

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

RESENT:

MR. JUSTICE IFTIKHAR MUHAMMAD CHAUDHRY, CJ
MR. JUSTICE JAVED IQBAL
MR. JUSTICE MIAN SHAKIRULLAH JAN
MR. JUSTICE TASSADUQ HUSSAIN JILLANI
MR. JUSTICE SARMAJ JALAL OSMANY
MR. JUSTICE AMIR HANI MUSLIM

INTRA COURT APPEALS NO. 3, 4, 6 TO 8 & 11 OF 2011

[On appeal against the order dated 02.02.2011
passed by a 4-Member Bench of the Supreme
Court in Criminal Original Petition No.93 etc.]

Mr. Justice Hasnat Ahmed Khan	...	APPELLANT (ICA 3/2011)
Mr. Justice Syed Shabbar Raza Rizvi	...	APPELLANT (ICA 4/2011)
Mr. Justice Syed Hamid Ali Shah	...	APPELLANT (ICA 6/2011)
Mr. Justice (R) Iftikhar Hussain Chaudhary...		APPELLANT (ICA 7/2011)
Mr. Justice Syed Sajjad Hussain Shah	...	APPELLANT (ICA 8/2011)
Justice Mrs. Yasmin Abbasey	...	APPELLANT (ICA 11/2011)

VERSUS

Federation of Pakistan/State	...	RESPONDENT
For the appellants: (ICA 3 & 4/2011)	Dr. A. Basit, Sr. ASC Mr. Arshad Ali Chaudhry, AOR	
For the appellants: (ICA 6/2011)	Syed Raza Kazim, Sr. ASC Mr. G.N. Gohar, AOR (absent)	
For the appellants: (ICA 7/2011)	Dr. Khalid Ranjha, Sr. ASC Mr. Mehmood A. Sheikh, AOR	
For the appellants: (ICA 8/2011)	Sh. Zamir Hussain, Sr. ASC Mr. Ejaz Muhammad Khan, AOR (absent)	

For the appellants: Syed Ali Zafar, ASC
(ICA 11/2011) Raja Abdul Ghafoor, AOR (absent)

On Court's notice: Maulvi Anwar-ul-Haq
Attorney General for Pakistan

Respondent: Not represented

Dates of hearing: 18 & 21 February, 3 & 21 March and 4
April, 2011

...

ORDER

IFTIKHAR MUHAMMAD CHAUDHRY, CJ. – Listed Intra Court Appeals are directed against the order dated 02.02.2011 passed by a 4-Member Bench of this Court in Criminal Original Petitions No. 93 to 98, 100 & 104 of 2009 and 2, 3 & 4 of 2011.

2. The facts in brief are that on 03.11.2007, the then Chief of Army Staff, General Pervez Musharraf (Retd.) issued a Proclamation of Emergency and two other instruments, namely, Provisional Constitution Order No. 1 of 2007 [hereinafter referred to as "the PCO, 2007"] and the Oath of Office (Judges) Order, 2007 [hereinafter referred to as "the Oath Order, 2007"] **whereby he held the Constitution of Pakistan in abeyance and declared that the Judges of Superior Courts had ceased to hold office** and only such Judges would continue to hold office who would make oath of office under those instruments. Paragraph No.3 of the PCO, 2007 is reproduced hereinbelow: -

"(3) Subject to clause (1) above and the Oath of Office (Judges) Order, 2007, all courts in existence immediately before the commencement of this Order shall continue to function and to exercise their respective powers and jurisdiction. Provided that the Supreme Court or a High Court and any other court shall not have the power to make any order against the President or the Prime Minister or any person exercising powers or jurisdiction under their authority."

As per the Oath Order, 2007 a person holding office immediately before that Order as Judge of the Supreme Court, the Federal Shariat Court, or a High Court would cease to hold that office with immediate effect; provided that a person who was given and did make, Oath in the form set out in the Schedule, before the expiration of such time from such commencement as the President may determine or within such further time as may be allowed by the President would be

deemed to continue to hold the office of a Judge of the Supreme Court, the Federal Shariat Court or a High Court, as the case may be. On this, in view of afore noted position, a 7-Member Bench of this Court passed a restraint order in the case of Justice (Rtd.) Wajihuddin Ahmad v. Chief Election Commissioner (PLD 2008 SC 25) wherein, it was, *inter alia*, directed as under: -

- “(i) Government of Pakistan, i.e. President and Prime Minister 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.”

It may be mentioned here that above restraint order was widely covered by the electronic media, thus few Judges of the Superior Courts including appellants made oath under the new dispensation, whereas, majority of the Judges of superior Courts declined to make oath obviously for their commitment with the Constitution of 1973 and in deference to above judicial order. It is noteworthy that appellants and some other Judges who had made oath under the Oath Order, 2007, instead of showing allegiance and upholding the Constitution, under which their appointment had taken place, accepted fresh appointments as Judges of superior Courts under the instruments i.e. PCO and Oath Order, 2007, thus, they ceased to hold office under the Constitution. Mr. Justice (R) Abdul Hameed Dogar, a Judge of this Court made oath of office of Chief Justice of Pakistan in pursuance of the Oath Order, 2007 read with PCO, 2007. Besides him, four other Judges of the Supreme Court also made similar oaths.

3. In the history of the country it is not for the first time that Judges of the superior Courts had made oath under instrument other than the Constitution and on revival of Constitution the ultra-

constitutional action had been legitimized by the parliament as it had happened in 1977 when the extra-constitutional acts of dictator were validated by the Eighth Constitutional Amendment. Likewise, such actions of 12.10.1999 were also legitimized/validated by means of Seventeenth Constitutional Amendment. It is noteworthy that the Judges who made oath under PCO and Oath Order, 2007 were under the impression that the action of dictator, violating the Constitution on 3.11.2007 would also be validated but it was not done by the Parliament existing at the time when the Constitution was held in abeyance and continued till 15.11.2007, and the new Parliament which came into existence on 18.2.2008 as a result of fresh elections held in the country under the Constitution. This aspect of the case shall, however, be discussed in detail at later stage.

4. It is essential to note at this stage that after the unconstitutional actions of 3.11.2007, two petitions bearing Constitution Petitions No.87 and 88/2007 were filed by Tikka Iqbal Muhammad Khan and Zafarullah Khan on 10th & 12th November, 2007 respectively, wherein the instruments and measures of 3.11.2007 were challenged. The Constitution Petitions were disposed of by the Judges of the Court who had made oath in violation of the order dated 3.11.2007 passed by a 7-Members Bench and it was held, *inter alia*, that the actions of 3.11.2007 were taken by General Pervez Musharraf (Retd.) in a situation for which the Constitution provided no solution. Consequently, the same were declared to have been validly made by him under the principles of state necessity and *Salus populi est suprema lex* i.e. the welfare of the people is the supreme law. [Tikka Iqbal Muhammad Khan v. Federation of Pakistan (PLD 2008 SC 178)]. Review petitions filed against the said judgment were dismissed [Tikka Iqbal Muhammad Khan v. Federation of Pakistan(PLD 2008 SC 615).]

5. The lawyers, civil society, and the general public agitated against actions of the then Chief of Army Staff and launched struggle for the restoration of judiciary, which was sacked unconstitutionally. Thus, ultimately *vide* notification dated 17.3.2009, the Chief Justice of Pakistan was restored to the position he was holding immediately before 3.11.2007. Similarly *vide* different notifications, the Judges of Supreme Court and High Courts, who were declared to have ceased to

hold office on or after 3.11.2007, were restored to the position they were holding prior to 3.11.2007.

6. In the above background, on the restoration of Judiciary, Constitution Petitions were filed by Sindh High Court Bar Association and Nadeem Ahmad Advocate, wherein the constitutionality of the actions of 3.11.2007 and validity of the judgment in the case of Tikka Iqbal Muhammad Khan (PLD 2008 SC 178) were questioned. This Court vide judgment dated 31.7.2009, in the case of Sindh High Court Bar Association v. Federation of Pakistan (PLD 2009 SC 879) made the following observations: -

"18. From above, the conclusions drawn are that:--

- (i) The General Pervez Musharraf (Rtd.) in the garb of Emergency Plus and the Provisional Constitution Order made amendments in the Constitution by self-acquired the powers which all are unconstitutional, unauthorized, without any legal basis, hence, without any legal consequences;*
- (ii) Mr. Justice Abdul Hameed Dogar, took oath as CJP in violation of the order dated 3.11.2007 passed by a 7 member Bench headed by de-jure Chief Justice of Pakistan and in pursuance of unconstitutional instruments introduced by General Pervez Musharraf (Rtd.), additionally knowing well that the office of Chief Justice of Pakistan was not lying vacant;*
- (iii) Also, the Judges who were either retired or were not holding any judicial office, beside those in High Courts took fresh oath on their appointment on and after 3.11.2007 till 15.12.2007 in Supreme Court where the full strength of Judges along with an Ad-hoc Judge appointed under the Constitution were already working and thus there was no vacancy. Similarly, 'many Judges took oath in Provincial High Courts. All of them did so in violation of order dated 3.11.2007 passed by 7 member Bench headed by de-jure Chief Justice of Pakistan. Four incumbent Judges already functioning in the Supreme Court took fresh oath under the influence of and in pursuance of unconstitutional steps of General Pervez Musharraf (Rtd.);*
- (iv) The Petition No.73 of 2007 filed by Mr. Justice (Rtd.) Wajihuddin Ahmad challenging the eligibility of General Pervez Musharraf (Rtd.) to contest for the office of President in uniform was dismissed purportedly on merits although the record maintained in the Supreme Court revealed otherwise;*
- (v) The decisions in the cases of Tikka Iqbal Muhammad Khan granting validity to the actions of General Pervez Musharraf (Rtd.) were per incuriam, coram-non-judice, without any legal basis hence, of no legal consequences;*

- (vi) *The amendments in the Supreme Court (Number of Judges) Act, (XXXIII, 1997) 1997 by way of Finance Act, 2008 raising the strength of Judges in Supreme Court from 17 (1+ 16) to 30 (1+29) seemingly aimed at providing allocation of funds for increasing the strength of Judges is unconstitutional because the strengths of Judges of Supreme Court is be increased by Parliament as defined in Article 50 to be read with Article 260 of the Constitution which defines the acts of Parliaments;*
- (vii) *Surprisingly, in the past the Courts of the time used to extend favours empowering the adventurers to amend the Constitution in actual effect were to achieve their overt and covert agenda but this time, such powers were acquired by the General Pervez Musharraf (Rtd.) himself through the PCO and brought a host of unconstitutional amendments for his own benefits; and*
- (viii) *The present representative of people firmly believe in strong and independent judiciary and the democratic system which is evident that the deposed Judges of Supreme Court, High Courts and the de-jure Chief Justice of Pakistan were restored with effect from 3rd of November, 2007 implied that the present representatives of people denied the validity of the actions of General Pervez Musharraf (Rtd.) taken from 3.11.2007 to 15.12.2007 during which the Constitution remained suspended.*

21. *The Proclamation of Emergency issued by General Pervez Musharraf as the, Chief of Army Staff (as he then was) on November 3, 2007; the Provisional Constitution Order No. 1 of 2007 issued by him on the same date in his said capacity; the Oath of Office (Judges) Order of 2007 issued by him also on the same date though as the President of Pakistan but in exercise of powers under the aforesaid Proclamation of A Emergency and the Provisional Constitution Order No.1 of 2007; the Provisional Constitution (Amendment) Order, 2007 issued by him like-wise on 15.11.2007; the Constitution (Amendment) Order, 2007 being President's Order No.5 of 2007 issued on November 20, 2007; the Constitution (Second Amendment) Order, 2007 being the President's Order No.6 of 2007 issued on 14th December, 2007; the Islamabad High Court (Establishment) Order 2007 dated 14th December 2007 being the President's Order No.7 of 2007; the High Court Judges (Pensionary Benefits) Order, 2007 being. President's Order No.8 of 2007; the Supreme Court Judges (Pensionary Benefits) Order, 2007 being President's Order No.9 of 2007 dated 14th December, 2007 are hereby declared to be un-constitutional, ultra-vires of the Constitution and consequently being illegal and of no legal effect.*

