

IN THE SUPREME COURT OF PAKISTAN
(ORIGINAL JURISDICTION)

PRESENT:

MR. JUSTICE MAHMOOD AKHTAR SHAHID SIDDIQUI.
MR. JUSTICE JAWWAD S. KHAWAJA.
MR. JUSTICE KHILJI ARIF HUSSAIN.
MR. JUSTICE TARIQ PARVEZ.

CRIMINAL ORIGINAL PETITIONS NO. 93 TO 98, 100 & 104 OF 2009 and 2,3 & 4 of 2011.

AND

CRL.M. As.NO.178, 311, 225, 179, 619,168,282,283 169, 148, 226 of 2010 & 1 and 2 of 2011.

AND

C.M.As.NO.4234, 4224, 4255, 4288 TO 4290, 4292, 4281, 4486, 4504 OF 2009 AND 1258 OF 2010, 9, 10, 12 of 2011, 4487 OF 2009, 35 of 2011, AND 1104 AND 1105 & 1174 OF 2010 in CMA.NO.2745 OF 2009 in C.R.P.No.NIL OF 2009 In Const. Petition No.09 of 2009.

PROCEEDINGS AGAINST :

Mr. Justice (R) Iftikhar Hussain Chaudhry
(in Crl.O.P.93/2009 and CMA.4234/2009 and
Crl.M.As.178 & 311/2010).

AND

Mr. Justice Khurshid Anwar Bhinder.
(in Crl.O.P.94/2009 and CMA.4224/2009 and
Crl.M.A.225/2010).

AND

Mr. Justice Hamid Ali Shah.
(in Crl.O.P.95/2009 and C.M.A.4255/2009 and
Crl.M.A.179 & 619/2010).

AND

Mr. Justice Zafar Iqbal Chaudhry.
(in Crl.O.P.96/2009 and CMA.4288/2009).

AND

Mr. Justice Hasnat Ahmed Khan.
(in Crl.O.P.97/2009 and CMA.4289/2009 and
Crl.M.As.168, 283/2010 and Crl.M.A.1/2011).

AND

Mr. Justice Syed Shabbar Raza Rizvi.
(in Crl.O.P.98/2009 and CMA.4290/2009 and
Crl.M.As.No.169 & 282/2010 and Crl.M.A.2/2011).

AND

Mrs. Justice Yasmin Abbasey.
(in Crl.O.P.100/2009 and CMA.4292/2009 and
Crl.M.A.148/2010).

AND

Mr. Justice Jehan Zaib Rahim.
(in Crl.O.P.104/2009 and CMA.4281/2009 and
Crl.M.A.226/2010).

AND

Mr. Justice (R) Abdul Hameed Dogar.
(in Crl.O.P.2/2011 and CMA.4487/2009 and CMA.35/2011)

AND

Mr. Justice Sayed Zahid Hussain.
(in Crl.O.P.3/2011 and CMA.4486/2009 and CMA.4504/2009 and CMA.1258/2010 and CMAs.9, 10 & 12/2011).

AND

Mr. Justice Syed Sajjad Hussain Shah.
(in Crl.O.P.3/2011 and CMA.1104/2010 and CMA.1105/2010 and CMA.1174/2010 in CMA.2745/2009 in C.R.P. NIL /2009 in Const. P. 09/2009).

For the Applicants: Dr. Khalid Ranjha Sr.ASC.
(in Crl.O.P.93/09)

Mr. Wasim Sajjad, Sr.ASC
(in Crl.O.P.94/09)

Mr. Raza Kazim, ASC and
Mr. Nadeem Ahmed Sheikh, ASC.
Mr. G.N. Gohar, AOR.
(in Crl.O.P.95/09)

Dr. Khalid Ranjha, ASC.
Mr. G.N. Gohar, AOR.
(in Crl.O.P.96/09)

Dr.Abdul Basit, Sr.ASC
Mr. Arshad Ali Ch., AOR.
(in Crl.O.Ps.97 & 98/09)

Syed Ali Zafar, ASC
(in Crl.O.P.100/09)

Syed Naeem Bokhari, ASC.
Mr. G.N.Gohar, AOR.
(in Crl.O.P.104/09)

Raja Muhammad Ibrahim Satti, Sr. ASC.
Sahibzada Ahmed Raza Qasuri, Sr. ASC.
Rai Muhammad Nawaz Kharal, ASC.
Raja Muhammad Usman Ibrahim Satti, Advocate.
(in Crl.O.P.2/2011)

Mr. S.M.Zafar, Sr.ASC,
Raja Abdul Ghafoor, AOR.
(in Crl.O.P.3/2011).

