IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
Mr. Justice Mohammad Moosa Khan Leghari
Mr. Justice Syed Sakhi Hussain Bukhari
Mr. Justice Sheikh Hakim Ali

CIVIL PETITION NOS. 778-779 of 2008

(On appeal from the judgment/order dated 23.6.2008 of the Lahore High Court, Lahore, passed in W.P. Nos.6468 and 6469 of 2008)

Federation of Pakistan — Petitioner in all cases

Versus

Mian Muhammad Nawaz Sharif and others — Respondents

For the petitioners: Agha Tariq Mehmood, DAG
a/w Ch. Arshad Ali, AOR

On Court Call: Sardar Latif Khan Khosa, Attorney General for Pakistan

For respondents1-5: Nemo

For respondent-6: Sahibzada Ahmed Raza Khan Qasuri, Sr. ASC
Dr. Mohyuddin Qazi, ASC

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CMAs 63 AND 1674 /2008 in CP NO.NIL/2008

Shakeel Baig — Petitioner

Versus

Noor Ellahi and others — Respondents

For the petitioner: Mr. A. K. Dogar, Sr. ASC
Mr. Arshad Ali Chaudhry, AOR

For respondent No.1: Sahibzada Ahmed Raza Khan Qasuri, Sr. ASC
Dr. Mohyuddin Qazi, ASC

For respondents 2 to 5: Nemo.

For respondent No.6: Agha Tariq Mahmood, DAG

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CMAs 64 AND 1675/2008 in CP No. Nil/2008

Mehr Zafar Iqbal — Petitioner

Versus

Syed Khurram Shah and others — Respondents

For the petitioner: Mr. Muhammad Akram Sheikh, Sr. ASC
Mr. Arshad Ali Chaudhry, AOR

For respondent No.1: Sahibzada Ahmed Raza Khan Qasuri, Sr. ASC

For respondents 2 to 5: Nemo.

For respondent No.6: Agha Tariq Mahmood, DAG

Dates of hearing: 6, 14, 15, 19 to 22, 27 to 30 January, 2nd to 4th, 9th to 12th, 16th to 20th, 23 to 25th February 2009.

JUDGMENT

SHEIKH HAKIM ALI, J.- To contest a seat of National Assembly, in the By-election for the constituency of NA 123, Lahore-VI, to be held on 26.6.2008, Mian Muhammad Nawaz Sharif had filed Nomination Papers, out of which one was proposed by Mehr Zafar Iqbal and it was seconded by Shakeel Baig. Noor Ellahi, respondent No.6 and Mian Ikhlaq Ahmed alias Guddu, were the contestants of that election from that constituency. Nomination papers were submitted before the Returning Officer, who took up the task of scrutiny of these nomination papers. Nomination paper of Mian Muhammad Nawaz Sharif, the candidate was accepted on 15.5.2008, although Noor Ellahi and Mian Ikhlaq Ahmed alias Guddu, the opposing candidates had objected to the acceptance of this nomination paper of Mian Muhammad Nawaz Sharif. The grounds

pleaded for rejection of nomination papers of Mian Muhammad Nawaz Sharif can be summarized in the following form: -

(i) Mian Muhammad Nawaz Sharif was convicted by Anti-Terrorism Court No.I, Karachi, on 30.10.2000 in Special Case No.385 of 1999 under section 402-B of the PPC read with section 7 of the Anti Terrorism Act, 1997, which conviction was also upheld by the learned appellate court (High Court of Sindh vide judgment reported in ***PLD 2002 Karachi 152 (Muhammad Nawaz Sharif v. The State)***. In the aforesaid case Mian Muhammad Nawaz Sharif was sentenced to life imprisonment and was imposed a fine of Rs.5,00,000/-, in default whereof he was to further undergo 5 years imprisonment, on the first count and similar sentence on the second;

(ii) Mian Muhammad Nawaz Sharif was also convicted and sentenced by learned Accountability Court, Attock Fort, in Reference No.2 of 2000 on 22.7.2000, under section 10 read with section 9-A(V) of the NAB Ordinance. He was sentenced to 14 years R.I. and fine of Rs.20 million. In case of non-payment of fine, he was to suffer R.I. for further imprisonment of three years. He was also declared disqualified for 21 years seeking from being elected, chosen, appointed as member or representative of any public office or any authority of the Local Government of Pakistan;

(iii) Under Article 45 of the Constitution of the Islamic Republic of Pakistan,1973, (which would be noted as the "Constitution hereinafter in the judgment) although sentences were pardoned by the President of Pakistan yet conviction was still intact and effective and having not been set aside by any competent higher/appellate court, conviction and disqualification would remain in existence.

(iv) Respondent No.1, Mian Muhammad Nawaz Sharif was not a sagacious, righteous and non-profligate and honest and ameen person, because he was convicted by the learned Accountability Court, Attock Fort under section 9-A(V) in Reference No.2 of 2000 dated 22.7.2000 and under section 10 of the NAB Ordinance, 1999 for dishonesty, corruption and corrupt practices, misappropriation of public funds and misuse/abuse of authority, etc.

(v) Respondent No.1 is publicly propagating his biased opinion, and acting in a manner, prejudicial to the integrity of the Judiciary of Pakistan and defaming and bringing into ridicule the judiciary as well as the Armed Forces of Pakistan.

(vi) In his application addressed to the Chief Election Commissioner of Pakistan dated 7.12.2007, against the rejection of his nomination papers from NA-120, in the General Election, held on 18.2.2008, he had clearly mentioned in that application that the Judges of the High Court who had taken oath under the PCO, and whose status as such was seriously flawed, he was not acknowledging the appointment of aforesaid judges. He was also maligning the Hon'ble Judges, who had taken oath under the Constitution and undermining their authority and integrity, and thereby trying to divide the judiciary.

(vii) Respondent No.1 after conviction, in order to avoid criminal liabilities for his misdeeds and heinous crimes, malafidely and through deceitful means entered into a compromise, for agreeing to 10 years exile in exchange of his release, which agreement was firstly kept on denying with regard to its period of 10 years but when the document was placed before the Hon'ble Supreme Court of Pakistan and a public press conference was held by Mr. Saad Al-Hariri, a son

of former Lebanese Prime Minister Rafique Hariri and the Saudi Intelligence Chief, Mian Muhammad Nawaz Sharif admitted the execution and the exile deal, thus he was disqualified from being elected, as he had committed non-fulfillment of obligation, in breach of that agreement, which act of his was against the Injunctions of Islam which required a person to fulfill all his obligations.

(viii) Mian Muhammad Nawaz Sharif was a defaulter of consortium of National Bank of Pakistan, Habib Bank Limited, United Bank Limited, Agricultural Development Bank of Pakistan, Muslim Commercial Bank, PICIC, Bank of Punjab and the first Punjab Mudarba and cases for recovery of loans were pending before the Lahore High Court, Lahore. It was further alleged that he was disqualified for having embezzled millions of valuable public money belonging to the poor citizens of Pakistan. He had committed the breach of contract and was not entitled to reap the fruits of his deceitful means and retain ill-gotten gains.

(ix) Nomination papers of respondent No.1 were even otherwise liable to be rejected as having been filed in complete disregard of law and containing incorrect declaration.

(x) Earlier nomination papers filed by Mian Muhammad Nawaz Sharif for the seat of NA-120 in the present General Elections were rejected by the Returning Officer, against which no appeal was filed by him, so, it had attained finality and respondent No.1 could not contest the same election in its by-election, on the principle of constructive resjudicata and estoppel.

(xi) By-election being in continuation of General Elections, rejection of nomination paper in the General Elections

having attained finality, the present nomination in this by-election was liable to be rejected.

2. Noor Ellahi had submitted a hand-written application in the shape of objections, against the nomination papers of Mian Muhammad Nawaz Sharif before the Returning Officer on 13.5.2008 alongwith affidavit.

3. Many other grounds were allegedly, as per learned counsel raised before the Returning Officer. But the Returning Officer had accepted the nomination papers of Mian Muhammad Nawaz Sharif. So, Mian Muhammad Ikhlaq Ahmed alias Guddu filed Election appeal No.6-A of 2008, before the learned Election Tribunal, Lahore consisting of two learned judges of High Court on 24.5.2008. When notices were issued to respondent in that appeal for 27.5.2008, an application under Order I Rule 10 of the CPC was filed by Noor Ellahi seeking his impleadment in aforementioned appeal but on that date, Mian Muhammad Ikhlaq Ahmed alias Guddu, withdrew his appeal allegedly due to political pressure. In these circumstances the learned Election Tribunal directed Noor Ellahi to file an independent appeal, if so desired, which was filed by him and notices were issued to respondents for appearance in that appeal. Syed Khurrum Shah filed a petition under section 14 subsection (5-A) of the Representation of the People Act, 1976 (hereinafter referred to as the “Act”), against Mian Muhammad Nawaz Sharif in respect of his disqualifications, before the learned Election Tribunal. It is noteworthy that Mian Muhammad Nawaz Sharif did not appear in the aforesaid Election

Appeal and petition and so was proceeded exparte. On 30.5.2008, Mr. Justice Muhammad Akram Qureshi, one of the learned Member of the Election Tribunal, accepted election appeal No.26-A of 2008 and Mian Muhammad Nawaz Sharif was declared to be disqualified to contest the election as his nomination papers were rejected. But the other learned member, Mr. Justice Hafiz Tariq Naseem, however, dismissed the appeal against Mian Muhammad Nawaz Sharif upholding the order of Returning Officer.

4. It is material to mention that Noor Ellahi had filed appeal/application under section 14(5) read with subsection (5-A) of the Act read with Rule 5 of Representation of the People (Conduct of Election) Rules, 1977 against the order dated 15.5.2008 passed by Returning Officer-respondent No.2.

5. As there was a split decision between the learned members of the Election Tribunal, so the matter was referred to Chief Election Commissioner of Pakistan, upon which the Chief Election Commissioner passed the following order on 1.6.2008, which is reproduced hereinbelow: -

> "The proposal highlighted in para-18/ante is approved as it is squarely in line with the mandatory provision of section 14(6) of the Representation of the People Act, 1976 that an appeal not disposed of within the period specified in the Election Schedule shall be deemed to have been rejected. It is scarcely necessary to mention that according to the Election Schedule notified on 7th May, 2008 the last date for deciding appeals against the acceptance or rejection of Nomination Papers by the appellate Tribunal was 31st May, 2008".

6. Aggrieved from this order, and all the other orders, Writ Petition No.6468 of 2008 was filed by Noor Ellahi, the candidate, while Writ Petition No.6469 of 2008 was filed by Syed Khurrum

Shah, against Mian Muhammad Nawaz Sharif in the Lahore High Court, Lahore as his application under section 14(5-A) of the Act, was not decided by the learned Election Tribunal.

7. During the pendency of both these writ petitions, a flood of applications under Order I Rule 10 of the CPC were filed before the Lahore High Court, Lahore, the details of which are as under: -

In Writ Petition No.6468 of 2008: -

C.M. No.1305 of 2008 by Shakeel Baig,

C.M. No.1306 of 2008 by Mr. A.K. Dogar, learned Advocate, on his own account.

C.M. No.1307 of 2008 by Mujtaba Shaju-ur-Rehman, Secretary General, City Lahore PML (N),

C.M. No.1308 of 2008 by Marghoob Ahmed, President, PML (N), Lahore,

C.M. No.1309 of 2008 by Mehr Zafar Iqbal, the proposer,

C.M. No.1310 of 2008 by Khawaja Mehmood, President, PML (N), Lawyers Forum.

C.M. No.1317 of 2008 by Judicial Activist Penal of Pakistan.

While in Writ Petition No.6469 of 2008: -

C.M. No.1311 of 2008 by Shakeel Baig,

C.M. No.1312 of 2008 by Mr. A.K. Dogar, learned Advocate on his own,

C.M. No.1318 of 2008 by Marghoob Ahmed, President PML (N), Lahore,

C.M. No.1314 of 2008 by Mujtaba Shuja-ur-Rehman, Secretary General, City Lahore, PML (N).

C.M. 1315 of 2008 by Khawaja Mehmood President PML (N) Lawyers Wing.

8. Upon all these applications, learned Full Bench of Lahore High Court, Lahore, passed orders dismissing all applications

holding that the applicants had no locus standi to file these applications. This order was announced on 20.6.2008.

9. Aggrieved from that order dated 20.6.2008, Mehr Zafar Iqbal had filed Civil Petition for Leave to Appeal No.Nil of 2008 in this Court alongwith a CM for grant of a period, to produce the impugned order, but on 25.6.2008 the C.M. was got dismissed as not pressed.

10. Before the learned Full Bench which was seized of main writ petitions and which were still not decided finally, C.M. Nos.1379 of 2008, CM 1380, 1382 to 1385 of 2008 (review petitions against order dated 20.6.2008) were filed and C.M. No.1381 of 2008 by one Wali Muhammad seeking permission to be impleaded as party to the writ petition was filed. All the CMs alongwith C.M. Nos.1305 to 1310 and 1317 of 2008 were dismissed. Learned Full Bench of the Lahore High Court vide its judgment/order dated 23.6.2008 disqualified respondent No.1 (Mian Muhammad Nawaz Sharif) for 21 years on the basis of judgment dated 22.7.2000 of the Accountability Court; for scandalizing, abusing, disobeying and ridiculing the judiciary of Pakistan, and having sworn a false affidavit attached with the nomination papers. Consequently, order of Returning Officer dated 15.5.2008, order dated 31.5.2008 of the learned Election Tribunal and observation/order dated 1.6.2008 of the learned Chief Election Commissioner were set aside.

11. Aggrieved from that judgment/order dated 23.6.2008, passed by learned Full Bench of Lahore High Court, Lahore, Federation of Pakistan filed two CPLAs No.778 of 2008 and 779

of 2008 in this Court. During the pendency of these petitions C.M. No.1914 of 2008 by Manzoor Ahmed Bhatti, and C.M. No.408 of 2009, by Shahid Orakzai, were filed for impleadment.

12. It is noteworthy that both learned counsel, Mr. A.K. Dogar, and Mr. Muhammad Akram Sheikh had filed applications on their own account, for impleadment before the learned Full Bench of Lahore High Court but those were dismissed by that Court. At present, they are appearing as counsel for Mehr Zafar Iqbal and Shakeel Baig, in this Court.

13. The gist of arguments addressed by all the learned counsel, requiring verdict from this Court is being formulated in the following form: -

(1) Recusal;
(2) PCO Judges;
(3) Bias;
(4) Locus standi of petitioners;
(5) Application under Order I Rule 10 CPC
(6) Constitution of Larger Bench and hearing from Selective Judges;
(7) Qualification and Disqualification:-
    (i) Convictions;
    (ii) Twenty One Years Disqualification;
    (iii) Breached covenants;
    (iv) Unpaid Loans;
    (v) Bank suits;
    (vi) Propagating opinion against judiciary;
    (vii) Pending contempt case – false declaration
    (viii) Miscellaneous Application to C.E.C.
    (ix) Unrefuted allegations.
(8) Interpretation of Section 14(5) and (5-A) of the Act;

(9) Subsection (6) of Section 14 of the Act.

(10) Jurisdiction of the High Court;

(1) RECUSAL

14. Before embarking upon the discussion of factual and legal plane of the case, it is essential to note that this highest Court had made multifarious efforts to inform and serve Mian Muhammad Nawaz Sharif, the candidate, with regard to the filing of this case. Inspite of being apprised of the case, he has opted not to appear and defend, apparently, perhaps due to reasons best known to him towards this Court, which would be later discussed in detail in this judgment at its appropriate place.

15. It is interesting to note that Mian Muhammad Nawaz Sharif, in whole of the proceedings during the hearing of election petitions, petition filed under section 14(5-A) of the Act, Writ Petitions in the High Court and CPLAs, thereafter in this Court has not appeared to defend his qualifications and disqualifications, allegations and incriminating attributions, levelled against him by his contesting candidates in the election. From the above noted narration, an inference is easily deducible that Mian Muhammad Nawaz Sharif has either got nothing to say in his defence or is shy of and nervous to face the case and its consequence or does not want to become a candidate, after the submission of nomination papers in the by-election, otherwise he would have contested the stigma of disqualification ascribed and attributed to him.

