IN THE SUPREME COURT OF PAKISTAN
(REVIEW JURISDICTION)

PRESENT:
MR. JUSTICE TASSADUQ HUSSAIN JILLANI, HCJ
MR. JUSTICE NASIR-UL-MULK
MR. JUSTICE JAWWAD S. KHAWAJA
MR. JUSTICE ANWAR ZAHEER JAMALI
MR. JUSTICE KHILJI ARIF HUSSAIN
MR. JUSTICE MIAN SAQIB NISAR
MR. JUSTICE ASIF SAEED KHAN KHOSA
MR. JUSTICE SARMAD JALAL OSMANY
MR. JUSTICE AMIR HANI MUSLIM
MR. JUSTICE IJAZ AHMED CHAUDHRY
MR. JUSTICE GULZAR AHMED
MR. JUSTICE SH. AZMAT SAEED
MR. JUSTICE IQBAL HAMEEDUR RAHMAN
MR. JUSTICE MUSHIR ALAM

CIVIL REVIEW PETITION NOs. 328 & 329 OF 2013 IN CONSTITUTION PETITION NOs. 8 & 9 OF 2009

General (R) Parvez Musharraf **(In both cases)**
... Petitioner

VERSUS

1. Nadeem Ahmed (Advocate) and another **(In CRP 328/2013)**
2. Sindh High Court Bar Association through its Secretary and others **(In CRP 329/2013)**
... Respondents

For the Petitioner: Syed Sharif ud Din Pirzada, Sr. ASC
Assisted by Ch. Faisal Hussain, Advocate
Raja Muhammad Ibrahim Satti, Sr. ASC
Assisted by Shazia Yasin, Advocate and
Mr. Osman Ibrahim, Advocate
Dr. Khalid Ranjha, Sr. ASC
Mr. Ahmed Raza Kasuri, Sr. ASC
Barrister Muhammad Ali Saif, ASC
Syed Zafar Abbas Naqvi, AOR

For the Respondent (1): Mr. Rasheed A. Rizwi, ASC/Caveator
Mr. Asim Iqbal, President Sindh High Court Bar Association
(In CRP 329/2013)

Date of Hearing: 28, 29 & 30.01.2014

JUDGMENT

TASSADUQ HUSSAIN JILLANI, CJ.- Through these review petitions, petitioner has sought review of this Court's judgment dated 31.7.2009 (short order and detailed reasons

reported in Sindh High Court Bar Association vs. Federation of Pakistan (PLD 2009 SC 789). Although these petitions are barred by 1576 days, yet in the interest of justice, we have heard petitioner's learned counsel at some length and have considered the submissions made even on merit.

2. The facts giving rise to the instant review petitions briefly stated are that on 12.10.1999, petitioner General (R) Pervez Musharraf who was then the Chairman Joint Chiefs of Staff Committee and Chief of the Army Staff seized power by dismissing the government of the then Prime Minister Mian Muhammad Nawaz Sharif. He proclaimed a State of Emergency throughout Pakistan and assumed the office of Chief Executive of the Islamic Republic of Pakistan, issued the Provisional Constitutional Order No. I of 1999 as also the Oath of Office (Judges) Order No. 10 of 1999. On 25.1.2000 yet another Oath of Office (Judges) Order No. I of 2000 was promulgated wherein it was provided that the Judges of Superior Courts who were holding office immediately before the commencement of the said Order would not continue to hold office if the said Judges were not given or did not take Oath in the form as set out in the Schedule as a result of which certain Judges ceased to hold office. These orders were challenged before this Court through several petitions which were dismissed. However, the actions of General Pervez Musharraf were validated with certain conditions and limitations (Syed Zafar Ali Shah v. General Pervez Musharraf, Chief Executive of Pakistan (PLD 2000 SC 869) which *inter alia* were:

(ii) That constitutional amendments by Chief Executive can be resorted to only if the Constitution fails to

provide solution for the attainment of its declared objectives;

(iii) That no amendment shall be made in the salient features of the Constitution i.e. independence of judiciary, federalism, parliamentary form of government blended with Islamic provisions;

(iv) That the Fundamental Rights provided in Part II, Chapter I of the Constitution shall continue to hold the field but the State will be authorized to make any law or take any executive action in deviation of Articles 15, 16, 17, 18, 19 and 24 as contemplated by Article 233(1) of the Constitution, keeping in view the language of Articles 10, 23 and 25 thereof;

(v) That the three years period is allowed to the Chief Executive with effect from the date of Army Takeover i.e. 12th of October 1999 for achieving his declared objectives;

(vi) That the Chief Executive shall appoint a date, not later than 90 days before the expiry of the aforesaid period of three years, for holding of a general election to the National Assembly and the Provincial Assemblies and the Senate of Pakistan; and

(vii) That this Court has jurisdiction to review/re-examine the continuation of the Proclamation of Emergency, dated 12th October, 1999 at any stage if the circumstances so warrant as held by this Court in the case of Sardar Farooq Ahmed Khan Leghari v. Federation of Pakistan PLD 1999 SC 57.

3. Mr. Justice Iftikhar Muhammad Chaudhry, former Chief Justice of Pakistan who headed the Bench which delivered the judgment review of which is sought (Sindh High Court Bar Association PLD 2009 SC 879 *Supra)* was Chief Justice of the High Court of Balochistan when Oath of Office (Judges) No.1 of 2000 was promulgated and State of Emergency was proclaimed. Since six Judges of the Supreme Court ceased to hold office for not taking fresh oath and vacancies occurred, he was elevated to this Court and subsequently he became the Chief Justice of Pakistan.

4. On 9th of March, 2007, the petitioner filed a Reference before the Supreme Judicial Council under Article 209 of the Constitution against Mr. Justice Iftikhar Muhammad Chaudhry, Chief Justice of Pakistan and that was challenged by the latter through Constitution Petition No. 21 of 2007 which was accepted on 20.7.2007 by a 9-Member Bench of this Court as a result of which he was restored (Mr. Justice Iftikhar Muhammad Chaudhry, Chief Justice of Pakistan v. The President of Pakistan, short order PLD 2007 SC 578 and detailed judgment of which is at PLD 2010 SC 61).

5. After the restoration of the Chief Justice on account of the aforesaid judgment of this Court (PLD 2007 SC 578), a Bench of this Court was hearing a petition wherein the issue mooted was whether General Pervez Musharraf (who then was President and Chief of Army Staff) was qualified to contest an election to the office of the President or not. Petitioner apprehending an adverse verdict decided to take a drastic action against the Judiciary. Sensing this the Chief Justice of Pakistan constituted a Bench of available 7 Judges of the Supreme Court, which, passed a restraint

order [in the case of Wajihuddin Ahmed {C.M.A. No. 2869 of 2007 in Constitution Petition No. 73 of 2007)] against the apprehended instruments and measures and directed, inter alia, the Judges of Supreme Court and High Courts not to take oath under PCO or take any other extra-constitutional step.

6. The petitioner proclaimed a State of Emergency on 3.11.2007 and prescribed a fresh Oath of office for all Judges of the Supreme Court and High Courts and it was provided therein (Oath of Office (Judges) Order, 2007) that a Judge who did not take Oath of office under the said Order shall cease to hold office. About 15 Judges of the Supreme Court including Chief Justice of Pakistan Mr. Justice Iftikhar Muhammad Chaudhry and 56 Judges of the High Courts were prevented from performing the duties of their constitutional office as they did not take such oath.

7. Certain Judges of the Supreme Court and High Courts including the Chief Justice of Pakistan were put under house arrest. Immediately thereafter, General Pervez Musharraf made the appointment of Abdul Hameed Dogar, J, as the Chief Justice of Pakistan, who was at serial No. 4 of the seniority list of the Judges of the Supreme Court, i.e. Chief Justice of Pakistan, Rana Bhagwandas, J, (as he then was) and Javed Iqbal, J were senior to Abdul Hameed Dogar, J.

8. Through a suspectedly prompted petition, the afore-referred proclamation of emergency was challenged in the case of Tika Iqbal Muhammad Khan v. General Pervez Musharaf and others (PLD 2008 SC 178) and this Court headed by Mr. Justice Abdul Hameed Dogar validated all the afore-mentioned acts of petitioner General Pervez Musharraf and the review petitions were

dismissed (Tika Iqbal Muhammad Khan v. General Pervez Musharraf, Chief of Army Staff, Rawalpindi and 2 others (PLD 2008 SC 615). Meanwhile, elections were held in the country as a result of which Syed Yousaf Raza Gillani became Prime Minister of Pakistan who in his first speech before the Parliament before taking Oath of office announced the release of all the Judges who had been detained. After a few days, petitioner General Pervez Musharraf resigned. On account of the persistent demand of Bar Associations and general public, Judges who were prevented from working, on account of Oath of Office (Judges) Order, 2007 including the then Chief Justice of Pakistan Mr. Justice Iftikhar Muhammad Chaudhry had to be restored. After restoration of Chief Justice of Pakistan and other Judges, the actions of General Pervez Musharraf and the appointment of Judges after 3rd of November, 2007 came under challenge and this Court pronounced the judgment in Sindh High Court Bar Association v. Federation of Pakistan (Short order at PLD 2009 SC 789 and detailed reasons at PLD 2009 SC 879) which is sought to be reviewed through these review petitions.

9. Learned counsel for the petitioner in support of these petitions made the following submissions:-

Raja Muhammad Ibrahim Satti, ASC

10. The judgment dated 31.7.2009 passed in Const. Petition Nos. 9 and 8/2009 is void, per-incurium and not binding as far as the petitioner namely General (Retd) Pervez Musharaf is concerned inter alia for the following reasons:

a. Admittedly General (Retd) Pervez Musharaf was not a party in either of the Constitution Petitions and no relief had been sought against him.

b. Right to "access to justice to all" is a well recognized inviolable right under Article 9 of Constitution and this includes right to an impartial Court or Tribunal and this fundamental right has not been adhered to.

c. There was no proper lis before this Court while passing judgment of 31.7.2009 as the events and actions of 3rd November 2007 and Proclamation of Emergency etc were not directly under challenge.

d. The Constitution Petitions under Article 184(3) were not competent and even otherwise this jurisdiction does not extend to set aside a judgment of the Supreme Court.

e. This Court has wrongly assumed the jurisdiction to adjudicate the events and acts of 3rd November, 2007 as the same stood validated by 7 Members Bench of Supreme Court in Tikka Iqbal Khan's case (PLD 2008 SC 178) and subsequent review of Tikka Iqbal Khan's case was dismissed by 14 Members Bench (PLD2008 SC 615).

f. The basic and fundamental principle of audi alteram partem (that no one shall be condemned unheard) had totally been violated and all the persons including petitioner General (Retd) Pervez Musharaf were condemned unheard.

g. The judgment of 31.7.2009 is void on the sole ground of bias as admittedly the petitioner and Mr. Justice Iftikhar Muhammad Chaudhry, HCJP were in fact earlier having very good relations but later on turned into adversaries and both were at daggers drawn. They were litigating against each other and the petitioner also filed a Reference against Mr. Justice Iftikhar Muhammad Chaudhry, HCJP and on 3rd November 2007 the Emergency was imposed for the second time to get rid of Mr. Justice Iftikhar Muhammad Chaudhry and some members of Judiciary. As such the bias and enmity between Mr. Justice Iftikhar Muhammad Chaudhry and General (Retd) Pervez Musharaf was obvious and

therefore, Mr. Justice Iftikhar Muhammad Chaudhry, CJP was disqualified to hear and decide the matter concerning him. More so when earlier on he had also recused himself to hear cases of General (Retd) Pervez Musharaf on 18.10.2007 and thereafter he himself entertained, constituted the Bench and presided over the Bench and decided the matter through the judgment of 31.7.2009 against General (Retd) Pervez Musharaf against whom he was totally biased and inimical and thus the judgment is a nullity on the basis of bias.

h. It is a recognized principle of law and jurisprudence that justice is not only to be done but the same should manifestly be seen to be done. In the judgment under review, this basic principle of administration of justice is not reflected.

i Very important questions of Constitutional interpretation were involved and both the Attorney General and Federation had failed in their duty to assist the Court and defend the case for which they were under legal and lawful obligation but they avoided the same for political reasons and even so this Court was bound to correctly interpret the Constitution and apply the law on the subject which has not been done in the instant case and the entire case has been decided before obtaining the view points of the persons who were to be affected by the judgment.

j. At one stage this Court had considered to issue a notice to the petitioner without adding him as a party or getting amended Constitution Petitions and just as a formality sent a Notice to the petitioner at his residence at Chak Shahzad, Islamabad whereas it was known to everybody that General (Retd) Pervez Musharaf was abroad and was being subjected to life threats and could not come to Pakistan. The servant at petitioner's residence at Chak Shahzad refused to receive the notice and he informed the Process Server that General (Retd) Pervez Musharaf was abroad and thereafter no step had been taken for

proper service of the petitioner and the judgment was announced even without declaring ex-parte proceedings and thus the judgment is per incurium, void and coram non judice as there was no view point of the other side and the entire judgment was based on the arguments of the petitioners.

k. The judgment passed and the findings recorded qua General (Retd) Pervez Musharaf are not sustainable in the eyes of law as the factual controversies have been decided in Constitutional jurisdiction which are against law and that too without any opportunity of rebuttal afforded to the petitioner.

l. The judgment is also to some extent self-contradictory as the binding and operative judgment is contained in a Short Order reported as Sindh High Court Bar Association v. Federation of Pakistan (PLD 2009 SC 789). The Short Order does not speak of any act of abrogation or subversion of the Constitution or prosecution of General (Retd) Pervez Musharaf for acts and events of 3rd November 2007 rather this Hon'ble Court simply declared those actions as unconstitutional and rightly so. Because every violation of the Constitution is neither High Treason nor subversion or abrogation of the Constitution as held in Sharaf Faridi's case and also as reflected under Article 45 of the Constitution.

m. On the basis of the short order passed in the Sindh High Court Bar Supra, C.P. No. 454/2009 was filed in Sindh High Court and a Division Bench of the said Court comprising of two Hon'ble Judges including the Hon'ble Chief Justice of High Court of Sindh who was a member of the 14-member Bench in Sindh High Court Bar Supra disposed of the said constitution petition with following observations:-

> *"However we are also conscious of the fact that the Hon'ble Supreme Court of Pakistan in the judgment dated 31.7.2009 in Constitution Petition No.8 and 9/2009 has not issued any direction for prosecution of General (Retd) Pervez Musharaf hence we restrained ourselves from doing.*

Therefore, it should be appropriate for the petitioner to approach and make such prayer before the Supreme Court of Pakistan and seek direction in this respect".

n. Even otherwise it was earlier held by a five Members Bench of the Supreme Court that the Supreme Court had not issued any direction for prosecution of the petitioner for High Treason because it is within the domain of the Federal Government (Moulvi Iqbal Haider v. Federation of Pakistan 2013 SCMR 1683).

o. It is also not out of place to mention that though the judgment in Sindh High Court Bar Supra was announced on 31.7.2009 but even the petitioner in Constitution Petition Nos. 8 and 9/2009 did not file any review petition for prosecution of General (Retd) Pervez Musharaf for High Treason. Another petition was filed by the Communist Party of Pakistan against about 627 respondents including Generals, Corps Commanders, Chief of Air Force, Prime Minister, Cabinet, Parliamentarians and others in this respect but the same was not entertained by the office of Supreme Court. Moulvi Iqbal Haider filed CP. No. 2255/2010 which remained pending for about two and half years but no order was passed, however on return of General (Retd) Pervez Musharaf the petition of Moulvi Iqbal Haider was heard. It was initially fixed before a two Member Bench but subsequently another Hon'ble Judge was included in the Bench whereas the application was made for constitution of Full Court or a Larger Bench of 14 Members (as the judgment of 31st July was passed by 14 Members) but Hon'ble Chief Justice did not agree to constitute Larger Bench or Full Court and ultimately culminated in the order dated 3.7.2013 and reported as (2013 SCMR 1683).

p. The judgment needs to be reviewed if not set aside in toto as it also violates the doctrine of past and closed transaction and also the principle that the judgments of

Supreme court operate prospectively and not retrospectively.

11. During the course of arguments, Raja Muhammad Ibrahim Satti admitted, on Court query, that petitioner General (R) Pervez Musharraf had a notice of the petition filed by Moulvi Iqbal Haider before the Sindh High Court through citation published in Daily Dawn and further that after dismissal of the said petition by the said Court Moulvi Iqbal Haider challenged the order before the Supreme Court in which General Musharraf was represented by him (Raja Muhammad Ibrahim Satti). The case is reported as Moulvi Iqbal Haider Vs. Federation of Pakistan through Ministry of Law & Justice (2013 SCMR 1683).