22. *As a consequence thereof: -*

- (i) *the Chief Justice of Pakistan; the Judges of the Supreme Court of Pakistan; any Chief Justice of any of the High Courts and the Judges of the High Courts who were declared to have ceased to hold their respective*

offices in pursuance of the afore-mentioned alleged judgments or any other such judgment and on account of the instruments mentioned in Para 21 above, shall be deemed never to have ceased to be such Judges, irrespective of any notification issued regarding their reappointment or restoration;

- (ii) *it is declared that the office of the Chief Justice of Pakistan never fell vacant on November 3, 2007 and as a consequence thereof it is further declared that the appointment of Mr. Justice Abdul Hameed Dogar as the Chief Justice of Pakistan was unconstitutional; void ab initio and of no legal effect;*

Provided that subject to whatever is contained hereinafter, the said un-constitutional appointment of Mr. Justice Abdul Hameed Dogar as the Chief Justice of Pakistan shall not affect the validity of any administrative or financial acts performed by him or of any oath made before him in the ordinary course of the affairs of the said office;

- (iii) *since Mr. Justice Abdul Hameed Dogar was never a constitutional Chief Justice of Pakistan, therefore, all appointments of Judges of the Supreme Court of Pakistan, of the Chief Justices of the High Courts and of the Judges of the High Courts made, in consultation with him, during the period that he, unconstitutionally, held the said office from 3.11.2007 to 22.3.2009 (both days inclusive) are hereby declared to be unconstitutional, void ab initio and of no legal effect and such appointees shall cease to hold office forthwith;*

Provided that the Judges so un-constitutionally appointed to the Supreme Court while holding the offices as Judges of any of the High Courts shall revert back as Judges of the respective High Courts subject to their age of superannuation and like-wise, the Judges of the High Courts, who were District and Sessions Judges before their said un-constitutional elevation to the High Courts shall revert back as District and Sessions Judge subject to limitation of superannuation;

- (iv) *the Judges of the Supreme Court of Pakistan, if any, the Chief Justices of the High Court, if any, and the Judges of any of the High Courts, if any, who stood appointed to the said offices prior to 3.11.2007 but who made oath or took oath of their respective offices in disobedience to the order passed by a Seven Member Bench of the Supreme Court of Pakistan on 3.11.2007 in C.M.A.No.2869 of 2007 in Constitution Petition No.73 of 2007, shall be proceeded against under Article 209 of the Constitution. The Secretary of the Law Division of the Government of Pakistan shall take steps in the matter accordingly;*

Provided that nothing hereinabove shall affect those Judges who though had been appointed as Judges/Chief Justices of any of the High Courts between 3.11.2007 to' 22.3.2009 but had subsequently been appointed afresh to other offices in consultation with or with the

approval of or with the consent of the Constitutional Chief Justice of Pakistan;

- (v) *any judgments delivered or orders made or any decrees passed by any Bench of the Supreme Court or of any of the High Courts which comprised of or which included the afore-described Judges whose appointments had been declared void ab initio, are protected on the principle laid down in MALIK ASAD ALI'S CASE (PLD 1998 SC 161);*
- (vi) *since the Constitution (Amendment) Order, 2007 being the President's Order No.5 of 2007 and the Islamabad High Court (Establishment) Order being President's Order No.7 of 2007 establishing Islamabad High Court for the Federal Capital Territory, have been declared to be un-constitutional and of no legal effect, therefore, the said Islamabad High Court shall cease . to exist forthwith. All judicial matters pending before the said High Court before the passing of this order shall revert/stand transferred to the courts which had jurisdiction in the said matters before the promulgation of afore-mentioned President's Order No.5 of 2007 and President's Order No.7 of 2007 promulgated on 14th December, 2007. The Judges of the said Court shall, as a consequence thereof, cease to be Judges except such Judges or the Chief Justice of the said court, who prior to their appointments in the said Islamabad High Court, were Judges of some other High Court who shall revert to the court of which they were originally the Judges, subject to their age of superannuation. The officers and employees of the said Court shall also cease to hold their respective appointments and shall become part of the Federal Government Surplus Pool for their further appointments. However, if any such officer or employee was an officer or an employee of some other court or department or office, such officers or employees shall revert to their respective courts, departments or offices to which they belonged before joining the service in the Islamabad High Court, subject again to their age of superannuation;*

We would like to mention here that establishment of a High Court or a Federal Court for the Federal Capital Territory might be a desirable act but it is unfortunate that such a step was taken in an un-constitutional and a highly objectionable manner. We may, therefore, add that notwithstanding what has been declared and ordered above, the relevant and competent authorities may take steps to establish such a court in accordance with the Constitution/the law;

- (vii) *the Ordinances promulgated by the President or a Governor of a Province before 3.11.2007 which were given permanence by the Provisional Constitution Order No.1 of 2007 as also the Ordinances issued by the President or a Governor between 3.11.2007 and 15.12.2007 (both days inclusive) which were also, likewise given permanence through the same instrument and which legislative measures along with the said Provisional Constitution Order had been validated by*

the afore-mentioned judgment delivered in TIKKA IQBAL MUHAMMAD KHAN'S CASE, stand shorn of their purported permanence on account of our afore-mentioned declarations. Since on account of the said judgment in TIKKA IQBAL MUHAMMAD KHAN'S CASE purporting to be a judgment of this Court, the presumption that the said Ordinances were valid laws not requiring approval of the Parliament or the respective Provincial Assemblies in terms of Article 89 or 128 of the Constitution and since it is today that this Court has attributed invalidity to the said legislative instruments, therefore, the period of 120 days and 90 days mentioned respectively in the said Article 89 and the said Article 128 of the Constitution, would be deemed to commence to run from today and steps may be taken to place, the said Ordinances before the Parliament or the respective Provincial Assemblies in accordance with law;

- (viii) since the Constitution, through its Article 176, authorises only the Parliament to determine the number of Judges of the Supreme Court of Pakistan and since the Parliament had so done through the Supreme Court (Number of Judges) Act XXXIII pf 1997, therefore, the increase in the strength of the Judges through the Finance Act of 2008 which Act was not passed by the Parliament but was passed only by the National Assembly would be deemed to be valid only for financial purposes and not for the purposes of Article 176 of the Constitution. It is resultantly declared that the number of Judges of the Supreme Court for purposes of the said Article 176 shall continue to remain, sixteen;*
- (ix) in the Code of Conduct prescribed for the Judges of the Superior Courts in terms of Article 209(8) of the Constitution, a new clause shall be added commanding that no such Judge shall, hereinafter, offer any support in whatever manner to any unconstitutional functionary who acquires power otherwise than through the modes envisaged by the Constitution and that any violation of the said clause would be deemed to be misconduct in terms of the said Article 209 of the Constitution;*
- (x) in view of our findings above regarding Mr. Justice Abdul Hameed Dogar not being a constitutional and a valid consultee, the notification dated 26.8.2008 and the notification dated 15.9.2008 extending the term of office of Mr. Justice Abdur Rasheed Kalwar and of Mr. Justice Zafar Ahmed Khan Sherwani as Additional Judges of the High Court of Sindh are declared to be unconstitutional and of no legal effect;*
- (xi) that the court acknowledges and respects the mandate given by the sovereign authority i.e. electorate to the democratically elected Government on 18th February, 2008 and would continue to jealously guard the principle of trichotomy of powers enshrined in the Constitution, which is the essence of the rule of law. Any declaration made in this judgment shall not in any manner affect the General Elections held and the Government formed as a result thereof i.e. the*

President, the Prime Minister, the Parliament, the Provincial Governments, anything done by these institutions in the discharge of their functions. These acts are fully protected in terms of the age old of principle of Salus populi est supremo lex reflected in PLD 1972 SC 139;

- (xii) *Before parting with the judgment, we would like to reiterate that to defend, protect and uphold the Constitution is the sacred function of the Supreme Court. The Constitution in its preamble, inter alia, mandates that there shall be democratic governance in the country, "wherein the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam shall be fully observed; wherein the independence of judiciary shall be fully secured." While rendering this judgment, these abiding values have weighed with us. We are sanguine that the current democratic dispensation comprising of the President, Prime Minister and the Parliament shall equally uphold these values and the mandate of their oaths."*

7. In the detailed reasons, passed in the Sindh High Court Bar Association's case, it was held that the 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 3.11.2007. Relevant portion from the said judgment is reproduced hereinbelow: -

121. *Proclamation of Emergency, PCO No. 1 of 2007 and Oath Order, 2007 per se having been found to be unconstitutional, illegal and ultra vires, the next limb of the contention of Mr. Hamid Khan, Sr. ASC was that all the acts based upon, or flowing from, the actions of 3rd November, 2007 were too, unconstitutional, illegal and ultra vires, therefore, all such acts including the appointment of Abdul Hameed Dogar, J, as the Chief Justice of Pakistan, the oath made by other Judges of the Supreme Court and High Courts, including Chief Justices, etc., and the appointment of Judges of the Supreme Court and High Courts in violation of the order dated 3rd November, 2007 passed by a seven - member Bench of this Court in Wajihuddin Ahmed's case and the appointments made in consultation with Abdul Hameed Dogar, J, were a nullity in the eye of law and of no legal effect and were liable to be so declared by this Court and such Judges had also rendered themselves liable for action under and in accordance with the Constitution and the law including action for contempt of Court.*

122. *..... Thus, on 3rd November, 2007 certainly it was the first time in the history of Pakistan that the judiciary, instead of accepting or acquiescing in the situation as per past practice, acted boldly and independently and took the most ever needed step, which conspicuously lacked in the past. A seven-member Bench of this Court, constituted and convened in the evening of the fateful day after the issuance of Proclamation of Emergency, PCO No. 1 of 2007 and Oath Order, 2007, passed*

the restraint order in Wajihuddin Ahmed's case. This was the most striking distinction between the action of 3rd November, 2007 on the one hand and those of 12th October, 1999, 5th July, 1977, 25th March, 1969 and on 7th October, 1958 on the other. In pursuance of the said order, a vast majority of the Judges of the superior courts rejected the actions of 3rd November, 2007 and did not make oath in pursuance with the order dated 3rd November, 2007 passed by a seven - member Bench of this Court in Wajihuddin Ahmed's case. The lawyers, members of the civil, society, political activists, the print and the electronic media personnel and the general public played their role for upholding the rule of law and supremacy of the Constitution in the country. Abdul Hameed Dogar, J, and some other Judges violated the aforesaid order, dated 3rd November, 2007 passed by a 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." (Emphasis provided)

The implication of above order was that the Judges, who were appointed as Judges of the Supreme Court by the President of Pakistan in consultation with Mr. Justice (R) Abdul Hameed Dogar were ceased to hold office vide notification No. F.12(4)/2007-A.II (Vol.II)(a) dated 2.8.2009, which reads as under: -

Government of Pakistan
Law and Justice Division

Islamabad, the 2nd August, 2009

NOTIFICATION

No.F.12(4)/2007-A.II-(Vol.II)(a). In pursuance of the judgment of the full Bench of Supreme Court of Pakistan dated 31st July, 2009, in Constitution Petitions No.9 and 8 of 2009 (Sindh High Court Bar Association and Mr. Nadeem Ahmed, Advocate Vs. Federation of Pakistan), the President is pleased to approve that the following Judges of Supreme Court of Pakistan shall cease to hold their offices with immediate effect: -

1. Mr. Justice Muhammad Qaim Jan
2. Mr. Justice Ijaz-ul-Hassan
3. Mr. Justice Muhammad Moosa K. Leghari
4. Mr. Justice Ch. Ejaz Yousaf
5. Mr. Justice Mian Hamid Farooq
6. Mr. Justice Syed Zawwar Hussain Jaffery
7. Mr. Justice Muhammad Farrukh Mamud
8. Mr. Justice Sheikh Hakim Ali
9. Mr. Justice Sardar Muhammad Aslam

**Justice (Retd.)
(Riaz Kayani)
Secretary**

8. It appears that the Judges of the High Court of Balochistan, who have violated order dated 3.11.2007 instead of facing proceedings as noted above tendered resignations, including the Chief Justice of the Balochistan High Court which was accepted and he was retired from his position, vide notification dated 5.8.2009, which reads as under: -

*Government of Pakistan
Law and Justice Division*

Islamabad, the 5th August, 2009

NOTIFICATION

No.F.12(4)/2007-A.II-(Vol.II). In exercise of the powers conferred by Article 195 of the Constitution of the Islamic Republic of Pakistan read with President's Order of 3 of 1997, the President is pleased to retire Mr. Justice Amanullah Khan Yasinzai, Chief Justice, High Court of Balochistan with immediate effect.