16. After the above narration of facts and arguments, we have found that Shakeel Baig, the proposer and Mehr Zafar Iqbal, the seconder have filed separate civil petitions for leave to appeal

while Federation of Pakistan has also filed two independent civil petitions for leave to appeal against the impugned judgment dated 23.6.2008 passed by the Lahore High Court, Lahore. The Registrar office of this Court has not registered and allocated any number to both these civil petitions of the proposer and seconder. Meaning thereby that these civil petitions of Shakeel Baig and Mehr Zafar Iqbal were not yet registered when two separate applications by these petitioners were filed, one, praying for entertainment of these civil petitions and the other for Recusal. Instead of pressing for order to be passed by this Court, for registration of their Civil Petitions, Shakeel Baig and Mehr Zafar Iqbal, petitioners have much insisted upon the acceptance of their applications for recusal. CMA No.63 of 2009 was filed by Mehr Zafar Iqbal while CMA No.64/2009 was presented in the office by Shakeel Baig. In both these petitions which are verbatim copy of each other's petition, it was asserted that on 3rd of November 2007, Martial Law, in the shape of emergency was imposed by General Pervez Musharraf (now retired) who had suspended the Constitution and the Judges sitting in the present Bench had taken oath under the Oath of Office (Judges) Order 2007, while many other Hon'ble Judges of this Court refused to take oath under the said Order, due to which they had ceased to hold their said respective offices, with the consequence that new appointments to fill in the vacancies were made. It was further asserted that petitioner as well as respondent No.1 (Mian Muhammad Nawaz Sharif) who was a Quaid of a major political party of the country Pakistan Muslim League (Nawaz Group) had

strong reservations to that act of General Pervez Musharraf. The Judges, who have been appointed aftermath of the constitutional deviation are required an adjudication regarding their holding of the office as of Judge in the present proceedings, therefore, necessity of constitution of a larger Bench of this Court was essential. It was further alleged that there was possibility that some prejudice might be occasioned in the case from the present Judges, who had taken oath under the PCO. Founding their case, upon legal Maxim, Nemo debet esse judex in propria sua causa (no man can be a judge in his own cause) it has been argued that bias was consequently to flow and result in their decision. In the last, it was prayed that the present sitting Judges might recuse themselves from these proceedings, by transmitting the case to the Chief Justice for Constitution of the Appropriate Bench (words were notable). When asked as to how the present sitting Judges would feel prejudice against the present petitioners or their leader when all the present sitting Judges of this apex Court have already taken oath under the present Constitution of the Islamic Republic of Pakistan, 1973, and they are constitutional judges, and more so, particularly after the full Court judgment of this Court by seven judges, as reported in PLD 2008 S.C. 178 (Tikka Iqbal Muhammad v. Pervez Musharraf) and affirmed by 17 judges in review, how then the present Judges can be called PCO Judges? Mr. A.K. Dogar, learned counsel was also put a query from the Bench as to whom these petitioners were considering the judges of “Appropriate Bench”, learned counsel replied that four Judges who were deposed in consequence of Proclamation of Emergency

and they were deposed thereafter but had taken oath under the present Constitution might be considered the Judges appropriate for the Bench.

17. This argument of petitioners' learned counsel has been found by us to be malicious and vicious, having no legs to stand in the eye of law of the land. The petitioners and their counsel have in fact tried to create division amongst the Hon'ble Judges of this apex Court into two factions of PCO and non-PCO Judges, although at present, all the sitting Judges are those Judges who have taken oath under the present Constitution, and no discrimination or distinction on this account can be made or created amongst them by these petitioners.

18. In fact, it is a conspiracy of highest and gravest nature which has been hatched up by some vested interests, to destroy the whole judicial fabric of this highest judicial institution of this country, for their own interest and purpose. It is being bred so as to get appointed judges of their own choice and interest, in the offices of judges of superior courts, by eliminating out the present judges even whose impartiality and honesty might be above board. This rule of politics, to divide and rule is being played and brought into this realm of judicial institution, so as to cause disturbance into peaceful, harmonious working and smooth running of this Institution, by raising prejudices and differences amongst the Judges, by procreating two factions in the judiciary, which is most harmful and sinful act, plea, stand and stance of the petitioners. All the Judges sitting in this Court are equal, respectful and revered and brother Judges, amongst whom no

distinction and discrimination of belonging to one or the other group can be allowed and permitted by any of the Judges of this Court to be made and raised at this stage and thereafter. All the Judges having taken oath under the present Constitution, a few of them cannot be given preference by the petitioners or their counsel over or against the others. On this basis, unity amongst the Judges has been attempted to be tarnished and torn into pieces through these baseless, frivolous and unfounded premises particularly when it has already been ruled out by the Seven Hon'ble Judges of this Court in Tikka Iqbal Muhammad Khan's case (PLD 2008 S.C. 178) and thereafter by 17 Judges of this Court in review jurisdiction, and the actions taken against the judiciary are to be considered a past and closed transaction. It is worth-mentioning that judgment in Tikka Iqbal Muhammad Khan's case was never disputed or challenged by these petitioners, through any review petition. It does not now lie in their mouth through these petitions to criticize the above noted judgment of Tikka Iqbal Muhammad Khan case, in collateral proceedings, which have got no nexus to the merits of this case, in respect of question of qualification and disqualification of Mian Muhammad Nawaz Sharif. Having lost the proper opportunity of disputing the validity and vires of that judgment of Tikka Iqbal Muhammad case (ibid), now the petitioners cannot be permitted to dispute or impugn the vires of that judgment, especially through these applications. The petitioners and their learned counsel have attempted to destroy the safe sailing of the ship of this great judicial institution. They have tried to make a hole in the ship so

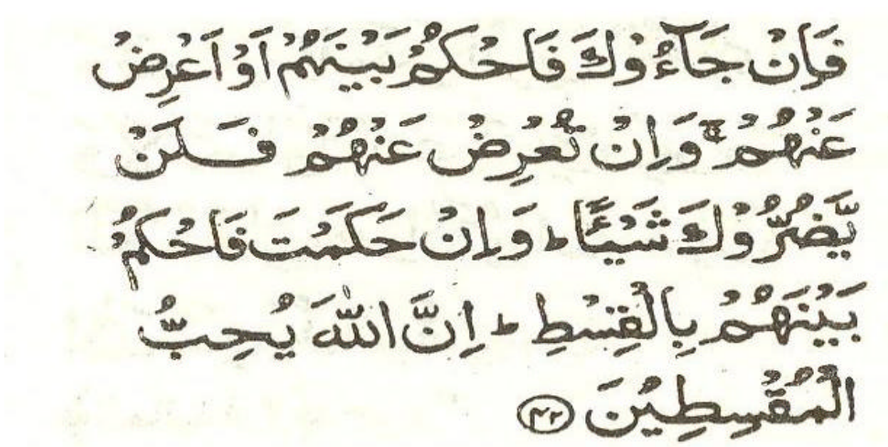
as to let it sink. The obnoxious plea raised and stand taken requires to be deprecated by all the prudent men, women including all stake holders interested to uphold the dignity and independence of this judicial institution and by all the citizens of Pakistan. It is the contempt of serious nature which cannot be forgiven/pardoned by this Court. The petitioners who have sworn affidavits by instructing their learned counsel through the above arguments, addressed by their counsel, do not deserve any leniency shown in the matter of this contumacious and destructive arguments and the stand taken of bifurcating this institution into two water tight compartments.

19. Resultantly the petitioners, namely, Mehr Zafar Iqbal and Shakeel Baig, both are mulcted with cost of Rs.1,00,000/- each to be paid/deposited in the office of this Court, within 15 days or to suffer simple imprisonment of three months.

20. While the learned counsel who have addressed these arguments without considering the repercussions on the judicial system and institution, on the basis of instructions although imparted to them by their clients, yet they cannot be excused on this plea because it is their primary and prime duty to uphold the dignity, unity and highest respectful image of this judicial institution. This art of advocacy also cannot be approved and appreciated. This Court has noticed with dismay the manner and method of arguments addressed to this Court. As we have got highest regard to the exalted legal profession and to the legal fraternity in general, so we have restricted ourselves to the extent of warning, considering it to be sufficient for them with remarks

to be careful in future and not to deviate from the path of augmenting the respect of the judges and the institution, and not to be entrapped, upon the direction of a client, to address the Court in an abusive language or with the pleas and position harmful to the judicial institutions although that may satisfy the ego of their clientele. It is the cardinal principle that the remarks which are creative of an atmosphere of distrust upon the judges or on the judicial institution, whether these may be false or true are bound to tumble down the sanctified image of this institution, of requiring highest regard and respect. The mutilation of the face of this institution would loosen the faith, trust and confidence in the mind of the litigants which would be harmful not for this institution but for the legal fraternity as well, as a whole and the destructive consequences would be borne by all the important segments, of the society in future.

21. Before taking into consideration the law of land and judgments of foreign jurisdiction, we feel dignified to refer and rely upon the Quranic Verses. In Surah Al-Ma'idah (6th Para) Verse No.42, which has very beautifully laid down the rule of recusal. The text is: -


فَإِنْ جَآءُوكَ فَاحْكُمْ بَيْنَهُمْ أَوْ أَعْرِضْ
عَنْهُمْ ۖ وَإِنْ تُعْرِضْ عَنْهُمْ فَلَنْ
يَضُرُّوكَ شَيْـًٔا ۖ وَإِنْ حَكَمْتَ فَاحْكُمْ
بَيْنَهُمْ بِالْقِسْطِ ۖ إِنَّ اللَّهَ يُحِبُّ
الْمُقْسِطِينَ ﴿٤٢﴾

The English translation of above Verse of Surah Al-Maidah by Muhammad Farooq-i-Azam Malik, of the Institute of Islamic Knowledge Houston, Texus, U.S.A and translation by M. Asad published by Daral Andaulus, Gibraltar is as under: -

> "Therefore, if they come to you with their cases, you may judge between them or refuse to do so. Even if you refuse, they will not be able to harm you the least, but if you do act as a judge, judge between them with fairness, for Allah loves those who judge with fairness."
>
> "Hence, if they come to thee (for judgment), thou mayest either judge between them or leave them alone; for, if thou leave them alone, they cannot harm thee in any way. But if thou dost judge, judge between them with equity: verily, God knows those who act equitably".

22. From the above Quranic Verse, it is the will, wish and choice of the judge to accept the case for imparting justice between the parties or to recuse himself from adjudicating the dispute.

23. From this verse, a litigant has not been granted a right to ask the judge to recuse himself. In a given case, it is the option of the judge to entertain it or to decline its admission with himself to administer justice between the parties of that case. If a litigant does not feel justice to be done from a judge, he must not place his case before the Judge. When the case is placed before a judge by a litigant, thereafter the litigant cannot ask the judge to recuse himself. The presentation of a case for decision before a judge presupposes that he believes the judge able in all respect to deliver justice. It would be contemptuous act of a litigant to present his case for adjudication and then ask the judge to decline to decide it. When a case is proffered before a judge, in

that event, the right to ask the judge to recuse himself is lost by the litigant because he has already accepted his authority, valid appointment, competency to administer justice, and with the belief of his independence. He is presupposed to have believed the judge to be a judge a person of integrity.

24. Before any finding is rendered upon this subject, it is necessary to consider the definition of Recusal and its applicability to the facts of this case.

The Recusal has been defined in Black's Law Dictionary, (Seventh Edition) in column IInd at page 1281 as: -

> "Removal of oneself as judge or policy-maker in a particular manner, esp. because of a conflict of interest".

While "recusation" has been given the meaning of: -

> "1. Civil Law. An objection, exception, or appeal; esp., an objection alleging a judge's prejudice or conflict of interest.
> 2. Recusal"

25. It is important to note that recusal has not been defined with the concept of ineligibility or in-competency of a judge to dispense justice. In other words, the Judge is considered competent and no question of validity or constitutionality of his appointment is in dispute. It is only the conflict of interest or prejudices, which may arise and hamper the free and fair delivery of justice for which recusal is being sought.

26. Seen from another angle, no prudent man can ask a person to decide the validity and constitutionality of his own appointment to an office, post or on a seat occupied by him, as it shall be a decision not appealing to reason and acceptable to the person seeking such decision, in case it is decided by that incumbent in

his own favour. Accordingly, recusal being prayed on the ground of PCO Judges being invalidly and unconstitutionally appointed, is not maintainable and is a fallacious and vicious prayer itself.

27. From the definition, even taken from the Black's Law Dictionary, it is apparent that it is the decision of the judge to recuse himself, when he feels that there is possibility of conflict of interest or prejudice which would be caused to a party of the case in his participation or in the decision of that case. It is the decision of the judge to gauge as to there is conflict of interest or not, and that by making decision in a lis, his inclination or bent of mind would not take him to such an extent, as to be on one side and that it would be creative of such a mind, so as to cause imbalance in the scale of justice, thereby prejudicing the case of a party without giving fair decision on it.

28. Supreme Court being the apex Court of the judicial hierarchy of the country, there being no other court except the Court of Almighty Allah, how in such a situation, a litigant can ask the Supreme Court to avoid the delivery of judgment after having offered his lis, for doing the justice to it?

CASE LAW FROM PAKISTAN

In PLD 1989 S.C. 689 at page 741(w) (Federation of Pakistan v. Muhammad Akram Sheikh) it was held, "It is for the Judges concerned (and not the rest of the Judges in the Bench) to decide in their judicious sagacity and wisdom whether they may participate in the proceedings in question".

CASE LAW FROM FOREIGN JURISDICTION

> In Public Utilities Commission v. Pollak (343 us 451 + 95 L ed 1068), "it was held that when the judges believed that some unconscious feelings might operate in the ultimate judgment, the judges might recuse themselves".

In R v. Gough (1993) 2 All ER it was observed: -

> "it is the feeling of the judge to judge as to whether his feelings would be so strongly engaged as to victimize the party in making unfairly in the decision of the controversy due to some prejudice. In such a situation, the judge may recuse himself and not to participate in the judicial judgments."

(2) PCO JUDGES

29. This term has been invented when a Provisional Constitution Order was enforced by a brutal force, by deviating from constitutional provisions and taking extra constitutional steps. We are not concerned at this stage as to the reasons, grounds and causes, which had taken place on 3rd of November 2007, particularly in the presence of Tikka Muhammad Iqbal Khan's case. This case has now closed the chapter of this unhappy event of past history and has made an attempt to save the judicial institutions of the country to take steps forward, instead of beating about the bush. But we have taken this aspect with another angle in this case, which has necessitated this discourse and is required to be noted by all the concerned stake-holders. The proclamation of emergency, enforcement of Provisional Constitution Order I of 2007 and the issuance of an order in the form of the Oath of Office (Judges) Order, 2007, were not enforced upon the advice of the PCO Judges. No advice was

delivered by the PCO Judges and no assistance was provided by these Judges to the military force to do such acts. The above noted steps were admittedly taken by a military General which were extra constitutional. Due to these extra constitutional steps, a vacuum was created in the working of judicial functions alongwith judiciary itself. After these steps were taken, some of the Judges were invited to take oath, out of whom a small negligible number of Judges had declined to take oath, while the other Judges were not invited and offered the oath. The Judges who were offered and invited to take oath were in an enigma as to take or to refuse the oath. In case of refusal, the judicial institution was to suffer greatest harm and its fabric which was woven in a period of more than 150 years, was to collapse completely. In the event of refusal to take the oath, it was expected that this judicial institution might be occupied by such persons who had no knowledge and expertise of delivering justice. There were many other considerations also in their mind. To save the judicial institution, to create hindrance and to prevent the spreading of chaos in the country, for the better interest of this institution and for the whole betterment of the citizens of Pakistan, it was decided that the offer of oath might not be declined. With this aim and purpose, and to put the derailed wagons on the track of the rails (as stated by Mr. Ahmed Raza Khan Kasuri), sincere, innocent and serious thoughts were given to the problem by majority of judges, who had thereafter decided to take oath so as to save the interest of country and the Constitution from being destroyed further. These actions and the

others were to be appreciated rather than to be deprecated. As pointed out by Mr. Ahmed Raza Kasuri, it were the efforts of these PCO Judges who had tamed the jungle loin by their wisdom. The judges, who are now being named as PCO Judges are in fact, the saviour of judicial institution and system, the main organ of the State and the interest of the litigant public at large. The citizen of Pakistan have been rescued from being pushed into chaotic environmental situation where law of jungle was to prevail in case these judges had not used their gumption of accepting the offer. It may be noted that when the guns are roaring, force of pen is silent, when guns are silent, voice of pen is brightened. The use of pen in given circumstances, without wisdom is nothing but destruction.

30. Let it be noted that these P.C.O. Judges had never been a hurdle or obstacle in the campaign launched for the restoration of those brother judges who either declined to take oath or were not administered the same.

31. The example has been set up by these PCO Judges, when they had welcomed those Hon'ble judges to take their previous positions in the judicial system. It was, therefore, a matter of two different thoughts to achieve the same goal of saving the judicial institution and system, for which no one can be blamed. It is a very sorrowful state of affair that a learned counsel of such a stature, namely Mr. A.K. Dogar has uttered these words of "faithless, law breakers and dishonest" persons. Before arguing the case on this premises, Mr. A.K. Dogar must have given thought, time and again to this aspect of the case and should not

have been swayed by the street slogans and should have avoided to utter these words even upon the instructions of his cliental, particularly when the transitional period was got immediately wrapped up by the efforts of these P.C.O. Judges from General Pervaiz Musharraf. If one set of judges had stood up for upholding the flag of independence of judiciary, the other was defending the fort of judiciary from being intruded from the aliens to this complexity of judicial system, although task was different but the goal was one.

32. The stand and the plea taken by Mr. A.K. Dogar although upon the instructions of his clientele, was destructive of the sanctity of this judicial institution. He was unmindful that this plea was being raised when the judiciary and its judicial institutions were working in a complete harmony, unity and delivering justice with its purity of thoughts, without bias and without prejudice to any one. The smooth working of the judicial functions of the judiciary was also disturbed by Mr. A.K. Dogar upon raising this plea of enormously destructive nature regarding this judicial institution. It may be remembered that this magnificent building of justice is constructed upon the belief of its honesty and sanctity. If this image is damaged, then no one will be ready to accept the judgments which are delivered by these judicial institutions. Anarchy and chaos would prevail within the citizens of the country. When judgments of courts are not accepted, submission and surrender to it is not performed, in that event, street and mob justice is invited, to become the rule of the day. Judgments require yielding of one's will and wish, without

murmuring and grumbling. If any party is grouched, it may approach to the higher court in accordance with law, and not to become judge himself so as to drag the judgment in the street for mob and street justice. Judicial institutions, judges and their judgments, require veneration and obeisance. If a judge is corrupt, his removal can be attempted through lawful means and manners as prescribed by law. But to malign judges, to impute dishonesty and to utter allegation of their being faithless, and law breakers are the words of gravest contempt. The use of derogatory language for the judiciary is a conspiracy to destroy the sacred temple of justice, which would tumble down its structure and there would be none in that event, to reconstruct it.