12. The petitioner had proclaimed State of Emergency pursuant to a letter received from the then Prime Minister of Pakistan (letter reproduced in PLD 2009 SC 879 supra at page 1035 para 58). At this stage, the Court asked him as to whether the Prime Minister advised the President to act in violation of the Constitution to which the answer was no. The Court further asked him whether the Prime Minister had given any advice to impose State of Emergency or the petitioner acted in his own discretion, to which Mr. Satti replied that the petitioner acted in his own discretion. He referred to the judgment of this Court in Tikka Iqbal Muhammad Khan Vs. General Pervez Musharraf (PLD 2008 SC 178) to contend that in the said judgment this Court had validated the imposition of state of emergency and all orders passed by the petitioner. He added that one of the factors mentioned by the Prime Minister in his letter for deteriorating law and order situation was the interference by the Courts. He submitted that in the afore-cited case PLD 2008 SC 178 supra some judges of this Court during hearing of the said case recused themselves on the ground that they had at one stage or the other released certain accused in terrorist cases but nevertheless they were invited to take oath by the then President. He in particular referred to that paragraph of the proclamation of emergency which specifically mentions that the same was being done after deliberations in meetings with the Governors, Cabinet Ministers and the Corps Commanders. The Court at this stage referred to Abdul Hameed

Dogar, former Judge/CJP Vs. Federation of Pakistan (PLD 2011 SC 315 at page 321 para 8) wherein Justice Abdul Hameed Dogar who was made the Chief Justice after the imposition of the state of emergency admitted and regretted that he did not comply with the 7 Member Bench's order of this Court dated 3.11.2007.

13. A three Member Bench passed the order for proceedings against General Musharraf for 'high treason' and unless the judgment under challenge is reviewed, the Special Court / Tribunal constituted to try the petitioner is likely to be influenced by the observations made therein. He referred to Shoukat Ali Dogar Vs. Ghulam Qasim Khan Khakwani (PLD 1994 SC 281) and Emperor v. Khwaja Nazir Ahmad (AIR 1945 PC 18) to contend that the Court should not interfere in the function of the investigating agency. He referred to Sharf Faridi v. The Federation of Islamic Republic of Pakistan through Prime Minister of Pakistan and another (PLD 1989 Karachi 404) and Government of Sindh Vs. Sharaf Faridi (PLD 1994 SC 105) to argue that every violation of the Constitution does not amount to 'high treason'. He added that the petitioner in his capacity as President could be impeached under Article 47 of the Constitution but when asked he admitted that the order was passed by the petitioner in his capacity as Chief of Army Staff and not as President. He referred to Article 12 to contend that the law has to have prospective effect and not retrospective and Article 6 as presently worded can not be applied retrospectively. He lastly contended that in view of Article 270AA of the Constitution, PCO 2002 and 2007 are on same footing.

Syed Sharif ud Din Pirzada, Sr. ASC

14. Mr. Sharif ud Din Pirzada, learned Sr. ASC submitted that the judgment under review stands vitiated on account of personal bias that the former Chief Justice of Pakistan Mr. Justice Iftikhar Muhammad Chaudhry had against the petitioner since petitioner had filed a Reference against him and had also imposed state of emergency on account of which he was rendered dysfunctional. He further contended that the salutary principles of

due process and right to fair trial have been violated. Learned counsel relied on the following case law on question of bias:-

i) Matlub Hussain v. Gaman with others and the Crown (PLD 1951 FC 115).

ii) Asif Ali Zardari Vs. The State (PLD 2001 SC 568 at page 587),

iii) All Pakistan Newspapers Society Vs. Federation of Pakistan (PLD 2012 SC 1 at page 58, para 55)

iv) AWG Group Ltd and another v. Morrison and another (2006 (1) All ER 967 at page 971)

v) Anwar and another v. The Crown (1955 FC 185 at 227 and 233)

vi) Zulfikar Ali Bhutto Vs. State (1977 SCMR 514)

15. Responding to a Court query as to whether the principle of severance can be applied in this case to which his reply was that it cannot be applied in the present case because the former Chief Justice was in a commanding position and he could influence the other Judges. He referred to Bangalore principles reproduced in Shimon Shetreet's book "Culture of Judicial Independence" at page 598. The Court confronted him with the law laid down by this Court in Nadeem Ahmed Vs. Federation of Pakistan (2013 SCMR 1062) wherein it was *inter alia* held that if one member is disqualified, this would not vitiate the judgment given by the Court.

16. Having considered the submissions made, the questions which crop up for consideration in these review petitions mainly are as follows:-

(i) Whether there are grounds tenable in law to condone delay of 1576 days in filing these petitions;

(ii) Whether while passing the judgment under challenge, petitioner was not issued any notice and the judgment under challenge can be interfered with on the ground that petitioner was condemned unheard;

(iii) Whether the judgment under challenge is reflective of an element of bias which can be considered as a ground in review jurisdiction to ensure substantive justice;

(iv) Whether the conclusion drawn and the findings rendered in the judgment review of which is sought are patently incorrect and something obvious has been overlooked by the Court which, if considered, would warrant review of the said judgment;

(v) Whether the error in the judgment is so apparent and material that if the same had been brought to the notice of this Court before the pronouncement of the judgment, a different conclusion could have been drawn; and

(vi) Whether the judgment under challenge has the effect of giving retrospective effect to Article 6?

Q. No.1 *Whether there are grounds tenable in law to condone delay of 1576 days in filing these petitions;*

17. This petition is barred by 1576 days and in the application (Civil Misc. Application No. 8164 of 2013) filed by petitioner for condonation of delay, the grounds pressed into service are:

1. That the petitioner who was President of Pakistan was compelled by the circumstances to resign the office and thereafter, he left for abroad as he was having security threats to his life by Talibans and from many others quarters and he was not in a

position to come to Pakistan and file the review petition.

2. *That it was in March 2013 when the petitioner landed in Pakistan and by that time Mr. Iftikhar Muhammad Chaudhry, Chief Justice of Pakistan was Head of Judiciary who was having personal enmity, bias and grudge against the petitioner and the petitioner was not expecting any justice as long as he was in office, and so is evident when he knocked at the door of various High Courts for justice.*
3. *That the case of petitioner squarely falls within four corner of the case of Mian Muhammad Nawaz Sharif where he filed a Crl. Appeal against his conviction after about 9 years but that delay was condoned in similar situation and the case of the petitioner is even more plausible as if the judgment is not reviewed the same is to be used against him in High Treason against which entails the penalty of death or life imprisonment and, therefore, the judgment of Mian Muhammad Nawaz Sharif reported in PLD 2009 SC 814 is fully applicable and also the case of disqualification of Mian Muhammad Nawaz Sharif reported as PLD 2009 SC 531 is relevant for condonation of delay.*
4. *That now after superannuation of Mr. Justice Iftikhar Muhammad Chaudhry, Chief Justice of Pakistan the petitioner after obtaining the certified copy and engaging the counsel is filing the instant review petition without any delay and as such the delay caused in filing of the review petition was beyond the control of the petitioner and thus there is sufficient cause for condonation of delay."*

18. In support of the application, learned counsel contended that since the petitioner had filed a Reference against the then Chief Justice of Pakistan Mr. Justice Iftikhar Muhammad Chaudhry who presided over the Bench (which delivered the judgment under review) petitioner apprehended utter bias from him and therefore as long as he remained Chief Justice, he did not file a review petition. The argument is not a sufficient ground in law to condone the delay. Because, first he could have appeared during hearing of the said case and asked that Mr. Justice Iftikhar Muhammad Chaudhry should not hear the case; second even after

the pronouncement of the judgment he could file review petition and could have requested the Court that the then Chief Justice who presided over the Bench should not hear the review petition and may recuse himself; and third in the judgment under consideration despite the finding that the imposition of State of Emergency by Chief of Army Staff was unconstitutional and void, the Court did not direct the trial of the petitioner under Article 6 of the Constitution; if there was bias there could have been directions to that effect; and fourth the Bench which disposed of the petition in view of the undertaking given by the Federal Government that it shall proceed against the petitioner under Article 6 (in C.P. No. 2255 of 2010 reported at 2013 SCMR 1683) was not presided over by the then Chief Justice against whom bias is alleged.

19. The contention that the delay be condoned since the petitioner was not heard or that the judgment on that count is *void ab initio* and that no limitation runs against a void order is not tenable because even against a void order, limitation would run and would be computed from the date of knowledge. In Muhammad Raz Khan v. Government of NWFP (PLD 1997 SC 397), this Court specifically adverted to the question whether a party can be extended indulgence which pleads that the order was not challenged in time as it was void. The Court repelled the argument and held:-

> *"Principle of justice and fair play does not help those who were extraordinary negligent in asserting their right and despite becoming aware about alleged void order adverse to their interest remain in deep slumber. Therefore, according to our considered opinion, facility regarding extension of time for challenging orders cannot be legitimately stretched to any length of unreasonable period at the whims, choices or sweet will of affected party. Thus, order termed*

as nullity or void could at best be assailed by computing period of limitation when he factually came to know about the same. When a person presumes that adverse order is a nullity or totally devoid of lawful authority and ignores it beyond the period specified by law of limitation, then he does so at his own risk. Therefore, in all fairness terminus a quo will have to be fixed, the date of knowledge of alleged void order; which too must be independently established on sound basis. In this behalf we derive strength from the observations contained in PLD 1975 Baghdad-ul-Jadid 29 (Sayed Sajid Ali v. Sayed Wajid Ali) and 1978 SCMR 367 (S. Sharif Ahmad Hashmi v. Chairman, Screening Committee)."

20. In Qaisar Mushtaq Ahmad v. Controller of Examinations (PLD 2011 SC 174), this Court while dismissing an appeal which was barred by 14 days held as follows:-

"The fact that the applicant himself for unexplained reasons allowed his appeal to become time barred, thus filed the C.P.L.A., in which his request for the conversion etc. was specifically disallowed, can by no stretch of any factual or legal imagination be considered a ground for the condonation of delay. We are not convinced, if the case of the applicant is covered by the cases reported as Zulfiqar and others v. Shahdat Khan (PLD 2007 SC 582) as in that case the Court for certain reasons allowed the conversion of C.P.L.A. into an appeal or treated alike, whereas in the present matter the situation is converse, due to the order dated 9-5-2005 whereby the Court declined the request of conversion, rather it was observed that the direct appeal so initiated by the applicant shall be subject to all just exceptions (emphasis supplied). This order as mentioned above has attained finality, therefore it cannot be directly or indirectly revisited. The question thus now to be resolved is not about the conversion of the C.P.L.A. into an appeal or vis-a-viz, but whether for the un-disclosed, unexplained and abstract reasons, which the applicant still has described in this application as beyond his control (emphasis supplied), the delay can be condoned. In my considered view, this in the given circumstances of the case is not permissible, as it shall amount in an indirect manner, to provide vantage and gain to the delinquent party for its unexplained inaction in approaching this Court in proper remedy, which he could not achieve in the earlier

> *C.P.L.A., (see order dated 9-5-2005), over the other side which has earned a right for such lapse of the applicant; the other judgment reported as Chairman, N.-W.F.P. Forest Development Corporation and others v. Khurshid Anwar Khan and others (1992 SCMR 1202) cited by the applicant's counsel is also inapt to the present case and is distinguishable on its own facts."*

21. In Messrs Blue Star Spinning Mills v. Collector of Sales Tax (2013 SCMR 587), this Court clearly held that the rule that no limitation runs against a void order is not an inflexible rule that a party cannot sleep over to challenge such an order; that it is bound to do so within the stipulated/prescribed period of limitation from the date of knowledge before the appropriate forum. It has never been petitioner's plea that he did not have the knowledge of the impugned judgment. Even otherwise it has been admitted by petitioner's learned counsel that one Maulvi Iqbal Haider had filed a constitution petition bearing No. 454 of 2010 wherein he had sought trial of the petitioner in view of the judgment of this Court in Sindh High Court Bar *Supra*. But the said petition was disposed of with a direction that the petitioner should approach this Court. Maulvi Iqbal Haider thereafter filed Civil Petition No. 2255 of 2010 before this Court. It remained pending for 2½ years and no order was passed for trial of the petitioner and eventually on 3.7.2013 a Bench of three Judges disposed of the petition whereafter Special Tribunal was constituted to try the petitioner. For two to three years, the question of petitioner's trial in the light of the judgment of this Court in Sindh High Court Bar *Supra* remained pending either before the High Court of Sindh or before this Court but petitioner never filed any application for review of the judgment. This conduct is reflective of an element of contumacy which does

not warrant indulgence in review jurisdiction.

22. The reliance of learned counsel for the petitioner on two judgments of this Court wherein limitation of many years was condoned would be of no avail as the facts and circumstances of those cases are distinct. In Federation of Pakistan v. Mian Muhammad Nawaz Sharif (PLD 2009 SC 644), petitioner Muhammad Nawaz Sharif had sought review of a three Member judgment of this Court whereby he was disqualified to contest the elections without hearing him. While condoning the delay in filing the review petitions, the Court had taken note of the circumstances under which initially the said review petitioner was restrained from returning to this country and thereafter on account of removal of Judges of the Supreme Court and High Courts pursuant to imposition of State of Emergency 2007, he and those of his party men who were contesting General Elections of 2008 had made a public Oath that they would not appear before the Supreme Court till the lawful judiciary was restored. The Court in the said judgment observed:-

> *"The case of the petitioners who happen to be real brothers is that as leaders of one of the main stream political parties i.e. Pakistan Muslim League (N), they had taken a public stand against the Imposition of "State of Emergency" on 3rd of November, 2007 by General Pervez Musharraf, the arbitrary and unconstitutional removal of judges of the superior courts and were party to a public and collective oath taken by all the candidates of their party in the General Elections held in February, 2008 that if elected, they would struggle for the restoration of superior judiciary and till then they had decided to abstain from appearing before the court then constituted. This stand it was contended was neither directed against the judiciary as an institution nor any particular judge was targeted but it was more an effort to save the Constitution and the institution of judiciary which is the third most important organ of the State.* (Emphasis is supplied).
>
> *24. While rendering the judgments under review, the Court did not have the benefit of hearing the petitioners on account of which their stance could not be appreciated.*

The petitioners in their letter to the Chief Election Commissioner and in their public statements had expressed great anguish over the imposition of the "State of Emergency", the unconstitutional removal of judges and induction of judges through the Provisional Constitutional Order. In all fairness, the Court which passed the judgment under review, shared this anguish on moral plane but opted a course which in their perception was in institutional interest. In Para-29 of the judgment (in case of Mian Muhammad Nawaz Sharif) while referring to the "Imposition of State of Emergency" on 3rd of November, 2007 and the issuance of Provisional Constitutional Order under which the judges were asked to take the oath, it was observed, " .....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."

25. Notwithstanding the sharing of moral perception, the Court repelled the reasons for non-appearance on the ground that the petitioners were by implication attributing personal bias to the judges. It was observed that Judges "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." However, on a deeper appreciation of the stance taken and after hearing their learned counsel, it has been found by us that petitioners' non-appearance was not attributable to a personal bias against the Court then constituted but on account of a public stand that they had taken before entering the process of elections i.e. the collective oath which they and all the party candidates had taken on the issues relating to the Imposition of "State of Emergency" on 3rd of November, 2007 and a resolve to launch a movement for the restoration of superior judiciary. The restoration of the Hon'ble Chief Justice of Pakistan and other judges who were deposed on the imposition of "State of Emergency" and the immediate appearance of the petitioners by way of filing these review petitions indicate that the stance taken was based on a certain moral grounds (sic) which stood vindicated. The same cannot be dubbed as either contumacious or reflective of acquiescence to warrant the impugned findings.

26. There is yet another aspect of the matter. Notice was issued to the petitioner Mian Muhammad Shahbaz Sharif (in Civil Petition No.905 of 2008) filed by Khuram Shah but the review petitioner did not appear. The Court heard the respondent-petitioner and others at some length and after

conclusion of arguments, the same day on 25-2-2009 converted the civil petition into appeal and allowed it which, as was candidly argued by learned Attorney General, is not in consonance with Order XIII Rule 6, Order XIV, Rule 2 and Order XVI, Rule I of the Supreme Court Rules which mandate as under:--

> *"----------
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> ----------*
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> *Order XIV, Rule 2.--Where an appeal has been admitted by an order of this Court, the Registrar shall notify the respondents of the order of this Court granting leave to appeal, and shall also transmit a certified copy of the order to the Registrar of the High Court concerned.*
>
> *Order XVI, Rule 1.--The respondent shall enter an appearance within 30 days of the receipt of notice from the Registrar regarding grant of leave to appeal to the appellant, under Rule 2, Order XIV, but he may enter an appearance at any time before the hearing of the appeal on such terms as the Court may deem fit."*

27. We agree with learned Attorney General for Pakistan that after the grant of leave, Order XVI Rule I provides 30 days' time for the respondent to appear. In the instant cases, however, instead of waiting for 30 days to enable the petitioner/respondent to appeal, the Court allowed the appeal immediately when the petition was converted into appeal.