***Justice (Retd.)
(Riaz Kayani)
Secretary***

Similarly, all the remaining Judges of the Balochistan High Court were also retired from their positions vide notification dated 5.8.2008, which is reproduced hereinbelow: -

*Government of Pakistan
Law and Justice Division*

Islamabad, the 5th August, 2009

NOTIFICATION

No.F.12(4)/2007-A.II-(Vol.II). In exercise of the powers conferred by Article 195 of the Constitution of the Islamic Republic of Pakistan read with President's Order of 3 of 1997, the President is pleased to retire the following Judges of High Court of Balochistan with immediate effect: -

1. *Mr. Justice Ahmed Khan Lashari*
2. *Mr. Justice Muhammad Nadir Khan*
3. *Mr. Justice Akhtar Zaman Malghani*
4. *Mr. Justice Mehta Kailash Nath Kohli*

***Justice (Retd.)
(Riaz Kayani)
Secretary***

Likewise, two of the Judges of this Court namely Mr. Justice (R) Faqir Muhammad Khokhar and Mr. Justice (R) Javed Buttar tendered resignations, which were accepted vide notification dated 08.08.2009 which reads as under: -

*Government of Pakistan
Law and Justice Division*

Islamabad, the 8th August, 2009

NOTIFICATION

No.F.12(4)/2007-A.II-(Vol.II). In exercise of the powers conferred by Article 179 of the Constitution of the Islamic Republic of Pakistan read with President's Order of 3 of 1997, the President is pleased to retire the following Judges of the Supreme Court of Pakistan with immediate effect:-

1. Mr. Justice Faqir Muhammad Khokhar
2. Mr. Justice M. Javed Buttar

***Justice (Retd.)
(Riaz Kayani)
Secretary***

Some of the Judges, who were elevated from the High Courts to this Court in consultation with Mr. Justice (R) Abdul Hameed Dogar, reverted to the concerned High Courts. As far as the Judges of High Courts, appointed in consultation with Mr. Justice (R) Abdul Hameed Dogar, who was declared not to be a Chief Justice, were removed from their positions vide separate notifications.

9. A number of Judges filed Review Petitions against the said judgment, which were returned by the office with certain objections. Later, they filed miscellaneous applications seeking permission to file review petitions against the judgment dated 31.7.2009, which were dismissed vide judgment dated 13.10.2009 passed in Justice Khurshid Anwar Bhinder v. Federation of Pakistan (PLD 2010 SC 483). Relevant para from the said judgment is reproduced hereinbelow: -

"50. It is worth mentioning that in the judgment impugned it has been declared that PCO was not a valid piece of legislation, therefore, the entire structure raised on it was bound to fall alongwith it. In such view of the matter no person can prefer review with the plea that he was deprived of the benefit which had accrued to him by the said illegal construction. It is also to be kept in view that electronic and print media had widely published the proceedings and judgment impugned and all the applicants were aware that they were deriving their legitimacy under the garb of

judgment delivered in Tika Muhammad Iqbal Khan's case (supra) and thus it was incumbent upon them to have approached this Court for impleadment. They had no other legitimacy and no legal right to hold the office of Judges of superior Courts once the dictum as laid down in Tikka Muhammad Iqbal Khan's case (supra) has been set aside and would be too late in the day to take the plea that they were unaware and should be afforded proper opportunity of hearing."

Meanwhile, vide order dated 5.10.2009 notices were ordered to be issued to all such Judges to explain as to why proceedings against them be not initiated under Article 204 of the Constitution read with relevant provisions of the law of contempt of court. Relevant portion therefrom is reproduced hereinbelow: -

"2. It is to be noted that in the detailed reasons of the judgment dated 31.07.2009, it has been held that the Judges, who violated the order dated 03.11.2007 passed by a seven-member Bench in Constitution Petition No. 73 of 2007, are also liable for committing contempt of Court in addition to being liable to be proceeded against under Article 209 of the Constitution as despite notice, (details of which are mentioned in the detailed reasons), they made new oath, though they were restrained from doing so by the aforesaid order. Accordingly, we consider it appropriate to issue notices of contempt of Court to all those Judges, who were Judges of High Courts prior to 3rd November, 2007 and they made oath in violation of the aforesaid order, as also the Judges who were appointed between 3rd November, 2007 and 15th December, 2007 because it has been held in the detailed reasons that the order dated 3rd November, 2007 remained operative and they were constitutionally, legally and morally bound to follow the order so passed by the apex Court.

3. The office is directed to issue notices to all such Judges by name, to explain as to why proceedings against them be not initiated 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. They may file replies on or before the next date of hearing. However, such notices shall not be issued, for the time being, to the Judges, who have resigned from office in the meantime."

Thus, Criminal Original Petitions were registered and the contempt proceedings were initiated against all the Judges, who opted to contest proceedings. A vast majority of the Judges to whom notices were issued tendered unconditional apologies. Many Judges of the other High Courts also opted for early/premature retirement, which were accepted and they were retired from their

positions vide separate notifications. Some of the notifications are reproduced hereinbelow: -

Lahore High Court:

Government of Pakistan
Law and Justice Division

Islamabad, the 11th October, 2009

NOTIFICATION

No.F.12(4)/2007-A.II-(Vol.II)(a). In exercise of the powers conferred by Article 195 of the Constitution of the Islamic Republic of Pakistan read with President's Order of 3 of 1997, the President is pleased to retire the following Judges of Lahore High Court with immediate effect: -

1. Mr. Justice Mian Muhammad Najum-uz-Zaman.
2. Mr. Justice Maulvi Anwarul Haq.
3. Mr. Justice Muhammad Khalid Alvi.
4. Mr. Justice Syed Sakhi Hussain Bukhari.
5. Mr. Justice M. Bilal Khan.
6. Mr. Justice Fazal-e-Miran Chauhan.
7. Mr. Justice Tariq Shamim.
8. Mr. Justice Syed Asghar Haider.

(MALAK HAKAM KHAN)
Draftsman/Additional Secretary

High Court of Sindh:

Government of Pakistan
Law and Justice Division

Islamabad, the 9th October, 2009

NOTIFICATION

No.F.12(4)/2007-A.II-(Vol.III).- In exercise of the powers conferred by Article 195 of the Constitution of the Islamic Republic of Pakistan read with President's Order of 3 of 1997, the President is pleased to retire Mr. Justice Agha Rafiq Ahmed Khan as Judge High Court of Sindh with immediate effect.

(MALAK HAKAM KHAN)
Draftsman/Additional Secretary

Government of Pakistan
Law and Justice Division

Islamabad, the 11th October, 2009

NOTIFICATION

No.F.12(4)/2007-A.II-(Vol.II)(b).- In exercise of the powers conferred by Article 195 of the Constitution of the Islamic Republic of Pakistan read with President's Order of 3 of

1997, the President is pleased to retire Justice Mrs. Qaiser Iqbal, Judge High Court of Sindh with immediate effect.

(MALAK HAKAM KHAN)
Draftsman/Additional Secretary

Government of Pakistan
Law and Justice Division

Islamabad, the 19th October, 2009

NOTIFICATION

No.F.12(4)/2007-A.II-(Vol.II).- In exercise of the powers conferred by Article 195 of the Constitution of the Islamic Republic of Pakistan read with President's Order of 3 of 1997, the President is pleased to retire following Judges of High Court of Sindh with immediate effect.

1. Mr. Justice Munib Ahmed Khan.
2. Mr. Justice Ali Sain Dino Metlo.

(MALAK HAKAM KHAN)
Draftsman/Additional Secretary

Government of Pakistan
Law and Justice Division

Islamabad, the 11th October, 2009

NOTIFICATION

No.F.12(4)/2007-A.II-(Vol.II).- In exercise of the powers conferred by Article 195 of the Constitution of the Islamic Republic of Pakistan read with President's Order of 3 of 1997, the President is pleased to retire following Judges of High Court of Sindh with immediate effect: -

1. Mr. Justice Muhammad Afzal Soomro
2. Mr. Justice Azhar Siddiqui

(MALAK HAKAM KHAN)
Draftsman/Additional Secretary

Government of Pakistan
Law and Justice Division

Islamabad, the 2nd November, 2009

NOTIFICATION

No.F.12(4)/2007-A.II-(Vol.III).- In exercise of the powers conferred by Article 195 of the Constitution of the Islamic Republic of Pakistan read with President's Order of 3 of 1997, the President is pleased to retire Mr. Justice Zia Perwez as Judge High Court of Sindh with immediate effect.

**Justice (Retd.)
(Riaz Kayani)
Secretary**

Peshawar High Court:

Government of Pakistan
Law and Justice Division

Islamabad, the 2nd November, 2009

NOTIFICATION

No.F.12(4)/2007-A.II-(Vol.III).- In exercise of the powers conferred by Article 195 of the Constitution of the Islamic Republic of Pakistan read with President's Order of 3 of 1997, the President is pleased to retire the following Judges of the Peshawar High Court with immediate effect: -

1. Mr. Justice Said Maroof Khan
2. Mr. Justice Hamid Farooq Durrani

**(MALAK HAKAM KHAN)
Draftsman/Additional Secretary**

For ready reference, apologies tendered by some of the Judges in response to notices for contempt of court are reproduced hereinbelow: -

**REPLY ON BEHALF OF JUSTICE (R) MUHAMMAD NAWAZ ABBASI
FORMER JUDGE SUPREME COURT OF PAKISTAN TO THE NOTICE
UNDER ARTICLE 204 OF THE CONSTITUTION OF PAKISTAN
READ WITH CONTEMPT OF COURT ACT, 1976.**

The replying respondent humbly submits as under: -

- i. *The supreme Court of Pakistan in Constitution Petitions No.8 and 9 of 2009 declared the proclamation of Emergency of 3rd November, 2007 and PCO-1 of 2007 read with Oath of Office of Judges Order 2007 as illegal and unconstitutional, vide judgment dated 31.07.2009.*
- ii. *The replying respondent, the then Judge of Supreme Court of Pakistan, had taken oath under Oath of Judges Order, 2007, and consequently he has been issued notice under Article 204 of the Constitution read with Contempt of Court Act, 1976 for violating order daed 03.11.2007 passed by a seven members' Bench of the Supreme Court of Pakistan*
- iii. *The replying respondent has earlier submitted reply to the above notice on 13.10.2009 but in view of the Honourable Supreme Court of Pakistan of even date he by withdrawing the said earlier reply and in supersession of the same submits his reply in the following manner in response to the notice dated 9.10.2009 repeated on 13.10.2009: -*

- a. The replying respondent having great respect, regard and honour for the Judiciary as a whole and for thus Honourable Court in particular with regret and repentance without contesting the contempt notice hereby sincerely tenders unqualified and unconditional apology.
- b. The replying respondent while tendering unconditional and unqualified apology prays for mercy of the Court in its dignity with the request that the Honourable Court by taking lenient view may graciously accept his apology and discharge/recall the notice issued to him in the interest of justice."