33. Learned Advocates and the legal fraternity in general is, in fact, the custodian and preserver of the dignity, independence and sanctity of this judicial institution. It must be remembered that their own respect and reverence is attached with the sanctity and reverence of this judicial institution. If a fraction of the legal fraternity is out to disfigure the face of this scared institution or to annihilate its image of impartiality, sacredness, sanctity and independence, none would be there to save them and this institution.

34. With these words and sentences, we desire and expect that the learned Advocates appearing in the cases, would observe this direction in future, because they are officers of the court and are saddled with the duty of upholding its dignity and independence.

(3) BIAS

35. During arguments of the case much stress has been laid by Mr. Muhammad Akram Sheikh and Mr. A.K. Dogar, learned counsel for Mehr Zafar Iqbal and Shakeel Baig, that as there is every likelihood of bias in the mind to prevail in the decision of the instant case, therefore, the Judges of this Bench may decline to hear this case. The main reason which has been argued by the learned counsel is the apprehension in the mind of petitioners that the judges of this Bench consist of PCO judges and they had taken oath under the Provisional Constitution Order, 2007, and Oath of Office (Judges) Order, 2007, promulgated by Gen. Pervez Musharraf, the Chief of Army Staff, and Mian Muhammad Nawaz Sharif, the candidate, having announced support in favour of deposed judges, there was likelihood of existence of bias in the mind of PCO judges, as against Mian Muhammad Nawaz Sharif. The petitioners, therefore, as per learned counsel are feeling that the case would not be decided fairly and in their favour. According to Mr. Muhammad Akram Sheikh and Mr. A.K. Dogar, learned counsel, Imam Abu Hanifa (Rehmatullah Alaih) had declined to accept the office of the Judge, therefore, the present judges might follow that example. It is argued that as the Judges of this Court have delivered the judgment of PLD 2008 S.C. 178 on 30.11.2007 in Tikka Iqbal Muhammad Khan case, in their own favour, which is a void, non-existent and coram non judice judgment, therefore, as per legal maxim, Nemo debet esse judex in propria sua causa (that no person should be judge in his own

cause) it is a prohibited course for the present judges to hear this case, as the petitioners are apprehensive that justice would not be done by the present Judges of this Bench in their case. Mr. Muhammad Akram Sheikh has referred to the passage from a book of De Smith's Judicial Review, Sixth Edition, authored by the Rt., Hon. The Lord Woolf and others, which is reproduced as follows: -

> "by taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections, becomes a passionless thinking machine" is doubtless beyond achievement."
> "Common law (and sometimes statute) disqualifies a decision-maker from adjudicating whenever circumstances point to a real possibility that his decision may be predetermined in favour of one of the parties)"
> "The principle expressed in the maxim nemo iudex in sua causa (no one should be a judge in his own cause) refers not only to the fact that no one shall adjudicate his own cause; it also refers to the fact that no one should adjudicate a matter in which he has a conflicting interest."

36. Learned counsel has also referred passages from Halsbury's Laws of England/Administrative Law (Volume 1(1) (2001 Reissue)/4, Judicial Control with regard to rule of "direct personal interest and apparent bias". The following is the relevant passage from that text: -

> "first, where an adjudicator has either a direct pecuniary or proprietary interest in the outcome of the matter, or can otherwise by reason of a direct personal interest be regarded as being a party to the action, and second, where either by reason of a different form of interest or by reason of his conduct or behaviour there is a 'real danger' of bias on his part. In the former category an automatic, and irrebuttable, presumption of bias is raised, in the latter category the test for apparent bias is satisfied".

37. To support the above principles and rules, learned counsel has cited the cases of (i) *Metropolitan Properties v.*

Lannon (1968) 3 All. E.R. 304; (ii) Pinochet, in re – [1999] UKHL 1; (iii) Locabail (U.K.) Ltd. V. Bay Field Properties Ltd.- [2000] EWCA Civ 3004; (iv) Magill v. Porter – [2001] UKHL 67, (v) George Meerabux v. The Attorney General of Belize (Belize) – [2005] UKPC 12; (vi) AWG Group v. Morrison [2006] 1 All ER 967; [2006] EWCA Civ 6; and (vii) Gillies (AP) Secretary of State for Work and Pensions [2006] UKHL 2.

38. Learned counsel also has referred American Law on the subject from U.S. Code Collection§ 455 regarding Disqualification of justice, judge or magistrate judge. The relevant para of which is reproduced through the following passage: -

> "where a judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; in private practice he has served as lawyer in the matter in controversy; he has served in governmental employment or in such capacity participated as counsel, adviser or material witness; has financial interest individually or fiduciary; has got third degree relationship with such a person; was a party to the proceedings; was acting as lawyer; a material witness in the proceedings; or known by the judge to have an interest that could be substantially affected by the outcome of the proceedings."

39. These were the qualifications enumerated by the aforementioned U.S. Code Collection for disqualifying a judge, justice or judge magistrate.

40. He has also relied upon two cases from Indian jurisdiction reported in *AIR 1959 S.C.1376 (Gullapalli Negeswararao etc. v. The State of Andhra Pradesh and others) and AIR 1987 S.C. 2386 (Ranjit Thakur v. Union of India and others.* In the former judgment, it was held that "no man shall be a judge in his own cause; justice should not only be done but

manifestly and undoubtedly seem to be done; if a member of a judicial body is subject to a bias (whether financial or other) in favour of, or against, any party to a dispute, or is in such a position that a bias be assumed to exist, he ought not take part in the decision or sit on the tribunal". While in the latter judgment test of likelihood of bias was noted as follows: -

> "...tests of the likelihood of bias what is relevant is the reasonableness of the apprehension in that regard in the mind of the party. The proper approach for the Judge is not to look at his own mind and ask himself, however, honestly, "am I biased?" ; but to look at the mind of the party before him....." (underlining is provided by us)

Two more judgments on which the learned counsel has placed reliance are as follows: -

(i) *Bhajan Lal v. Jindal Strips Ltd. (1994 SCC (6) 19 JT 1994 (5) 254;*

(ii) *1994 SCALE (3) 703*

41. It was held in those judgments that in the case of non pecuniary bias, regard was to be had to the extent and nature of interest. It was observed in those cases that the judge had to satisfy himself to this fact that there was a real likelihood of bias. 'Real likelihood of bias' is how to be determined, the test was also provided in those judgments. It was found that "real likelihood" depended on the impression which the court would get from the circumstances in which the justices were sitting. Bias should be based on reasonable suspicion.

42. Learned counsel has also placed reliance upon the judgments pronounced by Pakistani Courts. In *Ghulam Rasul and*

others v. Crown (PLD 1951 F.C. 62) Federal Court observed as under: -

> "Nothing should be allowed to happen in a case which may give rise to a reasonable apprehension in the mind of an accused person that he would not or did not have a fair trial. It is essential that justice must not only be done but must manifestly be seen to be done".

43. And so the case of Federation of Pakistan vs. Muhammad Akram Sheikh (PLD 1989 S.C. 689), which judgment is a landmark judgment on the subject of principles, applicability and exceptions of Bias.

44. We have also found some observations in para 31 of that judgment which are beautifully worded and demonstrate the present scenario of our passions and feelings which are reproduced as follows: -

> "31. Courts are indeed a storm centre facing the panoply of human problems, crowded dockets and unrelenting work schedules. Justice Oliver Wendell Holmes said: "We are quiet here but it is the quiet of a storm centre".
>
> In Justice Benjamin Cardozo's memorable words, "the great tides and currents which engulf the rest of men, do not turn aside in their course, and pass judges by". We should only add that the judges must remain unruffled and calm in the midst of contending forces. To recall the words of Mr. Justice Frankfurter in Public Utilities Commission of the District of Columbia v. Franklin S. Pollak16; "The judicial process demands that a judge move within the framework of relevant legal rules and the covenanted modes of thought for ascertaining them. He must think dispassionately and submerge private feeling on every aspect of a case. There is a good deal of shallow talk that the judicial robe does not change the man within it. It does. The fact is that on the whole, judges do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self-discipline and that fortunate alchemy by which men are loyal to the obligation with which they are entrusted." With this we leave. (emphasis supplied by us)".

45. We have also been apprised of a judgment *Webb and Hay v. The Queen – (1994) 181 CLR 41, (1994) 68 ALJR 582 F.C.*

94/030 from the High Court of Australia. In that judgment proper test given was as follows: -

> "...the proper test is whether fair minded people might reasonably apprehend or suspect that the judge has prejudged or might prejudge the case....." (Underling provided by us).

46. Although the whole judgment of PLD 1989 S.C. 689 has beautifully assimilated the case law and principle governing bias and the guidance was provided in it as to when a judge was not to take part in the adjudication of a case, yet in the same judgment the circumstances for applicability of principle that "no man can be judge in his own cause" were also noted. In it, rule of exception due to necessity was also narrated. In that judgment, in the exception part, it was held that the judge was to decide as to whether the party was not resorting to a device with an ulterior motive, so as to prevent him (the judge) from sitting on the Bench while dealing in a particular case. It was also ruled that the decision of allegation of bias was the prerogative of the judges concerned to decide it in their judicial sagacity and wisdom as to sit or not to sit on the Bench.

47. Judgment in the case of Malik Asad Ali and others v. Federation of Pakistan (PLD 1998 S.C. 161) has also been cited by Mr. Muhammad Akram Sheikh, in which objection raised against some of the judges sitting on the Bench was that they had previously participated in other legal proceedings against the same person. But in the aforementioned judgment, it was also held as under: -

> "Mere apprehension in the mind of a litigant that he may not get justice such as is based on inferences drawn from circumstantial indications will not justify the raising of the plea. The facts adduced

> must be such that the conclusion of bias follow necessarily therefrom. On no weak ground can any person be permitted to attack the impartiality of the superior Court and consequently should the proof fail to satisfy the requisite standard, he may be found in contempt". (underlining is ours)

48. Learned counsel has referred to a judgment delivered in the case of *Asif Ali Zardari and another v. The State (PLD 2001 S.C. 568)* and has referred to the passage with regard to three different kinds of bias which can be found at page 592 of that judgment, which are summarized as " the direct connection with the litigant of the judge through a legal interest, pecuniary interest in the cause, or personal bias towards a party.

But in the same judgment in para 25, the following exception has been found: -

> In other words, the principle is well settled that a judge of the superior court is blessed with a judicial conscience. It is for him to decide to hear or not to hear a matter before him. "(underlining is ours)

49. Upon the strength of above noted authorities and the principles laid down in those judgments, learned counsel Mr. Muhammad Akram Sheikh has prayed that the present Bench may not hear the case.

50. In reply to the arguments, Mr. Ahmed Raza Qasuri, has stated that the present Judges were not privy to the action of deposing of the judges. Qualifications and disqualifications of the judges are not involved in the present case, so the rule that "no one can be Judge in his own cause", cannot be applied to the present case. As regards the purpose of oath as provided by Article 178 of the Constitution, the crux of the oath is not to allow any personal interest to influence the official duty and conduct or

the decisions. Judges come from this environmental set up. They should not be disturbed with contemptuous language. If bias is alleged against the present Judges, then the perception can arise in the mind of the respondents against those judges who are being selected by the petitioners. Frivolous petitions have been filed so as to malign the Judges. Cases of political nature must not be brought before this Court and must be resolved in the Parliament.

51. We have examined the question of bias in detail in accordance with the facts of the case as well as the case law on the subject. This is an apex court of the country, against the decision of which no appeal or revision can be filed before any other Court. The judgments of this Court are the final decisions of the judiciary. If the judges of this Court are imputed bias, there will be no end to chaos. Judges of this Court cannot be swayed by cheap and petty slogans and attributions of frivolous nature. They are assessors of their own conscience, as they knew that they are answerable to the Allah Almighty. Why they should feel bias in favour of any one? When they are not involved in any referred to incident, which has already become a past and closed transaction. There are no reasons and grounds to possess the bias against petitioners and their candidate. As earlier pointed out, the present Judges cannot be called as PCO Judges because they are holding this office of highest reverence under the oath prescribed by Article 178 of the Constitution through Sixth Schedule of the present Constitution. After having taken oath under the Constitution, they are constitutional Judges. They are

working as such. Their work itself display the smooth working of the judiciary under the Constitution. Therefore, there is nothing in their mind to feel prejudice and bias against the petitioners or their candidate on this basis.

52. It is very strange and amazing argument, not appealing to reason that 16 judges out of 20 are biased according to the version of the petitioners. Ex-facie this is a frivolous version adopted by the petitioners because if the above mentioned number of judges were biased as against them, why then civil petitions for leave to appeal were filed by them on 25.6.2008, when all the Judges at that time were holding the office of Judges of the Supreme Court as such? Why the application of bias was not moved alongwith the civil petitions? It may be pointed out here that the reference to our four respectful brother judges, by these petitioners is, in fact, politically motivated and generated version with ulterior purposes, which trend has to be curbed by this highest Court of this country. It may be noted that in the application for recusal, petitioners have iterated the version of their leader. In the text of the petition, it was alleged by them, that their leader was not acknowledging the status and valid appointment of these Judges, if it was so, then why the petitioners had come to this Court and had filed these petitions? It appears, and is evident from the above noted filing of the petitions and the adopted version that the aim and object of the petitioner was not to obtain decision on the merits of the case, as they were fully aware regarding the weaknesses of their case. Their desire and design was only to malign the character of

judges and to defame this highest judicial institution with the imputation of partiality. It was, therefore, that the present petitioners, when the case was commenced for hearing, had filed the petition for recusal, which was presented by them after passage of near about 5 months and much stress was laid by them to decide this application first, so that they might be able to create fuss, upon the rejection of their petitions. They had not come to argue the cases to this court for obtaining the decision of their cases on merits. The filing of CPLAs by these petitioners, the proposer and seconder, without any petition being filed by the candidate himself, in the case was only an overdoing with a prior knowledge that their candidate was not prepared to approach this Court, and that he was not acknowledging the status and was not ready to accept the decision of this Court. In any case, with the filing of these petitions of recusal, this stratagem and design was manifested with much clarity. From this narration, one can easily judge the intention of these petitioners, who had approached this Court for creation of division, bifurcation, disunity amongst the judges of this Court, attribution of dishonesty and arousing of feelings of abhorrence against this institution. Their purpose was only to abuse the judges and the court by filing these petitions through far-fledged past events, having no nexus or any link with the making of decision of their cases.

53. It must be kept in mind that the Judges of this Court cannot yield to any temptation and allurement. They are the final adjudicators of the law of the land and their wrong interpretation of law has got far-reaching repercussions on the whole set up and

judicial system, as they are minarets of law for the subordinate judiciary to follow it in their judicial cases. Their age, judicial experience and training does not allow them to decide the case without keeping its merits in mind.

54. To impute bias is an easy task but to prove its truth is most difficult job. Judges of the highest, and apex court cannot be an easy prey to the pressures of any political party or any other highest authority. Their impartiality and independence lies in their encouragement to dispense fearless, temptless and pressure less justice. They are cognizant of their stature and status. To play with their independence, with unfounded perceptions is nothing but the distortion of real facts, which must not be allowed to prevail and to preoccupy the mind of any person, otherwise this trend would destroy the whole image of independence of judiciary.

55. Before deciding this case, we have been continuously posing questions to our innerselves as to whether we feel prejudice against a party to the case or have got any leaning in favour of the other. The answer in our mind and from our conscience was in the negative. By giving a thought to it, we felt that the other judges were to be imputed and would be facing with the same allegations and situation as they were also sailing in the same boat and the petitioners and their learned counsel had undistinguishably maligned all the judges in the same fashion and no one was left with any exception to it. Therefore, we decided to adjudicate this case.

56. It is interesting that still the civil petitions were not registered by the Registrar office. Instead of pressing the application containing prayer for registration, much stress was laid down upon the decision on the recusal petitions which gave way to the impression that petitioners were not serious to obtain decision on merits but had come to this Court to achieve some ulterior motive and objectives best known to them. When the petitioners were cognizant that their candidate was not acknowledging the status of this court as a court and they were also adopting and toeing the same line, then what was the fun to approach this Court? The answer was visible when arguments were addressed and merits of the case were adjudged. The absence of the candidate in whole of the proceedings was also supportive in raising this presumption of fact.

57. What is bias, and what are its determinative factors? It is defined in Black's Law Dictionary, 7th Edition, by Brayan A. Garner with others; as" –

> 'Bias' "inclination; prejudice < the juror's bias prompted a challenge for cause>. – bias, vb. – biased, adj. judicial bias. Bias that a judge develops during a trial. Judicial bias is usu. Insufficient to justify disqualifying a judge from presiding over a case. To justify disqualification or recusal, the judge's bias usu. Must be personal or based on some extrajudicial reason".

In ***PLD 2001 S.C. 568 (Asif Ali Zardari and another v. The State)*** description, kinds and test of bias have been exhaustively dealt with, and with clarity expounded. It has been noted in the aforesaid judgment at page 587 that "bias" is synonymous with "partiality" and strictly to be distinguished from "prejudice". Under

particular circumstances, the word has been described as a condition of mind; and has been held to refer not to views entertained regarding a particular subject matter, but to the mental attitude or disposition toward or disposition towards a particular person and to cover all varieties of personal hostility or prejudice against him.