28. No one should be condemned unheard is an old adage ever since the advent of judicial dispensation. In Commissioner of Income Tax, East Pakistan v. Syeedur Rehman (PLD 1964 SC 410), this Court went to the extent of classifying an order passed without hearing as a void order. In the afore-referred circumstances, we are of the view that non- hearing of petitioners is an error on the face of record meriting interference in review jurisdiction."

23. Again in Muhammad Nawaz Sharif v. the State (PLD 2009 SC 814), the Court condoned the delay in filing criminal petition for leave to appeal by observing as follows:-

> *16. The period of delay of more than eight years in filing the present petition for leave to appeal can be broadly divided in two phases; the first is the petitioner's absence from the country for about seven years and the second is his abstinence from approaching this Court for almost a year and a half after his return. For the purpose of condonation of delay for the first phase, the circumstances*

under which the petitioner left the country are not as relevant as the resolution of the issue whether the petitioner was prevented from returning to the country. It has been the consistent stand of the petitioner that despite efforts he had not been allowed to return to Pakistan. This stand is substantiated by the judgment pronounced by this Court in the case of Pakistan Muslim League (N) v. Federation of Pakistan and others (PLD 2007 SC 642) (ibid) and the ensuing events. It was declared that the petitioner was entitled to enter and remain in Pakistan and that no hurdle or obstruction was to be created by any authority to prevent the petitioner's return. Pursuant to the said direction, the petitioner embarked on a return journey to Pakistan and took a flight from London to Islamabad. However, after landing at Islamabad, he was not allowed to leave the airport and was sent out of the country. In view of violation of the order of this Court, an application for contempt of Court was filed before this Court. A similar abortive attempt was earlier made in the year 2004 by the petitioner's brother, Mian Muhammad Shahbaz Sharif, and he was not allowed to leave the airport and put on a flight destined for overseas. The above facts clearly demonstrate that the petitioner was prevented from returning to Pakistan.

17. The petitioner returned to the country on 27.11.2007 but did not file the petition for leave to appeal until 28.4.2009. The explanation for this delay is mentioned in Paras J, K and L of the application of condonation of delay (Cr. Misc. A. No. 168 of 2009) which are reproduced as under:--

> *"(j) That it is a matter of record that the petitioner had, on his return to Pakistan, publicly pledged, at the very outset, neither to accept nor to condone the aforesaid constitutional deviation whereby, inter alia, 63 hon'ble Judges of the Superior Courts had been forcibly restrained from continuing to perform their judicial functions. It was because of this reason that all the candidates of the Pakistan Muslim League (N) contesting General Election 2008, pledged on oath to restore the judiciary to pre November 3, 2007 position, and this ceremony of collective oath of Pakistan Muslim League (N) candidate was widely publicized and covered by the media. Moreover, the petitioner had repeatedly declared that he will not appear before the judges of the Superior Courts till the entire set of judges who were illegally deposed on November 3, 2007, including the hon'ble Chief Justice Iftikhar Muhammad Chaudhry, were restored.*
>
> *(k) ----------*
>
> *(l) That it was only on March 17, 2009 that, pursuant to a long and arduous struggle of the lawyer's fraternity, as well as the indefatigable efforts made by, inter alia, the Pakistan Muslim League (N), that the illegally and unconstitutionally deposed judges have been restored to their original position with effect from pre November 3, 2007. there being no longer any constraint upon the petitioner for appearance*

> *before the Hon'ble Judges, he has immediately initiated action for challenging the Judgment passed by the Full Bench of the Sindh High Court in the instant case."*

Admittedly there was no such restraint order against the petitioner to come to this country and file review petition. He has failed to show a cause or reason sufficient in law to condone such an inordinate delay. The petition merits dismissal on this short ground alone.

> ***Q. No. 2:*** *Whether while passing the judgment under challenge, petitioner was not issued any notice and whether the judgment under challenge can be interfered with on the ground that petitioner was condemned unheard;*

24. The principle of *audi alteram partem* or that nobody should be condemned unheard is a time honored principle of natural justice. However, facts of each case have to be considered before delay can be condoned and this principle cannot be made an inflexible rule to give license to someone who knowing fully well that a lis is pending against him or that a judgment has been passed against him refuses to appear and when the judgment is passed fails to challenge it in time. In the instant case, we note that the Court had issued a notice to petitioner on his available address in Islamabad and when from there it transpired that he was abroad, the notice was widely published and televised. In Para 6 of the judgment under challenge it has specifically been noted as follows:-

> *"On 22.7.2009 a notice was issued to General Pervez Musharraf (Rtd.) on his available address intimating him about the proceedings in this case and 29.7.2009 as the date fixed therein before this Court. The Process Serving Officer reported on the same day that he had gone to the*

> *residential place viz. C-1, B Park Road, Chak Shahzad, Islamabad where a person identifying himself as Muhammad Hussain son of Amir and that on former's offer the latter refused to receive the notice. The factum of issuance of the afore-referred notice was widely televised through National and International T.V. channels. Also, it was widely published in National and International print media, but, on the date so fixed no one entered appearance."*

25. Even otherwise, it has never been the case of the petitioner, not even in the body of this petition that he was not aware of the pendency of proceedings which culminated in the judgment of this Court in **Sindh High Court Bar** *(Supra)* review of which is sought.

> **Q. 3** *Whether the judgment under challenge is reflective of an element of bias which can be considered as a ground in review jurisdiction to ensure substantive justice;*

26. The assertion of bias against a Judge and whether he is disqualified to hear a case on that ground has been a subject of judicial review in several cases. In Federation of Pakistan v. Muhammad Akram Shaikh (PLD 1989 SC 689), this Court having considered the precedent case law, laid down following principles which the Court may keep in mind while deciding the question of bias:-

> *"(i) It is fundamental principle that in the absence of statutory authority or consensual agreement or the operation of necessity, no man can be Judge in his own cause.*
>
> *(ii) A Judge who would otherwise be disqualified may act in a case of necessity where no other Judge has jurisdiction. That the 'necessity' rule is a part of the common law is undoubted.*
>
> *(iii) The rule of disqualification must yield to the demands of necessity, and a Judge or an officer exercising judicial functions may act in a*

> *proceeding wherein he is disqualified even by interest, relationship or the like, if his jurisdiction is exclusive and there is no legal provision for calling in a substitute, so that his refusal to act would destroy the only tribunal in which relief could be had and thus prevent a termination of the proceeding.*
>
> *(iv) An adjudicator who is subject to disqualification at common law may be required to sit if there is no other competent tribunal or if a quorum cannot be formed without him. Here the doctrine of necessity is applied to prevent a failure of justice. So, if proceedings were brought against all the superior Judges, they would have to sit as Judges in their own cause. Similarly, a Judge may be obliged to hear a case in which he has a pecuniary interest."*

27. In Gullapalli Negeswararao etc v. The State of Andhra Pradesh and others (AIR 1959 SC 1376) and Ranjit Thakur v. Union of India and others (AIR 1987 SC 2386), the question of bias was also considered. 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 seen 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..."*

28. In Asif Ali Zardari Vs. The State (PLD 2001 SC 568), the facts are distinguishable. Facts in brief were that the Chief Ehtesaab Commissioner filed a reference in the Lahore High Court,

Lahore against Mohtarma Benazir Bhutto ex-Prime Minister of Pakistan and her husband Asif Ali Zardari and some other officials *inter alia* on the ground that in their authority as holders of public office in collusion with each other and with M/s Societe General De Surveillance SA ("SGS") as well as Jens Schlegelmilch, they awarded a contract for shipment inspection to M/s SGS after accepting illegal gratification in the form of kickbacks and commissions resulting in a huge loss to the public exchequer. Vide a short order dated 15.4.1999 both Mohtarma Benazir Bhutto, former Prime Minister and Asif Ali Zardari were convicted and sentenced to various terms. This conviction was challenged in appeal which was allowed by this Court, the convictions were set aside and the case was remanded for *de novo* trial mainly on the ground of bias on the part of the bench headed by Malik Muhammad Qayyum, J. The Court while alluding to the question of bias observed as under:-

> *"25. No doubt, the Judges of the Superior Courts are blessed with a judicial conscience but question nonetheless is whether a particular Judge of the Subordinate or the Superior Judiciary against whom the allegation of bias is alleged is possessed of judicial conscience. This litmus test is indeed very difficult but certainly not impossible. The circumstances of a particular case wherein bias of a Judge is alleged would themselves speak volumes for the same. In other words, the principle is well settled that a Judge of the Superior Court is a keeper of his own conscience and it is for him to decide to hear or not to hear a matter before him. However, in the present case we are not inclined to adhere to the said settled principle because bias is floating on the surface of the record."*

29. The Court in arriving at the conclusion quoted in the preceding paragraph had considered the circumstantial and documentary evidence which comprised of issuance of red passport to the head of the Ehtesab Court (who was not otherwise entitled) on the direction of Senator Saif ur Rehman who was

incharge of the Ehtesab cell; the transfer of Ehtesab Reference from Principal Seat at Lahore to Rawalpindi Bench of the Lahore High Court; the order of the then Chief Justice, Lahore High Court to send the same judge of the Lahore High Court to Rawalpindi who was hearing the case at Lahore; the fact that the accused Mohtarma Benazir Bhutto was not even examined during trial; the appointment of Commission comprising of the Registrar, Lahore High Court to visit Switzerland and ascertain the genuineness and authenticity of certain documents; the manner in which the Commission conducted itself; the production of audio tapes and their transcripts in proof of the allegation that the learned judges who convicted the accused had been pressurized and forced by the authorities in power to oust the appellants from the arena of politics by securing their conviction to hold public office. In the case in hand, however, it has never been the case of the petitioner that the then Chief Justice Iftikhar Muhammad Chaudhry had done any overt act which could warrant an inference that he was inimical towards him rather it is petitioner's case that they were on good terms till filing of the reference before the Supreme Judicial Council against the said Chief Justice which was challenged by him and the same was set aside by a 13-Member Bench of this Court against which petitioner never filed any review application rather accepted it. As a matter of fact he welcomed the judgment. However, a few weeks after the restoration of the former Chief Justice, petitioner imposed state of emergency; issued various presidential orders and after prescribing a new oath those Judges who did not take the oath were stopped from working which included the said former Chief Justice. The events which followed

and the launching of the peoples' movement leading to the restoration of the then Chief Justice Iftikhar Muhammad Chaudhry on 16.3.2009 have already been narrated above. The judgment sought to be reviewed in the afore-referred circumstances does not reflect any personal bias on his part. First, because admittedly after the setting aside of the Presidential Reference and restoration of the former Chief Justice when the case of General (R) Pervez Musharraf's disqualification to contest the Presidential elections while in Army uniform (as Chief of Army Staff) was taken up, the said former Chief Justice constituted a Bench and did not include himself as a member of the said Bench. Second, petitioner's counsel has not referred to any case in which after his reinstatement for the second time on 24.3.2009 the then Chief Justice passed any adverse order against the person of the petitioner. Even in the judgment under review, the Bench headed by him did not direct trial of petitioner under Article 6 of the Constitution and in fact this is one of the grounds to seek review that though the Bench which delivered the judgment in Sindh High Court Bar Association's case did not direct trial but a 3 Members Bench in Moulvi Iqbal Haider vs. Federation of Pakistan through Secretary M/o Law and Justice (2013 SCMR 1683) directed trial under Article 6 of the Constitution.

30. This brings us to questions No. (iv) and (v) which we propose to deal jointly. These are as follows:-

(iv) *Whether the conclusion drawn and the findings rendered in the judgment review of which is sought are patently incorrect and something obvious has been overlooked by the Court which, if considered, would warrant review of the said judgment; and*

(v) *Whether the error in the judgment is so apparent and material that if the same had been brought to the notice of*

this Court before the pronouncement of the judgment, a different conclusion could have been drawn?

31. For a proper appreciation of the afore-referred two issues, it would be pertinent to first examine the nature of review jurisdiction. Article 188 of the Constitution provides that subject to the provisions of any act of the Parliament and any rules framed by the Supreme Court, to review any judgment pronounced or any order made by it; Order XXVI, rule 1 of the Supreme Court Rules lays down that subject to law and practice of this Court, the Court may review its judgment/order in civil proceedings on grounds similar to those mentioned in Order XLVII, rule 1 of C.P.C. and any criminal proceeding on the ground of an error apparent on the face of the record. Order XLVII of C.P.C. stipulates that a party may apply for review if it is aggrieved by the orders or decrees, or decisions mentioned in sub clauses (a), (b), (c) of rule 1 on three grounds namely, discovery of new and important matter or evidence which, after the exercise of due diligence was not within its knowledge or could not be produced by it at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason.

32. The scope of review jurisdiction came up for consideration before this Court in Lt. Col. Nawabzada Muhammad Amir Khan v. The Controller of Estate Duty, Government of Pakistan, Karachi and others (PLD 1962 SC 335), and this Court speaking through its Chief Justice Mr. Justice Cornelius as he then was observed as follows:-

"For the present purpose, the emphasis should, in my opinion, be laid upon the consideration that,

> *for the doing of "complete justice", the Supreme Court is vested with full power, and I can see no reason why the exercise of that full power should be applicable only in respect of a matter coming up before the Supreme Court in the form of a decision by a High Court or some subordinate Court. I can see no reason why that purpose, in its full scope, should not also be applicable for the purpose of reviewing a judgment delivered by the Supreme Court itself provided that there be found a necessity within the meaning of the expression "complete justice" to exercise that power. It must, of course, be borne in mind that by assumption, every judgment pronounced by the Court is a considered and solemn decision on all points arising out of the case, and further that every reason compels towards the grant of finality in favour of such judgments delivered by a Court which sits at the apex of the judicial system. Again, the expression "complete justice" is clearly not to be understood in any abstract or academic sense. So much is clear from the provision in Article 163 (3) that a written order is to be necessary for the purpose of carrying out the intention to dispense "complete justice". There must be a substantial or material effect to be produced upon the result of the case if, in the interests of "complete justice" the Supreme Court undertakes to exercise its extraordinary power of review of one of its own considered judgments. If there be found material irregularity, and yet there be no substantial injury consequent thereon, the exercise of the power of review to alter the judgment would not necessarily be required. The irregularity must be of such a nature as converts the process from being one in aid of justice to a process that brings about injustice. Where, how-ever, there is found to be something directed by the judgment of which review is sought which is in conflict with the Constitution or with a law of Pakistan, then it would be the duty of the Court, unhesitatingly to amend the error. It is a duty which is enjoined upon every Judge of the Court by the solemn oath which he takes when he enters upon his duties, viz., to" preserve, protect and defend the Constitution and laws of Pakistan".*

33. In Abdul Ghaffar-Abdul Rehman v. Asghar Ali (PLD 1998 SC 363), this Court after having examined a plethora of case law both from Pakistan & India laid down principles which a Court should consider before exercising review jurisdiction:

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

(i) That every judgment pronounced by the Supreme Court is presumed to be a considered, solemn and final decision on all points arising out of the case;

(ii) that if the Court has taken a conscious and deliberate decision on a point of fact or law, a review petition will not lie;

(iii) that the fact the view canvassed in the review petition is more reasonable than the view found favour with the Court in the judgment/order of which review is sought, is not sufficient to sustain a review petition;

(iv) that simpliciter the factum that a material irregularity was committed would not be sufficient to review a judgment/order but if the material irregularity was of such a nature, as to convert the process from being one in aid of justice to a process of injustice, a review petition would lie;

(v) that simpliciter the fact that the conclusion recorded in a judgment/order is wrong does not warrant review of the same but if the conclusion is wrong because something obvious has been overlooked by the Court or it has failed to consider some important aspect of the matter, a review petition would lie;

(vi) that if the error in the judgment/order is so manifest and is floating on the surface, which is so material that had the same been noticed prior to the rendering of the judgment the conclusion would have been different, in such a case a review petition would lie;

(vii) that the power of review cannot be invoked as a routine matter to rehear a case which has already been decided nor change of a counsel would warrant sustaining of a review petition, but the same can be pressed into service where a glaring omission or patent mistake has crept in earlier by judicial fallibility;

(viii) that the Constitution does not place any restriction on the power of the Supreme Court to review its earlier decisions or even to depart from them nor the doctrine stare decisis will come in its way so long as review is warranted in view of the significant impact on the fundamental rights of citizens or in the interest of public good;-

(ix) that the Court is competent to review its judgment/order suo motu without any formal application;

(x) that under the Supreme Court Rules, it sits in divisions and not as a whole. Each Bench whether small or large exercises the same power vested in the Supreme Court and decisions rendered by the Benches irrespective of their size