Replying Respondent
Justice (R) Muhammad Nawaz Abbasi,
Supreme Court of Pakistan

REPLY OF MR. JUSTICE (R) MAULVI ANWAR UL HAQ

"In the matter of Notice under Article 204 of the Constitution of Islamic Republic of Pakistan read with Section 3 & 4 of Contempt of Court Act, 1976 or any other enabling provisions of relevant laws.

May it please your lordships,

Humbly bowing before the verdict handed down by my honorable peers, I hereby tender unqualified apology and pray for condonation of error, about grave, on my part while deciding to agree to take oath on 13th November, 2007.

I pray that Allah Almighty have mercy upon and forgive us all. (Amen)

Maulvi Anwar ul Haq
Retired Judge

REPLY ON BEHALF OF MR. JUSTIC MUHAMMAD AKRAM QURESHI
OF LAHORE HIGH COURT LAHORE TO NOTICE UNDER ARTICLE
204 OF THE CONSTITUTION OF ISLAMIC REPUBLIC OF
PAKISTAN, 1973.

Reply respondent Most Humbly submits as under:-

In response to notice dated 21.10.2009 issued to me by this Hon'ble Court in pursuance of the Court's dated o.10.2009 I express and place on record my profound regret for having taken oath of office as a judge of this Court after the "proclamation of emergency" dated 3.11.2007 for which I tender my unqualified, unconditional and sincere apology and place myself at the mercy of this Hon'ble Court.

The undersigned has got the highest regard for the judiciary, especially for this Court hence, while tendering

unqualified apology pray that a clement view in the matter may be taken and notice under reply may be discharged/recalled.

(Justice Muhammad Akram Qureshi)"

10. The Court after considering the apologies tendered by the Judges coupled with the fact that they had resigned or were retired from their positions, vide order dated 13.10.2009 passed in Justice Khurshid Anwar Bhinder (ibid), *inter alia*, held that: -

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

However, the contempt proceedings continued against those who contested the notices issued to them.

11. During the contempt proceedings, Dr. Abdul Basit, Sr. ASC on behalf of Mr. Justice Hasnat Ahmed Khan and Mr. Justice Syed Shabbar Raza Rizvi filed Criminal Miscellaneous Applications No. 01 & 02 of 2011 wherein it was *inter alia* prayed as under: -

- (i) *For purposes of due process a notice of the same kind as has been served on the present petitioner and other judges be also served on the functionaries enumerated in sub-paras (i) and (iii) of Restraint Order dated 3.11.2007;*
- (ii) *Even for purposes of due process, the functionaries who have played major role are to be treated in the same fashion as the petitioner whose role is merely for taking oath arranged for him and other judges by other functionaries.*

The Bench seized with contempt proceedings by a separate order dated 2.2.2011 referred the matter to the Chief Justice of Pakistan with the observation that the matter qua those persons named in the application (the President, Prime Minister, Chief of Army Staff, Corps Commanders, Staff Officers and all concerned of the Civil and Military Authorities) may be proceeded independently and on their own facts, either before the same Bench or before some other Bench, as may be determined. It was further observed that it was quite unnecessary to link or club the proceedings against the respondents therein, with those which may be taken against the above named persons. In pursuance of above observations, office submitted a note soliciting permission for initiating proceedings of contempt of Court against the persons named in the applications. Therefore, on 2.2.2011, one of us (Mr. Justice Iftikhar Muhammad Chaudhry, CJ) passed following order: -

“Put up after the decision of case against Judges of superior Courts.”

12. The learned Bench, seized with the contempt matter heard the arguments and summarized the moot points agitated on behalf of appellants in the following terms: -

- “(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?”*

13. Vide short order dated 2.2.2011, which is impugned in these Intra Court Appeals, it was held that the proceedings should be taken against the respondents therein and they, with the exception of Mr. Justice Zafar Iqbal Chaudhry and Mr. Justice Khurshid Anwar

Bhindar be put to trial in accordance with law. The operative paragraphs from the impugned order are reproduced below: -

"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 Bhindar 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.*

... ..

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."

Hence, these Intra Court Appeals under section 19 of the Contempt of Court Ordinance, 2003.

14. As the Criminal Original Petitions were fixed before the 4-Member Bench of this Court for 21.2.2011 for framing of charge

against the appellants and others, therefore, at the request of one of the appellants matter was taken up on 18.2.2011. During hearing of the ICA, the appellants in other appeals requested for taking up their cases as well, as such, vide order dated 18.2.2011 they were given option to get their cases fixed by making application for early hearing till 2:30 pm that day. Accordingly Intra Court Appeals No.3, 4, 6 to 11 of 2011 were fixed.

15. Mr. S.M. Zafar, learned Sr. ASC appeared on behalf of Mr. Justice (R) Syed Zahid Hussain appellant in ICA No.10 of 2011 and addressed the arguments but when we inquired as to whether in absence of legitimacy granted to the unconstitutional acts of the then Chief of Army Staff, General Pervez Musharraf (Retd.) dated 3.11.2007 whereby while enforcing unconstitutional emergency, the Constitution was held in abeyance and the Oath Order, 2007 was issued declaring the Judges of the superior Courts to cease to hold their offices if they had not made oath under the Oath Order, 2007 read with PCO, 2007, the Judges including the appellants, who instead of showing allegiance to Pakistan and defending the Constitution opted to make oath under the instruments other than the Constitution and benefited from the same, have severed their connection with the Constitution? He initially attempted to answer the proposition but in the meanwhile case was adjourned. On the next day i.e. 3.3.2011 he filed an application on behalf of Mr. Justice (R) Syed Zahid Hussain, under Order XXXIII, Rules 5 & 6 of the Supreme Court Rule, 1980 wherein it was categorically stated that ***“he is extremely sorry for having taken oath on 03.11.2007 under a misunderstanding and has regretted for the same.”*** He also placed on record notification dated 1.3.2011 issued by the Government of Pakistan, Ministry of Law & Justice whereby his resignation was accepted and he was allowed retirement. For ready reference same is reproduced hereinbelow: -

“In exercise of the powers conferred by Article 179 of the Constitution of Islamic Republic of Pakistan, the President is pleased to allow retirement to Mr. Justice Syed Zahid Hussain, Judge of Supreme Court of Pakistan with immediate effect in terms of Paragraph 15 of the Supreme Court Judge (Leave, Pension and Privileges) Order, 1997.”

In view of the above changed scenario vide order dated 3.3.2011, the appeal of Justice (R) Syed Zahid Hussain was allowed and proceedings

for contempt of Court to his extent pending before a Bench of this Court were terminated in the following terms: -

"3. Mr. S.M. Zafar, learned Sr. ASC for appellant Mr. Justice Sayed Zahid Hussain, now retired, has filed an application under Order XXXIII, rules 5 & 6 of the Supreme Court Rules, 1980, wherein besides mentioning the different dates on which Justice Sayed Zahid Hussain had taken oath as an Additional Judge, as a Judge and as Chief Justice of the Lahore High Court, and thereafter as a Judge of the Supreme Court, already referred to in the judgment of this Court in Sindh High Court Bar Association's case (PLD 2009 SC 879), it is categorically stated that "he is extremely sorry for having taken oath on 03.11.2007 under a misunderstanding and has regretted for the same". The learned counsel submitted that Mr. Justice Sayed Zahid Hussain, for the sake of the dignity and respect of the Institution of Judiciary, has sacrificed his four years' service as a Judge of the Apex Court and henceforth he would be no more adorning the Bench, as the notification of his retirement has already been issued, therefore, while exercising jurisdiction available to this Court to decide not to proceed against a person facing the charge of contempt who offers regrets, the proceedings against him be terminated.

4. The learned Attorney General for Pakistan, after having gone through the notification of retirement of Justice Sayed Zahid Hussain and the contents of the application containing statement of regrets for taking oath on 03.11.2007 stated that regrets so expressed by him may be accepted, particularly keeping in view that he had stood retired and was no more the Judge of this Court.

5. It may be observed that in a case of contempt of Court like the one in hand all that the Court is required to be satisfied is that the dignity and authority of the Court by flouting its judgments/orders are not put at stake. The law of contempt is primarily intended to ensure that the majesty of the law is upheld and the dignity of the Institution of Judiciary, which is a most important pillar of the State, is protected and it also restores confidence of the general public in the due and proper administration of justice in the country. Indeed, Courts are vested with an extraordinary jurisdiction to punish a person for committing contempt of Court, and armed with a powerful weapon, but the same is to be exercised/used judiciously and sparingly depending upon the facts and circumstances of each case. However, with reference to instant case, it needs to be emphasized that on 03.11.2007, a 7 – Member Bench of this Court passed a restraint order not only to save the dignity of the judiciary, but also to protect Constitution as it is the duty of Judges of Superior Courts who have taken oath to preserve and protect it. Thus, it was all the more necessary for the Judges of the Superior Courts to respect the order in all circumstances. However, Mr. Justice Sayed Zahid Hussain having realized that he had taken oath under a misunderstanding has regretted for his action and decided to quit in the larger interests of the Institution and he would not be adorning the Bench. Therefore, we accept the request so made by him. Consequently, appeal (ICA No. 10 of 2011) is allowed and proceedings for contempt of Court to his extent pending before a Bench of this Court are terminated."

16. In sequence of above situation one of other appellants namely Justice (R) Abdul Hameed Dogar, who also made oath after proclamation of emergency and PCO, 2007 under the Oath Order, 2007 and subsequently administered oath to the Judges of Supreme Court under the PCO and Oath Order, 2007, also filed statement through Mr. Muhammad Ibrahim Satti, learned Sr. ASC, which reads as under: -

**"STATEMENT OF MR. JUSTICE (RETD) ABDUL HAMEED
DOGAR (APPELLANT)**

With all humility and humbleness at my command, it is submitted that under abrupt, unexpected changes, confusion, misconception and misunderstanding, the order dated 3.11.2007 could not be complied which is highly regretted with repentance and sorrow. I stood retired on 21.3.2009 and not enjoying good health. It is humbly requested that, in view of my ailment, the explained scenario, for which I am really sorry, my regrets may very kindly be accepted and notice of contempt may please be withdrawn for which I shall highly obliged and place myself at the mercy of Court.

Sd/-
(Abdul Hameed Dogar)
Appellant
02.03.2011"

The above statement was also accepted vide order of even date and the proceedings of Contempt of Court were terminated against him.

Relevant portion from the said order is reproduced hereinbelow: -

"9. The learned counsel has submitted that Justice (Retd.) Abdul Hameed Dogar has already retired on 21.03.2009, he is no more a Judge of this Court, he is not enjoying good health and while feeling sorry and expressing regrets he has stated that he could not comply with the order dated 03.11.2007 under confusion, misconception and misunderstanding. Besides, he has placed himself at the mercy of the Court, therefore, his regrets may be accepted and his appeal may be disposed of accordingly.

10. The learned Attorney General for Pakistan, on having gone through the statement noted hereinabove has stated that as Justice (Retd.) Abdul Hameed Dogar has placed himself at the mercy of the Court, therefore, on account of the realization that he ought to have complied with the aforesaid order, the request so made by him may be accepted.