58. While providing description of bias in that, it was held: - "accused having a right of fair trial by a judicial minded person, not functioning under an influence which might paralyze mind to result in absence of a fair trial. The bias is in fact based on the principle of Latin maxim "Nemo Debet Esse Judex in propria sua causa" meaning thereby that no one can be judge in his own cause.

59. Bias in our estimation is: -

> **"A state of mind of an adjudicator, having predetermined feeling, inclination, passion or leaning, liking or disliking, prejudicial or adverse to any party or to the subject matter involved in a lis, due to pecuniary or any other interest, based on relationship, friendship or having any intimacy with any party of the case, so as to make decision of the lis in favour of any party or particular person, without adjudging the merits of the case in a fair and balanced manner".**

60. But bias must be differentiated and distinction must be kept in mind between the following situations: -

> "One of a judge/arbitrator/juror, who is predetermined to decide the lis in favour of one party before the hearing of the case due to extraneous reasons;
>
> and
>
> The other arriving to a conclusion during the hearing of a case.

The former can be called bias, while the latter would be assessment process of the merits, culminating into a decision of the case.

61. To our mind, causes may be manifold. It may be based on the pecuniary interest of a judge involved in the case, the inclination of a judge in favour of a party; may be based on the ground of relationship, intimacy towards any party, there may be a close relative or an intimate friend. There may be a case where judge has got fiduciary relationship with any party in the case. There may be a case of a judge who had been a member of a political party. There may be a case where a judge might have remained an advocate of any party to the lis, he might have been an arbitrator, referee, or conciliator in the subject matter for any party to the case. He might have developed hatred to a party due to the acts and demeanor of a party before filing of the petition. All the reasons and kinds cannot be completely encompassed through this narration which may give rise to bias and be the example in procreation of bias in the mind of a judge. But it is hard and real fact that we all the judges of this Bench have got no such feelings, links or relations with any party to the proceedings as noted above. There is no apparent or latent reason to lean in favour of one or to be against the other. If one political party has got its own stand or stance, it has nothing to do with the working of this Court and upon its decision. As noted under the heading of "recusal", all the present judges are constitutional judges and having taken oath under the Constitution are bound to administer and deliver justice in accordance with the Constitution and the law of the land. Their faculty of approach cannot be considered to be effected by any stretch of imagination to be in favour of

anyone due to the stand/stance taken by any political party in this country.

62. It is worth mentioning that a judge once appointed in the superior court has got sufficient security/guarantee in the Constitution, not to be removed or dismissed unless through the decision of Supreme Judicial Council constituted under the Constitution. Therefore, these guarantees and safety measures particularly in a democratic step up, are sufficient to protect and guard the interests of judges of the superior courts to impart justice without fear and favour, and without being influenced by the parties stand in the streets.

63. In *2003 SCMR 104 (Government of NWFP through its Chief Secretary and another v. Dr. Hussain Ahmad Haroon and others)* at page 110, test was provided by the Hon'ble Judges of this Court, "where a litigant could reasonably apprehend that a bias might have operated against him" (emphasis through underlining has been provided by us). In *PLD 2001 S.C. 568 (Asif Ali Zardari and another v. The State)* the word "real likelihood is the apprehension of a *reasonable man,* apprise of the facts and not suspicion of fools or "capricious persons". It has also been noted in that judgment that judges of superior courts are blessed with judicious conscience". Accordingly, the real test to adjudge bias is to examine and analyse the facts narrated and stand taken by a party as to whether in the given circumstances a reasonable and prudent man would feel that the "Bias" in the mind of judge was available or not? In the present case, it is evident and established that all judges of this Court are constitutional judges and the

issue of P.C.O. has become a past and closed transaction. There is, therefore, no reason to feel "Bias" by a reasonable prudent man in such circumstances.

64. According to Administrative Law by HWR Wade – Third Edition – published by Clarenda Press Oxford, at page 176, it has been noted that "justice should not only be done but should manifestly and undoubtedly be seen to be done. Nevertheless, a line has to be drawn between genuine and fanciful cases". (emphasis is provided by us). It was further provided at another place, where the words are material to be noted which are: -

> "A court of appeal has protested against the tendency to impeach judicial decisions upon the flimsiest pretext bias, and against the erroneous impression that it is more important that justice should appear to be done than that it should in fact be done". (Underling is provided by us).

65. In the case of The Queen v. Mc Kenzie 1892] QBD 519, it was found that the Magistrates were not biased in their decision when they had got no pecuniary interest in the matter and the circumstances were not suggesting that there could be likelihood of any bias or there was any biased adjudication.

In the case reported as *The Queen v. Burton ex parte Young [1897] QBD 468* it was argued that if any pecuniary interest was in existence, it would be sufficient to cause disqualification. A pecuniary loss or interest might be small one.

But the above noted case is not applicable to the present case because admittedly in the present case, judges have got no pecuniary interest in the matter or related to any party.

The case of *Locabail (UK) Ltd. V. Bayfield Properties (2000 1 All ER 65)* relied upon by both the parties, had laid down the principles and guidelines with regard to judicial bias. It was held that when there was a real danger of possibility of bias on the part of a judicial decision maker, the judge might recuse himself from the case. It was held that the circumstances were to be considered of each case but in the aforesaid case, it was also held that where the objection was wrongly made, the judge was not to yield to a tenuous or frivolous objection. (Underlining is ours).

66. The crux which has been deduced from the above referred judgments, is that there must be a real danger of possibility of bias. It may be due to conflict of interest, pecuniary or of any other kind. But the judge would not recuse himself on the basis of alleged bias upon the frivolous objections, having no substance, having no possibility of bias to happen, having no likelihood of real danger of bias to strike in the mind of a party and having no reasonable cause to exist. The remonstration against the judge in any of the above mentioned situations hearing the case is nothing but a frivolous attempt to restrain a judge to perform his duties of adjudication of cases, which can not be allowed to hamper the administration of justice. Emphasis was, therefore, laid on the word "real danger" in the cases.

67. In the case of *The Queen v. Australian Stevedoring (88 CLR 100* from the High Court of Australia, it was held that there must be strong grounds for holding bias against the judicial

or quasi judicial officer. The bias must be "real" with the result that a substantial distrust must result and exist in the minds of the reasonable persons. It was also held that "preconceived opinions – though it is unfortunate that a judge should have any – do not constitute such a bias nor even the expression of such opinions, for it does not follow that the evidence will be disregarded.

In this case also, it was held that there must be 'real bias'.

68. In the case of *Public Utilities Commission of the District of Columbia v. Franklin S. Pollak and Guy Martin (343 US 451 + 95 L ed 1068)* it was would that a judge would not participate in a decision when there was a ground for believing that such unconscious feelings might operate in the ultimate judgment or might fairly lead others to believe that they were operating in the judgments, in such case judges might recuse themselves.

69. In ***R v. Gough (1993) 2 All ER 724*** the test provided for real danger of bias on the part of concerned member of the Tribunal in question was in the sense that he might unfairly regard with favour or disfavour the case of a party to the issue under consideration by him.

70. In the recent case of 2001 from the Supreme Court of United States in ***Richard B. Cheney, Vice President of the United States, ET. AL. v. United States District Court for the District of Columbia ET AL.,*** it was held "the decision whether a judge/judges impartiality can "reasonably be questioned" is to be made in the

light of the facts as they existed, and not as they were surmised or reported. Mr. Justice Scalia refused to recuse because he held that in the courts below, a judge could recuse to be replaced by another judge and the case would proceed normally. But in the Supreme Court he considered it in a different consequence by holding that in case of recusal for the remaining eight justices, in case of any division, a tie would not be there. Therefore, in the Supreme Court the case was to be held differently. (underlining is ours).

71. It may be noted, that the present case is akin to the above noted case, where all the judges have been considered by the petitioners to be biased against their case. When such is the case, who would then hear and decide the case of the petitioners. Is it not an interesting prayer, and is it not the case wherein no decision is being wished by the party to be made by any judge of this Bench and by this Court.

72. What is the test to determine the existence of bias? To our mind and from the analysis of the above noted authorities, and facts, the test of bias is, the thought of a prudent/reasonable man in the given circumstances of a case. If a prudent man considers the facts and circumstances of a case demonstrating and to be creative of bias in the mind of a judge and the real danger of having no fair trial at the hands of the aforesaid judge is apparent and existing, then the question would be relevant, otherwise it would not be allowed to work, when a person having mere apprehension on the basis of flimsy grounds, suppositional thoughts, surmises not in reality, with ulterior motives and

making pretences so as not to get justice from a particular judge, with a view that he might be able to get the case transferred on that basis to the judge of his own choice or to the selective judges, there being no likelihood of bias, or there being no real danger of unfair trial and so many other reasons which cannot be exhaustively encompassed.

73. In the present case after hearing all the parties, we have found that in fact, there is no question of bias to take place in the hearing of the instant case. Actually, the petitioners do not possess locus standi to pursue this case, therefore, to procrastinate its prompt decision and to get transfer of it to the "judges of their own choice", a hypothical danger of bias has been invented and presented, otherwise there is no likelihood of bias to prevail in the decision.

74. Interestingly and astonishingly, it has been noticed that in the case of Mian Muhammad Shahbaz Sharif, the brother of the candidate and also a prominent leader of PML (N) with similar view point, not to get hearing of the case from PCO Judges, no such application for bias or recusal was filed in his case. Accordingly, this prayer of petitioners is dismissed.

(4) LOCUS STANDI

75. Mehr Zafar Iqbal, the proposer and Shakeel Baig, the seconder had filed applications under Order I Rule 10 of the CPC in the Writ Petition filed by Noor Ellahi, the opposing candidate of Mian Muhammad Nawaz Sharif and in the writ petition of Syed Khurrum Shah. Their applications were rejected by the Lahore

High Court, Lahore, holding them having no right to be impleaded in these writ petitions. The question arises as to whether both these petitioners had the right to file these applications under Order I Rule of the CPC or under Article 199 of the Constitution in the aforementioned writ petition and then to file civil petitions in this Court, in the absence of Mian Muhammad Nawaz Sharif, the contesting candidate, who had opted not to defend the verdict passed against him in the Lahore High Court, by which he was declared disqualified to contest election. To comprehend the controversy and the right arising therefrom we have to examine the nature of the dispute involved in the case. It is an admitted fact that Noor Ellahi who had filed writ petition No.6468 of 2008 before the Lahore High Court, Lahore against Mian Muhammad Nawaz Sharif, was an opposing candidate against Mian Muhammad Nawaz Sharif. According to the version of Noor Ellahi, his contesting candidate Mian Muhammad Nawaz Sharif was disqualified and his nomination papers could not be accepted on 15.5.2008 in the by-election. To say in other words, the pivotal point for determination in the case was qualification and disqualification of Mian Muhammad Nawaz Sharif. To understand the nature of this right, we have to advert to the definition of qualification and disqualification as defined in Black's Law Dictionary, 7th Edition which is as under: -

> "Qualification" The possession of qualities or properties (such as fitness or capacity) inherently or legally necessary to make one eligible for a position or office, or to perform a public duty or function".
>
> Disqualification: - The act of making ineligible; the fact or condition of being ineligible."

76. From the above noted definition, it is evident that qualifications and disqualifications are the inherent, personal, capabilities, abilities, qualities and disabilities of a person which are best known to that person. The keys of gate of this secret room lie with that person. Other person cannot gauge it or disclose those secrets other than the person himself or unless instructed properly and completely by him to his representatives and agents. All these are the personal rights, inherent and possessed by that person himself. Dispute regarding the right of the person concerned from being a member of Assembly is in the nature of private rights of two persons to the same office vide **PLD 1970 S.C. 98 at page 113 (Lt. Col. Farzand Ali and others v. Province of West Pakistan through the Secretary, Department of Agriculture, Government of West Pakistan, Lahore)** which judgment was affirmed by this Court in the case of **Hafiz Hamdullah v. Saifullah Khan and others (PLD 2007 S.C. 52) at page 62.**

77. It is an admitted fact that proposer and seconder are not claiming their status as agents or representatives of Mian Muhammad Nawaz Sharif in the case in hand. They had not filed applications under Order I Rule 10 CPC before the Lahore High Court, Lahore in such capacity. They are claiming an independent right vesting in them to defend the candidature of Mian Muhammad Nawaz Sharif. In such a situation, when the candidate himself is not coming forward to defend his qualifications and disqualifications, which are personal and

inherent with that person, how the proposer and seconder can claim an independent right to appear and to defend such a candidate when the candidate himself is not prepared and ready to safeguard his qualifications and to oppose his alleged disqualifications, who has got a legal right to assert, dispute and defend? The proposer and seconder cannot claim an independent right to defend him, when they are not agent or representatives of the candidate, because due to failure of Mian Muhammad Nawaz Sharif to dispute and challenge those findings, those are considered to have been correctly and rightly been possessed by him. Proposer and Seconder cannot act against the will and wish of a candidate with regard to his acceptance of qualifications and disqualifications, as those proceedings shall be antagonist to his interest.

78. After the proposer and seconder recommend a candidate, consent of the candidate becomes necessary for the contest of the seat of the assembly. If the candidate does not give his consent, the recommendations of the proposer and seconder become a futile exercise. They can not compel a person, to whom they have recommended, to become a candidate unless the consent of that candidate is given. In other words, proposer and seconder are only recommendees and their recommendations would ripen into a tasteful fruit when the candidate gives consent. To amplify it, one can state that their recommendations are dependent upon the choice and will of candidate, which right of candidate is an independent right who may or may not exercise it

by giving consent or by declining to accept those recommendations to become a candidate. After the recommendations are made, this dependent right is merged into an independent right vested in the candidate. The dependent right looses its significance and existence thereafter and the independent right of candidate comes and appears on the surface.

79. It is material to note that the proposer and the seconder does not figure thereafter in the whole election process. After the nomination papers are accepted or rejected, it is for the candidate to withdraw or to retire from the election. In such an event, the proposer and seconder can not force the candidate to contest the election by or through any legal proceedings. This logic itself shows that after the recommendations are made by the proposer and seconder, they have got no right to ask the candidate legally to remain in the contest. In the present case, the decision of candidate not to defend his qualifications and disqualifications, and not to contest the election, goes a long way to establish this fact that the candidate is not interested to remain in the field of contest or be a candidate for the proposed seat any more, otherwise he would have appeared at least before this Court. In such a situation, the proposer and seconder have no independent right to file this petition for impleadment in the writ petition and through civil petition in this court. In ***1994 CLC (AJ&K) 1108 (Jammu and Kashmir Council for Human Rights through Secretary, Rawalpindi and another v. Secretary, Azad Jammu and Kashmir Legislative Assembly Muzaffarabad and 4***

others), elector was declared not to be an aggrieved person, therefore, not competent to file writ petition on behalf of a deseated candidate.

80. It is important to have a cursory look at the provision of subsection (5) of section 14 of the Act, by which the right to appeal against the order of acceptance or rejection of nomination paper, by the Returning Officer has been conferred upon the candidate and not upon any proposer or seconder or on any other person. This shows the imposition of limitation and restraint upon the right of proposer and seconder, after the recommendations and scrutiny, by not permitting them thereafter, to pursue the election proceedings any further.

81. Mr. Muhammad Akram Sheikh, has brought a novel concept of trust to be made applicable to the facts and circumstances of the case, to support the locus standi of Mehr Zafar Iqbal and Shakeel Baig, the proposer and seconder. The following arguments have been addressed by the learned counsel with his assistants: -

(i) The nature of public office is like a trust. In the words of Mr. Muhammad Akram Sheikh "public office has been held since long to be in the nature of a public trust. The beneficiary of this trust is the electorate and the holder of public office is a trustee". He has placed reliance on the case of *Yaselli v. Goof et al. reported in 12 F.2D 396* from volume 35 of Words and Phrases, Permanent Edition. According to the learned counsel this definition has been found therein: -

> "Every public office is created in the interest and for the benefit of the people."

Referring to American Jurisprudence, Second Edition, published by Lawyers Cooperative Publishing Aqueduct Building Rochester, New York, learned counsel has submitted as follows: -

> "Every public office is created in the interest and for the benefit of the people and belongs to them, thus a public office is a public agency or trust created in the interest and for the benefit of the people. Such trust extends to all matters within the range of the duties pertaining to the office."

He has also referred to page 331, Words and Phrases, Permanent Edition, Volume 42-A of the above referred book, wherein public office has been defined as under: -

> "Public office is a public "trust" and the performance of the trust may not be farmed out or delegated to one, not chosen directly or indirectly by the citizens, and delegation, if any, can be only on the permission of the legislative body which established the trust".

82. Learned counsel for the petitioners with regard to nomination has uttered these words: -

> "....it is not strictly speaking a Holder of office (not yet) and is a nominee for holder of office. It has even been held that a nominee is also a quasi-public office"

He has also referred to the case of Supreme Court of Alabama, *(State of Alabama ex rel. W.E. Norrell, Jr. v. Fred KEY. 4 Div. 185 (276 Ala.524, 165 So.2d 76)* wherein it was observed that "The holder of a certificate of nomination has the status of a quasi officer".

83. In fact, the learned counsel has attempted to display that the holder of certificate of nomination, attains the status of a quasi officer. To say in different manner, learned counsel wants to impress upon us that after the nomination papers of Mian

Muhammad Nawaz Sharif were accepted by the Returning Officer, he had become a quasi public officer. Referring to page 24 para 16 of the case of *Chairman RTA v. Mutual Insurance (PLD 1991 S.C.14)*, learned counsel has relied upon this sentence "A public office is a public agency or trust created in the interest and for the benefit of the people and since an incumbent of a public office is invested with certain powers and charged with certain duties pertinent to sovereignty, the powers so delegated to the officer are held in trust for the people".