> *are decisions of the Court having the same binding nature."*

34. In Justice Sajjad Ali Shah v. Malik Asad Ali (1999 SCMR 640), the afore-referred view was reiterated.

35. In Justice Khurshid Anwar Bhinder v. Federation of Pakistan (PLD 2010 SC 483), this Court held:

> *"A review is by its very nature not an appeal or a rehearing merely on the ground that one party or another conceives himself to be dissatisfied with the decision of the court, but that it should only be granted for some sufficient cause akin to those mentioned in Order XLVII, Rule 1 of the Code of Civil Procedure, the provisions whereof incorporate the principles upon which a review was usually granted by Courts of law in England. The indulgence by way of review may no doubt be granted to prevent remediable injustice being done by a court of last resort as where by some inadvertence an important statutory provision has escaped notice which, if it had been noticed, might materially have affected the judgment of the court but in no case should a rehearing be allowed upon merits."*

36. The facts of the case in hand are rather straight i.e. the imposition of state of emergency, the promulgation of Presidential Order 2007, the requirement of taking fresh Oath by Judges and those who did not, ceased to be Judges. The appointment of Mr. Abdul Hameed Dogar as Chief Justice after the former Chief Justice was held to have ceased to hold office, the judgment of Tikka Iqbal's case whereby a Bench headed by Mr. Abdul Hameed Dogar validated the actions taken by the petitioner on 3rd of November, thereafter the turn of events, the movement for restoration of judiciary and the ultimate restoration of Chief Justice and other Judges and the vires of the actions taken were examined by the Court headed by the restored Chief Justice, Mr. Justice Iftikhar Muhammad Chaudhry and the pronouncement of

the Sindh High Court Bar (*Supra*). The view taken in Sindh High Court Bar (*Supra*) is that the Chief of Army Staff could not have imposed emergency as he had no power under the Constitution to do so; that the former Prime Minister had addressed a letter to the President and not to the Chief of Army Staff about the deteriorating law and order situation and orders of some of the Judges of this Court which according to him were not appropriate in the given circumstances in the country. The full Bench of this Court had unanimously declared the actions taken to be *void ab initio* and *non est* and held as follows:-

> *"60. From the contents of the letter of the Prime Minister, it cannot be said that he issued any direction to the Armed Forces in terms of Article 245 of the Constitution to act in aid of the civil power, nor the actions of General Pervez Musharraf of 3rd November, 2007 could be said to have been taken or done while acting in aid of the civil power. Even otherwise, the letter was addressed to the President of Pakistan and not to the Chief of Army Staff. But for the sake of argument, it may be stated that even if the letter was addressed to the Chief of Army Staff, it could not be construed to give to the latter any power to take the kind of steps that he took in pursuance of the aforesaid letter.*
>
> *80. Seen in the above perspective, the actions of General Pervez Musharraf dated 3rd November, 2007 were the result of his apprehensions regarding the decision of Wajihuddin Ahmed's case and his resultant disqualification to contest the election of President. Therefore, it could not be said that the said actions were taken for the welfare of the people. Clearly, the same were taken by him in his own interest and for illegal and unlawful personal gain of maneuvering another term in office of President, therefore,-the same were mala fide as well. The statement made in Proclamation of Emergency that the situation had been reviewed in meetings with the Prime Minister, Governors of all the four Provinces, and with Chairman, Joint Chiefs of Staff Committee, Chiefs of the Armed Forces, Vice Chief of Army Staff and Corps Commanders of the Pakistan Army, and emergency was proclaimed in pursuance of the deliberations and*

> *decisions of the said meetings, was incorrect. The Proclamation of Emergency emanated from his person, which was apparent from the words "I, General Pervez Musharraf...." used in it.*
>
> *----------*
>
> *85. In the light of the above discussion, the actions of General Pervez Musharraf dated 3rd November, 2007, viz., Proclamation of Emergency, PCO No. 1 of 2007 and Oath Order, 2007, etc. are held and declared to be unconstitutional, illegal, mala fide and void ab initio. In pursuance of the aforesaid declaration, it is further held and declared that the Chief Justice of Pakistan, the Judges of the Supreme Court of Pakistan, Chief Justices and Judges of High Courts who were declared to have ceased to hold office by the notifications issued by the Ministry of Law and Justice, Government of Pakistan in pursuance PCO No.1 of 2007 and Oath Order, 2007 shall be deemed never to have ceased to be such Chief Justices or such Judges, irrespective of any notification issued regarding their reappointment or restoration. The notifications issued by the Ministry of Law in this behalf are declared to be null and void."*

37. The afore-referred declarations and findings could not be subject matter of review as neither there is any discovery of new or important matter or evidence which after the "exercise of due diligence" was not within the knowledge of the petitioner or could not be produced by him at the time when the judgment under challenge was passed. As noted in para 16 above, in fact, petitioner's learned counsel frankly admitted, on Court query, first that the then Prime Minister Mr. Shaukat Aziz had written a letter to the President of Pakistan and not to the Chief of Army Staff; second that the Prime Minister had not advised him to impose the State of Emergency rather *"the petitioner acted in his own discretion"*. This frank admission by his counsel has further weakened his case for review. How could petitioner in his capacity

as Chief of Army Staff or even as President act on his own discretion. He had no power under the law to impose State of Emergency and make Judges of the Supreme Court and High Courts dysfunctional notwithstanding the mandate of Article 48 of the Constitution which *inter alia* stipulates that:

> *[**48.** (1) In the exercise of his functions, the President shall act [on and] in accordance with the advice of the Cabinet [or the Prime Minister]:*
>
> *[Provided that [within fifteen days] the President may require the Cabinet or, as the case may be, the Prime Minister to reconsider such advice, either generally or otherwise, and the President shall[, within ten days,] act in accordance with the advice tendered after such reconsideration.]"*

38. Yet another argument raised was that although in the judgment under challenge, there was no direction for trial of petitioner under Article 6, but a 3-Member Bench has directed trial (2013 SCMR 1683) which is not warranted in law. First this argument is no ground to seek review of the judgment under challenge because it seems the petitioner's grievance is against the order of the three Member Bench (2013 SCMR 1683). But the said judgment has not been challenged in review. Second, a violation of Article 6 has two aspects/consequences i.e. constitutional and criminal. In the judgment under review, the former aspect was dealt with and the Court held that the acts of petitioner were violative of the constitutional provisions. While in Moulvi Iqbal Haider v. Federation of Pakistan (2013 SCMR 1683), the Court dealt with the latter aspect i.e. criminal. But while doing so it did not give a finding on merit, lest it may prejudice the case of either side during trial. Rather the Court disposed of the case on the statement of Attorney General for Pakistan who said:

> *(1) The Prime Minister has directed the Secretary Interior to forthwith direct the Director-General FIA to constitute a special investigative team of senior officers to commence an inquiry and investigation in relation to the acts of General (R) Parvez Musharraf of 3rd November, 2007 that may amount to high treason under Article 6 of the Constitution and to finalize as expeditiously as possible the statement of case to be put up by the Federal Government before the Special Court to be constituted under the Criminal Law Amendment (Special Courts) Act, 1976.*
>
> *(2) The Law entrusts the investigation of the offence of high treason to the FIA under entry No. 14 of the Schedule of the FIA Act, 1974 read with sections 3(a) and 6 thereof. However, in order to ensure expeditious completion of the inquiry and investigation, the Prime Minister is also considering the constitution of a Commission to oversee and monitor the progress of the proceedings.*
>
> *(3) On the completion of the investigation, the Federal Government shall file the requisite complaint under section 5 of the Criminal Law Amendment (Special Courts) Act, 1976 and take steps to constitute the Special Court in accordance with section 4 of the said Act for the trial of the offence."*

39. In Para 3 of Moulvi Iqbal Haider *(supra)*, to be fair to the petitioner, the Court observed:-

> *"3. We are consciously, deliberately and as submitted by Mr. Muhammad Ibrahim Satti, learned Senior Advocate Supreme Court for the respondent, not touching the question of "abrogation" or "subversion" or "holding in abeyance the Constitution" or "any conspiracy in that behalf" or indeed the question of suspending or holding the Constitution in abeyance or the issue as to abetment or collaboration in the acts mentioned in Article 6 of the Constitution. This is so because any finding/observation or view expressed by us may potentially result in prejudice to the inquiry/investigation or subsequent trial should that take place as a result of such investigation."*

40. Third the findings rendered and the conclusions drawn

in Sindh High Court (*Supra*) did not in any manner preclude the passing of an order of the kind passed in Moulvi Iqbal Haider's case (2013 SCMR 1683). Because if the Court in an earlier judgment held the actions of petitioner Pervez Musharraf as unconstitutional, it did not deter a Bench of this Court from passing an order as a consequence of the findings rendered therein. Fourth notwithstanding the Sindh High Court *supra*, the discretion to direct trial under Article 6 of the Constitution lies with the Executive as reflected in the Preamble of the Criminal Law Amendment (Special Courts) Act, 1976 which stipulates, *"whereas it is expedient to provide for the trial by a Special Court of certain offences affecting the security, integrity or sovereignty of Pakistan or any part thereof, including offences of high treason and for matters connected therewith…."*. It was for the exercise of the said executive discretion that petitioners in Moulvi Iqbal Haider (*supra*), had prayed that the Federal Government be directed to lodge a complaint under Article 6 of the Constitution against General (R) Pervez Musharraf. Fifth in Moulvi Iqbal Haider (*supra*), the judgment *per se* did not amount to an order rather it is provided in the operative part of the judgment that the case would be investigated and thereafter final report submitted before the trial Court. The judgment merely refers to the commencement of proceedings by the Federal Government which include, but are not limited, to the task of investigation. As indicated earlier the Court has been conscious not to make any expression of opinion on merits of the case lest it may prejudice the case of the petitioner during trial.

(vi) *Whether the judgment under challenge has the effect of giving retrospective effect to Article 6?*

41. To appreciate this argument, a reference to unamended and amended Article 6 of the Constitution and Article 12 would be pertinent:-

Un-amended Article 6	**Amended Article 6**
6. (1) Any person who abrogates or attempts or conspires to abrogate, subverts or attempts or conspires to subvert the Constitution by use of force or by other unconstitutional means shall be guilty of high treason. (2) Any person aiding or abetting the acts mentioned in clause (1) shall likewise be guilty of high treason. (3) [Majlis-e-Shoora (Parliament)] shall by law provide for the punishment of persons found guilty of high treason.	**6.** [(1) Any person who abrogates or subverts or suspends or holds <u>in abeyance</u>, or attempts or conspires to abrogates or subvert or suspend or <u>hold in abeyance</u>, the Constitution by use of force or show of force or by any other unconstitutional means shall be guilty of high treason.] (Emphasis is supplied). (2) Any person aiding or abetting [or <u>collaborating</u>] the acts mentioned in clause (1) shall likewise be guilty of high treason. (Emphasis is supplied) [(2A) <u>An act of high treason mentioned in clause (1) or clause (2) shall not be validated by any court including the Supreme Court and a High Court.</u>] (Emphasis is supplied) (3) [Majlis-e-Shoora (Parliament) shall by law provide for the punishment of persons found guilty of high treason.

42. The argument of petitioner's learned counsel is grounded on protection against retrospective punishment guaranteed under Article 12 which mandates:

> *"**12.** (1) No law shall authorize the punishment of a person-------*
>
> *(a) for an act or omission that was not punishable by law at the time of the act or omission; or*
> *(b) for an offence by a penalty greater than, or of a kind different from, the penalty prescribed by law for that offence at the time the offence was*

committed.

(2) Nothing in clause (1) or in Article 270 shall apply to any law making acts of abrogation or subversion of a Constitution in force in Pakistan at any time since the twenty-third day of March, one thousand nine hundred and fifty-six, an offence."

43. Article 6 of the Constitution as it stands today was amended by virtue of Constitution (Eighteenth Amendment) Act, 2010 (10 of 2010). The amended parts of Article 6 which have been highlighted indicate following additions/changes:-

(i) In Article 6(1), words "or hold in abeyance";

(ii) In Article 6(2) words, "or collaborating"; and

(iii) Article 6(2A): This is a new sub-clause whereby it has been mandated that any act of high treason within the meaning of Article 6(1) and Article 6(2) "shall not be validated by any court including the Supreme Court and a High Court".

44. The nature of offence, definition and procedure of trial substantially remain the same except that another mode of suspending the Constitution (hold in abeyance) in the definition clause of high treason have been added. The major change brought is the addition of Article 6(2A). By this newly added sub-clause there is prohibition for courts including the High Court and Supreme Court to validate it.

45. The Court is seized of a review petition against a judgment wherein neither the question of petitioner's trial or the retrospective or prospective effect of Article 6 were moot points. The argument qua this is therefore misplaced and is accordingly repelled.

46. The Court has narrated with a measure of dismay the frequent constitutional deviations in the country. The spirit which underpins the judgment is a strong realization that we should not remain trapped by mistakes in history and turn a new leaf towards constitutionalism and the rule of law:-

> *"For the first time, Constitution of 1956 was abrogated on 7th October, 1958 and Martial Law was imposed by the then President, Iskandar Mirza who dismissed the Central and Provincial Governments; dissolved the Parliament and Provincial Assemblies and abolished all Political Parties and appointed General Muhammad Ayub Khan, the then Commander in Chief as Martial Law Administrator. Iskandar Mirza was soon, within few days, replaced by the latter. On 25th March, 1969, again the then head of Army, General Agha Muhammad Yahya Khan, abrogated the Constitution of 1962 and by Proclamation (PLD 1977 Central Statutes 42) Promulgated Martial Law followed by Provisional Constitution Order (Gazette of Pakistan, Extraordinary 4th April, 1969). On 5th July, 1977 once again Martial Law was imposed throughout the country by the then head of Army Chief viz. former General Muhammad Ziaul Haq, who, vide Proclamation of Martial Law (PLD 1969 Federal Statutes 326) dissolved the National Assembly, the Senate, the Provincial Assemblies etc. and put the Constitution of 1973 in abeyance followed by Laws (Continuance in Force) Order, 1977. When the Constitution was revived, it was undeniably, in a mutilated form by the notorious Eighth Amendment.*
>
> *10. Later, there was another onslaught on the ongoing democratic system of governance. On 12th October, 1999, the then Chief of Army Staff, General Pervez Musharraf, now retired, once more, put the Constitution in abeyance and the whole of Pakistan was brought under the control of Armed Forces. The National Assembly, the Senate and the Provincial Assemblies were suspended, so also, the Chairman and Deputy Chairman of Senate, the Speaker and Deputy Speaker of the National Assembly and the Provincial Assemblies were suspended and it was declared that the Prime Minister, Federal Ministers, Parliamentary Secretaries, the Provincial Governors, the Provincial Chief Ministers and the Advisor to the Chief Ministers would cease to hold offices, followed by issuance of Provisional Constitution Order and the Oath of Office (Judges) Order 2000. General Pervez Musharraf (Rtd.), self styled himself as Chief*

Executive and started ruling the country under the new dispensation. Later, he, unceremoniously, occupied the office of President and in the coming years revived the Constitution with Seventeenth Amendment.

11. Again, on 3rd November, 2007 the General Pervez Musharraf, (Rtd.), in his capacity as Chief of Army Staff, in the garb of declaration of emergency, put the Constitution in abeyance, issued Provisional Constitution Order No.1 of 2007 followed by the Oath of Office (Judges) Order, 2007, making as many as sixty one (61) Judges of superior judiciary including Chief Justice of Pakistan and Chief Justices of three Provinces dysfunctional for many of them either did not agree to take or were not given the oath. Of them were; from Supreme Court 13 out of 18 (17 permanent and one ad-hoc) Judges including Chief Justice of Pakistan, 18 out of 31 Judges of the Lahore High Court, 24 out of 28 Judges including Chief Justice of High Court of Sindh, 6 out of 13 Judges including Chief Justice of Peshawar High Court. It is quite saddening that all the five Judges including the Chief Justice of Balochistan High Court took oath under the Oath of Office (Judges) Order, 2007.

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13. .....In order to save the judiciary from being destroyed, for the first time in the history of this Country, a seven member Bench of this Court headed by the de jure Chief Justice of Pakistan, passed an order, inter-alia, restraining the President and Prime Minister of Pakistan from undertaking any such action, which was contrary to the Independence of Judiciary. So also the Judges of this Court and that of the High Courts including Chief Justice (s) were required not to take oath under the Provisional Constitution Order or any other extra Constitutional step and on the same day viz. 3.11.2007, the order was served on the members of superior judiciary through the respective Registrars of the Courts by way of Fax. It was also sent to all the relevant Executive functionaries."