Sh. Zamir Hussain, Sr. ASC.
(in Crl.O.P.4/2011).

Date of Hearing: 29.11.10, 30.11.10, 01.12.10, 02.12.10,
06.12.10, 13.12.10, 14.12.10 15.12.10,
03.01.11, 04.01.11, 05.01.11, 10.01.11,
11.01.11, 12.01.11, 13.01.11, 14.01.11,
17.01.11, 18.01.11, 19.01.11, 20.01.11,
21.01.11, 24.01.11, 25.01.11 &
26.01.2011.

O R D E R

M.A.SHAHID SIDDIQUI, J.- The essential facts necessary for adjudication of these matters arising from notices issued to the respondents, are quite straightforward. These can be stated at the outset to facilitate understanding of the issues raised by the respondents before us, and the arguments advanced on their behalf by their learned counsel.

2. On 3.11.2007, the then Chief of Army Staff (General Pervez Musharraf) violating the Constitution, issued an instrument termed as Proclamation of Emergency. This was followed by other instruments purporting to be issued in the name of the President, including the Provisional Constitution Order (1 of 2007) (the 'PCO') and Oath of Office (Judges) Order, 2007. On the same day i.e. 3.11.2007 which was a Saturday, 7 Judges of this Court assembled in the Supreme Court building and passed an order which, in relevant part, directed as under:-

- "i) Government of Pakistan, i.e. President and Prime Minister of Pakistan are restrained from undertaking any such action, which is contrary to Independence of Judiciary;*
- ii) No judge of the Supreme Court or the High Courts including Chief Justice(s) shall take oath under PCO or any other extra- Constitutional step;*
- iii) Chief of Army Staff, Corps Commanders, Staff Officers and all concerned of the Civil and Military Authorities are hereby restrained from acting on PCO which has been issued or from administering fresh oath to Chief Justice of Pakistan*

or Judges of Supreme Court and Chief Justice or Judges of the Provincial High Courts;

iv) They are also restrained to undertake any such action, which is contrary to independence of Judiciary. Any further appointment of the Chief Justice of Pakistan and Judges of the Supreme Court and Chief Justices of High Courts or Judges of Provinces, under new development shall be unlawful and without jurisdiction;

v) Put up before full Court on 5th November 2007”.

3. Some of the respondents before us have questioned the passing of the above order on 3.11.2007. However, for the present, and having seen the original record of the Court, we are satisfied that such order was indeed passed on 3.11.2007.

4. At the time when the purported emergency was proclaimed by the Chief of Army Staff, there were 17 permanent Judges of this Court including the Chief Justice of Pakistan and one ad-hoc Judge. Out of these 18 Judges four, namely, Justice (R) Abdul Hameed Dogar, Justice (R) Muhammad Nawaz Abbasi, Justice (R) Faqir Muhammad Khokhar and Justice (R) M. Javed Buttar chose to take oath under the PCO on 3.11.2007 while Justice (R) Saiyed Saeed Ashhad did so on 4.11.2007. Justice (R) Abdul Hameed Dogar purported to take Oath as Chief Justice of Pakistan although Mr. Justice Iftikhar Muhammad Chaudhry was the incumbent holding that office. Thus, in all five out of the 18 Judges of this Court, took oath under the PCO while the remaining 13 did not do so. Some of the Judges in the High Courts of the four Provinces also took oath under the PCO. The oath taken by these Judges of the Supreme Court and High Courts was not the oath prescribed by the Constitution. Instead, it was an oath under the Oath of Office (Judges) Order 2007. These Judges who took oath found nothing objectionable in continuing to work while the others who had not taken oath under the PCO were physically stopped from performing

the functions of their judicial office and some of them, including the Chief Justice of Pakistan were also incarcerated.