84. He has referred to judgment in the case of *Maqbool Ahmed Qureshi v. Pakistan (PLD 1991 S.C. 484 from page 501)* in which it was held that "Offices which are regarded as sacred trust are to be passed on to those who are entitled thereto Amanat (Trusts) includes the offices of the Government.

85. As per learned counsel, the proposer and the seconder are not bound to prove their locus standi because they are defending the case as a shield and not filing, instituting or using it as a sword, which does not require the same rights as are necessary for a candidate. Referring to *1991 SCMR 2883 (Ardeshir Cowasjee v. KBCA)*, learned counsel submits that "the concept of locus standi has been whittled down inasmuch as the expression 'sufficient interest', inter alia, includes civic or (community) environmental and cultural interests". The meaning of a person aggrieved "may vary according to the context" to which liberal approach must be made. This concept has been presented before us by him on the basis of *Halsbury's Laws of England/Administrative Law (Volume 1(1) (2001 Reissue)/4,*

Judicial Control/(1) The Ambit of Judicial Review/(iv). Further relies upon [1981] 2 AllER 92, Inland Revenue Comr v. National Federation and [1994] 4 AllER 329, R. v. Inspectorate of Pollution and another exparte Greenpeace.

86. Beneficiary has got right to defend trust. For that purpose he relies on Halsbury's Laws, Vol. 48 at page 1082 (2007 Reissue) to submit that "if no trustee is willing to institute a proper claim, the beneficiary may take proceedings for the administration of the trust by the court and obtain an order for liberty to use the trustee's name, or for a receiver who will use the trustee's name, in the institution of a proper claim". *Touche v. Metropolitan Railway Warehousing Company, (1871) L.R. 6 Ch. App.671; Parker & Mellows: The Modern Law of Trusts, AJ Oakley page 716; Fletcher v. Fletcher (1844) 4 Hare 67 and American Jurisprudence Volume 76, page 670, 671.*

87. The candidate represents the right, obligations and aspirations of electors of a constituency. Refers to PLD 2007 S.C. 277 at page 283 A, 284 (Rana Shaukat Mahmood case)

Any defect in proposer's credentials is fatal to the candidacy of the aspirant. *Rana Shaukat Mahmood's case (PLD 2007 S.C.277), Muhammad Abbas v. Returning Officer (1993 MLD 2509), Qaiser Iqbal v. Ch. Asad Raza (2002 YLR 2401), Asif Khan v. Returning Officer (2003 MLD 230), Mudassar Qayyum Nahra v. Election Tribunal (2003 MLD 1089).*

88. The law has given proposer and seconder an integral role in the election process by rendering as disqualified a candidate, if his proposer or seconder is disqualified.

89. He has also given the history of nomination of candidate in the election which is not so much relevant so as to reproduce it.

90. Referring to H. M. Saya's case reported in PLD 1969 S.C. 65, learned counsel submits that a person can file an appeal against an order which adversely affects a person's an independent and well recognized right.

91. Right to choose is more fundamental right than any other right. Cites, American Constitutional Rights by William Carroll & Norman Smith, 1991 University Press of America at pages 705 -706.

92. With regard to provisions of Order I Rule 10 CPC learned counsel has referred to PLD 1975 SC 463 (Islamic Republic of Pakistan v. Abdul Wali Khan), PLD 2002 SC 615 (Ghulam Ahmed Chaudhary v. Akbar Hussain) and Civil Petition 1269 of 2008 (A.H. International (Private) Ltd. V. Federation of Pakistan.).

93. On the basis of above addressed arguments learned counsel has tried to justify the locus standi of proposer and seconder to file an appeal, application under Order I Rule 10 CPC in Writ Petition before the Lahore High Court and Civil Petitions in this Court.

94. Learned counsel has also argued that in case the trustee of a trust does not file a suit with regard to the trust

property, the beneficiaries can enforce the right belonging to them which action is called a derivative action.

95. According to Black's Law Dictionary Seventh Edition by Bryan A. Garner 'derivative action' has been defined as under: -

> "A suit by a beneficiary of a fiduciary to enforce a right belonging to the fiduciary, a suit asserted by a shareholder on the corporation's behalf against a third party because of the corporation's failure to take some action against the third party. Also termed derivative suit, shareholder derivative suit; stockholder derivative suit, representative action. A law suit arising from an injury to another person, such as a husband's action for loss of consortium arising from an injury to his wife caused by a third person".

96. But the arguments of the learned counsel have failed to convince us when it is found that still trust was not created by the occupation of that alleged seat of trust. Unless trust is completed in all respect, no beneficiary can claim any benefit from an incomplete and inchoate alleged trust.

97. In the case of *Yaselli v. Goff et. al reported in 12 F.2D 396* it was held that a Special Assistant to Attorney General of the United States in the performance of duties was immuned from malicious prosecution, therefore, the above referred case was not applicable to the present case. It may be remembered and noted that in Pakistan, we have got codified law with the nomenclature of the Trust Act. 1882 (II of 1882), therefore, in the presence of codified law, we do not desire to load our land laws by the import of concept of others, who are not based on any codified law as are ours. We must divert our attention towards the

law enacted and applicable to this Country. Section 3 of the Trust Act, 1882 has been framed in the following sentences: -

> "3. Interpretation clause – Expressions defined in Act IX of 1872: A "trust" is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him for the benefit of another, or of another and the owner :
>
> The person who reposes or declares the confidence is called the "author of the trust"; the person who accepts the confidence is called the "trustee" the person for whose benefit the confidence is accepted is called the "beneficiary"; the subject-matter of the trust is called "trust-property" or "trust-money"; the "beneficial interest" or "interest" of the beneficiary is his right against the trustee as owner of the trust-property; and the instrument, if any, by which the trust is declared is called the "instrument of trust";
>
> A breach of any duty imposed on a trustee, as such by any law for the time being in force, is called a "breach of trust".

98. There is another provision of section 6 which can be found in the Trust Act, 1882, which is relevant and is reproduced as under: -

> 6. Creation of trust : Subject to the provisions of Section 5, a trust is created when the author of the trust indicates with reasonable certainty by any words or acts (a) an intention on his part to create thereby a trust, (b) the purpose of trust, (c) the beneficiary, and (d) the trust-property, and (unless the trust is declared by will or the author of the trust is himself to be the trustee) transfers the trust-property to the trustee."

99. From the above provision of section 6 of Trust Act, 1882, the following conditions are necessary for the creation of trust: -

> "A trust is created when
>
> (a) the author of the trust indicates with reasonable certainty, by words or acts, an intention on his part to create thereby a trust;

(b) the beneficiary or beneficiaries are nominated specifically;

(c) the trust property is indicated with reasonable certainty;

(d) except in the case of a trust declared by will or when the author of the trust is himself to be the trustee, the trust property is transferred to the trustee."

100. Keeping in view the above definition and even the concept/definition submitted by the learned counsel, an essential ingredient of the trust is the transfer of trust property to the trustee, which would be in the instant case the "public office".

101. So from the above analysis, we have found that first of all there must be an electorate who shall elect, which may be called the beneficiary of the trust and the person (the candidate) must be elected or chosen by that electorate, to become a trustee and then creation of trust would be completed when public office is occupied by that trustee (the returned candidate). In whole of that process from the proposal, seconding, filing of the nomination paper, the consent of the candidate (to become a trustee) is necessary. The aforesaid candidate, "the trustee (in future) must be a qualified person and not disqualified to contest the election, and he must be prepared to give his consent for the nomination, and by filing of those nomination papers with that Returning Officer, he must be ready to contest the objections raised against him, by the opposing candidate before the Returning Officer, he must not withdraw or retire from the election, after having successfully gone this process of scrutiny from the Returning Officer, he must be prepared to contest the election and all the proceedings, to reach to the post of trust to

occupy it. If he successfully completes all this process, he would become a returned candidate in consequence of election and would occupy the concerned seat of public office. He would become a public office holder (the trustee) after this exercise is complete. It can also happen that after the successful completion of all other steps of election process, on the date of holding of election, he may withdraw, retire or loose the election in the contest. In case of his defeat, he would not become a trustee, to occupy the seat. The emphasis being provided is the completion of all other steps for the creation of trust, which is a long process and which has to be successfully completed by the candidate to become a trustee of a public office. It may also be kept in view that the proposer and seconder are not the sole beneficiaries of the trust but after a candidate occupies the seat in the shape of a returned candidate, due to majority choice/will of the electorate, it is then that he would become a trustee of public office. This also shows that all the voters of the area concerned/constituency become beneficiaries collectively. No one can claim this right solely or lonely by ignoring and excluding the others, because the elected member becomes a representative of the voters/persons of the constituency, a public property

102. Right of beneficiaries comes to light when a person is elected, declared returned and is notified as such and occupies the seat in consequence of that, otherwise there is no presupposed right to be claimed by any voter before the returned candidate holds the office. During the completion of election

process, no case can be filed or defended for the qualifications and disqualifications of the candidate by any alleged voter, proposer and seconder before any court of law, as it would be an amorphous right to have any recognition by any court of law.

103. It may be remembered that by proposing and seconding, a candidate does not become a trustee. It is only a step towards election and during that election, the candidate is the person who has to defend his personal, inherent qualities, qualifications and disqualifications. If the candidate is not prepared to defend himself before any Tribunal and a court of law, then no one including the proposer and the seconder can compel the candidate to contest election by defending his qualifications and disqualifications.

104. Mr. Justice (Retd.) Fazal Karim former Judge Supreme Court of Pakistan in his treatise on "Judicial Review of Public Actions" Volume 2, through his hard work, has beautifully quoted and explained the doctrine of locus standi, as being followed in England, doctrine of standing in America and from law of our own land under Article 199 of the Constitution. To summarize all those doctrines in America and England, we have gained impression that in England under the English Legal System, the courts are considered as judicial arm of the Government and do not act on their own initiative. They have always reserved the right to be satisfied that the applicant had some genuine locus standi to appear before it. With the passage of time, it has now moved forward from the test of "legal right" to one of "sufficient interest"

and now it has been considered in the light of right of access to justice and has become remarkably liberal particularly in public interest litigation.

105. In America the doctrine of standing has been found with these words: -

> "that cases and controversies, adverse, substantial interest and real questions are no more than trees behind which the Judges hide when they wish either to throw stones at Congress or the President or to escape from those who are urging them to do so"
> "Whether a party has sufficient stake in an otherwise justifiable (that is fit for adjudication) controversy to obtain judicial resolution of that controversy is that has traditionally been referred to as the question of standing to sue".
>
> "To satisfy the 'case' or 'controversy' requirement of Article III, which is the 'irreducible constitutional minimum' of sanding, "a plaintiff must, generally speaking, demonstrate that he has suffered 'injury in fact', that the injury is 'fairly traceable' to the action of the defendant, and the injury will likely be redressed by a favourable decision."

106. Now we advert to our law of land, essential for filing of a petition under Article 199 of the Constitution. Analytical study of sub-article (1) can be better understood when it is kept in front. So, it is reproduced as under: -

> 199. (1) Subject to the Constitution, a High Court may, if it is satisfied that no other adequate remedy is provided by law, -
> (a) On the application of any aggrieved party, make an order-
> (i) directing a person performing, within the territorial jurisdiction of the Court, functions in connection with the affairs of the Federation, a Province or a local authority, to refrain from doing anything his is not permitted by law to do, or to do anything he is required by law to do; or
> (ii) declaring that any act done or proceeding taken within the territorial jurisdiction of the Court by a person performing functions in connection with the affairs of the Federation, a Province or a local

authority has been done or taken without lawful authority and is of no legal effect; or

(b) On the application of any person, make an order–

(i) directing that a person in custody within the territorial jurisdiction of the Court be brought before it so that the Court may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner; or

(ii) requiring a person within the territorial jurisdiction of the Court holding or purporting to hold a public office to show under what authority of law he claims to hold that office; or

(c) on the application of any aggrieved person, make an order giving such directions to any person or authority, including any Government exercising any power or performing any function in, or in relation to, any territory within the jurisdiction of that Court as may be appropriate for the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II."

107. From the simple reading of the above provision, it is evident that there are three main parts noted in Sub-Article (1) of Article 199 of the Constitution. Clause (a) of Sub-Article (1) of Article 199 of the Constitution has conferred jurisdiction upon the High Court with regard to writs of certiorari, mandamus and prohibition, in clause (b) habeas corpus and writ of quo warranto are provided, while in clause (c) jurisdiction to enforce the fundamental rights conferred by Chapter I of Part II of the Constitution has been invested with the High Court. All these three main divisions have got interesting commencement with the words "on the application of any aggrieved party" in clause (a), "on the application of any person" in clause (b) and in case of clause (c) the words are "on the application of any aggrieved person". According to our own view, all these words noted in clauses (a) (b) and (c) of sub-Article (1) of Article 199 of the

Constitution, have got important meanings and connotations. The use of different words “any aggrieved party”, “any person” and “any aggrieved person” have not been used in oblivion of their meanings and implications.

108. It is also interesting to note that word “aggrieved” is noted in clauses (a) and (c) in a prefix form to the words “party” and “person” but in clause (b) word “aggrieved” has been omitted knowingly. The use of words ‘party’ in clause(a) and ‘person’ in clause (c) have been differently used. Why these different words are occurring, in all these (a), (b) and (c) divisions, there is philosophy behind it. The power and jurisdiction of certiorari, mandamus and prohibition can be initiated and commenced on the application of any ‘aggrieved party’. Words ‘aggrieved’ and ‘party’ are significant, the meaning of which are to be unearthed from the Black’s Law Dictionary, an authentic Dictionary providing the definitions of legal words and terms. “Aggrieved party” at page 1144 is defined as :-

> “A party whose personal pecuniary, or property rights have been adversely affected by another person’s actions or by a court’s decree or judgment.”

While word “party” has been noted with the following meanings: -

> “Party. 1. One who takes part in a transaction <a party to the contract>”.
> “2. One by or against or against whom a lawsuit is brought <a party to the lawsuit>.”

109. From the above noted definition, it is explicit and transparent that it refers to a party by or against whom a law suit was brought which law suit may encircle a proceeding also. In

other words, an aggrieved party can be termed a person who was party to a law suit or to any proceeding. If a person natural or legal was not a party to the proceedings and personal, pecuniary interest or property rights were not adversely affected by the action of the authority, tribunal, court, decree, order or judgment, that person natural or juridical would not fall within the ambit of "aggrieved party".

Vide **1970 SCMR 681 (Yousuf Ali V. Fazal M. Malik and 3 others),** it was held that a person who was not party before the Tribunals below could not claim right to be impleaded as party in the writ proceedings.

1994 CLC (AJ&K) 1108 (Jammu and Kashmir Council for Human Rights through Secretary, Rawalpindi and another v. Secretary, Azad Jammu and Kashmir Legislative Assembly Muzaffarabad and 4 others), is the case wherein elector was not permitted to maintain constitutional petition on behalf of deseated member who had not filed that petition himself.

In ***1994 CLC (Lahore) 2318 (Mian Muhammad Nawaz Sharif v. Federation of Pakistan through Secretary, Ministry of Defence, Government of Pakistan, Islamabad and 8 others)*** it was observed as under: -

> "Constitutional petition can be filed only by a person aggrieved--- Relief granted must be in relation to grievance of said aggrieved person and not the grievance of any third person---)."

Vide also ***PLD 1998 Karachi 189 (Percy Robinson and others v. Reverend Bashir Jiwan and others)*** and ***PLD 2008 S.C. 30 (Jamat-e-Islami through Amir and others v. Federation of Pakistan and others)***

110. It is material for obtaining writ of prohibition, mandamus and certiorari that the party which is seeking the relief under clause (a) of sub-article (1) of Article 199 of the Constitution must be an "aggrieved party". If party applying is not interested in the performance of any act which may be in the nature of declaring, prohibiting or issuing direction, in that case that party would have no right to file the application under clause (a) of sub-article (1) of Article 199 of the Constitution. The word "aggrieved" has presupposed grievance to the party concerned. Therefore, if a person was party to the proceedings before any authority, tribunal, officer or court, but afterward, he had got no grievance to file or defend the writ petition, it would not be competent to file writ of certiorari, mandamus or prohibition, as the case may be, by any other person, than the person who was party to that proceedings. To say in other words, a party must establish that he was aggrieved from the proceedings taken by the person performing functions in connection with the affairs of the Federation, Province or Local Authority or was refraining from doing anything which he was required by law to do and doing a thing which was not permitted by law to be done.

111. In sub-clause (ii) of clause (a) of sub-article (1) of Article 199 of the Constitution, a declaration can be sought by a party who is aggrieved by an act or proceeding taken by a person performing functions in connection with the affairs of the Federation, a Province or a Local Authority, if that act done was without lawful authority and of no legal effect. This declaration

also requires the party applying under Article 199 of the Constitution to satisfy the court that he was aggrieved by that act or proceeding referred to above, otherwise he would not be granted any relief of writ of mandamus, prohibition or certiorari. In the present case, the proposer and seconder and other applicants have not been able to establish that they were aggrieved party as expounded above, because it is the right of the candidate himself to contest or not to contest. If the candidate wishes to contest the election and any order, act, by any authority referred to in the above noted provision, comes in his way, it is the candidate who can be called the aggrieved party and not any other person. If a candidate refuses to contest, the proposer, seconder and all other applicants can not file a petition in the High Court to force the candidate to contest the election or to defend him in any such proceedings before any court or tribunal. If these intervenors have got no right to compel a candidate for the above noted purposes, then how they can be allowed and permitted to file a petition, may be in defence or it may be in the shape of filing of the writ petition. Accordingly, we do not consider and cannot hold all these applicants to be aggrieved party and having right to invoke the jurisdiction of the High Court. The impugned order dated 20.6.2008 has, therefore, been rightly passed.