47. The foregoing narration, analysis and observations lead us to conclude that the judgment under review does not stand vitiated by any bias or error in law or fact to warrant review. The petitions having no merit are accordingly dismissed. These are the detailed reasons for our short order dated 30.1.2014 which reads as under:-

"For reasons to be recorded later in the detailed judgment, we find the review petitions filed by petitioner General (R) Parvez Musharraf to be barred by time and the precedent case law cited in this behalf to be distinguishable. Even otherwise, we have considered the submissions made on merits. The grounds urged by the petitioner's learned counsel neither fall within the purview of review jurisdiction nor tenable on merit to warrant interference in the judgment under challenge. Both the petitions filed by him are accordingly dismissed."

CHIEF JUSTICE

JUDGE (HJ 1) JUDGE (HJ 2) JUDGE (HJ 3)

JUDGE (HJ 4) JUDGE (HJ 5) JUDGE (HJ 6)

JUDGE (HJ 7) JUDGE (HJ 8) JUDGE (HJ 10)

JUDGE (HJ 11) JUDGE (HJ 13) JUDGE (HJ 14)

JUDGE (HJ 15)

Islamabad, the
30th of January, 2014
Approved For Reporting
Khurram Anees

Jawwad S. Khawaja, J. I have had the benefit of reading the detailed judgment of Honourable the Chief Justice, with which I agree completely. My aim here is to highlight briefly, some additional aspects relating to bias and the contention advanced on behalf of the petitioner that the former Chief Justice of the Court, Justice Iftikhar Muhammad Chaudhry was biased against the petitioner General Pervez Musharraf and that in hearing the case relating to the Proclamation of Emergency he was acting as a "*judge in his own cause*". For this reason, it was urged that the judgment dated 31.7.2009 in the said case (now sought to be reviewed) is not sustainable.

2. Syed Sharifuddin Pirzada, learned Sr. ASC, almost exclusively confined his arguments to stress the point that the judgment under review should be set aside as averred in the Review Petition, firstly because *"General (Retd) Pervez Musharraf and Mr. Justice Iftikhar Muhammad Chaudhary were rival [sic] to each other and were dagger [sic] drawn and they were party against each other in case of Reference against Mr. Justice Iftikhar Chaudhry . . . and on filing the Presidential Reference [the] Supreme Judicial Council had suspended Mr. Justice Iftikhar Muhammad Chaudhry, Chief Justice of Pakistan and. . . that [sic] again ceased to hold office for about ½ years [sic] which show [sic] that by no stretch of imagination Mr. Justice Iftikhar Muhammad Chaudhry CJP was qualified to constitute and preside over the Bench*" which rendered the aforesaid judgment. And secondly because the Proclamation of Emergency was due to "*the deed [sic] and mis-deed of the [sic] Mr. Justice Iftikhar Muhammad Chaudhry CJP and therefore he was not supposed to be Judge of his own cause as it violates the basic maxim (NEMO DEBATE SSE JUDEX IN PROPRIA SUA CAUSA [sic]) and other principles of administration of justice".*

3. In relation to the learned counsel's first argument, the Honourable Chief Justice has already noted the counsel's inability in providing evidence of any act of the former Chief Justice which establishes his bias against the Petitioner. On 29.1.2014 Mr. Pirzada Sr. ASC was asked to go through the Review Petition (spanning 34 pages and settled by three ASCs) and advert to that paragraph or sentence where a fact had been asserted which, if accepted, would demonstrate bias on the part of the former Chief Justice. Mr. Pirzada took some time thumbing through and shuffling papers in his file but could not point to any such factual assertion. He, therefore, sought time (which was allowed) till the following day. The next day also he failed to show that any fact had been pleaded in support of the allegation of actual bias. The reason for setting out, in some detail this aspect of the case, will be evident from the discussion below.

4. The assertion of bias against a Judge can take two forms recognized by our law viz. 'actual' bias and 'reasonable perception' of bias even though there may be no actual bias. Actual bias is alleged on the basis of one or more specific incidents showing partiality or animosity amounting to bias. In order to demonstrate such bias, a factual averment has to be made in the pleadings of the party alleging it. The question as to whether the factual

allegation is true or not, will not arise if the relevant fact has not been pleaded. As has been noted above, the review petition was settled by three eminent Advocates of our Bar and the petitioner himself had the occasion to meet with and instruct the learned counsel. In these circumstances, in the absence of any factual assertion of actual bias, we can only say that there was in fact no basis for such allegation. We may, however, advert to certain assertions made in the review petition (as noted above) and arguments advanced on behalf of the petitioner inviting the Court to infer bias of the former Chief Justice against the petitioner. It was submitted that bias arose on account of the unlawful removal of the former Chief Justice and his house arrest and also on account of a reference having been filed by the petitioner against the former Chief Justice under Article 209 of the Constitution, wherein the Supreme Judicial Council had stopped the former Chief Justice from performing the duties of his office. This submission on its face is irrational and without lawful basis, as these events may show a bias harboured by the petitioner against the former Chief Justice but not the other way round. This aspect of the case has been further elaborated later in this opinion. Learned counsel for the petitioner argued that at the very least, we should accept the allegation of bias on the ground that there was the possibility of a 'reasonable perception' of bias. This argument appears to be based on the ratio in the case of *Metropolitan Properties, Ltd. v. Lannon* [(1968) 3 All E.R. 304]. The perception of bias, without there being actual bias, as noted above is also recognized by our law but again it has to be founded on a more solid footing than allegations which are imaginary or which are based on a subjective opinion divorced from objective reality. The main thrust of the argument of Mr. Pirzada, Sr. ASC was that our judgment of 31.7.2009 must be reviewed because of actual bias on the part of the former Chief Justice or in the alternate, on account of a reasonable perception that there could have been bias which must, without more, be inferred from the events noted above.

5. The above aspect of the case may become clearer and the attitude of the petitioner in levelling allegations of bias against the former Chief Justice could become more comprehensible if looked at in the context of the petitioner's career leading up to his appointment as the Chief of Army Staff. We can only try to understand the motivation behind such allegations of bias. The inference, if any, to be drawn is not in relation to the Court or the alleged bias of its former Chief Justice, it is to be drawn in relation to the petitioner himself. It appears that the petitioner, perhaps on account of his long service in the armed forces, may not have encountered dissent, disagreement or resistance to orders issued in a chain of command, necessary for a cohesive fighting force. He may, therefore, in his own mind, have considered the resistance to his unconstitutional Proclamation of Emergency, by the Judiciary of the country including the former Chief Justice, as a manifestation of disobedience or insubordination and thus ill will or animus against him. The imperious tenor of the Proclamation of Emergency brooks no dissent and says it all : *"I, General Pervez Musharraf, Chief of the Army Staff, proclaim emergency throughout Pakistan … I*

hereby order and proclaim … (emphasis supplied). With such thinking, it may not have crossed his mind that he may actually have missed the reality that the Court and its Judges were only doing their job in accordance with the law and the Constitution. His logic, perhaps not so strange to him can be best explained by referring to the wisdom of Hafez who recognized the elements of '*zarf*' and '*nafs*', and while doing so, understood the extremes of subjective opinion which may be contrary to accepted norms and which may lead a person bedevilled by subjective standards into an irrational persecution complex. As the sage of Shiraz said:

فکرِ ہر کس بقدرِ ہمتِ اُوست

However, as noted above, Courts are required to proceed on the basis of objective / rational standards and not on the basis of unfounded subjective opinions or on the basis of assumed perceptions of bias which may border on paranoia.

6. Judges, it may be noted, do encounter allegations of bias and also receive criticism some of which may be expressed in civil language while others may be through hate speech or outright vilification based on malice. In either event, the Judge by training does not allow such vilification to cloud his judgment in a judicial matter. Even extremely derogatory language used against Judges does not, by itself create bias, as is evident from the negligible number of contempt cases based on scandalisation of Judges, (none leading to a sentence) cited in the case titled *Baz Muhammad Kakar vs. Federation of Pakistan* (PLD 2012 SC 923). Courts, therefore, cannot decide questions of perceived bias by accepting the individual and personal views of an aggrieved petitioner and thus recuse from a case. It was pointed out to Mr. Pirzada, Sr. ASC that if a subjective perception of bias could be made a basis for recusal of a Judge merely because the petitioner had done things or had taken unconstitutional steps against the former Chief Justice, it would be very simple for any litigant not wanting his case to be heard by a particular Judge to start hurling abuses at such Judge and thereafter to claim that the Judge was biased against him. For litigants and their Advocates it is important to bear this in mind while urging 'perception of bias' against a Judge.

7. The submissions of learned counsel are clearly not tenable in law. In the present case there is not even an allegation of actual bias pleaded in the Review Petition let alone proof of the same. As for perception of bias, this has been discussed above and will be further dealt with later. The acts of the petitioner to which learned counsel drew our attention, if anything, only serve to demonstrate a sense of bias harboured by the petitioner against the former Chief Justice. The actions and conduct of the former Chief Justice on the contrary, demonstrate a dignified restraint such that even after being twice unlawfully prevented from performing his constitutional duties, orders (including the judgment under review) were not passed by him or by this Court which could be considered as having been

made in respect of the petitioner in a personal capacity. However, even if the perception of bias is for a moment said to exist, it is quite impossible to hold that the same has any relevance to the present review petition.

8. Mr. Pirzada cited a number of precedents to define the contours of bias as recognized in law and the effect which these may have on the validity of a judgment. The Hon'ble Chief Justice in the lead judgment has already discussed in some detail the ratio of these precedents. It may be added that the time-honoured principles of natural justice which call for vitiating a judgment as a result of bias in a Judge, are reasonably well defined in law and cannot be disputed. The purpose of these principles is to ensure that the rights of litigants are adjudicated upon by an impartial Court. This is an established rule and the Supreme Court would be the first to uphold it. We, however, are not engaged in an academic exercise, to determine generally the law relating to bias. Our endeavour is to see if, in the facts and circumstances of the case before us, there was bias sufficient to justify review of our judgment dated 31.7.2009. Learned counsel failed to advert to a single right of the petitioner which was the subject matter of adjudication in the case under review and which could, by extension, be prejudiced on account of the alleged bias of the former Chief Justice.

9. The cases cited by the learned Sr. ASC involve some personal right of a party which is in danger of being prejudiced because of the bias of the presiding judge. Indeed, in the Pakistani cases cited by him, the liberty of a party alleging bias was at stake. *Ghulam Rasool v. Crown* (PLD 1953 Federal Court 62) concerned an appellate ruling by M. R. Kayani, J where he had convicted and sentenced, as judge of the Lahore High Court, the appellants therein for murder. However, prior to being elevated to the Bench, Kayani, J had, as Legal Remembrancer to the Government of Punjab, advised the government on the same murder case. On appeal, the Federal Court held that the judgment of Kayani, J was vitiated due to the 'possibility' of him being biased against the appellants on account of him having expressed an opinion on the same case in favour of the prosecution and thus pre-judged the case. *Anwar v. Crown* (PLD 1955 Federal Court 185) also concerned a sentence passed against the appellant therein on a charge of murder. The Sessions Court had acquitted the appellant, but the deceased's father filed a criminal revision petition before the Lahore High Court which was accepted and re-trial was ordered. The appellant challenged this decision before the Federal Court on the ground that the language used by the High Court in its findings was so strong that the Sessions Court would be influenced by it and therefore he would not get a fair trial. The Federal Court however held that there was no danger of bias and upheld the order of re-trial. In *Asif Ali Zardari v. State* (PLD 2001 Supreme Court 568) Mr. Zardari, who was the spouse of a former Prime Minister was convicted by a Division Bench of the Lahore High Court headed by Malik Muhammad Qayyum, J under the Ehtasab Act, 1997. The appellant Mr. Zardari contended that Qayyum, J was biased because he had purportedly accepted a diplomatic passport for himself and his wife (which

they otherwise were not entitled to) in exchange for a ruling against Mr. Zardari. Recordings of telephonic conversations were also adduced in evidence where Qayyum, J was heard to be receiving directions from functionaries of the Federation. The Supreme Court found that bias was "*floating on the surface of the record*" and decided to set aside the judgment. This, it may be noted, was an instance of actual bias.

10. Unlike the above mentioned cases, the judgment under review makes no determination with respect to the personal rights of the Petitioner. The Court in the case of *Sindh High Court Bar Association* was instead primarily tasked with determining the constitutional validity of the Proclamation of Emergency made on November 3rd, 2007 and certain acts and other instruments following the said Proclamation. While determining this issue, the Court struck down and declared unconstitutional *inter alia* the Proclamation of Emergency, the Provisional Constitution Order No.1 of 2007 and the Oath of Office (Judges) Order of 2007. These were all indeed *actions* taken by the petitioner, but the Court did not comment on the criminal or civil consequences which could flow against the petitioner as a result of this determination. The petitioner has conceded this much in paragraph 30 of the Review Petition in the following words:

> "*30. That it is also pertinent to mention that though this Hon'ble Court after declaring that the Acts of 3rd November, 2007 were un-Constitutional yet in the operative part of the judgment this Hon'ble Court did not mention the prosecution of the petitioner under the High Treason Act…*"

11. The actions of the Petitioner on 3.11.2007, may have well been taken for his personal benefit, as the judgment under review holds, but it cannot be held on this basis that the petitioner's act of appointment/removal of judges of the superior courts, attempts at making unilateral amendments to the constitution, declaring a state of emergency, and so forth were *personal* rights of the petitioner the adjudication of which showed bias of the former Chief Justice against the petitioner. The judgment under review was rendered by 14 Judges of this Court who held the aforesaid acts of the petitioner to be unconstitutional. The Court, it may be noted, was called upon to decide constitutional questions concerning the affairs of the State. These questions were much bigger than the person of the petitioner and the same were decided in accordance with the Constitution. If the petitioner's contention is accepted it would be akin to saying that a judge who decides against the constitutionality of actions taken by a State functionary, thereby demonstrates impermissible bias against such functionary rendering the Judge incapable of hearing cases involving such functionary. It is the very essence of the judicial function to adjudicate matters coming before a Court. To illustrate this point one can, for instance, well imagine a situation where on the advice of the Prime Minister, the President files a reference under Article 209 of the Constitution against a judge of the superior courts and the judge is cleared of all charges by the Supreme Judicial Council. Can it be contended that the said

judge will be incapacitated from questioning the validity of any subsequent act of the Prime Minister or of the President because of a purported bias? If such a position is accepted, it would lead to the absurd situation that despite being cleared by the Supreme Judicial Council, the Judge would become non-functional in respect of cases against the President or the Prime Minister. In other words, such a Judge would stand accused of bias without having done anything to invite such an accusation and simply because he had been unsuccessfully proceeded against earlier through a Presidential reference to the Supreme Judicial Council. Moreover, this position would provide the Executive an impermissible means of control over the Judiciary which is neither provided for by the Constitution nor ever believed to have been so provided. Reading this novel check on the Judiciary into the Constitution would distort and obfuscate the carefully designed system of checks and balances already made part of the Constitutional structure. Judges, because of the nature of their work, at times do encounter invective, and at times malicious tirades, including abnoxious hate speech from litigants and sometimes even from members of the Bar. But they are able to disregard the same on account of their experience and training, when hearing cases involving such persons in Court.

12. Even otherwise, in observing that the *actions* taken by the petitioner on November 3rd 2007 were unconstitutional, the Court did little more than state what the petitioner admitted before the national and international media. Within a few days after the Proclamation of Emergency, the petitioner himself, in an interview to a foreign TV news channel (BBC) admitted that he had taken unconstitutional steps. Relevant portions from his interview, as reported in the Daily 'DAWN' of 18th November, 2007, are reproduced below:

> The daily DAWN, Islamabad, 18th November, 2007
>
> *NO ILLEGAL STEP TAKEN BEFORE NOV. PRESIDENT*
>
> *"Before March, I was very good. Suddenly did I go mad after March or suddenly my personality changed, am I Doctor Jekyll and Mister Hyde or what is it?" He said.*
>
> *"Am I such a person?*
>
> *"Please go into the details, the causes. What I am doing? Have I done anything unconstitutional, yes, I did it on Nov. 3.*
>
> *"Did I do it before? Not once." (Emphasis Added)*

It is difficult in these circumstances, to hold that the petitioner could have been prejudiced by the purported bias of the former Chief Justice, as the observations made in the judgment under review appear to be in line with the public pronouncement of the petitioner noted above. It is also important to note here that the said interview was within the knowledge of the Bench which rendered the judgment under review and was quoted in the said

judgment. There is no denial of the said interview from the petitioner whether in the Review Petition or otherwise.

13. This brings me to the petitioner's other argument i.e. the former Chief Justice acted as a "*judge in his own cause"* in deciding a matter related to the Proclamation of Emergency. The petitioner contends that it was the "*deed and mis-deed"* [*sic*] of the former Chief Justice which led to the Proclamation of Emergency and therefore he was biased in deciding this case against the petitioner. This argument is both fallacious and fails to recognize the objective reality of Constitutional rule.