11. We have considered the request made before us vide statement reproduced hereinabove and have also gone through the judgments of this Court in the cases of Sindh High Court Bar Association and Justice Khurshid Anwar Bhinder. We are of the opinion that as against the past practice, the order dated 03.11.2007 was passed by a 7 – Member Bench for the first time in the history of this Court whereby Judges of Supreme Court and High Courts including Chief Justices of High

Courts were restrained not to take oath under PCO or any other extra-constitutional act with a view to block the imposition of martial law and abrogation of the Constitution as it has already been clarified hereinabove, as the dignity and respect of the Institution of Judiciary are to be guarded first of all by its own members. Admittedly, Justice (Retd.) Abdul Hameed Dogar violated the order dated 03.11.2007 as it is evident from the conclusion drawn by this Court in the case of Sindh High Court Bar Association (ibid). However, in the case of Justice (Retd.) Abdul Hameed Dogar much water has already flown under the bridges, during course whereof all the actions taken by the then Chief of Army Staff had been declared unconstitutional including appointment of Judges of Supreme Court and High Courts. Reference may be made to the case of Justice Khurshid Anwar Bhinder (ibid). At this stage, Mr. Justice (Retd.) Abdul Hameed Dogar has regretted for his actions and has also thrown himself at the mercy of the Court. In the case in which helplessness has been shown by a person facing contempt proceedings has persuaded us to exercise jurisdiction of contempt sparingly. We accept appeal (ICA No. 9 of 2011) and terminate the contempt proceedings against him too. However, no exception of whatsoever nature shall be claimed by him in respect of observations made in the Sindh High Court Bar Association's case as well as in Justice Khurshid Anwar Bhinder's case."

17. Learned Attorney General, vide order dated 21.3.2011 was also called upon to explain the status of the appellants in view of the fact that the actions of 3.11.2007 taken by the then Chief of Army Staff were not validated by the Parliament in the Eighteenth or the Nineteenth Constitutional Amendments. He was also asked to seek instructions from Government of Pakistan on that aspect of the case. In compliance with Court's order, the learned Attorney General filed a statement on behalf of Government of Pakistan, which is reproduced hereinbelow: -

"It is a matter of record that the Special Committee of the Parliament on Constitutional Reforms had taken notice of the judgment dated 31.07.2009 passed in Sindh High Court Bar Association (PLD 2009 SC 879), wherein the Parliament had been applauded for not validating the actions of 03.11.2007 and hope was expressed that the Parliament will not do so. Para 17 of the judgment at page 957 is reproduced for ready reference herein below: -

It may be noted that the chosen representative of the time, too, did not extend validation to the unconstitutional acts taken upto 3rd November, 2007 as is universally known. It is, however, quite heartening that, for the first time, in the history of our beloved country, the chosen representative of people, who took their offices as a result of election taking place on 18th

February, 2008 have, commendably, stayed their hands off and have not sanctified the unconstitutional acts, such as, the Declaration of Emergency, the Provisional Constitution Order No.1, the Oath of Office (Judges), Order, 2007, the Constitution (Amendment) Order, 2007 (President's Order No.5 of 2007), the Constitution (Second Amendment) Order of 2007 (President's Order No.6 of 2007) and many other' instruments made and declared by General Pervez Musharraf (Rtd.). In this, their restraint not extending validity to all these unconstitutional and illegal instruments and other steps taken by retired General are laudable. Evidently, this was done by the present representatives of people believing firmly that the prosperity of the country lies in the strong and independent democratic system which can alone flourish and survive with democratic steps to be taken in the better interest of people always apt and keen to choose them in such a viable system of governance. We are sanguine that the current democratic dispensation comprising of the President, the Prime Minister, Ministers and the Parliament shall continue to uphold the Constitution, its institutions and sacred values.

2. In this regard it is important to note that in paragraph No.19 of the Review Judgment reported as PLD 2010 SC 483 this Hon'ble Court was pleased to divide the judges into two categories in the following terms: -

We have carefully examined the respective contentions as agitated on behalf of the parties in the light of relevant provisions of the Constitution, law and rules made thereunder. It is to be noted that there are two categories of Judges i.e. the first comprising those who were Judges of this Court or of any of the High Courts on 3-11-2007 and the second category is of those persons who were notified as Judges of this Court or of the High Courts between 4-11-2007 and 23-3-2009 on the basis of "consultation" with Abdul Hameed Dogar, J., purporting to act as Chief Justice of Pakistan.

3. Para-21 of the said judgment then deals with the Judges in the second category while Para-22 deals with the Judges in the first category. This discussion has reference to Para-22(iv) and Para-22(iii) respectively of the main judgment (PLD 2009 SC 879 at pages 960).

4. In this view of the matter, the Federation acted accordingly. So far as the judgment itself is concerned it was implemented in letter and spirit in as much as the notification were issued in the matter of second category of Judges in terms thereof while references were prepared and filed under Article 209 of the Constitution regarding the first category of the Hon'ble Judges (Appellants).

5. In the light of the judgment dated 31.07.2009 as also the judgment in review the first category Judges remain to be duly appointed Judges.

6. The view of the Federation that the present appellant Hon'ble Judge remains to be Judge under the Constitution till removed under Article 209 of the Constitution is based upon the reading of the said judgments."

18. Dr. Abdul Basit learned counsel appearing for the appellant in ICA No.3 of 2011 stated that a Judge could only be removed by means of Article 209 of the Constitution and not by initiating proceedings under Article 204 of the Constitution for alleged violation of Order dated 3.11.2007 passed by this Court in Justice (R) Wajihuddin Ahmad's case (ibid). He further added that when a person was performing a judicial role he needed protection, therefore, no proceedings of contempt of Court could be initiated against him because if this practice would be allowed to continue it would tantamount to opening the door of exploitation and blackmailing. Learned counsel further contended that 14-Member Bench vide order dated 05.10.2010 held that contempt proceedings should be initiated against the Judges who violated the order dated 3.11.2007 although there was no such direction in Sindh High Court Bar Association's case as well as Justice (R) Khurshid Anwar Bhinder's case. In the former case, it was held that the Judges who violated the order dated 03.11.2007 shall be dealt with under Article 209 and not under Article 204 of the Constitution. A Judge is a person but with a different role to play. The judicial role commences when a person is appointed as a Judge and during the period he is performing the judicial role, protection given to such person do not allow initiation of proceedings against him.

19. Dr. Khalid Ranjha, learned counsel for appellant in ICA No.7 of 2011, contended that Attorney General who was the Chief Law Officer of the country and also the prosecutor of appellants had made a statement on behalf of Government that appellants were still Judges of the High Court, therefore, such statement ought to have some relevance, which could be that the appellants could not be tried for the contempt of Court.

20. Sheikh Zamir Hussain, Sr. ASC appearing on behalf of appellant in ICA No.8 of 2011, contended that the appellants were Judges of the High Court which was court of record, therefore, they could not be proceeded against for contempt of Court. As according to him the only way was to proceed against them under Article 209 of the Constitution as it has already been observed in short order dated 31.7.2009 passed in Sindh High Court Bar Association's case (ibid). To

support his contention he relied upon the cases reported as Harish Chandra v. Justice S. Ali Ahmed (AIR 1986 Patna 65), K.L. Gauba v. The Hon'ble the Chief Justice and Judges of the High Court of judicature at Lahore (AIR 1942 FC 1), Mujeebur Rehman Shami v. Judge of High Court (PLD 1973 Lahore 778). He further relied upon the books "Military Incorporated" [p. 92, para 2]; "Memoirs and Reflections" by Dr. Justice Nasim Hasan Shah [p.129]; "A Judge speaks out" by Justice Ajmal Mian [p. 54]; Chief Justice Cornelius' book and the Article "Viewpoint" by Justice Dorab Patel to canvass a plea for condoning the act of taking oath by the appellants under the PCO, 2007.

21. Syed Ali Zafar, learned ASC contended that a Judge could not be removed from the office except under Article 209(6). Rationale behind it, is to protect the independence of judiciary. He further added that if a Judge had violated his oath, mere such violation did not amount to his removal unless such violation was determined to be misconduct.

22. Stand of the learned Attorney General relating to status of the appellants has already been reproduced hereinabove. Further, learned Bench seized with contempt proceedings has already concluded that there is no bar to proceed against the appellants for contempt of Court. Needless to observe that undoubtedly unique situation has arisen essentially for peculiar circumstances commenced from the month of October, 2007 till 3.11.2007 on account of pendency of Constitution Petitions No. 73 of 2007 in the case of Justice (R) Wajihuddin's case (ibid) wherein qualification of General Pervez Musharraf (Retd.) to contest in uniform, the election of President of Pakistan, was questioned. Facts in this behalf have already been noted in Sindh High Court Bar Association's case therefore, to refresh the happening of incident, on the basis of which on 3.11.2007 a 7-Member Bench of this Court decided to pass a restraint order with the intention to end up unconstitutional era by imposing the martial law in the garb of emergency or emergency plus, relevant paras therefrom are reproduced hereinbelow: -

72. As per schedule of election, nomination papers filed by General Pervez Musharraf, Makhdoom Muhammad Amin Faheem, Mr. Wajihuddin Ahmed and Mrs. Faryal Talpur were

scrutinized by the Chief Election Commissioner of Pakistan on 29th September, 2007. However, the objections' raised on behalf of the latter three candidates against the candidature of General Pervez Musharraf were rejected vide order of even date.

73. One of the candidates of election of the President, namely, Mr. Wajihuddin Ahmed, a former Judge of the Supreme Court filed Constitution Petition No. 73 of 2007 in this Court with the following prayer: --

(1) The order of the Chief Election Commissioner dated 29.09.2007 accepting orally the nomination papers of General Pervez Musharraf as a candidate for the President of Pakistan may kindly be set aside as unconstitutional;

(2) General Pervez Musharraf may kindly be declared ineligible, lacking in qualifications under Article 62 and other provisions of the Constitution and disqualified under Article 63 of the Constitution to contest the election of the office of the President of Pakistan;

(3) After rejecting nomination papers of General Pervez Musharraf, the remaining electoral process for the election of President of Pakistan under the schedule announced by the Chief Election Commissioner may be set aside; and

(4) As a consequence, fresh Presidential elections through the new electoral college to be inducted after holding general election be ordered.

75. On 4th October, 2007, a Bench of 10 available Judges heard the petitions and adjourned the hearing to 5th October, 2007 on which date the following order was passed on the miscellaneous applications filed by the petitioner seeking stay of the Presidential election scheduled to be held on 6th October, 2007:--

"Having heard the learned counsel for the parties at some length, it is unanimously resolved and directed that the election process already commenced shall continue as per the schedule notified by the Chief Election Commissioner of Pakistan but the final notification of the election of the returned candidate shall not be issued till the final decision of these petitions.

2. The main petitions shall be set down for hearing on 17.10.2007."

On passing of the above order, General Pervez Musharraf seemed to be fully satisfied. According to the news items appearing in the Daily News, Islamabad dated 6 October, 2007, he told the Treasury MPs that he was he grateful to the judiciary on the "wonderful decision". Elaborating the point, he observed that the decision was also beneficial to him and that he left it to the judiciary to decide, and expressed that they must bank upon the judiciary of Pakistan.

78. In the above background, Mr. Hamid Khan, Sr. ASC, learned counsel for the petitioners in the instant petitions, who was one of the counsel for Wajihuddin Ahmed petitioner in

Constitution Petition No. 73 of 2007, stated at the Bar that on 2nd November, 2007 a miscellaneous application (later assigned CMA No. 2869 of 2007) was sought to be presented by Barrister Aitezaz Ahsan before the eleven -member Bench during the course of hearing, but it was directed that the same be filed in office. In the said miscellaneous application, it was stated, *inter alia* that there were widespread reports in the print and electronic media, and some federal ministers had also stated, that the decision in the "disqualification case" would lead to imposition of martial law or emergency or some other unconstitutional steps including but not limited to a fresh Provisional Constitution Order, which would subvert the proceedings in the aforesaid case. It was prayed that the respondents may be directed to clarify their intent in this regard and may be restrained from taking any such step. The office brought the application on file with instruction to the Court Associate to bring it to the notice of the 11-member Bench when it resumed hearing of the petitions on 5 November, 2007.

79. The speculations came true on 3rd of November, 2007, when General Pervez Musharraf in the capacity of the Chief of the Army Staff issued a Proclamation of Emergency, whereby he held the Constitution in abeyance and also issued PCO No. 1 of 2007 and Oath Order, 2007. Immediately thereafter, the Registrar placed the file of Wajihuddin Ahmed's case before the Chief Justice of Pakistan for taking up CMA No. 2869 of 2007 filed therein. Thus, a special Bench of 7 available Judges was immediately constituted and convened, which passed the following order: -

"This application was filed in Court on 2nd November 2007 praying that respondent Government may change composition of Bench by adopting extra- constitutional measures, which could mean either by placing martial law or bringing PCO or by imposing emergency.