112. In Part (b) of sub-article (1) of Article 199, the word ‘any person’ has been used and condition of “aggrieved” has not been attached to such person, therefore, for the invocation of those reliefs mentioned in sub-clauses (i) and (ii) of clause(b) of

sub-article (1) of Article 199 of the Constitution, any person who may or may not be aggrieved can file an application. He is not required to demonstrate his right to move the court for the purposes noted in sub-clauses (i) & (ii) of clause (b) of sub-article (1) of Article 199 of the Constitution.

113. The word “aggrieved” in clause (c) of sub-article (1) of Article 199 of the Constitution has got the same meaning as noted above for clauses (a) of sub-Article (1) of Article 199 of the Constitution but the word “person” with the affixing word “any aggrieved” has declared that for filing of application under clause (c) of sub-article (1) of Article 199 of the Constitution, it is not necessary that there must be prior or previous law suit or proceeding for the person invoking the jurisdiction of High Court. Any person who has got complaint with regard to the matters noted above in clause (c) can file an application, if he is aggrieved by any action, order or proceedings, having been done, performed or made in violation of Fundamental Rights, for the enforcement of it as conferred by Chapter I of Part II of the Constitution.

114. From the above discussion we have found that all these applicants including the proposer and seconder, cannot be called “aggrieved party” giving them a right to file a writ petition or to be impleaded in the writ petitions, filed before the Lahore High Court, Lahore. As the impugned order has been passed correctly in legal term by holding them not “an aggrieved party”, these civil petitions for leave to appeal cannot be entertained in this Court also.

(5) APPLICATIONS UNDER ORDER I RULE 10 OF THE C.P.C.

115. Mehr Zafar Iqbal and Shakeel Baig, the proposer and the seconder and other applicants, had filed applications under Order I Rule 10 CPC in Writ Petition No.6468 of 2008 filed by Noor Ellahi against Mian Muhammad Nawaz Sharif etc. and in Writ Petition No.6469 of 2008 filed Syed Khurrum Shah against Mian Muhammad Nawaz Sharif and others.

116. Before the discussion is made with regard to the status of the applicants to move such applications in the writ petitions indicated above, it is necessary to mention that both these petitioners, Mehr Zafar Iqbal and Shakeel Baig, the proposer and the seconder had not filed any application before the learned Election Tribunal in the Election Appeal filed by Noor Ellahi against the acceptance of nomination papers of Mian Muhammad Nawaz Sharif by the Returning Officer for making the defence of Mian Muhammad Nawaz Sharif. There is no explanation as to why they had not come forward to claim their right of proposing and seconding at that stage, to defend the candidature of Mian Muhammad Nawaz Sharif. It was for the first time that they and other applicants had filed applications in both the above mentioned writ petitions for their impleadment.

117. There is another important fact to be noted, that in the election appeal, Mian Muhammad Nawaz Sharif, the candidate himself had opted not to defend himself before the Election Tribunal. Due to this lapse, it can easily be inferred that

Mian Muhammad Nawaz Sharif, the candidate had opted not to contest the election, otherwise he would have come forward to defend the election petition which was going to result into the passing of an order of disqualifying him to participate in the election. The same attitude was adopted and maintained by him even in the above mentioned writ petitions although he was made a party to the writ petitions but due to his non-appearance the exparte proceedings were ordered by the learned Full Bench of the Lahore High Court, Lahore.

118. Question arises as to whether the candidate who does not want to contest the election by defending his personal right of qualification and disqualification, the applicants can be allowed to defend that candidate? Answer would be in the negative because the aggrieved party is candidate and not the proposer and the seconder, or any other voter.

119. According to the provision of Order I Rule 10 CPC, the proper party is that party whose presence before the Court is necessary to enable the court to effectually and completely adjudicate upon and settle all the questions involved in the proceedings. In other words, the following circumstances are the essentialities for a person to be impleaded as a proper party in any Court: -

(i) the court considers that presence of that party is necessary for the purpose of complete and effectual adjudication. Thus, it is the satisfaction of the court itself not of the party. It is the court who feels inability

without the presence of that party, whereas in the present case, no such feeling was expressed by the court;

(ii) the presence of that party must be for the purposes of adjudication and settlement of all the questions involved in the proceedings. In the writ petitions, admittedly the qualifications and disqualifications of the candidate were involved , which questions had got intimate relations with the personal inherent rights of the candidate. The presence or absence of intervenors could not have any repercussion upon the effectual and complete adjudication of those questions involved in the writ petitions. The candidate himself could defend by asserting or refuting the objections, raised to his personal qualifications and disqualifications. The intervenors are not concerned with those personal inherent abilities and disabilities of the Election.

(iii) Noor Ellahi and Khurrum Shah had filed writ petitions and they can be considered to have the role of plaintiff of a law suit. In the suits filed before any court, a plaintiff has got right of “dominus litus” meaning thereby that a plaintiff can not be compelled to sue a person against whom he does not claim any relief in that suit. This principle of “dominus litus” can be availed of by the writ petitioners and they can not be compelled to array the intervenors in their writ

petitions against their wish because the writ petitioners do not want to claim any relief against them. Question arises at this juncture as to whether these intervenors can file writ petitions independently defending their candidate before the Lahore High Court, Lahore. The reply would be in clear terms “no” because these intervenors, as noted above cannot be considered “an aggrieved party” to obtain declaration with regard to qualification and disqualification of other, as provided by clause (a) of sub-article (1) of Article 199 of the Constitution. In these circumstances dismissal of applications under Order I Rule 10 CPC of these intervenors was rightly made.

120. It may be recapitulated that according to section 14 of the Act, after the proposing and seconding is made and the consent is given by the candidate to his nomination papers by declaring his eligibility to the Returning Officer, the order passed accepting or rejecting the nomination paper can by challenged only by the candidate according to subsection (5) of section 14 of the Act. The law having restrained the proposer and the seconder after passing of order of Returning Officer from taking any action in the shape of filing of appeal before the election tribunal, the intervenors can not come forward to defend their candidate because their right having extinguished by the rule of merger in the right of the candidate, which would become non-existent giving no legal right to defend their candidate in any further proceedings.

(6) CONSTITUTION OF LARGER BENCH AND HEARING FROM SELECTIVE JUDGES.

121. Petitioners have prayed for the constitution of larger Bench to decide the questions raised in the instant case. One of the reasons adduced by these petitioners is that there was conflict of views between two Benches consisting of 4 judges versus a Bench of 5 Judges and the other reason was involvement of interpretation of provisions of section 14 (5-A) and (6) of the Act.

122. We have found that both these contentions are not sound to be accepted because to constitute a larger Bench Hon'ble Chief Justice has got the prerogative, the status of whom the petitioners do not acknowledge. In such an event, the judges selected for constitution of larger Bench would not be accepted by the petitioners. The question of constitution of larger Bench is the prerogative of the Hon'ble Chief Justice of the Court as was held in ***PLD 2002 S.C. 939*** *(Supreme Court Bar Association v. Federation of Pakistan* wherein it was clearly laid down as a principle that it was the sole prerogative of the Hon'ble Chief Justice to constitute a Bench of any number of Judges to hear a particular case. Neither an objection can be raised nor any party is entitled to ask for constitution of a Bench of its own choice.

123. While considering the provision of Order XI and Order XXXIII Rule 6 of the Supreme Court Rules, 1980, it was laid down in ***PLD 1997 S.C. 80 (In re: M.A. No.657 of 1996 in References Nos.1 and 2 of 1996)*** that no litigant or lawyer can be permitted to ask that his case be heard by a Bench of his choice, for it is the

duty and privilege of the Chief Justice of the Supreme Court to constitute Benches for the hearing and disposal of cases coming before the Court. In *Malik Hamid Sarfaraz V. Federation of Pakistan and another (PLD 1979 S.C. 991)* it was held that no litigant or the lawyer can be permitted to ask that a case be heard by a Bench of his choice. In *Malik Asad Ali and others v. Federation of Pakistan (PLD 1998 S.C. 161)* it was held that "the qualification to hold the office of the Judge is indeed discretion and has nothing to do with his performance as a Court or a Member of the Court.

124. In **PLD 2005 S.C. 186 (Ch. Muhammad Siddique and 2 others v. Government of Pakistan, through Secretary, Ministry of Law and Justice Division, Islamabad and others)** it was held: -

> "...it was not the right of petitioner/appellant to select the Judges of their own choice---To constitute a Bench was a prerogative of the Chief Justice and the parties could not ask for a Bench of their choice".

125. Moreover it has been admitted by the petitioners that the latest view has been delivered by five Hon'ble judges of this Court. In these circumstances, how the Bench of three Judges can take different view as against the judgment of five Hon'ble Judges. ***PLD 2004 S.C. 600 (All Pakistan Newspapers Society and others v. Federation of Pakistan and others)*** is the answer to it, wherein it was held that a Bench of three judges could not take different view from the Bench of five Judges.

126. It is notable that the plea of bias, and desirability of constitution of a larger Bench are based on flimsy grounds, particularly when the petitioners, as noted earlier, are not

accepting/acknowledging the authority and status of all the Judges of the Supreme and of the Hon'ble Chief Justice, then how they can pray for the constitution of a larger Bench of their own choice to be made available to them.

(7) QUALIFICATIONS AND DISQUALIFICATIONS.

(i) CONVICTIONS

127. The definition with regard to qualification and disqualification has already been given under the heading of Locus Standi, therefore, it is not being reiterated herein.

128. The objections which have been raised against Mian Muhammad Nawaz Sharif, with regard to his disqualifications, by contesting candidates/the applicant by filing application under section 14(5-A) of the Act, Shahid Orakzai, the applicant and the other source as narrated by learned counsel and gleaned from the records are: -

(i) Mian Muhammad Nawaz Sharif was convicted in aeroplane hijacking case, special case No.385/1999, registered under section 402-B PPC read with section 7 of the Anti Terrorism Act, 1997. The conviction and sentence was announced by Anti Terrorism Court I, Karachi on 30.10.2000. Mian Muhammad Nawaz Sharif was sentenced to life imprisonment and was imposed a fine of Rs.5, 00,000/-, in default whereof he has to suffer further imprisonment for 5 years on the first, and similar sentence on the second count. This conviction sentence was upheld by the learned

appellate court and Special Criminal ATA Appeal No.43 of 2002, which judgment was published in PLD 2002 Karachi 152 (Muhammad Nawaz Sharif v. State).

(ii) He was also convicted by learned Accountability Court Attock Fort, in Reference No.2 of 2000 decided on 27.7.2000, under section 10 read with section 9(a)(5) of the National Accountability Bureau Ordinance and was sentenced to R.I. for 14 years with fine of Rs.20 millions. In case of non-payment, he was ordered to undergo further R.I. for three years. He was further declared to be disqualified for 21 years for seeking or being elected, chosen, appointed as member or representative of any public office or any authority of the Local Government of Pakistan.

129. It has been argued by the learned counsel that under Article 45 of the Constitution, sentence and convictions were pardoned by the President of Pakistan, therefore, these judgments could not impede the way of Mian Muhammad Nawaz Sharif to file the nomination papers as this disqualification had disappeared with the above noted pardon.

130. We have considered the arguments of the learned counsel. To understand the extent of pardon, reprieve and respite, and to remit, suspend or commute any sentence passed under Article 45 of the Constitution, the provision of Article 45 of the Constitution is necessary to be reproduced in this judgment which is as under: -

> "45. The President shall have power to grant pardon, reprieve and respite and to remit, suspend or commute any sentence passed by any court, tribunal or other authority."

131. If we consider and presume, the argument of the learned counsel to be factually correct, question arises as to whether President of Pakistan under Article 45 of the Constitution could grant pardon in respect of the conviction or only for the sentence. The words in Article 45 of the Constitution after the words power to grant pardon.....and "any sentence" are indicative of remarkable worth and consequence. The framer of the Constitution had used the word "sentence" only and not the conviction. Difference between "conviction" and "sentence" in legal phraseology is evident. The conviction is declaration of a person found guilty, while the sentence follows after a person is declared convict, which sentence may be in different forms as prescribed by the relevant laws. To dilate upon it, the President has got power to grant pardon etc. only with regard to the sentence but has got no power to set aside the declaration of guilt (conviction) as recorded by a competent Court, authority or Tribunal. The conviction can only be set aside by the Court, Tribunal or authority, concerned or the competent or superior court to that Court or forum, as provided by law against that conviction. The concept of conviction and sentence having two different connotations, can be found in **AIR 1995 HP 130 (Vikram Anand v. Rakesh Singha)** in which case after a convict was sentenced and appeal was filed by him before the learned appellate court, the execution of sentence was suspended, but

the court had declared the conviction and disqualification still remaining in existence, as conviction being a different concept, so it was still continuing in operation.

132. In **PLD 1990 S.C. 823 (Abdul Kabir v. The State)** the following was held: -

> "Pendency of the appeal for decision does not ipso facto mean that the conviction is wiped out. The appellate Court has no authority under section 426 to suspend the conviction. Conviction and sentence connote two different terms: Conviction means proving or finding guilty. Sentence is punishment awarded to a person convicted in criminal trial. Conviction is followed by sentence. It cannot be accepted as principle of law that till matter is finally disposed of by Supreme Court against convicted person, the conviction would be considered as held in abeyance. This interpretation is not in consonance with the spirit of law and against logical coherence. The suspension of sentence is only a concession to an accused under section 426, Cr.P.C. but it does not mean that the conviction is erased."

133. It may be noted that under section 15 of the NAB Ordinance, 1999 as stood at the time of pronouncement of sentence, the Accountability Court was granted power to disqualify a person convicted for the offence of corruption and corrupt practices. In that judgment of Accountability Court, Mian Muhammad Nawaz Sharif was disqualified for 21 years to become member of the Assembly. There was no power granted by the Constitution to the President, to condone this disqualification order, by grant of pardon. Therefore, even if it be presumed for the sake of consideration, that conviction and sentence recorded in both these cases, were set aside by the President under Article 45 of the Constitution, even then pardoning of this disqualifying power was never granted or conferred upon the President by the Constitution, hence this disqualification had remained in the field.

134. Mr. Muhammad Akram Sheikh, learned counsel has made an attempt to defend the convictions by stating that assuming the convictions were there, even then those convictions were not creative of bar as against the candidate because clauses (h) and (l) of sub-article (1) of Article 63 of the Constitution, as it stood at the time of conviction had provided that after a period of five years from the release, the conviction would not be applicable, if in the opinion of C.E.C., the offence committed had involved offence of moral turpitude and it would not be considered as a disqualification. He has further explained clause (l) of sub-article (1) of Article 63 of the Constitution. According to him, even in the case of corrupt or illegal practices, if a period of five years has elapsed from the date on which that order of guilt had taken effect, it would not be a disqualification restraining the candidate to contest the election.

135. From the above argument, it has been established that Mian Muhammad Nawaz Sharif was convicted in both the above noted cases. The plea being raised is that those convictions cannot be considered as disqualification after the lapse of 5 years from the release in cases involving moral turpitude and for the guilt of corrupt or illegal practice from the date of order of conviction. Whether this stance taken by the learned counsel is legally correct, we have to examine the law on this aspect. Dr. Mohyuddin Qazi, learned ASC has replied that Article 63 of the Constitution was amended by Legal Framework Order 2002 (Chief Executive Order 24 of 2002) and it was clearly held in **PLD 2002 S.C. 369 (Imtiaz Ahmed Lali v. Ghulam Muhammad Lali)**

that the amendment in Article 63 of the Constitution as made by Legal Frame Work Order as well as in section 99(1)(a)(i) of the Act, alongwith amendment of Article 8(3d)(1) of the Code of Conduct of General Election Order, 2002, its effect would be retrospective in effect. Therefore, Mian Muhammad Nawaz Sharif was not qualified to contest the election, as the amendment brought in clause (h) and (l) of sub-article (1) of Article 63 of the Constitution had erased the time limit from these clauses and also the seeking of opinion from the Chief Election Commissioner. To have the benefit of these provisions, both clauses (h) and (l) in the year 1985 introduced through substitution by Revival of the Constitution of 1973 Order, 1985(P.O.No.14 of 1985) were as under: -

> (h) He has been, on conviction for any offence which in the opinion of the Chief Election Commissioner involves moral turpitude, sentenced to imprisonment for a term of not less than two years, unless a period of five years has elapsed since his release; or
> (i).....
> (j).....
> (k).....
> (l) He is found guilty of a corrupt or illegal practice under any law for the time being in force, unless a period of five years has elapsed from the date on which that order takes effect; or

136. But after the substitution through Legal Framework Order 2002, clauses (h), (l) and (q) were in the following shape: -

> (h) He has been convicted by a court of competent jurisdiction on a charge of corrupt practice, moral turpitude or misuse of power or authority under any law for the time being in force; or
> (i).....
> (j).....
> (k).....
> (l) He is found guilty of a corrupt or illegal practice under any law for the time being in force, unless a period of five years has elapsed from the date on which that order takes effect; or
>
> (q) He has obtained a loan for an amount of two million rupees or more, from any bank, financial institution, cooperative

> society or cooperative body in his own name or in the name of his spouse or any of his dependents, which remains unpaid for more than one year from the due date, or has got such loan written off; or

137. On the basis of the above noted amendment and mentioned judgment, the argument of the learned counsel for the petitioners has lost its force.