5. It is not necessary to narrate in detail the events which followed the passing of the above referred order on 3.11.2007. This has been done by this Court in the case of Sindh High Court Bar Association, cited below. Thereafter Constitution Petition No.9 of 2009 titled Sindh High Court Bar Association versus Federation of Pakistan and others and Constitution Petition No.8 of 2009 titled Nadeem Ahmed Advocate versus Federation of Pakistan through Secretary, Ministry of Law, Justice and Human Rights Division, Pakistan Secretariat Islamabad were heard by a 14 member Bench of this Court. The said petitions were decided vide order dated 31.7.2009 for reasons reported in PLD 2009 SC 879.

After considering the circumstances following 3.11.2007, the 14 member Bench of this Court observed that “*Abdul Hameed Dogar, J, and some other Judges violated the aforesaid order dated 3rd November, 2007 passed by seven – member Bench of this Court in Wajihuddin Ahmed’s case. These Judges, whether they were in this Court or in the High Courts, have all rendered themselves liable for consequences under the Constitution for their disobedience of the aforesaid order of 3rd November, 2007.*” Some of the Judges arrayed before us as respondents in these proceedings filed petitions seeking review of the aforesaid judgment dated 31.7.2007. Office objections were raised in respect of the said review petitions which led to the filing of a number of miscellaneous applications in respect of the review petitions. These applications were heard and decided by a 14 member Bench of this Court vide order dated 13.10.2009. By means of the said order, the applications for permission to file review petitions against the judgment dated 31.7.2009 were dismissed and it was held and directed as under:-

“(1) *The notices issued under Article 204 of the Constitution read with sections 3 and 4 of the Contempt*

of Court Act, 1976 or any other enabling provisions of the relevant law, to the Judges who have expressed their regrets and repentance; by tendering unconditional apologies and affirming their remorse through withdrawal of the petitions filed by them and tendering of resignations, are discharge;

(2) Similarly, as to the Judges who have already retired and have tendered unconditional apologies and have expressed their repentance and remorse, the notices issued to them are discharged.

(3) As to the Judges, who are contesting notices, they shall be proceeded against separately along with the cases of those Judges, who have not filed replies and/or have prayed for grant of time;

(4) The Judges of the Supreme Court and the High Courts, who tendered resignations after pronouncement of the judgment dated 31.7.2009 in deference thereto shall not be proceeded against;

(5) The Judges who have tendered resignations, but have not filed replies to the notices, the process shall be repeated to them so as to file the replies within two weeks;

(6) The Judges, who have neither tendered resignations nor have filed replies, are required to file replies within two weeks;

(7) Mr. Ahmed Raza Kasuri, Advocate Supreme Court, has prayed for grant of four weeks' time to submit reply on behalf of Justice (Retd.) Abdul Hameed Dogar. Let the reply be filed within two weeks.

(8) Justice (Retd.) Muhammad Nawaz Abbasi has filed reply, which is not unconditional apology, therefore, his matter shall be proceeded along with other cases; and

(9) As far as Syed Zulfiqar Ali Bokhari is concerned, he has tendered unconditional apology and has thrown himself at the mercy of the Court, the notice issued to him is also discharged."

6. Pending decision on the aforesaid miscellaneous applications and pursuant to orders dated 5.10.2009 and 9.10.2009 notices were issued to the respondents and 61 others, to explain as to why proceedings should not be initiated against them for committing contempt of this Court. This provides a brief background and the context of the present proceedings. The 72 persons either submitted their respective replies to the said notices or tendered unconditional apologies. Some of them resigned from office. There are presently 10 respondents who have contested the notices issued to them.