14. The Proclamation of Emergency, it will be seen, did not target the former Chief Justice alone, it targeted the Judiciary of the country. This much is clear even from a cursory reading of the text of the Proclamation of Emergency and the advice of the Prime Minister quoted below which was purportedly relied upon by the petitioner in taking his actions of 3.11.2007. The grounds of the Proclamation of Emergency are reproduced at paragraph 47 of the judgment under review and the aforementioned letter of the Prime Minister is reproduced at paragraph 58 of the same judgment. These two documents, on account of their relevance to the petition in hand, are reproduced hereunder *in extenso*:

Text of the Proclamation of Emergency

> *"WHEREAS there is visible ascendancy in the activities of extremists and incidents of terrorist attacks, including suicide bombings, IED explosions, rocket firing and bomb explosions and the banding together of some militant groups have taken such activities to an unprecedented level of violent intensity posing a grave threat to the life and property of the citizens of Pakistan;*
>
> *WHEREAS there has also been a spate of attacks on State infrastructure and on law enforcement agencies;*
>
> *WHEREAS some members of the judiciary are working at cross purposes with the executive and legislature in the fight against terrorism and extremism thereby weakening the Government and the nation's resolve and diluting the efficacy of its actions to control this menace;*
>
> *WHEREAS there has been increasing interference by some members of the judiciary in government policy, adversely affecting economic growth in particular;*
>
> *WHEREAS constant interference in executive functions, including but not limited to the control of terrorist activity, economic policy, price controls, downsizing of corporations and urban planning, has weakened the writ of the government; the police force has been completely demoralized and is fast losing its efficacy to fight terrorism and Intelligence Agencies have been thwarted in their activities and prevented from pursuing terrorists;*
>
> *WHEREAS some hard core militants, extremists, terrorists and suicide bombers, who were arrested and being investigated were ordered to be released. The persons so released have subsequently been involved in heinous terrorist activities, resulting in loss of human life and property. Militants across the country have, thus, been encouraged while law enforcement agencies subdued;*

WHEREAS some judges by overstepping the limits of judicial authority have taken over the executive and legislative functions;

WHEREAS the Government is committed to the independence of the judiciary and the rule of law and holds the superior judiciary in high esteem, it is nonetheless of paramount importance that the Honourable Judges confine the scope of their activity to the judicial function and not assume charge of administration;

WHEREAS an important Constitutional institution, the Supreme Judicial Council, has been made entirely irrelevant and non est by a recent order and judges have, thus, made themselves immune from inquiry into their conduct and put themselves beyond accountability;

WHEREAS the humiliating treatment meted to government officials by some members of the judiciary on a routine basis during court proceedings has demoralized the civil bureaucracy and senior government functionaries, to avoid being harassed, prefer inaction;

WHEREAS the law and order situation in the country as well as the economy have been adversely affected and trichotomy of powers eroded;

WHEREAS a situation has thus arisen where the Government of the country cannot be carried on in accordance with the Constitution and as the Constitution provides no solution for this situation, there is no way out except through emergent and extraordinary measures;

AND WHEREAS the situation has been reviewed in meetings with the Prime Minister, Governors of all four Provinces, and with Chairman Joint Chiefs of Staff Committee, Chiefs of the Armed Forces, Vice-Chief of Army Staff and Corps Commanders of the Pakistan Army;

NOW, THEREFORE, in pursuance of the deliberations and decisions of the said meetings:-

1. I, General Pervez Musharraf, Chief of the Army Staff, proclaim Emergency throughout Pakistan.

2. I hereby order and proclaim that the Constitution of the Islamic Republic of Pakistan shall remain in abeyance.

3. This Proclamation shall come into force at once."
(emphasis added)

……..

Text of the letter of Prime Minister

"SUBJECT: NATIONAL SECURITY SITUATION.

Dear Mr. President,

I am writing to you to share my thoughts on the current national security situation and the risks that it represents for the future of Pakistan.

2. The Government has made serious and sincere efforts to revive the economy, maintain law and order and to curb extremism and terrorism in the country. In the last few months, however, militancy, extremism and terrorist activities have been in ascendance, particularly in some districts of NWFP where the writ of the government is being eroded and non-State militants are apparently gaining control. There have been a number of bomb blasts and

suicide attacks in other parts of the country including the recent suicide attack on a political rally in Karachi on 18th October, 2007. During the last ten months, 1322 precious lives have been lost and 3183 persons have been injured. Details of such incidents between April – October, 2007 are enclosed. The executive measures taken against extremist elements to contain militancy and terrorist activities have, on a number of occasions, been called into question by some members of the judiciary making effective action impossible.

3. There has been increasing interference by some members of the judiciary in government policy, adversely affecting economic growth, in particular. The cornerstone of the economic policies of the government is privatization, liberalization and deregulation which create economic growth and investment. Both local and foreign investment has been negatively affected.

4. It cannot be disputed that the legality of executive measures is open to judicial scrutiny. The wisdom or necessity of a policy or a measure is an executive function and not open to judicial review, however, in the recent past, some members of the judiciary have, nevertheless, departed from these norms. While we all are committed to the independency of the judiciary and the rule of law and hold the superior judiciary in high esteem, it is nonetheless of paramount importance that the Honourable Judges confine the scope of their activity to the judicial function. While judges must adjudicate they must neither legislate nor assume the charge of administration.

5. Most importantly, constant interference in executive functions, including but not limited to the control of terrorist activity, economic policy, price controls, downsizing of corporations and urban planning, has weakened the writ of the government. This has increased the incidents of terrorist attacks thereby posing grave threat to the life and property of the citizens of Pakistan and negatively impacting the economy. Wide-ranging suo motu actions of the courts negate the fundamentals of an adversarial system of justice. The police force has been completely demoralized and is fast losing its efficacy to fight terrorism. Intelligence Agencies have been thwarted in their activities and prevented from pursuing terrorists.

6. A large number of hard core militants, extremists, terrorists and suicide bombers, who were arrested and being investigated have been released. The persons so released are reported to be involved in heinous terrorist activities, resulting in loss of human life and property. Militants across the country have, thus, been encouraged while law enforcement agencies subdued.

7. There is a widespread perception of overstepping the limits of judicial authority and taking over of executive functions. Privatization is at a standstill while domestic and foreign investors are being compelled to reconsider investment plans thus adversely affecting the economy.

8. On the other hand, an important constitutional institution, the Supreme Judicial Council, has been made entirely irrelevant by a recent order. Detailed reasons for this order are still awaited despite a lapse of three months. Judges have, thus, made themselves immune from inquiry into their conduct and are now beyond accountability.

9. The law and order condition in the country as well as the economy have been adversely affected and trichotomy of powers eroded. A situation has thus arisen where the routine and smooth functioning of government

machinery is becoming increasingly difficult and causing grave concern among ordinary citizens about their security. As evident from the attached list, there has been an unusual increase in security related incidents highlighting the gravity of the situation.

10. Mr. President, the contents of this letter reflect my views and public opinion about the current scenario. For any State to function, all the three pillars of State must act in harmony in the best national interest. Pakistan is a country that achieved independence after immense sacrifices and has tremendous potential to develop prosper and be recognized among the comity of nations as a country with an exciting future.

Yours sincerely,

Sd/-
(Shaukat Aziz)

General Pervez Musharraf
President
Islamic Republic of Pakistan
Aiwan-e-Sadr, Islamabad." (emphasis supplied)

15. Nowhere in the above quoted texts is the former Chief Justice mentioned as the cause for declaring the emergency and he was certainly not the only one affected by it. In a narrow context, all judges of the superior courts in office on November 3rd, 2007 were directly affected by the Proclamation of Emergency. The majority of these judges suffered from this act, as they were unlawfully prevented from performing the duties of their Constitutional office. The remaining judges in the minority who decided to take the unconstitutional oath of office, on the other hand, could be perceived as beneficiaries of the aforesaid act of the petitioner. Therefore, at the time the case of *Sindh High Court Bar Association* was being heard, the 14 Hon'ble Judges on the Bench (other than myself) had been Judges in the Supreme Court and/or a High Court on 3.11.2007 and were thus direct 'affectees' of the unconstitutional Proclamation of Emergency made that day by the petitioner. Yet, as per Mr. Pirzada only the former Chief Justice acted as a judge in his own cause. The argument of the learned counsel is therefore clearly fallacious: if the Chief Justice acted in his own cause by hearing this case, then so did 12 other Judges on the Bench. If the petitioner seeks to draw a distinction between the former Chief Justice and the 12 other Judges simply on the basis of the reference he filed against the former Chief Justice, the distinction would be illogical and quite misleading. Such reference (as noted earlier) can raise an inference that it was the petitioner who was biased against the former Chief Justice and not the other way round.

16. Having observed as above, the submission of Mr. Pirzada also fails on another ground. If indeed there were no Judges who could satisfy the impartiality litmus test the petitioner proposes for the former Chief Justice, could the Court justifiably stand back and ignore the crucially important constitutional questions of national importance raised in the case of the *Sindh High Court Bar Association*. Such option was not available to the Court and it, therefore, had to assume jurisdiction since no one else could. This position finds support

from numerous precedents such as *Federation of Pakistan v. Muhammad Akram Sheikh* (*supra*) which has been cited in the lead judgment as well and which holds in relevant part that, "*a judge who would otherwise be disqualified may act in a case of necessity where no other judge has jurisdiction.*" I therefore find no merit in the argument of Mr. Pirzada, Sr. ASC even on this score.

17. Before concluding this opinion, I must take note of the statements of the Quaid-e-Azam that Mr. Pirzada elaborated on. He cited the following speech of the Quaid from his book "The Collected Works of Quaid-e-Azam Mohammad Ali Jinnah" (Vol. II) pages 308-309:

> *Excerpt from the book by S. Sharifuddin Pirzada*
>
> *"On 17 February 1925 Sir Hari Singh moved a resolution for the establishment of a Supreme Court in India for the quick disposal of civil suits, previously disposed of by the Judicial Committee of the Privy Council, and for the disposal of appeals in serious criminal cases. Colonel Sir Henry Stanyon opposed on the grounds that it would involve heavy expenditure; considerably lower the prestige of the provincial High Courts; the disposal of appeals would not be more quick than those of the privy Council; and the provincial advocates to be taken to conclude the struggle in the Supreme Court would not be less costly than those obtained in England.*
> *The Home Member, Hon. Sir Alexander Muddiman, and Pandit Motilal Nehru also spoke against the resolution. Supporting the resolution, Mr. M. A. Jinnah refuted the arguments advanced by the Members opposing the motion".*
>
> ……..
>
> *Excerpt from Quaid-e-Azam's speech*
>
> *"… My Honourable friend, Sir Henry Stanyon, said that it will lower the prestige of the provincial High Courts. Why? I really fail to see it. How is it going to lower the prestige of the provincial High Courts? Then you find in the Privy Council for which I have great respect, although I have no hesitation in saying that the Privy Council have on several occasions absolutely murdered Hindu law, and slaughtered Muhammadan law – with regard to common law, the English law, of which they are the masters, undoubtedly they command the greatest respect of every practitioner and of every Judge in this country …".*

18. Although in these statements I could see no direct relevance to the present case, it must be said that as an indomitable constitutionalist and parliamentarian, the Quaid-e-Azam would have been severely disappointed with the long list of constitutional deviations that this country has been subject to. Perhaps, with the sounding of the death knell (in the judgment under review) for the concept of constitutional deviations and

martial law, we have now started on the path to becoming the nation founded on constitutionalism that our Founder envisioned.

19. Lastly, we must remain cognizant of a central tenet of the rule of law, that the law must be widely accessible to the public. It is particularly important for the public to understand the aspects of law elaborated upon in this note. I refer to Articles 28 and 251 of the Constitution and the imperative highlighted therein of promoting languages other than English. To fulfil this need, the note has also been written in the national language to make it accessible to a wider section of those who are unable to understand the alien language of this note. It is hoped that this will free the people from reliance on pontificating pundits (to whom they are currently beholden) who themselves, at times, donot have a good grasp of the English language. It is a result of the initiative of the former Chief Justice that a translation department has been set up in the Court and judgments in cases of Constitutional and public importance are being written or translated in the national language.

(Jawwad S. Khawaja)
Judge

جواد ایس خواجہ۔ جج۔

مجھے عزت مآب چیف جسٹس آف پاکستان کے تحریر کردہ تفصیلی فیصلے کو پڑھنے کا موقع ملا ہے جس سے میں پوری طرح متفق ہوں۔ اس وقت میں مختصراً سائل کی طرف سے پیش کئے گئے موقف بابت تعصب (bias) کے بعض اضافی پہلوؤں پر روشنی ڈالنا چاہتا ہوں۔ سائل کے مطابق سابق چیف جسٹس آف پاکستان جناب افتخار محمد چوہدری سائل جنرل (ر) پرویز مشرف کے خلاف تعصب رکھتے تھے اور نفاذِ ایمرجنسی کے مقدمے کی سماعت میں درحقیقت خود ہی ''مدعی بھی تھے اور منصف بھی''۔ سائل کی طرف سے اس بناء پر درخواست کی گئی ہے کہ 31-7-2009 کے عدالتی فیصلے پر نظر ثانی کی ضرورت ہے اور اسے برقرار نہیں رکھا جاسکتا۔

2۔ فاضل سینئر وکیل سپریم کورٹ جناب سید شریف الدین پیرزادہ نے کم وبیش خود کو اسی نکتے پر بحث کرنے تک محدود رکھا ہے کہ اس مقدمے میں جنرل (ر) پرویز مشرف اور جسٹس افتخار محمد چوہدری کی حیثیت حریف کی ہے۔ اس بناء پر یہ فیصلہ برقرار نہیں رہنا چاہیے۔ یہ بھی کہ اس وجہ سے جسٹس افتخار محمد چوہدری کو نہ اس مقدمے کی سماعت کے لیے بنچ تشکیل دینا چاہیے تھا اور نہ ہی اس کی صدارت کرنی چاہیے تھی۔ نیز یہ کہ ایمرجنسی کا نفاذ جنرل (ر) پرویز مشرف کے عمل اور جسٹس افتخار محمد چوہدری کے ردِعمل کا نتیجہ ہے۔ چنانچہ جسٹس افتخار محمد چوہدری کو اس مقدمے میں منصف نہیں بننا چاہیے تھا۔

3۔ عزت مآب چیف جسٹس نے فاضل وکیل کی پہلی دلیل کے حوالے سے بجا طور پر یہ نشاندہی کی ہے کہ سائل کے فاضل وکیل جسٹس افتخار محمد چوہدری کے کسی بھی عمل سے یہ ظاہر کرنے میں ناکام رہے ہیں کہ وہ متعصب ہیں یا وہ جانبدار تھے۔ عدالت نے پیرزادہ صاحب کو 29-1-2014 کو کہا کہ وہ اپنی نظرِ ثانی کی درخواست کا مطالعہ کریں جس کے 34 صفحات ہیں اور جسے سپریم کورٹ کے تین سینئر وکلاء نے تحریر کیا ہے اور کسی ایسے جملے کا حوالہ دیں جسے اگر تسلیم بھی کرلیا جائے تو سابق چیف جسٹس کی جانبداری ثابت ہوتی ہو۔ جناب پیرزادہ نے اپنی فائل کے صفحے اُلٹنے پلٹنے میں کچھ وقت صرف کیا اور اس میں سے حقیقت پر مبنی ایسے کوئی مندرجات سامنے نہیں لا سکے، چنانچہ انہوں نے اس سلسلے میں اگلے دن تک کا وقت مانگا۔ اگلے دن بھی وہ اپنی معروضات کے حق میں کچھ پیش کرنے میں ناکام رہے۔ اس فیصلے کا آغاز اس نکتے سے کرنے کی وجہ آگے کی گئی تحریر سے ظاہر ہوجائے گی۔