(ii) TWENTY ONE YEAR DISQUALIFICATION

138. There is another aspect of disqualification on the basis of conviction and sentence recorded by Accountability Court. The NAB Ordinance, 1999 became the part of the Constitution under Sixth Schedule which allowed its continuation and adaptation of certain laws in force. In the judgment dated 22.7.2000 of the Accountability Court in para 54, Mian Muhammad Nawaz Sharif having been held guilty of corrupt practices and corruption was disqualified to contest the election or being elected, chosen, appointed or nominated to any public office or local authority of Government of Pakistan for 21 years under section 15 of the NAB Ordinance, 1999, which disqualifying order was never pardoned or got erased from the legal character of the candidate. It may be pointed out here that it was for the candidate to dislodge and refute these objections with regard to the qualifications and disqualifications.

(iii) BREACHED COVENANT

139. It has also been argued that Mian Muhammad Nawaz Sharif had left this country with an agreement to stay out of Pakistan for 10 years. This covenant was signed on 2nd of

December 2000 by Mian Muhammad Nawaz Sharif and on 5th of December 2000 by Mian Muhammad Shahbaz Sharif. Copy of which has been appended with CPLA No.778 of 2008. It has also been argued that under section 401(5A) of Cr.P.C. the pardon was conditional and this condition was to be fulfilled by the candidate as this condition was to be considered to have been imposed by a competent court and was enforceable accordingly. Therefore, Mian Muhammad Nawaz Sharif was not qualified to contest the election unless a period of 10 years as undertaken had expired in accordance with provision of section 401(5-A) of the Cr.P.C.

(iv) UNPAID LOANS.

140. It has been argued by the learned counsel for Noor Ellahi that Mian Muhammad Nawaz Sharif and Mian Muhammad Shahbaz Sharif had obtained loans from Consortium of Banks but had not paid back the amount since 1994. He has referred to a document of "project brief" dated 22.5.2008 to display that both these brothers had got different loans for their Foundries, Mills etc. but had not paid back the amount till today. Learned counsel has also submitted that suits were filed by the creditors banks and during the pendency of those suits, in the year 1998, it was settled that the units would be surrendered as assets to the claims of the bank and after the sale of these units amount would be adjusted towards the loan. When a committee was constituted by the Lahore High Court, Lahore and a bid of Rs.2.48 billion was offered for these units, in order to defeat the compromise/ settlement with malafide intention and through deceitful means

instead of payment of the loans, objection petitions were got filed in breach of the settlement and till today not a single penny was paid or realized, therefore, Mian Muhammad Nawaz Sharif was also disqualified on this count.

(v) BANK SUITS

141. To ascertain as to whether this allegation of the contestant candidate was based on truth or not, we had also sent for the copies of suits, filed by these banks from where it has been found that: -

(i) Suit bearing No.C.O.S. 40 of 1998 was instituted in the year 1994, for the recovery of 6.8 million as on 30.9.1994 vide UBL v. Itifaq Group and others,

(ii) Suit COS No.37 of 1998 for recovery of Rs.1072.227 millions alongwith other charges etc. as stood on 31.10.1994 (NBP v. Itifaq Foundries and others). In both the above suits, Mian Muhammad Nawaz Sharif and Mian Muhammad Shahbaz Sharif were also defendants

(iii) Suit COS No.42 of 1998 (NBP V. Itifaq Brothers (Pvt.) Limited and three others) for recovery of 355.463 million alongwith other charges etc, and;

(iv) Suit COS No.129 of 1998 (HBL v. Ittifaq Foundries and others) for recovery of Rs.34,72,33,046.83 alongwith other charges etc., as stood on 31.10.1994 were filed. In the last two suits, only Mian Muhammad Shahbaz Sharif was one of the defendants.

142. All these suits have been found pending from 1994, without any material progress. From the perusal of plaints of those suits, it has revealed that the loan facilities were in fact

obtained from these creditor banks earlier to the year 1994, yet the amount was not paid even after the passage of more than 15 years from the filing of the suits. It has further revealed from the contents of plaints that to gain these loans personal guarantees were executed by both these brothers also.

143. This allegation of unpaid loans, if is further dug out, we have found its nexus and link with the judgment, reported in PLD 2000 S.C. 869 (Zafar Ali Shah v. Pervez Musharraf, Chief Executive) (a judgment delivered by 12 Hon'ble judges) alongwith some other allegations, but at page 1133 the following passage is relevant, which is reproduced as under: -

"ILLEGAL EXTRACTION OF HEAVY AMOUNT BY MIAN NAWAZ SHARIF, SHEHBAZ SHARIF AND HIS FAMILY MEMBERS FOR THE FOLLOWING UNITS OWNED BY THEM.

S.NO.	**NAME OF UNIT**	**OUTSTANDING LIABILITY (In Million)**
1.	Ittefaq Foundries Ltd.	1,556
2.	Ramzan Sugar Mills Ltd.	623
3.	Haseeb Waqas Sugar Mill Ltd.	543
4.	Mehran Ramzan Textile Mill	455
5.	Ramzan Bukhsh Textile Mill	373
6.	Brothers Sugar Mills Ltd.	351
7.	CH. Sugar Mills Ltd.	339
8.	Ittefaq Sugar Mills Ltd.	313
9.	Ittefaq Brothers Ltd.	226
10.	Sandalbar Textile Mills Ltd.	205
11.	Khalid Siraj Textile Mills Ltd.	191
12.	Hudabiya Engineering Co. Ltd.	182
13.	Brothers Textile Mills Ltd.	174
14.	Ittefaq Textile Mills Ltd.	164
15.	Brothers Steel Ltd.	159
16.	Hamza Board Mulls Ltd.	153
17.	Hudabiya Paper Mills Ltd.	134
18.	Ilyas Enterprises Ltd.	3
19.	Ittefaq Hospital Trust	2
	Total:	**6,146**

."

144. So, it has become evident from the above allegations that the candidate who has opted not to defend this case either has no case to dislodge the allegations of unpaid loans or for the reasons best known to him, he has avoided to appear. The result of it would be that keeping in view the judgment of PLD 2000 S.C. 869(ibid). Suits of different banks mentioned above, and the "Project Brief" dated 22.5.2008, it is apparent that the candidate had not paid the loan secured by him alongwith his associates. At this stage, the following words are manifesting our passion:-

> "A poor is hauled up for a penny only.
> A rich is allowed let off for billions.
> We can't be contributory to this injustice.
> As it is injustice to this poor nation".

145. Therefore, on this count also, the candidate has been found disqualified to contest the election, due to provision of Article 63 (q) of the Constitution, section 14(5-A), section 12(2)(c) read with section 99(1)(s) of the Act.

(vi) PROPAGATING OPINION AGAINST JUDICIARY

146. It has been argued that Mian Muhammad Nawaz Sharif and Mian Muhammad Shahbaz Sharif, both brothers have been propagating opinion with regarding to integrity, independence of judiciary and are also ridiculing and defaming the judiciary. According to clause (g) of sub-article (1) of Article 63 of the Constitution, they may be declared disqualified to contest election.

147. Mr. Ahmed Raza Qasuri, has referred to news items attributed to both these brothers published in various newspapers: -

(1) Daily Express dated 24.6.2008: -

روزنامہ ایکسپریس 24 جون 2008ء

عدالت کو دوکان بنایا گیا: شہباز پیچھے نہیں ہٹوں گا: نواز انصاف کی توقع نہیں تھی، اپیل نہیں کروں گا۔ قائدن لیگ
عدلیہ کی آزادی کے لیے سب کچھ لٹانے کے لیے تیار ہیں، پی سی او ججز کے سامنے پیش ہوا تو میاں شریف کا بیٹا نہیں: صدرن لیگ
پی سی او ججز قوم کی قسمت سے کھیل رہے ہیں۔

(2) A clipping from Daily Khabrain dated 13th June 2008 is in the following terms: -

روزنامہ خبریں 13 جون 2008ء

فوجیوں کو سلیوٹ مارنے والے جج نہیں چاہتے: نواز شریف

(3) In clipping of 28.6.2008 Daily Jang, Rawalpindi following was allegedly uttered by Mian Muhammad Nawaz Sharif: -

روزنامہ جنگ 28 جون 2008ء

اصلی ججوں کو بحال کرائینگے، پی سی او ججز کے سامنے پیش نہیں ہوں گے: نواز شریف
جن وجوہات کی بنا پر مجھے نااہل قرار دیا گیا وہ قوم کے سامنے ہے۔

(4) According to clipping of Daily Khabrain Islamabad/ Rawalpindi dated 12.12.2008 the following words were uttered by Mian Muhammad Nawaz Sharif: -

روزنامہ خبریں 29 جنوری 2009ء

سپریم کورٹ کے جج میرے پیچھے پڑے ہیں، ناانصافیاں چلتی رہیں تو پاکستان ہاتھ سے نکل سکتا ہے۔ مشرف کا حلف اٹھانے والے نااہل قرار نہیں دے سکتے: نواز شریف

(5) In clipping dated 13.12.2008 published in Daily Jinnah

Islamabad/Rawalpindi Mian Muhammad Nawaz Sharif uttered the following words: -

روزنامہ جناح 12 دسمبر 2008ء

پاکستان میں انصاف فراہم کرنیوالے ناانصاف ہیں، عوام کو خود اٹھنا ہوگا: نواز شریف

(6) Clipping of Daily Express dated 29th Jaunary 2009 reads as under: -

روزنامہ ایکسپریس 29 جنوری 2009ء

میری اہلیت کا فیصلہ کرنے والے جج خود نااہل ہیں، عوام 9 مارچ سے پہلے ہی تبدیلی لے آئیں: نواز شریف

ججوں نے آئین کی بجائے فرد واحد کا حلف اٹھا رکھا ہے، عدالت نے نااہل قرار دیا تو اسمبلی سے فیصلہ تبدیل کرالینگے، جج میرے پیچھے پڑے ہیں مگر ہم انہیں قومی اسمبلی کے کٹہرے میں لائیں گے۔

(7) Clipping from Nawa-i-Waqqat, Lahore dated 29th January 2009 reads as under: -

روزنامہ نوائے وقت 29 جنوری 2009ء

سپریم کورٹ کے جج میرے پیچھے پڑے ہیں، سو مرتبہ نااہل قرار دیں عوام میرے ساتھ ہیں: نواز شریف

پاکستان کی بجائے آمر کا حلف لینے والے ججز کا احتساب کریں گے، یہ جھوٹے پاکستانی ایک سچے پاکستانی کو کیسے نااہل قرار دے سکتے ہیں۔

(8) Clipping from The Nation dated 29th January, 2009:-

"Nawaz says PCO judges ineligible"

148. As the candidate to whom these news items are attributed has not appeared to rebut these news clippings noted above, ex-facie the case would fall under Article 63(g) of the Constitution.

(vii) PENDING CONTEMPT CASE – FALSE DECLARATION

149. Mr. Shahid Orakzai, has submitted that Mian Muhammad Nawaz Sharif had submitted false declaration before the Returning Officer in the earlier election as well as in the by-election because in case titled *Shahid Orakzai v. Pakistan Muslim League (Nawaz Group) and 8 others* (2000 SCMR 1969) Criminal

Appeal No.162 of 1999 (appeal in respect of rowdyism in the Supreme Court premises). This Court had passed the following order: -

> " We find that without substantial compliance of section 7 of the Contempt of Court Act, 1976 no proceedings for contempt can be initiated against PML (N) or Mian Muhammad Nawaz Sharif or their other leaders allegedly involved in the act of rowdyism. The matter requires a thorough probe which course of action was not resorted to earlier. The ends of justice would be fully met, if further proceedings against respondent No.1 are also deferred till a thorough investigation is made by the Investigating Agency concerned as to the culpability or otherwise of respondent No.1 as also any other person who may be found so involved. The Registrar of this Court shall supply a print of video film prepared by B.B.C. and of the film prepared by the Closed Circuit System installed in the Supreme Court premises to the Inspector General of Police, Islamabad, who shall entrust the investigation to a senior police officer, not below the rank of Superintendent of Police. The Investigating Agency shall complete the investigation within a period of four months from the receipt of the copy of this order so as to identify the miscreants involved in the incident and thereafter proceed in accordance with law".

150. As per Shahid Orakzai, the investigation was conducted by Mr. Taimur Ali Khan, PSP with regard to the culpability or otherwise of Mian Muhammad Nawaz Sharif, his brother Mian Muhammad Shahbaz Sharif and others, and a report was submitted in this Court. In that report dated 23.2.2001, it was found that Mian Muhammad Nawaz Sharif, President PML (N) and the then Chief Minister Shahbaz Sharif had facilitated 100 to 150 persons to attack on this Court and the bill of their meals etc. were paid by the Chief Minister House, Lahore on 10.12.1997. This report was submitted in the office of the Supreme Court but it was not unveiled due to an earlier high Official of the office, who was in league with these brothers. As per Shahid Orakzai, the aforementioned Criminal Appeal No.162 of 1999 was still pending on the basis of that report and it was

never finally decided as the action/proceedings were still to be commenced on the basis of that report. Without discussing the authenticity or otherwise of the arguments of Shahid Orakzai, it is quite certain that this criminal appeal being a pending case, against Mian Muhammad Nawaz Sharif, It was to be mentioned in his declaration filed with the nomination paper but it was omitted, therefore, Mian Muhammad Nawaz Sharif was disqualified for filing of incorrect declaration.

151. The fact of earlier order of rejection of Nomination Papers of Mian Muhammad Nawaz Sharif in the General Election which order had attained finality was suppressed and false declaration was submitted.

(viii) MISCELLANEOUS APPLICATION TO C.E.C.

152. It has further been submitted by the learned counsel that against the rejection of nomination papers dated 3.12.2007, during the General Elections, Mian Muhammad Nawaz Sharif had transmitted a miscellaneous application dated 7.12.2007, maligning the judges of the superior Courts, which miscellaneous application was rejected by the Chief Election Commissioner on 17.12.2007, holding that appeal against the rejection order was competent.

153. In fact, the Returning Officer who accepted the nomination papers of Mian Muhammad Nawaz Sharif had acted in such a manner which order could not be termed as having been passed with impartiality. It is not presumable that the Returning Officer who was judicial officer was unaware of the above noted judgments, one of which was reported in the law journal also as

noted above. According to learned counsel, all these above mentioned facts were brought to the notice of Returning Officer but the Returning Officer kept it aside while deciding the Nomination Papers of Mian Muhammad Nawaz Sharif.

154. It has also been submitted by the learned counsel that the present election was a continuation of the general elections. In the general election which were held on 18.2.2008, Mian Muhammad Nawaz Sharif had filed nomination papers for NA 120 Lahore-III which were rejected vide order dated 3.12.2007 by the Returning Officer, in the presence of the counsel of Mian Muhammad Nawaz Sharif after hearing both the parties. Against that order of rejection of nomination papers passed on 3.12.2007, appeal under section 14 of the Act being competent was not filed by Mian Muhammad Nawaz Sharif and that order dated 3.12.2007 had attained finality. The proposer and seconder could not propose and second Mian Muhammad Nawaz Sharif who could not also give consent for filing the nomination papers before the Returning Officer for the seat in the by-election to be held on 26.6.2008, and nothing was brought on record to prove that this previous order was set aside by any competent Court or forum or disqualification had disappeared in the by-election.

(ix) **UN-REFUTED ALLEGATIONS**

155. It is clarified that Mian Muhammad Nawaz Sharif, the candidate, having opted not to appear and having chosen not to file any proceeding, petition/appeal/revision or review before the competent court of law, under the prescribed provision of law, no

other person can obtain declaration in respect of his qualifications or disqualification by arguing that these provisions were not applicable to his case. The person legally competent to get such declaration is and was Mian Muhammad Nawaz Sharif the candidate/convict/himself, therefore, in his absence, the petitioners have got no legal right to obtain declaration for purging his disqualification with regard to his status.

156. As there is no rebuttal from the candidate himself on this factual aspect, therefore, we have to accept all these disqualifications considering these uncontroverted by the candidate himself and having no counter affidavit and arguments.

(8) INTERPRETATION OF SUBSECTION (5), (5-A) OF SECTION 14 OF THE ACT.

157. It has been contended by the learned counsel for proposer and seconder that the words used in subsection (5-A) of section 14 of the Act, "suffer from any disqualification". are ejusdem generis to the categories noted to the preceding words of "defaulter of loan, taxes, govt. dues or utility charges or has had any loan written off". But we are not in agreement with this interpretation of the learned counsel for the proposer and seconder. Before the provision is interpreted, it is necessary that section 14 of the Act may be reproduced: -

> "14. Scrutiny- (1) The candidates, their election agents, the proposers and seconders and one other person authorized in this behalf by each candidate and an elector who has filed an objection to the nomination of a candidate, may attend the scrutiny of nomination papers, and the Returning Officer shall give the reasonable opportunity for examining all nomination papers delivered to him under Section 12:

Provided that an elector who has filed an objection to the nomination of candidate shall only attend the scrutiny of the nomination paper of that candidate.

(2) The Returning Officer shall, in the presence of the persons attending the scrutiny under sub-section (1), examine the nomination papers and decide any objection raised by any such person to any nomination.