2. Application could not be taken up as it was not numbered. However, now it has been marked to Bench. In the meantime, in electronic and print media news appeared that PCO has been promulgated to enable Government to administer fresh oath to the Chief Justice as well as Judges of the Supreme Court so that favourable Judges could be appointed. Be that as it may, we feel that Government has no ground/reason to take extra-constitutional steps, particularly for the reasons being published in the newspapers that high profile case is pending and is not likely to be decided in favour of the Government, although matter is still pending. Therefore, a special Bench has been constituted and on considering pressing situation and news which have been published in newspapers, we direct as follows:

(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."

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.

23. There had been imposition of martial law, etc. in the country from time to time without any frontal resistance by any of the constitutional organ of the State except on 3.11.2007 when a restraint order was passed by this Court. Without prejudice to the cases of the appellants the members of the judiciary, by and large, implemented the said restraint order in letter and spirit, details of which have already been mentioned hereinabove. Inasmuch as, after restoration of the superior judiciary, which had been sacked by a dictator by no other mechanism except show of force, as neither the dictates of Article 209 of the Constitution were adhered to nor any misconduct was established by any forum for their removal, only for the reasons that Chief of Army Staff was intending to get himself elected as President in uniform, as happened in the past, during the eras of Field Marshal Ayub Khan, General Zia-ul-Haq and General Pervez Musharraf

during his first tenure as President which commenced after deviating from the Constitutional provisions on 12.10.1999.

24. In the history of Nations of the world, there are so many examples where decisions had been taken to follow no other system but one which has been envisaged under the Constitution. Evidently, the Constitution does not allow a Military Personal to divulge into politics and to take over the powers contrary to the commitments made by him to protect and preserve the Constitution. For the first time, as noted in the above paras, the only cause of imposing emergency was the apprehension of not getting favourable decision from the Court by a person in uniform having no right to rule the country except as per the mandate of the Constitution of 1973. It may not be out of context to note that not only majority of Judges of the superior Courts declined to make oath under PCO, 2007 but also stuck to it till the last. Inasmuch as, post-restoration of the sacked judiciary, after passing of the judgment dated 31.7.2009 in Sindh High Court Bar Association's case whereby appointments of Judges of the superior Courts not made in consultation with the *de jure* Chief Justice of Pakistan were declared unconstitutional and immediately after passing of the short order, notifications of their removal were issued by the democratic government, instead of making recourse to the procedure laid down in Article 209 of the Constitution. Besides, some of the Judges, who on their own realized that they had not honoured the order of the Supreme Court dated 3.11.2007, tendered their resignations. Interestingly, all the Judges of the Balochistan High Court volunteered to quit the positions they were holding at the time of pronouncement of the said judgment.

25. It would also not be out of context to note that majority of the Judges of the Supreme Court also faced the same situation, however, they did not tender the resignation but either they were removed because of having already reached the age of superannuation provided for a Judge of the High Court from where they were elevated to the Supreme Court, in terms of Article 195 of the Constitution, or others, who yet had not reached the age of superannuation, were reverted back to the concerned High Courts. This had happened due to the enforcement of the judgment of this Court and not adhering to the Constitutional Provision under Article 209 of the Constitution. Likewise,

a vast majority of the Judges from all over the country, details of which have already been mentioned hereinbefore, after issuance of contempt notices, opted to tender resignations, which were accepted as such they were severed from the connections with the judiciary. They had also not claimed/pleaded for protection under Article 209(6) of the Constitution, presumably, in deference to the order dated 3.11.2007 in Justice (R) Wajuddin Ahmed's case. Inasmuch as, after commencement of the proceedings for contempt of court, Justice (R) Syed Zahid Hussain, a Judge of Supreme Court, who all along had been contesting the contempt of court proceedings, during the pendency of Intra-Court Appeal, opted to tender resignation, detailed facts have already been mentioned. Likewise, Mr. Justice (R) Abdul Hameed Dogar, who was the first person to take oath under the PCO, 2007 and unconstitutionally assumed the office of the Chief Justice of Pakistan for which he was not authorized as no vacancy was available, initially contested the proceedings but during the ICA submitted the statement in black and white showing his remorse for taking the oath on 03.11.2007, for the reasons mentioned in the statement so filed on his behalf. One of the learned counsel had also contended that appellants had no option but to take the oath, which was being administered to them, therefore, no fault lies with them. Such argument being without any substance, cannot be discussed in detail except observing that the role of a person administering the oath is never important but the role of the persons who had accepted oath holding the highest post in superior judiciary having full knowledge of the Constitution and laws could have refused to do so instead of opting the same and becoming an active party in the unauthorized constitutional deviation.

26. In the country like ours the powerful persons in the helm of affairs had been doing so in the past, not only with the assistance of the judiciary but also with the help of chosen representatives getting validation of unconstitutional actions by means of legislative interference, as is evident from the Eighth and Seventeenth Constitutional Amendments. The Members of the Judiciary are not the ordinary persons. As far as such unconstitutional actions of the dictator are concerned, they are supposed to know the consequence of the same, and being responsible to administer justice

while adoring the superior courts and also supposed to have all laws written on their sleeves. No one can claim amongst the members of the superior judiciary including the appellants that constitutional deviation by a dictator notwithstanding the judgment of the Court can be rectified, legitimized except with the legislative interference by the Parliament, that too, by making amendment in the Constitution, because an ordinary legislation could not serve such purpose as it has its own limitations to promulgate the laws in terms of Article 70 of the Constitution; therefore, the judgments cited by the learned counsel are not to be applied in the peculiar circumstances of the case. As far as the script of the books, cited by the learned counsel are concerned, we have viewed them with highest esteem and spirit, and without commenting at the same, we would make only one observation that constitutional deviation on 3.11.2007 had taken place as the then Chief of Army Staff apprehended that he would not get favourable decision from the Court allowing him to contest the election of President in uniform and for the first time in the country restraint order dated 3.11.2007 was passed. Had such like resistance been shown earlier, his lordships Mr. Justice Naseem Hassan Shah, Mr. Justice Ajmal Mian and Dorab Petal would have also followed such order to save and protect the constitution, as well, to allow this country to be governed under the instruments, which represented the nation as a whole and essentially they would have never liked to be on the side of a person, who had bent upon to mutilate the constitution for no other purpose except self service.

27. There is no dispute that in Sindh High Court Bar Association's case at para-22(iv) it has been observed that the Judges of the Supreme Court, if any, the Chief Justices of the High Courts, if any, and the Judges of any of the High Courts, if any, who stood appointed to the said office prior to 3.11.2007 but made oath of their respective offices in disobedience to the order dated 3.11.2007 passed by 7-Member Bench of the Supreme Court in Justice (R) Wajihuddin Ahmed's case shall be proceeded against under Article 209 of the Constitution. The Secretary, Ministry of Law and Justice Division, Government of Pakistan was directed to take steps in the matter accordingly. However, proviso was provided in that behalf. Complete text has already been provided hereinabove. However, at paras No.

121 and 122 of the said judgment, it was held that Judges, whether they were in this Court or in the High Courts, who violated the aforesaid order dated 3.11.2007 passed by a seven - member Bench of this Court in Justice (R) Wajihuddin Ahmed's case have all rendered themselves liable for consequences under the Constitution for their disobedience of the aforesaid order of 3.11.2007. Relevant portions from the said judgment have already been reproduced hereinabove.

28. As Article 204 of the Constitution deals with the cases where a person has violated an order passed by this Court, therefore, in view of the observations made in the detailed reasons given in Sindh High Court Bar Association's case notices under Article 204 of the Constitution read with relevant provisions of contempt of court laws, were issued to all those Judges, who were appointed between 3.11.2007 and 15.12.2007 and made oath in violation of Order dated 3.11.2007.

29. Now important question is, as to whether in absence of any rectification, validation, indemnity provided to the deeds, actions, omission and commissions of the then Chief of Army Staff during the period 3.11.2007 to 15.12.2007 (both days inclusive) by legislative interference of the Parliament, which in the meanwhile had taken place by the Eighteenth and Nineteenth Constitutional Amendments, the appellants and others are the Judges of the High Courts, serving or retired, because of controversy, which has been raised and discussed hereinbefore namely that proceedings against a Judge cannot be initiated for contempt of Court under Article 204 of the Constitution, which persuaded us to decide this question. Undoubtedly, such proceedings of contempt of Court, are ordinarily treated as *quasi* criminal proceedings. However, according to the definition clause of the Contempt of Court Ordinance, 2003, there is another type of contempt namely civil contempt, besides the criminal contempt and judicial contempt. The person who is facing the proceedings is always at liberty to raise as many pleas as he likes and the Court is bound to decide the same by passing an order in view of the situation prevailing at that time.

30. Mr. Raza Kazim, learned ASC stated that the trial Court (4-Member Bench of this Court) has held that Judges could be tried for contempt of Court, whereas, the Court has raised objection whether they are still Judges after passing of the order dated 3.11.2007 and no validation having been given to the acts of that day by this Court or by the Eighteenth and Nineteenth Constitutional Amendments, therefore, assuming that appellants had not bowed to the earlier decision in Syed Zafar Ali Shah's case, the law of contempt of Court under Article 204 of the Constitution may not be applied because if it was a case of misconduct then it should be referred to the Supreme Judicial Council. On the other hand, if they were not Judges the question would be since when they were not Judges; whether from 3.11.2007, when they violated the restraint order and took oath under the PCO, 2007 or when the Judgment of 31.7.2009 was passed, or when the review judgment came, or when the Eighteenth or Nineteenth Constitutional Amendments were made, because surely they were the Judges at some point of time. He further stated that appellants had been hauled up for an act, which, according to his personal standard, was wrong. Other Judges too said that they had taken oath under misunderstanding and an act which was the result of misunderstanding could not be made culpable. To strengthen the view of appellants he stated that there was utter chaos and confusion in which he opted for a certain course in the light of the precedents then available to him as a Judge of the superior Court.

31. Dr. Khalid Ranjha, Sr. ASC admired to the arguments put forward by Syed Raza Kazim, Sr. ASC concerning non-validation of the actions of 3.11.2007 and added that Parliamentary Committee in finalizing the Eighteenth and Nineteenth Constitutional Amendments was cognizant of the decision of this Court dated 31.7.2009 in Sindh High Court Bar Association's case and the Review Judgment dated 13.10.2009 in Justice (R) Khurshid Anwar Bhinder's case and being aware of those judgments, while amending the Constitution, the Parliament in its wisdom did not talk about it. He further added that question of validation was not before the Court at the time of review. It was criminal proceeding involving question of facts.

32. Syed Ali Zafar, ASC contended that there was no need of validation to the actions of 03.11.2007 because this Court had already declared all the actions to be unconstitutional and void ab initio. He further submitted that making of oath under the PCO, 2007 did not affect validity of appointment of appellant as subsequently on 15.12.2007, she (appellant) once again made oath under the Constitution.

33. Sh. Zameer Hussain, learned Sr. ASC supported to the arguments of Dr. Khalid Ranjha, with further explanation that if the Parliament had validated the acts of General Pervez Musharraf (Retd.), what would be left? It would be against the dictum of highest Court of the country. It would have nullified the judgment and gone back to esquire zero. So they followed the judgment and treated the said actions as void ab initio and non existent. However, the judgments referred to hereinabove treated the appellants as Judges. The Review judgment, in particular, refrained from making any observation lest it may prejudice their cases at the trial stage. If the appellants were not treated as Judges or did not continue to be the Judges, such observations would have not been made in the review judgment. This question could be left open for decision by the Bench, which had already taken cognizance of the proceedings lest any finding in this behalf should prejudice the case and nothing would be left for the Bench dealing with the case or in alternative it should be referred to a Larger Bench because 14-Member Bench had expressed its view qua their amenability to Article 209 of the Constitution.

