the learned Members of this Bench, who graced the respective High Courts of the country as the Chief Justices were unaware of “the judgment”, but still no timely action was initiated to set the wrong law, right and the time was allowed to pass. If a wrong and an error has been committed in the declaration of law (*PLD 2008 SC 522*), the responsibility rests on this Court and it is fundamental rule of law and justice, that the act of the Court shall prejudice none; in my view this principle tilts in favour of the Judges, rather the **State**. Because on account of the lapse of considerable time, most of the Judges might have spent and consumed the amount received by them, as they are expected to have decent living after their retirement; the amount so received might have expended on the education and marriages of their children; the possibility that they might have acquired an*

abode to spend rest of their life to avoid dependency on their scion cannot be ruled out. This amount might have been utilized on their daily expense and sustenance and in the discharge of their other social and financial obligations. And if now the amount is ordered to be recovered from them they might have to sell their assets (*shelter*) and belongings. Those who have no assets or saving might be compelled and constrained to entreat others or borrow which would definitely not behove with their status and position as the retired Judges; baring few, most of them are of old age and I am not sure they have the ability and capacity, at such an advance age to generate the requisite amount for the refund. Enforcing the refund of the amount upon them may cause innumerable predicament for them and may lead to a very pathetic and a ludicrous situation for them. And all those who have once graced the superior judiciary, might in this scenario be rendered destitute and precarious and deprived of even a modest life and living in future. But for the commission of no wrong, fraud, foul and fault on their part. Rather as stated earlier an error and mistake perpetrated by this Court. Therefore, I am of the considered view that the present judgment be given prospective effect."

3. I, therefore, consider the judgment Accountant-General, Sindh (supra) to be per incuriam, which should be given prospective effect and the pensionary benefits being paid to the Judges should be discontinued with effect from passing of the judgment and order by this Court, but no direction for the recovery of pensionary benefits and emoluments already availed by them can be given, as the same are undoubtedly not obtained by them on account of any commission of wrong, fraud or fault on their part rather the same have been availed on account of a mistaken judgment by this Court. As such, the instant judgment and order cannot be given retrospective effect.

Judge.