(3) the Returning Officer may, either of his own motion or upon any objection, either by an elector or by any person referred to in sub-section (1), conduct such summary enquiry as he may think fit and may reject nomination paper if he is satisfied that-

(a) the candidate is not qualified to be elected as a member;

(b) the proposer or the seconder is not qualified to subscribe to the nomination paper;

(c) any provision of section 12 or section 13 has not been complied with 3[or submits any false or incorrect declaration or statement in any material particular]; or

(d) the signature of the proposer or the seconder is not genuine:

Provided that: -

(i) the rejection of a nomination paper shall not invalidate the nomination of a candidate by any other valid nomination paper;

(1a) the Returning Officer may, for the purpose of scrutiny, require any agency or authority to produce any document or record;

(ii) the Returning Officer shall not reject a nomination paper on the ground of any defect which is not of a substantial nature and may allow any such defect to be remedied forthwith, including an error in regard to the name, serial number in the electoral roll or other particulars of the candidate or his proposer or secornder so as to bring them in conformity with the corresponding entries in the electoral roll; and

a. the Returning Officer shall not enquire into the correctness or validity of any entry in the electoral roll.

(3A) Notwithstanding anything contained in sub-section (3), where a candidate deposits any amount of loan, tax or utility charges payable by him before rejection of his nomination paper on the ground of default in payment of such loan, taxes or utility charges, such nomination paper shall not be rejected for default thereof.]

(4) The Returning Officer shall endorse on each nomination paper his decision accepting or rejecting it and shall, in the case of rejection, record brief reason therefore.

(5) A candidate, may prefer an appeal against the decision of the Returning Officer rejecting or, as the case may be, accepting the nomination paper of the candidate to the Tribunal constituted for the constituency to which the nomination relates and consisting of not less

> than two nor more than three Judges of the High Court nominated by the Commissioner, with the approval of the President; and such appeal shall be summarily decided within such time as may be notified by the Commission and any order passed thereon shall be final.
>
> (5A) If, on the basis of any information or material brought to its knowledge by any source, a Tribunal constituted under sub-section (5) is of the opinion that a candidate whose nomination papers have been accepted is a defaulter of loan, taxes government dues or utility charges or has had any loan written off or suffers from any other disqualification from being elected as a member of an Assembly, it may, on its own motion, call upon such candidate to show cause why his nomination papers may not be rejected, and if the Tribunal is satisfied that the candidate is actually a defaulter as aforesaid or has had a loan written off or suffers from any disqualification, it may reject the nomination papers.
>
> (6) An appeal not disposed of within the period specified in sub-section (5) shall be deemed to have been rejected.
>
> (7) Announcement of the day and time appointed for the hearing of an appeal under sub-section (5) over the radio or television or by publication in the press shall be deemed to be sufficient notice of the day and time so appointed.

158. According to this section, it has to be noted that in subsection (3) of section 14 of the Act, the Returning Officer has been granted power to conduct such summary inquiry either of his own motion or upon any objection raised either by an elector or by any person referred to in subsection (1) and may pass order of rejection. In that subsection, a few kinds of disqualifications have also been enumerated. There is another provision of subsection (3-A) of section 14 in which it has been provided that the Returning Officer shall not reject the papers of the candidate in case he deposits any amount of loan, tax or utility charges payable by him before rejection of his nomination papers on the ground of default in payment of such loan, taxes or utility charges. Seen from this angle, the loan, tax or utility charges were noted in subsection (3) of section 14, therefore, there was no need to insert through amendment in 2002, this provision of subsection (5-A) in section 14 of the Act. In fact, subsection (5-A) was investing power to the Tribunal, who had to examine all kinds of

objections of disqualifications of a candidate, upon the basis of any information or material brought to its knowledge by "any source". The use of words, "or suffers from any disqualification" was in actuality granting power to the Election Tribunal to consider all the objections, of disqualifications brought by any person, natural or legal (any source) who lays information, or brings material before the Tribunal, it may be with regard to default of dues or utility charges etc. or it may be any other disqualifications of the candidate against whom such information or material were not brought by his opposing candidate due to any reason before the Returning Officer or the Election Tribunal. The aim decipherable from this provision appears to further filter the qualifications and disqualifications of a candidate through "any source" other than the opposing candidate. By bringing this provision, persons from general public have also been invited to apprise of the tribunal, if any, disqualification which has been suppressed or concealed or could not be brought by candidates due to collusion or for any other reason.

159. It is important that in subsection (5-A) of section 14 of the Act, at one place the words "or suffers from any other disqualification from being elected as a member of assembly" and at another place "or suffers from <u>any</u> disqualification" clearly import that words "any other" has not been used as 'ejusdem generis' to the default of loans. The word "other" cannot be ignored from the provision which is occurring immediately after the category of default of loan, taxes etc. if the plain words of "any other disqualification" are kept in view then these are

sufficient to dispel the impression that these words were "ejusdem generis" to the preceding class of default.

160. We have also noted that the provision of subsection (5-A) was inserted into section 14 of the Act when sub-section (3-A) of the Act was also being brought into it. The legislature could provide all that which is being argued in that subsection (3-A) easily. But by providing a separate provision, wider net was supplied in respect of disqualifications, persons bringing information, and to empower and to give jurisdiction to the Tribunal. Accordingly, the scope cannot be limited by applying rule of "ejusdum generis".

161. In fact, this provision is a second filter provided to the Election Tribunal, in case a candidate maneuvers the acceptance of his nomination papers through deceitful means or in collaboration or with the conspiracy of the other candidate, by making efforts of withdrawal or by manipulating the retirement of other from the contest although he was patently disqualified to contest election due to any of his disqualifications as conditioned by law. This provision has broadened the scope and power of election tribunal as earlier to this provision subsection (5) only was there, which had provided the right of appeal to a candidate before the Election Tribunal, against the acceptance or rejection of nomination papers. But with the advent of this provision of section (5-A) of section 14 during the process of Election, burden of invocation of writ of Quo warranto has been relaxed upon a common man/voter, source, etc. who was to wait and see till the

finalization of election process. It is, therefore, that Election Tribunal has been conferred power to act on the basis of any information or material brought to its knowledge. The purpose of insertion of this provision was to prohibit a disqualified person to enter into the scared Hall of Parliament wherein a seat was prescribed by the Constitution to a qualified person who is pious, sagacious, righteous and non-profligate, honest and Ameen, not of unsound mind, not an undischarged insolvent, not defaulter of loans, taxes, government dues, utility charges, not guilty of corrupt or illegal practices, not to those persons who were removed or compulsorily retired from the Service of Pakistan etc., nor to those who were convicted by a court of competent jurisdiction, not to persons or defamers who were propagating any opinion or acting in any manner prejudicial to the ideology of Pakistan, sovereignty, integrity or security of Pakistan, or morality, or the maintenance of public order or the integrity or independence of the judiciary of Pakistan or not to those who brings into ridicule the judiciary or the Armed Forces of Pakistan,. as provided by Articles 62 and 63 of the Constitution, section 12, subsections (3) (3-A) and (5-A) of Section 14 and section 99 of the Act.

162. If the words “suffer from any other disqualification” were used as ejusdem generis, then there was no need to insert the word “any other” in the aforesaid subsection. The use of words “any other” in its clear meanings are referring to other disqualifications, which have been enumerated preceding to this para, otherwise there was no fun to use the words “any other”.

163. The interpretation of the word “any source” as put by the learned counsel for the petitioner that it is confined only to juridical person is also not restricted only to legal, juridical or artificial person, it also covers in its encompass, the natural person. See the word “source” as to how it has been defined in Black’s Laws Dictionary (7th Edition): -

> “Source- The originator or primary agent of an act, circumstance, or result < she was the source of the information> <the side business was the source of income>”

164. A nearly comprehensive meaning of “source” has been found in Words and Phrases (Permanent Edition) by West Publishing Company as under: -

> “The word “source” conveys idea of origin, and is that from which any act, movement, or effect proceeds; a person or thing that originates, sets in motion, or is a primary agency in producing any course of action or result; an originator; creator; origin”.

In the “New English Dictionary and Thesaurus” by Geddes & Grosset (New Edition of 2000) it is given at page 557 Col II, which is as under: -

> “source n a spring forming the head of a stream; an origin or cause; a person, book, etc, that provides information “vti (inf) to find a supplier; to identify a source”.

165. From the above definitions, it is transparent and free from doubt that the word “source” includes in it the legal, juridical as well as natural person also. Moreover, this word “any source” cannot be limited for loans, taxes, dues or utility charges.

166. In our opinion this provision has provided a remedy which was lacking and deficit in the election process to electors,

voters, or any other person who was in the knowledge of disqualification of a candidate but was unable to object against the candidate, who had manipulated the concealment/ suppression of those disqualifications from the returning officer, so as to empower him to inform or place the material before the election tribunal, so that a disqualified person might not contest the election freely, with all his patent disqualifications which were requiring no detailed inquiry, or proof, and the information or material supplied was sufficient to restrain that candidate to participate in the election. Because after the election process was complete only a candidate was allowed to file election petition with regard to election disputes under section 52 of the Act and no other person was allowed to file an election petition with regard to the qualifications or disqualifications after the end of election. By providing this provision of subsection (5-A) in section 14 of the Act, in fact, the qualifications and disqualifications disputes to a great extent were allowed to be settled uptill the stage of the forum of Election Tribunal, in the election process.

(9) SUBSECTION (6) OF SECTION 14 OF THE ACT

167. The provision of subsection (6) of section 14 of the Act has not provided any period for the disposal of the petition filed under subsection (5-A) of section 14 of the Act. The word used “an appeal” cannot be construed to include the word ‘petition’, therefore, this subsection (6) of section 14 of the Act cannot be applied to the above mentioned petition. However, it cannot be held that indefinite period has been provided for

decision of such petitions. The principle and rule 'reasonableness' has to supply answer to it.

(10) JURISDICTION OF THE HIGH COURT

168. It has been contended that in election disputes, High Court lacks power to interfere, due to provision of Article 225 of the Constitution. Further has been submitted that power and jurisdiction under Article 199 of the Constitution can be invoked when whole election process is complete. Elaborating his argument, learned counsel states that after a candidate is chosen by the electorate and takes oath of the office, in that event, election petition would be maintainable by the opposing candidate and if it is not maintainable, in such a case, a writ of quo warranto under Article 199 of the Constitution can be instituted by any person.

169. While the learned counsel for respondents has opposed the arguments by stating that power and jurisdiction conferred by Article 199 of the Constitution upon the High Court is unfettered. The bar contained under Article 225 of the Constitution is applicable when the matter relates to election disputes. A person who is not qualified can be debarred through invocation of writ jurisdiction under Article 199 of the Constitution, if the Returning Officer and the Election Tribunal have failed to decide the matter in dispute or it has been decided against the apparent admitted facts, documents and record, as is the case of Mian Muhammad Nawaz Sharif, against whom there were two major convictions and many other disqualifications in

existence, which were not controverted even by the candidate himself. In such a case, it was not necessary to wait and allow a disqualified person to enter into the gates of Parliament, which is a sacred place of peoples chosen representatives.

170. To appreciate the arguments of both the learned counsel, copying of Article 225 of the Constitution is necessary which is as under: -

> 225. Election Dispute. No election to a House or a Provincial Assembly shall be called in question except by an election petition presented to such tribunal and in such manner as may be determined by Act of [Majlis-e-Shoora (Parliament)].

171. Firstly, this Article has used the word “no election” and secondly, except by an election petition” and the word “in such manner as may be determined by Act of Majlis-e-Shoora (Parliament). The Representation of the People Act, 1976 has provided Chapter VII for election disputes. According to section 52 of the Act, an election petition can be filed by a candidate. Subsection (1) of section 52 is as follows: -

> 52. **Election Petition-** (i) No election shall be called in question except by an election petition made by a candidate for that election (hereafter in this Chapter referred to as the petitioner).

172. From reading of the above noted subsection (1) of section 52 of the Act, it has transparently been provided that a candidate can file an election petition and not any other person. But after the insertion of subsection (5-A) in section 14 of the Act, which has allowed “any source” (a person legal or natural) to

communicate any information or place material before the Election Tribunal with regard to the disqualification of a candidate, a situation, may arise which has arisen in this case, that the petition filed under subsection (5-A) of section 14 of the Act has not been decided by the Election Tribunal, then what should be the fate of that petition. If a petition is filed under the above indicated subsection, and it is not decided for one reason or the other, and the candidate against whom information has been placed before the Election Tribunal, whether can be allowed to contest the election, even if he has got clear disqualifications of unrebutable and undeniable nature, having been proved through admitted documentary proof, whose authenticity can not be disputed even, by the candidate himself? The remedy provided to convey information and to place the material before the Election Tribunal through an application would become nugatory, if the Election Tribunal does not decide it in either way. In these circumstances, question arises as to whether such person ("source") may be ordered to remain mum and to wait till the whole election process becomes complete and a disqualified person enters the Hall of Parliament, mocking the purity of election process and the actions of election authorities, who have failed to perform their legal duty by allowing such disqualified person to enter the Hall of Parliament. The answer is provided by a legal maxim "Ubi Jus Ibi Remedium" (where there is right, there is remedy). By granting right to a "source" to file petition before an Election Tribunal with regard to the disqualification of a candidate, the remedy has also to be provided to such "source"

when his application is thrown away in a cold storage, without even examining it. In these circumstances, when the election laws are not providing any remedial steps, the High Court has got inherent and constitutional powers to remedy the wrong being done or having been done by the Election Tribunal.

173. Accordingly, the High Court has got power and jurisdiction in these circumstances to invoke its power to do justice.

174. Law is not a static object. It has to cope with the modern ideas and concepts, and the disputes coming before the court for resolution, as the society with its environmental set up is continuously progressing. Laws as well as its remedies are also changing with the passage of time. Before insertion of subsection (5-A) of section 14 on 31.7.2002, appeal before the Election Tribunal was competent by the candidate only but with the introduction of subsection (5-A) of section 14 into the Act, scope has been widened so to prohibit and restrain a disqualified person to contest and participate in the election. This new concept was introduced by section (5-A) of section 14 of the Act. Not only a person (source) was allowed to lay information but the Election Tribunal was itself conferred more powers and jurisdiction to entertain such information and material, in respect of disqualification of a candidate. When such power has been granted to the Election Tribunal, then it was the duty of the Election Tribunal to examine and decide the petition in either way. But the petition could not be thrown away without any order being

passed on it. In case of inaction of the Tribunal, the High Court has got power under Article 199 of the Constitution to decide that petition.

175. The latest trend developed by the Judge made law is that qualifications and disqualifications of a candidate, being matter of personal rights of the candidate, its decision, if it needs no factual enquiry and the dispute can be decided on the basis of admitted facts and authentic documentary proof, in that event, the jurisdiction of the High Court would be there, to correct legal errors or apparent defects having been crept into the order of the learned Election Tribunal. In ***PLD 2008 S.C. 313 (Intesar Hussain Bhatti v. Vice Chancellor, University of Punjab, Lahore and others)*** it was held "when validity of election is not challenged and the matter primarily relates to the competency and qualification or otherwise of a person of a candidate in the election, the bar contained in Article 255 would not be attracted and it would also not apply when the Tribunal having jurisdiction has failed to exercise the same". It is important that the person aggrieved cannot be left without any remedy at a later stage of the close of Election, because a Tribunal having jurisdiction cannot do it wrongly, but is bound to do it rightly".

In ***PLD 2008 S.C.735 (Lt. Gen. (R) Salahuddin Tirmizi V. Election Commission of Pakistan***, many judgments were referred with regard to scope of judicial review of the High Court under Article 199 of the Constitution which were noted as under: -

(1994 SCMR 1299) Ghulam Mustafa Jatoi **Vs** Additional District and Sessions Judge, Election Commission of

Pakistan **vs.** Javed Hashmi (PLD 1989 Supreme Court 396) and in Rao Sikandar Iqbal's case (C.P.No.1 of 2008)

176. In para 29 of the above judgment of 2008, this Court had observed as under: -

> ".....The High Court also in its constitution jurisdiction can entertain the question of rejection or acceptance of nomination papers, in the cases in which the disqualification of a person to contest the election, is apparent and can be decided without any factual inquiry....."
>
> ".....The power of Election Tribunal constituted under Article 225 is confined to the extent of election disputes which may also included qualification and disqualification of a candidate whereas Article 199 of the Constitution is not as such controlled by Article 225 of the Constitution in all matter at all stages of election rather the High Court in exercise of its constitutional jurisdiction may in suitable cases exercise all powers to correct a legal error, defect or disability and has much wider power to that of the power of the Tribunal constituted under Article 225 of the Constitution of Islamic Republic of Pakistan....."

177. Accordingly, the impugned order passed by High Court is just and proper and is not liable to be set aside. Resultantly, we hold that proposer, seconder, Federation of Pakistan and all the intervenors have got no right to defend the qualifications and disqualifications of Mian Muhammad Nawaz Sharif, who has failed to defend those qualities and disabilities of election himself. These persons/petitioners cannot be considered "aggrieved party" and to have a right to be impleaded in the writs or to file civil petitions for leave to appeal in this Court.

178. Consequently, the impugned judgment dated 23.6.2008 passed by learned Full Bench of Lahore High Court, Lahore is upheld by refusing leave to appeal.

179. The above are the detailed reasons for the short order announced on 25.2.2009.

J.

J.

J.

Islamabad,
25th February 2009
Saleem

APPROVED FOR REPORTING.