4۔ کسی جج کی جانبداری کے موقف کی دو صورتیں ہیں جنہیں ہمارا قانون مانتا ہے۔ پہلی قسم ''حقیقی تعصب'' (actual bias) ہے اور دوسری قسم ''ظاہری یا امکانی تعصب'' (perception of bias) ہے جہاں کوئی ذاتی یا حقیقی تعصب نہ ہو۔ حقیقی تعصب ایسے واقعات کی بنیاد پر تسلیم کیا جا سکتا ہے جو تعصب کی حد تک پہنچی ہوئی جانبداری کا الزام ثابت کرتے ہوں۔ ایسے تعصب کو ثابت کرنے کے لیے ضروری ہے کہ الزام لگانے والا فریق کوئی حقیقی واقعہ پیش کرے نہ کہ محض گمان کا سہارا لے۔ یہ سوال کہ کیا یہ الزام درست ہے کہ نہیں' اسی وقت پیدا ہو سکتا ہے جب ایسا کوئی متعلقہ واقعہ واضح طور پر درخواست میں تحریر ہو۔ جیسا کہ اوپر نشاندہی کی جا چکی ہے، نظر ثانی کی درخواست ہماری بار کے تین فاضل وکلاء نے تحریر کی ہے اور اس کے علاوہ خود سائل سے ان کو ملاقات کا اور ہدایت حاصل کرنے کا موقع بھی ملا۔ موجودہ درخواست کے متن میں کسی حقیقی دلیل یا تعصب کے الزام کی عدم موجودگی میں ہم یہی کہہ سکتے ہیں کہ حقیقت میں کسی قسم کا کوئی تعصب تھا ہی نہیں جو کہ درخواست کی بنیاد بن سکتا۔ چنانچہ ہم نظر ثانی کی درخواست کے ان مندرجات کا جائزہ لیں گے جن میں یہ کہا گیا ہے کہ سابق چیف جسٹس سائل کے بارے میں تعصب رکھتے تھے۔ ہمیں یہ دلیل دی گئی تھی کہ اس تعصب نے اُس وقت جنم لیا جب سابق چیف جسٹس کو غیر قانونی طور پر ان کے عہدے سے ہٹا دیا گیا اور انہیں اُن کے گھر میں نظر بند کر دیا گیا۔ اس کے علاوہ اس بناء پر بھی کہ سائل نے سابق چیف جسٹس کے خلاف آئین کی دفعہ 209 کے تحت ایک ریفرنس دائر کیا تھا جس کی وجہ سے سپریم جوڈیشل کونسل نے سابق چیف جسٹس کو اپنے آئینی فرائض انجام دینے سے روک دیا۔ عدالت سے کی گئی یہ گذارش غیر منطقی ہے۔ اِن واقعات سے یہ تو اخذ کیا جا سکتا ہے کہ سائل سابق چیف جسٹس کے خلاف تعصب رکھتے تھے لیکن یہ تاثر لینا قطعاً ممکن نہیں کہ یہ واقعات سابق چیف جسٹس کا سائل کے خلاف تعصب ظاہر کرتے ہیں۔ سائل کے فاضل وکیل نے یہ بحث کی کہ کم از کم ہم تعصب کے الزام کو اس بنیاد پر تسلیم کر لیں کہ تعصب کا امکان موجود تھا یا اس کا گمان ہو سکتا تھا۔ شاید اس دلیل کے حق میں یہ اصول اُن کے پیش نظر ہو جو مقدمہ بعنوان Metropolitan Properties v. Lannon [(1968) 3 All E.R. 304] میں بیان کیا گیا ہے۔ تعصب کا گمان حقیقی تعصب نہ ہوتے ہوئے بھی قانون میں تسلیم کیا گیا ہے' تاہم اس کو پھر بھی ٹھوس بنیاد پر ہونا چاہیے نہ کہ محض الزام جو مغالطے یا داخلی یا ذاتی تاثر پر مبنی ہو۔

5۔ حالیہ مقدمے کا یہ پہلو اور سائل کا سابق چیف جسٹس پر تعصب کا الزام لگانے کا رویہ زیادہ واضح ہوگا اگر ہم سائل کو ماضی کے منظر میں دیکھیں جس میں وہ چیف آف آرمی سٹاف یعنی سپہ سالار متعین ہوئے تھے۔ ہم صرف اس الزام کے پیچھے کارفرما سبب کو سمجھنے کی کوشش کر سکتے ہیں۔ اگر کوئی نتیجہ اخذ کیا جا سکتا ہے تو وہ سابق چیف جسٹس کے نام نہاد تعصب کے حوالے سے نہیں بلکہ خود سائل کے حوالے سے ہو سکتا ہے۔ یوں لگتا ہے کہ سائل کو شاید مسلح افواج میں اپنی طویل ملازمت کی بناء پر احکامات کے خلاف مزاحمت سے کبھی واسطہ نہیں پڑا۔ شاید انہیں اپنے ذہن میں ایسا لگا ہو کہ عدلیہ بشمول سابق چیف جسٹس سائل کے بعض غیر آئینی اقدامات کے خلاف مزاحمت کر کے اپنے تعصب کو ظاہر کر رہے ہیں۔ شاید انہیں خیال ہی نہ آیا ہو کہ عدالت اور معزز جج صاحبان تو صرف قانون اور دستور کے مطابق ہی فیصلے کر رہے تھے۔ اعلانِ ایمرجنسی کے انداز سے ہی یہ بات واضح نظر آتی ہے کہ سائل کے ذہن اور سوچ میں مزاحمت کی کوئی گنجائش ہی نہیں تھی۔ سائل نے خود بطور سپہ سالار (COAS) ایمرجنسی کو نافذ کیا اور کسی سلطانی فرمان کی طرح اِس کا اعلان کیا۔ اس ''سلطانی فرمان'' کا متن ہی سائل کی آمرانہ سوچ کا مظہر معلوم ہوتا ہے، ملاحظہ ہو: ''میں جنرل پرویز مشرف سپہ سالار (COAS) پاکستان کے طول و ارض میں ایمرجنسی کا اطلاق کرتا ہوں اور یہ حکم دیتا ہوں اور اعلان کرتا ہوں ... '' ایسی سوچ کا حامل شخص اس بات کو قبول کرنے میں یقیناً تاثر لے سکتا ہے کہ سابق چیف جسٹس یا دیگر جج صاحبان شاید کسی ذاتی عناد کی بنا پر ان کی حکم عدولی کر رہے ہیں یا ان کے احکامات میں مزاحم ہو رہے ہیں۔ سائل کے ذہن میں شاید یہ خیال تک نہ آیا ہو کہ سابق چیف جسٹس اور جج صاحبان تو فقط اُس آئین کی پاسداری کر رہے ہیں جس میں سپہ سالار (COAS) کے لیے کوئی ایسے اختیارات تفویز نہیں کئے گئے جو کہ سائل نے غصب کر لیے ہیں۔ ان کی یہ سوچ، جو شاید ان کے لیے عجیب نہ ہو، حافظؔ کے ایک مصرعے سے بیان ہو سکتی ہے:

فکرِ ہر کس بقدرِ ہمتِ اُوست

حافظؔ نے انسانی ظرف اور نفس کا بخوبی ادراک کرتے ہوئے عیاں کیا کہ خالص ذاتی احساسات ہی ہر شخص کی سوچ اور فکر کی بنیاد ہوتے ہیں، تاہم قانون اور عدالتیں کسی کی ذاتی رائے یا احساسات کی بنیاد پر تعصب کا تعین نہیں کرتیں بلکہ معروضی حقائق و

شواہد اور مجموعی معاشرتی اقدار کو تعصب کے تعین کا پیمانہ سمجھتی ہیں۔ جیسا کہ پہلے کہا گیا ہے کہ عدالتوں کو اپنے معروضی معیاروں کو ملحوظ رکھ کر مقدموں کی سماعت کرنا ہوتی ہے نہ کہ بے بنیاد آراء یا واہموں اور وسوسوں کی حدوں کو چھوتے ہوئے تاثرات کی بنیاد پر۔

6۔ جج تنقید کا نشانہ بنتے رہتے ہیں۔ بعض اوقات یہ تنقید شائستہ زبان میں ہوتی ہے اور کبھی غیر شائستہ زبان میں۔ دونوں صورتوں میں جج اپنی تربیت کی بناء پر اپنے فیصلے کو ایسی تنقید سے متاثر نہیں ہونے دیتے، تنقید خواہ کتنی ہی توہین آمیز زبان میں کیوں نہ ہو، جج اپنے اندر ایسا تاثر پیدا نہیں ہونے دیتے۔ یہ بات توہین عدالت کے مقدموں کے اعداد و شمار سے ثابت ہوتی ہے جن کا حوالہ بازمحمد کاکڑ بنام وفاق پاکستان (PLD 2012 SC 923) میں دیا گیا ہے۔ اِن اعداد و شمار سے عیاں ہے کہ ججوں کو بعض اوقات معاندانہ روش کا نشانہ بنایا جاتا ہے اور ان کی ذاتی توہین و تضحیک بھی کی جاتی ہے۔ لیکن مذکورہ اعداد و شمار ثابت کرتے ہیں کہ مرتکب افراد کے خلاف غلط بیانی یا جج کی ذاتی توہین و تضحیک ثابت ہونے کے باوجود توہین کنندہ کو نہ تو سزا ہوئی اور نہ ہی جج پر فرائضِ منصبی کی ادائیگی میں کوئی رکاوٹ آئی۔ چنانچہ یہ ممکن نہیں ہے کہ عدالتیں سائل کے داخلی اور درُونِ سینہ احساسات کے تحت تصور کیے گئے فرضی تعصب کے الزام کو قبول کرتے ہوئے سماعت سے معذرت کر لیں۔ چنانچہ جناب شریف الدین پیرزادہ سینئر وکیل سپریم کورٹ کو اس بات کی نشاندہی کر دی گئی تھی کہ اگر اسی طرح سائل کے فرضی تعصب کی دلیل کو مان لیا جائے تو پھر یہ کسی بھی فریق کے لیے بہت آسان ہے کہ اگر وہ کسی خاص جج سے اپنے مقدمے کی سماعت کروانے کا خواہشمند نہ ہو تو پھر اس جج کو گالیاں دینا شروع کر دے اور بعد ازاں یہ موقف اختیار کر لے کہ جج اس کے خلاف تعصب رکھتا ہے۔

7۔ فاضل وکیل کی معروضات قانوناً قابل قبول نہیں ہیں۔ ہم پہلے ہی یہ بتا چکے ہیں کہ حقیقی تعصب ثابت کرنے کے لیے یہ ضروری ہے کہ تعصب کا الزام لگانے والے فریق اپنی درخواست میں لکھیں کہ جج کسی ایک فریق کے حق میں یا اس کے خلاف حقیقتاً تعصب رکھتے ہیں۔ موجودہ درخواست میں تو حقیقی تعصب کی بنیاد تک موجود نہیں، کجا یہ کہ اس کا ثبوت بھی ہو۔ اس کے برعکس سابق چیف جسٹس کے عمل اور روّیے میں ایک باوقار تحمل کا مظاہرہ دیکھنے میں آتا ہے۔ باوجود اس کے کہ انہیں دو بار غیر قانونی طور پر اپنے آئینی فرائض سرانجام دینے سے روک دیا گیا تھا، سابق چیف جسٹس یا عدالت کا کوئی بھی حکم

سائل کی ذاتی حیثیت کے بارے میں نہیں دیا گیا، تاہم اگر ایک لمحے کے لیے بھی تعصب کا امکان مان لیا جائے تو بھی یہ ممکن نہیں کہ یہ سمجھا جائے کہ اس کا موجودہ نظرثانی کی درخواست سے کوئی تعلق ہے۔

8۔ پیرزادہ صاحب نے عمومی قانون بابت تعصب اور کسی بھی عدالتی حکم کے جواز اور صحت پر تعصب کے اثرات اور حدود کی وضاحت کے لیے کئی نظائر پیش کیے۔ عزت مآب چیف جسٹس نے پہلے ہی اپنے فیصلے میں اس کا ذکر کیا ہے۔ یہاں یہ اضافہ کیا جا سکتا ہے کہ وقت کی کسوٹی پر پرکھے گئے اور پورا اترتے فطری انصاف کے اصولوں کا تقاضا ہے کہ اگر کسی جج کا فیصلہ ان کے تعصب پر مبنی ہے تو اس فیصلے کو منسوخ کر دینا چاہیے۔ فطری انصاف کے یہ اصول بہت واضح ہیں اور ان پر اختلاف ممکن نہیں۔ ان اصولوں کا مقصد یہ ضمانت فراہم کرنا ہے کہ عدالت میں آئے ہوئے مقدموں کی سماعت ایک غیر جانبدار عدالت کرے گی۔ یہ ایک مسلمہ اور طے شدہ اصول ہے اور عدالتِ عظمیٰ اِس اصول کی سب سے بڑی علمبردار ہے۔ لیکن اس وقت ہم کوئی علمی بحث نہیں کر رہے ہیں جس کا مقصد تعصب کے قانون کا عمومی تعین ہو۔ ہماری اس کوشش کا مقصد زیرِ سماعت مقدمے میں حقائق اور حالات کی روشنی میں یہ دیکھنا ہے کہ کیا اس میں واقعتاً تعصب برتا گیا ہے جس کی بنیاد پر 31-7-2009 کو دیے گئے فیصلے پر نظرثانی ضروری ہے۔ فاضل وکیل یہ ثابت کرنے میں ناکام رہے ہیں کہ اس مقدمے میں سائل کا کوئی ایک حق بھی متاثر ہوا ہے یا سابق چیف جسٹس کے نام نہاد تعصب کی وجہ سے سائل کے کسی ایک حق پر بھی زد پڑی ہے۔

9۔ فاضل وکیل نے جو نظائر پیش کیے ہیں ان میں حقائق کچھ اس طرح تھے کہ فریقین کے کسی ذاتی حق پر جج کے تعصب کی بناء پر اثر پڑنے کا امکان موجود تھا۔ یقیناً انہوں نے پاکستانی عدالتوں کے جن مقدمات کا حوالہ دیا ہے ان میں ایک فریق کی آزادی داؤ پر لگی ہوئی تھی۔ غلام رسول بنام سرکار (PLD 1953 FC 62) کا فیصلہ جسٹس ایم آر کیانی نے کیا تھا۔ اس فیصلے میں انہوں نے لاہور ہائی کورٹ کے جج کے طور پر اپیل کنندگان کو قتل کے مقدمے میں مجرم قرار دیا تھا اور سزا دی تھی۔ تاہم جسٹس کیانی نے جج مقرر ہونے سے پہلے، حکومت کے قانونی مشیر کی حیثیت میں اسی مقدمے میں رائے دی ہوئی تھی۔ اس لیے وفاقی عدالت نے یہ فیصلہ کیا کہ چونکہ جسٹس کیانی قتل کے اس مقدمے میں سماعت کے بغیر اپنی رائے پہلے ہی قائم کر چکے تھے اس لیے امکانی تعصب کی گنجائش موجود ہے جس کی بنیاد پر جسٹس کیانی کا فیصلہ کالعدم قرار دیا گیا۔ انور بنام سرکار (PLD 1955 FC 185) کا تعلق بھی اُس سزا سے تھا جو اپیل کنندگان کو قتل کے ایک مقدمے میں

دی گئی تھی۔ سیشن عدالت نے اپیل کنندگان کو بری کر دیا تھا مگر مقتول کے والد نے لاہور ہائی کورٹ میں درخواست نگرانی دائر کر دی تھی جسے قبول کر لیا گیا اور دوبارہ مقدمہ چلانے کا حکم دیا گیا۔ اپیل کنندگان نے اِس فیصلے کو وفاقی عدالت میں اس بنیاد پر چیلنج کیا کہ لاہور ہائی کورٹ کے فیصلے میں بہت سخت زبان استعمال کی گئی ہے جس کے پیش نظر یہ امکان ہے کہ دوبارہ سماعت کرنے والی سیشن عدالت اس سے متاثر ہو کر منصفانہ سماعت نہ کر سکے۔ وفاقی عدالت نے یہ فیصلہ دیا کہ اس قسم کے تعصب کا کوئی خطرہ یا امکان نہیں ہے اور دوبارہ سماعت کا حکم بحال رکھا۔ آصف علی زرداری بنام سرکار (PLD 2001 SC 568) میں آصف علی زرداری، جو ایک سابق وزیر اعظم کے شوہر تھے، کو جسٹس ملک محمد قیوم کی سربراہی میں لاہور ہائی کورٹ کے دورکنی بنچ نے احتساب ایکٹ کے تحت سزا دی تھی۔ زرداری صاحب نے یہ موقف اختیار کیا تھا کہ جسٹس قیوم نے اپنے اور اپنی بیگم کے لیے حکومت سے بلا استحقاق سفارتی پاسپورٹ حاصل کیے تھے۔ جسٹس قیوم کو یہ سفارتی پاسپورٹ زرداری صاحب کے خلاف فیصلہ دینے کے عوض دیے گئے تھے۔ ٹیلی فون پر کی گئی گفتگو کی ریکارڈنگ بھی ثبوت کے طور پر پیش کی گئی تھی جس میں جسٹس قیوم وفاقی حکومت کے عہدے داروں سے اس سلسلے میں ہدایات لے رہے تھے۔ سپریم کورٹ نے تسلیم کیا کہ تعصب صاف ظاہر ہے اس لیے ہائی کورٹ کا فیصلہ کالعدم قرار دے دیا گیا۔

10۔ مندرجہ بالا مقدمات کے برعکس زیرِ نظر فیصلے میں درخواست دہندہ کے ذاتی حقوق پر کوئی روک یا پابندی عائد نہیں کی گئی تھی جب کہ سندھ ہائی کورٹ بار ایسوسی ایشن کے مقدمے میں بنیادی طور پر 3-11-2007 کے اعلانِ ایمرجنسی کے دستوری جواز اور مذکورہ اعلامیہ کے نتیجے میں کئے گئے بعض دیگر اقدامات اور اختیار کئے گئے طریقوں کے بارے میں فیصلہ کرنا تھا۔ اس مسئلے کا فیصلہ کرتے وقت عدالت نے اعلانِ ایمرجنسی کو غیر قانونی قرار دے دیا اور دیگر امور کو بھی جن میں ایمرجنسی کا نفاذ، 2007 کا عبوری دستوری حکم نمبر ۱، اور 2007 کا عدلیہ کے عہدوں کے حلف کا حکم شامل تھے۔ یقیناً یہ سب وہ اقدامات تھے جو سائل نے کئے تھے تاہم اس کے باوجود عدالت نے ان کے مجرمانہ یا قانونی نتائج کے بارے میں جو اس فیصلے کے نتیجے میں سائل کو پیش آ سکتے تھے کوئی رائے نہیں دی تھی۔ سائل نے اتنا اعتراف تو اپنی نظرِ ثانی کی درخواست کے پیراگراف 30 میں بھی اس طور کیا ہے۔

"... اور اس بات کا تذکرہ مناسب ہوگا کہ اگرچہ معزز عدالت نے یہ اعلان کرنے کے بعد کہ 3 نومبر 2007 کے اقدامات غیر دستوری تھے فیصلے کے عمل درآمد والے حصے میں سائل پر... غداری (کی آئینی شك 6) کے تحت مقدمہ چلانے کا کوئی ذکر نہیں کیا..."