34. As far as the objections raised by Sheikh Zameer Hussain, learned counsel are concerned, these are not tenable, perhaps he has not gone through the detailed reasons given in continuation of the short order in Sindh High Court Bar Association's case wherein in an unambiguous and categorical term, directions have been issued to proceed under the Constitution, against the judges who have violated the order dated 3.11.2007. As far as Article 204 of the Constitution is concerned it is one of the parts of the Constitution. Detailed discussion in this regard has already been made hereinabove coupled with the facts that after the pronouncement of the judgments in Sindh High Court Bar Association's Case and Justice (R) Khurshid Anwar Bhinder's case, a good of number of the Judges have been removed from their

offices by means of different notifications. Not only Sheikh Zameer Hussain, ASC but other learned counsel as well, had emphasized that the procedure of removal of the Judges is not under Article 204 but Article 209 (6) of the Constitution. We may point out here that the contempt proceedings which have been initiated in pursuance of the judgment passed by 14-Member Bench, which decided to issue notices to them had no concern with their removal. We have time and again explained in the judgments referred to hereinbefore that on account of unique circumstances, with which the judiciary of the Country was confronted for the first time on 3.11.2007, instant proceedings have been initiated.

35. Thus, in view of above background it is to be seen whether the appellants are still Judges so as to be liable to be dealt with under Article 209 of the Constitution or had ceased to be Judges after they had taken oath on 03.11.2007 under the PCO, 2007 read with the Oath Order, 2007, which, *inter alia*, provided that a person holding office immediately before the issuance of said instruments as a Judge of the Supreme Court, the Federal Shariat Court or a High Court would cease to hold office with immediate effect, particularly after the passing of the Eighteenth Constitutional Amendment whereby no validation was provided to the actions of 3.11.2007 because in the past, the Parliament had, on each such occasion, granted validation to such actions i.e. the extra-constitutional steps of 05.07.1977 were validated by the Parliament through the Eighth Constitutional Amendment whereas the extra-constitutional steps of 12.10.1999 were validated by the Parliament under the 17th Constitutional Amendment.

36. It is to be noted that much emphasis has been laid on behalf of the appellants that notwithstanding the fact that indemnity/validity has not been granted to the unauthorized actions of the then Chief of Army Staff dated 03.11.2007, they continued to be the Judges in view of the observations of this Court, in pursuance whereof they were ordered to be dealt with under Article 209 of the Constitution and in the order dated 5.10.2010 though they were ordered to be proceeded under Article 204 of the Constitution but it was never held that they were no more Judges of the Supreme Court or the High Courts. Reliance in this behalf has also been placed on the

stand taken by the Government of Pakistan in the statement reproduced hereinabove wherein reference of paragraph No. 17 of the Sindh High Court Bar Association's case has been made. The arguments so advanced on behalf of the appellant as well as the Attorney General for Pakistan required to be examined in different context because in Sindh High Court Bar Association's case PCO as well as Oath Order, 2007 had been declared unconstitutional and void ab-initio, whereas in Khurshid Anwar Bhinder's case permission was not accorded to some of the applicants (Judges) who wanted to seek the review of the main judgment for expunging the observations of whatsoever nature made therein against them.

37. It is most encouraging aspect of the case that the Federal Government through the Attorney General had not supported the actions of dictator dated 3.11.2007 and an unambiguous and a categorical stand was taken by the Attorney General. Relevant para from Sindh High Court Bar Association's case is reproduced hereinbelow: -

"13. The learned Attorney General stated that the acts and instruments of 3rd November 2007 of General Pervez Musharraf, which were obviously extra-constitutional, were not accepted, rather were objected to by all the democratic political parties except Pakistan Muslim League (Quaid-e-Azam), hereinafter referred to as "PML (Q)", which had tabled a resolution in the National Assembly to endorse the said actions and got it passed. He unequivocally declared that neither he was supporting General Pervez Musharraf's actions of 3rd November, 2007 nor he would defend him in the instant proceedings. He made the following arguments: -

- (1) *The present democratic government had never accepted extra-constitutional promulgation of Orders and/or any other repressive measures. The respect for judiciary had always been hallmark of its ideology and judicial process was resorted to by their leaders even in the most trying circumstances. The verdict in Tikka Iqbal Muhammad Khan's case was affirmed in review by a 13 - member Bench of the Supreme Court whereby the acts of 3rd November 2007 were validated on the principles of state necessity and *salus populi est suprema lex*, which even otherwise ceased to exist on revival of the Constitution on 15th December 2007;*
- (2) *Notwithstanding the aforesaid position, the present fourteen-member Bench may like to revisit the cases of Dosso, Begum Nusrat Bhutto, Mehmood Khan Achakzai, Zafar Ali Shah, Watan Party, Pakistan Lawyers Forum, and Tikka Iqbal Muhammad Khan, but such revisiting would be prospective as held in a chain of authorities,*

including Punjab Province v. Malik Khizar Hayat Khan Tiwana (PLD 1956 FC 200), etc;

- (3) *Much water having flown under the bridge in the interregnum, the de facto doctrine would call for judicial restraint because complete annulment would create chaos and confusion of great magnitude. In re: Reference by H.E. The Governor-General (PLD 1955 FC 435), certain Ordinances were saved for consideration of their validity by the Constituent Assembly. Reliance was also placed on Cooley's Constitutional Limitations 8th Edition, Vol. 2, p. 137, Sabir Shah v. Federation of Pakistan (PLD 1994 SC 738), Managing Director, Sui Southern Gas Co. Ltd. v. Ghulam Abbas (PLD 2003 SC 724), etc;*

Inasmuch as notice was issued to General Pervez Musharraf (Retd.) at his available address intimating him about the proceedings and factum of issuance of notice was also televised both on national and international channels but on the date so fixed no one entered appearance on his behalf. Meaning thereby that even the person who violated the Constitution did not come forward to defend his own action by appearing in the Court. As far as the chosen representatives are concerned, till the announcement of the judgment in Sindh High Court Bar Association's case (ibid) they did not legitimized, validated, indemnified the actions of 3.11.2007 as it has been observed in the following para of Sindh High Court Bar Association's case: -

"172. The striking difference and distinction between the actions of 5th July 1977 and 12th October 1999 on the one hand, and the action of 3rd November 2007 on the other, was that the former were affirmed, adopted and validated by the Parliament through the Eighth and Seventeenth Amendments of the Constitution respectively whereas the latter was not validated; or ratified by the Parliament. Reference in this behalf was made to Article 270C, which though was first introduced under the Legal Framework Order, 2002, but it was later inserted into the Constitution under the Seventeenth Amendment. In absence of any validation or ratification by the Parliament, Abdul Hameed Dogar and other persons who were ostensibly styled as Chief Justices would not be consultees for the purposes of Articles 177, 193 and 197 of the Constitution. Hence, all the appointments made in consultation with such Chief Justices would be void ab initio;"

38. It would also not be out of context to note that Ordinances promulgated by the President or the Governors of the Provinces before 3.11.2007, were given permanence by the PCO, 2007 as also the Ordinances issued by the President or the Governors between 3.11.2007 and 15.12.2007 (both days inclusive), were likewise given

permanence through same instrument and such legislative measures along with PCO, 2007 were validated by Tikka Iqbal Muhammad Khan's case, but were shorn of purported permanence on account of declaration of PCO, 2007 and other instruments to be unconstitutional, as such these Ordinances were ordered to be placed before the Parliament or the respective Assemblies in accordance with Articles 89 and 128 of the Constitution. But to our knowledge some of these Ordinances were not accepted by the Parliament including the National Reconciliation Ordinance, 2007, which in the case of Dr. Mubashir Hassan v. Federation of Pakistan (PLD 2010 SC 265) was declared to be an instrument void ab initio being ultra vires and violative of various constitutional provisions including Article Nos. 4, 8, 25, 62(f), 63(i)(p), 89, 175 and 227 of the Constitution.

Had the democratic dispensation not examined various provisions of the Eighth Constitutional Amendment and Seventeenth Constitutional Amendment, perhaps the question which now has been cropped up about the status of the appellants, to be Judges, might have not arisen at all. Needless to observe that on 5.7.1977, the then Chief Martial Law Administrator, General Zia-ul-Haq imposed Martial Law and held in abeyance the Constitution of 1973. He succeeded in obtaining the judgment in his favour in the case of Begum Nusrat Bhutto v. Chief of Army Staff (PLD 1977 SC 657) but legitimacy, indemnity, validation so secured under the Court's judgment had no Constitutional mandate, therefore, condonation of unconstitutional/unauthorized action was called for. Accordingly chosen representatives were approached for this purpose and Eighth Constitutional Amendment was made whereby Article 270A was inserted in pursuance whereof validation, legitimization and condonation was granted to the actions of 5.7.1977. For ready reference Article 270A is reproduced hereinbelow: -

"270A. (1) The Proclamation of the fifth day of July, 1977, all President's Orders, Ordinances, Martial Law Regulations, Martial Law Orders, including the Referendum Order, 1984 (P. O. No. 11 of 1984), the Revival of the Constitution of 1973 Order, 1985 (P. O. No. 14 of 1985), the Constitution (Second Amendment) Order 1985 (P. O. No. 24 of 1985), and all other laws, made between the fifth day of July, 1977, and the date on which this Article comes into force are hereby affirmed, adopted and declared, notwithstanding any judgment of any court, to have been validly made by competent authority and, notwithstanding anything contained in the Constitution, shall not be called in question in any court on any ground whatsoever:

Provided that a President's Order, Martial Law Regulation or Martial Law Order made after the thirtieth day of September, 1985, shall be confined only to making such provisions as facilitate, or are incidental to, the revocation of the Proclamation of the fifth day of July, 1977.

(2) All order made, proceedings taken and acts done by any authority or by any person, which were made, taken or done, or purported to have been made, taken or done, between the fifth day of July, 1977, and the date on which this Article comes into force, in exercise of the powers derived from any Proclamation, President's Orders, Ordinances, Martial Law Regulations, Martial Law Orders, enactments, notifications, rules, orders or by-laws, or in execution of or in compliance with any order made or sentence passed by any authority in the exercise or purported exercise of powers as aforesaid, shall, notwithstanding any judgment of any court, be deemed to be and always to have been validly made, taken or done and shall not be called in question in any court on any ground whatsoever.

(3) All President's Orders, Ordinances, Martial Law Regulations, Martial Law Orders, enactments, notifications, rules, orders or by-laws in force immediately before the date on which this Article comes into force shall continue in force until altered, repealed or amended by competent authority.

Explanation. In this clause, Competent authority means-

(a) in respect of President's Orders, Ordinances, Martial Law Regulations, Martial Law Orders and enactments, the Legislature; and

(b) in respect of notifications, rules orders and by-laws, the authority in which the power to made, alter, repeal or amend the same vests under the law.

(4) No suit, prosecution or other legal proceedings shall lie in any court against any authority or any person, for or on account of or in respect of any order made, proceedings taken or act done whether in the exercise or purported exercise of the powers referred to in clause (2) or in execution of or in compliance with orders made or sentences passed in exercise or purported exercise of such powers.

(5) For the purposes of clauses (1), (2) and (4), all orders made, proceedings taken, acts done or purporting to be made, taken or done by any authority or person shall be deemed to have been made, taken or done in good faith and for the purpose intended to be served thereby.

(6) The laws referred to in clause (1) may be amended by the appropriate Legislature in the manner provided for amendment of such laws.

Explanation. In this Article, "President's Orders" includes "President and Chief Martial Law Administrator's Orders" and "Chief Martial Law Administrator's Orders."