7. The extensive arguments of learned counsel shall be discussed fully in reasons to follow later. These arguments are to be examined in the light of the above background. The issues arising in these matters and the arguments of learned counsel can, however, be presently encapsulated in the following primary questions:-

- i) Is it constitutionally permissible for this Court to proceed under Article 204 of the Constitution against Judges of the Supreme Court and of the High Courts, for committing contempt of this Court?
- ii) If the aforesaid question is answered in the affirmative then, as a matter of propriety, should the Supreme Court proceed against the said Judges or should it, bearing in mind the status of the respondents as Judges of the Supreme Court and High Courts, discontinue these proceedings and discharge the notices issued to them?
- iii) If it is decided that the Constitution does not place restrictions on contempt proceedings against Judges and if it is also found that questions of propriety do not stop this Court from proceeding against the respondents under Article 204 of the Constitution, then is there sufficient material available before the Court to charge the respondents for committing contempt of the

Supreme Court on account of disobedience of the order dated 3.11.2007?

8. We have heard learned counsel for the respondents at great length spread over a number of days. The focus, direction and emphasis of their arguments have varied and such variation will be dealt with separately in detail in reasons to be recorded later. The underlying strains of the submissions made before us can all, however, be discussed under the rubric of the questions framed above.

9. Having considered the arguments of learned counsel, we answer the above noted questions as under:-

- i) In the facts and circumstances of these matters, the Constitution and law does not prohibit proceedings under Article 204 of the Constitution against the respondents even though they may be Judges of the Supreme Court and the High Courts. We hold that they are not immune from proceedings under Article 204 and the Contempt of Court Ordinance V 2003, for committing contempt of this Court.
- ii) Having considered the submissions of learned counsel as to the propriety of initiating contempt proceedings against the respondents and being fully conscious of the status of the respondents, we hold that in the circumstances of these matters, propriety requires that proceedings should be taken against the respondents and they, with the exception of Mr. Zafar Iqbal Chaudhry and Khurshid Anwar Bhindar, be put to trial in accordance with the aforesaid law.
- iii) Having considered the record, facts and circumstances and replies in these matters and after due consideration of the arguments advanced on behalf of respondents, we find that there is sufficient material available before us to justify

charging the respondents (other than Mr. Khurshid Anwar Bhinder and Mr. Zafar Iqbal Chaudhry,) for committing contempt of the Supreme Court on account of their disobedience of the order dated 3.11.2007 passed by a seven member Bench of this Court.

- iv) Having noted the submissions made on behalf of respondents Mr. Zafar Iqbal Chaudhry and Mr. Khurshid Anwar Bhinder and the contents of their replies, we find that even though they took oath under the PCO on 14.12.2007, since they were not Judges of the Lahore High Court whether on 3.11.2007 or at any later point in time, they did not violate the letter of the order dated 3.11.2007 even though they may have violated its spirit. In the circumstances their conduct in taking oath under the PCO and purporting to act as Judges subsequent thereto, is deprecated in terms of Section 18 (2) of the Contempt of Court Ordinance 2003. We hold that in the circumstances they shall not be charged to face trial under the said Ordinance.

10. At the fag end of these hearings which commenced on 3.11.2009 and after concluding his arguments, Dr. A. Basit mentioned the names of certain lawyers including the President of the Supreme Bar Association and suggested that they be heard as *amicus curiae*. We have been assisted by a number of eminent and senior Advocates of this Court including Mr. Wasim Sajjad, Dr. Khalid Ranjha, Mr. Raza Kazim, Mr. S.M. Zafar, Dr. A. Basit, Mr. Ibrahim Satti, Mr. Naeem Bokhari and Sh. Zameer Hussain who all have addressed exhaustive arguments on the issues arising in these matters. They have thus performed the duties expected of them as Officers of the Court. We, therefore, find no need to seek assistance from any other Advocates. We also note that while addressing a full Court reference on 22.11.2010 on the retirement

of Justice (R) Rahmat Hussain Jafferri, the incumbent President of the Supreme Court Bar Association has already expressed the view that these matters should be taken up on priority.

11. Let the cases now be fixed for framing of charge against the aforesaid respondents on 21.02.2011. The respondents, if they so desire, appear on that date to enter their plea on the charge(s) framed. In the alternative they may, if they choose, enter their pleas through counsel who are duly instructed.

Judge

Judge

Judge

Judge

Islamabad,
A. Rehman

Announced on 02.02.2011.

APPROVED FOR REPORTING.