11۔ 3 نومبر 2007 کے اقدامات سائل کے ذاتی مفاد میں تو ہو سکتے ہیں جیسا کہ زیرِنظر فیصلے میں قرار دیا گیا ہے مگر اس بنیاد پر یہ نہیں کہا جا سکتا کہ ججوں کی تعیناتی اور اعلیٰ عدالتوں کے ججوں کو ہٹا دینے کا عمل، یک طرفہ دستوری ترامیم، ہنگامی حالت کا نفاذ وغیرہ سائل کا ذاتی استحقاق تھا، اور یہ بھی نہیں کہا جا سکتا کہ سماعت کے بعد فیصلے کا صادر کرنا سابق چیف جسٹس آف پاکستان کے سائل کے خلاف تعصب کا اظہار ہے۔ یہ فیصلہ جس پر نظرِ ثانی سائل کو مقصود ہے اِس عدالت کے 14 ججوں نے صادر کیا تھا اور ان کی رائے ہے کہ سائل کے درجِ بالا بیان کئے گئے اقدامات غیر دستوری ہیں۔ یہ بات نوٹ کی جانی چاہیے کہ عدالت سے ریاست سے متعلق دستوری معاملات پر فیصلہ دینے کی درخواست کی گئی تھی۔ یہ معاملات سائل کی ذات سے کہیں زیادہ اہم اور بڑے تھے اور ان کا فیصلہ دستور کے مطابق کیا گیا ہے۔ اگر سائل کے موقف کو تسلیم کر لیا جائے تو یہ، یہ کہنے کے مترادف ہوگا کہ جو جج ریاست کے کسی اہل کار کے اقدامات کے دستوری ہونے کے خلاف فیصلہ دیتا ہے وہ اس اہل کار کے خلاف ایسے تعصب کا مظاہرہ کرتا ہے جو اُس جج کو قانوناً متعصب گردانا جا سکتا ہے۔ اس دلیل کو قبول نہیں کیا جا سکتا۔ عدالت کا بنیادی فریضہ ہے کہ پیش ہونے والے معاملات کی سماعت کرے اور فیصلے دے۔ اس نکتے کی وضاحت کے لئے یہ مثال دی جا سکتی ہے جس میں وزیرِ اعظم کے مشورے پر صدرِ مملکت دستور کی دفعہ 209 کے تحت اعلیٰ عدلیہ کے ایک جج کے خلاف ریفرنس دائر کرتا ہے اور اس جج کو سپریم جوڈیشل کونسل تمام الزامات سے بری کر دیتی ہے تو بعد ازاں کیا یہ موقف اختیار کیا جا سکتا ہے کہ اس جج کو صرف امکانی تعصب کی بنیاد پر کسی بھی صدارتی اقدام پر استفسار یا فیصلہ کرنے کا اختیار نہیں رہے گا کیوں کہ صدر نے اس کے خلاف ریفرنس دائر کیا تھا۔ اگر اس طرح کی دلیل کو قبول کر لیا جائے تو اس سے یہ غیر منطقی صورت جنم لے گی کہ باوجود اس کے کہ سپریم جوڈیشل کونسل نے جج مذکور کو تمام الزامات سے بری کر دیا تھا وہ صدر یا وزیرِ اعظم کے خلاف

تمام مقدمات میں غیر فعال ہو جائے گا۔ بہ الفاظِ دِگر ایسا جج متعصب گردانا جائے گا باوجود اس کے کہ اس نے کوئی غلط عمل نہیں کیا جس کی بناء پر وہ موردِ الزام ٹھہرے۔ اور یہ فقط اس بنا پر کہ اُس کے خلاف صدارتی ریفرنس دائر ہوا لیکن ناکام ہو گیا تھا۔ یہ منطق کسی بھی قانونی اصول کے تحت قابل قبول نہیں۔ علاوہ ازیں اگر یہ دلیل تسلیم کر لی جائے تو اس کا نتیجہ یہ ہوگا کہ حکومتِ وقت کو ایک طریقہ ہاتھ لگ جائے گا جس کے ذریعہ کسی جج کے خلاف ریفرنس (چاہے بے بنیاد کیوں نہ ہو) دائر کرے اور بعد ازاں جج کو اُن مقدموں میں امکانی تعصب کی بنیاد پر غیر مؤثر کر دے جس میں حکومت فریق ہو۔ ایسی صورتِ حال دستور میں سموئے ہوئے اُس بنیادی اور سنہری اصول سے متصادم ہوگی جس کے تحت عدلیہ کی آزادی کو یقینی بنایا گیا ہے۔ ججوں کو لعن طعن، معاندانہ تشنیع، فریقینِ مقدمات کے پُرنفرت خطوط، اور بعض اوقات اراکینِ بار کی طرف سے بھی ناخوشگوار صورت پیش آتی ہے لیکن جج اپنی تربیت اور تجربے کی بنا پر ایسے افراد کے مقدمات کا فیصلہ کرتے وقت ایسی باتوں کو نظر انداز کر دیتے ہیں۔

12۔ عدالت نے زیرِ نظر فیصلہ میں صرف یہی کہا کہ 3-11-2007 کے اقدامات غیر آئینی ہیں۔ اور یہ ایسی بات ہے جس کا اعتراف خود سائل نے ملکی اور بین الاقوامی ابلاغِ عامہ کے سامنے کیا ہے۔ سائل نے ہنگامی حالت کے نفاذ کے چند دن کے اندر ایک غیر ملکی ٹی وی چینل (BBC) کو انٹرویو دیتے ہوئے اعتراف کیا تھا کہ اس نے غیر دستوری اقدامات کئے ہیں۔ متعلقہ اقتباس درجِ ذیل ہے۔

"روزنامہ ڈان، اسلام آباد، 18 نومبر 2007

نومبر سے پہلے کوئی غیر دستوری قدم نہیں اٹھایا گیا تھا۔ صدر۔ مارچ سے پہلے میں بہت اچھا تھا۔ کیا مارچ کے بعد یک دم میں پاگل ہو گیا تھا۔ کیا میں ایسا شخص ہوں؟ از راہِ کرم تفصیل میں جائیں، میرے اقدام کے پیچھے کیا وجوہات ہیں۔ میں کیا کر رہا ہوں؟ کیا میں نے کوئی غیر آئینی بات کی ہے، ہاں، میں نے 3 نومبر کو کی ہے!

کیا میں نے پہلے ایسا کیا تھا؟ ایک بار بھی نہیں!"

13۔ ان حالات میں یہ باور کرنا کہ سابق چیف جسٹس سائل کے کہنے کے مطابق تعصب کی بنا پر جانبدار تھے ماننا ممکن نہیں کیونکہ زیرِ نظر فیصلے میں ریکارڈ کئے گئے نتائج تو سائل کے اپنے کھلے بیان کے عین مطابق ہیں۔ یہاں اس بات کی نشان دہی کرنا بھی ضروری ہے کہ مذکورہ بالا بیان اس بنچ کے علم میں تھا جس نے یہ فیصلہ صادر کیا اور اس کا حوالہ بھی اس فیصلے میں دیا گیا ہے۔ سائل کی طرف سے اس انٹرویو کی تردید نہ ہی نظرِ ثانی کی درخواست میں کی گئی ہے اور نہ ہی کبھی کسی اور طرح سے۔

14۔ اب میں سائل کی دوسری دلیل کی طرف آتا ہوں اور وہ یہ ہے کہ نفاذِ ایمرجنسی کے مقدمے سے متعلق معاملے میں فیصلہ کرتے وقت سابق چیف جسٹس اپنے ہی مقدمے میں منصف بنے ہوئے تھے۔(خود ہی مدعی اور خود ہی منصف تھے) ۔ سائل نے یہ موقف اختیار کیا ہے کہ یہ عمل اور ردِ عمل تھا، جس کا نتیجہ ایمرجنسی کے نفاذ میں نکلا، اس لئے وہ اس مقدمے کا فیصلے کرتے وقت جانبدار تھے۔ یہ دلیل مغالطہ آمیز ہے اور دستور کی حکمرانی کے مقصد کی حقیقت کو تسلیم نہ کرنے پر مبنی ہے۔

15۔ یہ بات واضح ہو جائے گی کہ اعلانِ ایمرجنسی نے صرف سابق چیف جسٹس کو ہی نشانہ نہیں بنایا تھا بلکہ ملک کی تمام عدلیہ کو ہدف بنایا تھا۔ اتنی بات تو ایمرجنسی کے نفاذ کے اعلامیہ اور وزیرِ اعظم کے مشورے کی عبارت کے سرسری مطالعے سے ہی ظاہر ہو جاتی ہے جس پر سائل نے انحصار کیا ہے۔ نفاذ ایمرجنسی کا متن اور وزیرِ اعظم کے خط کے مندرجات کی بناء پر سائل نے 3-11-2007 کے اعمال کا جواز پیش کیا ہے۔ ان دستاویزات کی زبان کا ملاحظہ کرنے سے بھی یہ بات صاف ظاہر ہو جاتی ہے کہ ان دونوں دستاویزات میں عدالت کا تو تذکرہ کیا گیا ہے، چیف جسٹس کا ذکر ایک دفعہ بھی نہیں کیا گیا۔

16۔ ایک محدود دائرے میں اگر واقعات کو دیکھا جائے تو اعلیٰ عدلیہ کے سب جج صاحبان جو عہدوں پر فائز تھے، 3 نومبر 2007 کے نفاذِ ایمرجنسی سے براہ راست متاثر ہوئے تھے۔ ججوں کی اکثریت اس عمل سے متاثر ہوئی کیونکہ وہ اپنے آئینی فرائض انجام دینے سے محروم کر دیئے گئے تھے۔ باقی ججوں نے، جو اقلیت میں تھے، یہ فیصلہ کیا کہ غیر آئینی حلف اٹھا کر

فائدہ حاصل کیا جائے۔ سندھ ہائی کورٹ بار ایسوسی ایشن کے کیس کی سماعت کرنے والے 14 جج صاحبان (علاوہ میرے) مورخہ 3 نومبر 2007 کو عدالت عظمیٰ یا عدالت عالیہ کے جج تھے جس روز سائل نے غیر آئینی ایمرجنسی نافذ کی۔ لہذا یہ سب جج صاحبان اس عمل سے براہ راست متاثر ہوئے تھے۔ مگر فاضل سینئر وکیل کے کہنے کے مطابق، صرف سابق چیف جسٹس خود ہی مدعی بھی تھے اور منصف بھی۔ فاضل وکیل کی دلیل واضح طور پر غلط ہے۔ اگر سابق چیف جسٹس خود ہی مدعی بھی تھے اور منصف بھی، پھر باقی 12 ججوں کی بھی یہی حالت تھی۔ اگر سائل سابق چیف جسٹس اور باقی 12 ججوں میں فرق اس بنیاد پر قائم کرنا چاہتے ہیں کہ انہوں نے سابق چیف جسٹس کے خلاف ریفرنس دائر کیا تھا، تو ایسا فرق بے بنیاد اور گمراہ کن ہوگا جیسے مندرجہ بالا وضاحت کی گئی ہے، ریفرنس کے دائر کرنے سے یہ معلوم ہوتا ہے کہ سائل سابق چیف جسٹس کے خلاف تعصب رکھتے تھے، نہ کہ سابق چیف جسٹس سائل کے خلاف تعصب کی سوچ رکھتے تھے۔

17۔ اس کے علاوہ پیرزادہ صاحب کی دلیل ایک اور پہلو سے بھی مسلمہ قانون کے خلاف ہے۔ اگر واقعی کوئی بھی جج ایسے نہیں تھے جو سائل کی پیش کی گئی غیر جانبداری کے معیار پر پورا اترتے ہوں تو آیا عدالت انصاف کو بالائے طاق رکھتے ہوئے ان نہایت اہم آئینی سوالات سے پیچھے ہٹ سکتی تھی جو سندھ ہائی کورٹ بار ایسوسی ایشن کے کیس میں اٹھائے گئے تھے؟ عدالت ایسا بالکل نہیں کر سکتی تھی، لہذا عدالت نے اختیارِ سماعت استعمال کیا کیونکہ کوئی اور نہیں کر سکتا تھا۔ اس موقف کو متعدد فیصلوں سے حمایت ملتی ہے جیسے کہ وفاق پاکستان بنام محمد اکرم شیخ، جس کا حوالہ چیف جسٹس صاحب کے فیصلے میں بھی ہے اور جس میں یہ وضاحت موجود ہے کہ ''ایک جج جو کسی اور صورت میں سماعت نہ کر سکتے ہوں تو وہ ضرورت پڑنے پر سماعت کے اہل ہوں گے جہاں کسی اور جج کے پاس اختیارِ سماعت نہ ہو''۔ چنانچہ میں اس بنیاد پر بھی پیرزادہ صاحب کی دلیل سے قائل نہیں ہوں۔

18۔ اس نوٹ کے اختتام سے قبل میں قائداعظم کے کچھ بیانات کا جائزہ لینا چاہوں گا جو پیرزادہ صاحب کی کتاب میں موجود ہیں اور جن کا حوالہ انہوں نے اپنی بحث میں دیا۔ یہ بیانات 1925 کے ہیں جب قائداعظم امپیریل قانون ساز کونسل میں ہندوستان کے لیے پریوی (Privy) کونسل کی جگہ پر عدالت عظمیٰ کی تشکیل کے حق میں اور موتی لال نہرو کے موقف کے

خلاف دلائل پیش کررہے تھے۔البتہ ان بیانات کا حالیہ مقدمے سے براہ راست تعلق نہیں ہے، تاہم یہ کہنے کی ضرورت ہے کہ قائداعظم جیسی دستوراور قانون پسند شخصیت ہمارے ماضی کے متعدد آئینی انحرافات کو دیکھ کر نہایت دلبرداشتہ ہوتی۔شاید آئینی انحراف اورفوجی حکومت کے تصور کے خاتمے سے (جو 31-7-2009 کے فیصلے کی وجہ سے ہو چکا ہے) ہمارا ملک اس راستے پر چل پڑا ہے جس کا خواب ہمارے قائد نے دیکھا تھا۔

19۔ آخر میں یہ کہوں گا کہ ہم پر لازم ہے کہ ہم قانونی فیصلوں اور ضابطوں کو مقامی اور قومی زبانوں میں عوام الناس تک پہنچائیں تاکہ وہ اپنے قانون اور آئین کے بارے میں خود معلومات حاصل کرسکیں اور ایسے خودساختہ ماہرین اور پنڈتوں سے نجات حاصل کرسکیں جن کے وہ فی الحال مرہونِ منت ہیں۔یہ بھی سابق چیف جسٹس صاحب کی کاوش کا نتیجہ ہے کہ عدالتِ عظمیٰ میں ایک شعبۂ تراجم قائم ہوا ہے اور آئینی اور عمومی اہمیت کے حامل فیصلے قومی زبان میں لکھے جارہے ہیں۔

(جواد ایس خواجہ)

جج