39. It may be noted that the Supreme Court or the High Courts have no lawful jurisdiction to validate, condone or legitimize any unconstitutional dispensation as it has been held in Sindh High

Court Bar Association's case (ibid) that the assumption of power by an authority not mentioned in the Constitution would be unconstitutional, illegal and void ab initio and not liable to be recognized by any court, including the Supreme Court. It is also pertinent to mention here that the unconstitutional actions of General Pervez Musharraf (Retd.) i.e. proclaiming Emergency w.e.f. 12.10.1999 and holding the Constitution in abeyance, issuance of PCO, 1999 and Oath Order, 2000, were validated by this Court in the case of Syed Zafar Ali Shah v. Federation of Pakistan (PLD 2000 SC 869) but even then he approached the Parliament for getting the validation of the same, which was granted by means of Seventeenth Constitutional Amendment whereby Article 270AA was inserted in the Constitution, which reads as under: -

"270-AA (1) The Proclamation of Emergency of the fourteenth day of October, 1999, all President's Orders, Ordinances, Chief Executive's Orders, including the Provisional Constitution Order No. 1 of 1999, the Oath of Office (Judges) Order, 2000 (No. 1 of 2000), Chief Executive's Order No. 12 of 2002, the amendments made in the Constitution through the Legal Framework Order, 2002 (Chief Executive's Order No. 24 of 2002), the Legal Framework (Amendment) Order, 2002 (Chief Executive's Order No. 29 of 2002), the Legal Framework (Second Amendment) Order, 2002 (Chief Executive's Order No. 32 of 2002) and all other laws made between the twelfth day of October, one thousand nine hundred and ninety-nine and the date on which this Article comes into force (both days inclusive), having been duly made or accordingly affirmed, adopted and declared to have been validly made by the competent authority and notwithstanding anything contained in the Constitution shall not be called in question in any court or forum on any ground whatsoever.

(2) All orders made, proceedings taken, appointments made, including secondments and deputations, and acts done by any authority, or by any person, which were made, taken or done, or purported to have been made, taken or done, between the twelfth day of October, one thousand nine hundred and ninety-nine, and the date on which this Article comes into force (both days inclusive), in exercise of the powers derived from any Proclamation, President's Orders, Ordinances, Chief Executive's Orders, enactments, including amendments in the Constitution, notifications, rules, orders, bye-laws or in execution of or in compliance with any orders made or sentences passed by any authority in the exercise or purported exercise of powers as aforesaid, shall, notwithstanding any judgment of any court, be deemed to be and always to have been validly made, taken or done and shall not be called in question in any court or forum on any ground whatsoever.

(3) All Proclamations, President's Orders, Ordinances, Chief Executive's Orders, laws, regulations, enactments, including amendments in the Constitution, notification, rules, orders or bye-laws in force immediately before the date on which this

Article comes into force shall continue in force, until altered, repealed or amended by the competent authority.

Explanation: In this clause, "competent authority" means: -

(a) in respect of President's Orders, Ordinances, Chief Executive's Orders and enactments, including amendments in the Constitution, the appropriate Legislature; and

(b) in respect of notifications, rules, orders and bye-laws, the authority in which the power to make, alter, repeal or amend the same vests under the law.

(4) No suit, prosecution or other legal proceedings, including writ petitions, shall lie in any court or forum against any authority or any persons, for or on account of or in respect of any order made, proceedings taken or act done whether in the exercise or purported exercise of the powers referred to in clause (2) or in execution of or in compliance with orders made or sentences passed in exercise or purported exercise of such powers.

(5) For the purposes of clauses (1), (2) and (4), all orders made, proceedings taken, appointments made, including secondments and deputations, acts done or purporting to be made, taken or done by any authority or person shall be deemed to have been made, taken or done in good faith and for the purpose intended to be served thereby."

40. It is noteworthy that for the first time in the history of the country it has categorically been pronounced by this Court that superior Courts had no jurisdiction to legitimize unconstitutional acts, actions, omissions and commissions of any functionary who had acted contrary to the constitutional provisions. Reason behind it has its germane in clause (1) of Article 243 of the Constitution, according to which the Federal Government shall have control and command on the Armed Forces. Clause (1A) of Article 243 provides that without to the generality of the provision of clause (1) the supreme command of the Armed Forces shall vest in the President, whereas, as per clause (3) of the said Article, the President, in consultation with the Prime Minister, enjoys authority for the appointment of (i) the Chairman of Joint Chiefs Staff Committee (ii) the Chief of Army Staff (iii) the Chief of Navel Staff and (iv) the Chief of Air Staff. Similarly, Article 244 of the Constitution speaks that every member of the Armed Forces shall make oath in the form set out in the Third Schedule under the Constitution, according to which a member of Armed Forces solemnly swears that he will bear true faith and allegiance to Pakistan and uphold the Constitution of the Islamic Republic of Pakistan which embodies the will of the people, that he will not engage himself in any

political activities whatsoever and that he will honestly and faithfully serve Pakistan in the Pakistan Army or Navy or Air Force, as required by and under the law. Upholding the Constitution, as per the oath of the members of the Armed Forces, casts a duty upon them that they will not engage themselves in any political activities, whatsoever it may be. Likewise, under Article 245(1) of the Constitution, the Armed Forces of Pakistan are bound to remain under the direction of Federal Government to defend Pakistan against external aggression or threat of war, and, subject to law, act in aid of civil power when called upon to do so. Therefore, non adherence to the constitutional provisions prima facie tends to establish denying the oath to uphold the Constitution. This subject has already been discussed in detail in Sindh High Court Bar Association's case(Ibid). Relevant para therefrom is reproduced hereinbelow:-

"56. Each member of the Armed Forces, as per his oath under the Third Schedule to the Constitution in pursuance of Article 244, is bound to bear true faith and allegiance to Pakistan and uphold the Constitution which embodies the will of the people. He is also sworn not to engage himself in any political activities whatsoever. He also solemnly affirms and declares that he will honestly and faithfully serve Pakistan in the Pakistan Army (or Navy or Air Force) as required by and under the law. The learned counsel for the petitioners vehemently contended that General Pervez Musharraf, by his actions of 3rd November, 2007, not only violated his oath as a member of the Armed Forces, 'but also overthrew the solemn pledge he made as President of Pakistan of performing his functions and discharging his duties honestly, to the best of his ability, faithfully in accordance with the Constitution and the law. We agree with the contention of the learned counsel that General Pervez Musharraf failed to abide by his oath to preserve, protect and defend the Constitution. The Constitution was framed to continue to be in force at all times. By Article 6, an in-built mechanism was provided to safeguard the Constitution from its abrogation or subversion by anyone, that is to say, it could neither be cancelled by anyone nor could it be overthrown or undermined by anyone in any manner or mode whatsoever. Thus, unless and until the Constitution is altered or amended in accordance with the procedure laid down in Articles 238 and 239, or it is repealed on the pattern of the Interim Constitution under the provisions of Article 266, which too, is possible by recourse to the provisions of Articles 238 and 239, its operation and enforceability cannot be interrupted even for a single day, nay a single moment except as specifically provided in the Constitution itself. The Constitution has not contemplated any situation where it can be held in abeyance at the will or whims of the Chief of Army Staff and to be revived after he has achieved his objectives. Let it be stated in unequivocal terms that the validity accorded in the past did not give a licence to any holder of the office of Chief of Army Staff of repeating such acts at his will. It is hereby firmly laid down that the holding in abeyance of the Constitution or any other act having the effect

of discontinuing the operation and the enforceability of the Constitution for a single moment in a manner not authorized under the Constitution is nothing but an overthrowing of the Constitution, so to say, the subversion of the Constitution and thus constitutes the offence of high treason.

41. In the past, whenever by Martial Law, or to avoid this expression a phrase "Emergency" has been used, was imposed and the Constitution was abrogated in the case of Martial Law of 1958 or held in abeyance in the case of Martial Law of 1977 and imposition of Emergency Plus on 5.7.1977 as well as the Emergency of 1999, not only the Courts but also the Parliament had granted legitimacy, validity or indemnity to unconstitutional and unauthorized omission and commission of the dictator, with due respect, without realizing that Armed Forces are under the control of Federation and they have taken the oath to show allegiance to Pakistan and uphold the Constitution and they can only come forward to act in aid of the civilian government whenever they are called for and no sooner the circumstances, on the basis of which the civilian administration was compelled to call for its aid, are over, they have to go back to their barracks and not to continue ruling the country as it had happened in the Martial Law imposed by General Muhammad Ayub Khan in 1958, who ruled the country till the month of March, 1969 when instead of restoring the order of civilian government, he handed over the power to the then Commander-in-Chief of Army, General Muhammad Yahya Khan who continued till the time when this nation had to face the debacle of East Pakistan. However, his all actions were declared unconstitutional being accomplished by a usurper in the case of Asma Jilani v. Government of Punjab (PLD 1972 SC 139). Subsequent thereto, again in 1977 Martial Law was imposed and the Constitution was held in abeyance till its revival by Eighth Constitutional Amendment, wherein Article 270A was inserted, which has been reproduced hereinabove. Unfortunately on 12.10.1999, Martial Law by the name of Emergency was imposed and in Zafar Ali Shah's case the dictator once again succeeded in getting legitimacy from the Supreme Court as well as by Parliament. It is important to note that the Judges who had then made oath under the PCO read with Oath Order, 1999 were provided constitutional protection by means of Article 270C which reads as under: -

270C. (1) *Notwithstanding anything contained in the Constitution, all persons appointed as Judges of the Supreme Court, High Courts and Federal Shariat Court who have taken oath under the Oath of Office (Judges) Order, 2007 (1 of 2000), or the Oath of Office (Judges) Order, 2000, or not having been given or taken oath under the said orders have ceased to continue to hold the office of a Judge shall be deemed to have been appointed or ceased to continue to hold such office, as the case may be, under the Constitution and such appointment or cessation of office shall have effect accordingly.*

(2) *Notwithstanding any thing contained in the Constitution or nay other law for the time being in force,--*

- (i) *a judge including the Chief Justice, of the Supreme Court, a High Court of Federal Shariat Court who had, not been given or taken oath under the Oath of Office (Judges) Order, 2007 had ceased to hold office on and with effect from the 3rd day of November, 2007; and*
- (ii) *a judge including the Chief justice of the Supreme Court, a High Court and Federal Shariat Court appointed and/or continued as such Judge or Chief Justice by virtue of the Oath of Office (Judges) Order, 2007, shall, on revival of the Constitution, take oath as set out in the Third Schedule and shall be deemed to have been appointed, and/or shall continue to hold office, under the Constitution.*

42. On 3.11.2007 when again in the name of Emergency Plus the Constitution was held in abeyance and while proclaiming emergency the PCO, 2007 and Oath Order, 2007 was issued by the Chief of Army Staff, General Pervez Musharraf (Retd.) in exercise of authority contrary to any provision of the Constitution, the appellants who were initially appointed under the Constitution of 1973 and had also made oath to discharge their duties and perform their functions honestly to the best of their abilities and faithfully in accordance with the Constitution of Islamic Republic of Pakistan and had also committed themselves to preserve, protect and defend the Constitution of Pakistan, accepted beneficially the directions of the then Chief of Army Staff to cease to hold their offices and agreed to continue as a Judge under the proclamation of emergency and the PCO, 2007 read with the Oath Order, 2007, accordingly they sworn oath of their offices. On the cast of repetition it is again stated that this is for the first time in 60/62 years history when the Supreme Court resisted the imposition of emergency by passing a restraint order dated 3.11.2007 but without prejudice to the case of appellants whether they were aware of the same or not, fact remains that they continued as Judge under PCO, 2007 although on the revival of the Constitution on 15.12.2007 they were again given the oath under the

Constitution when after making certain amendments the dictator restored the Constitution. However, as far as actions of the dictator are concerned, they were indemnified, validated and legitimized by this Courts in the Tikka Iqbal Muhammad Khan's case, for which no jurisdiction vests in them because by doing so, on every third day a powerful General of Military shall impose the Martial Law (Emergency Plus) on its whims and wishes with capricious designs and shall restore the Constitution by amending the same as per their requirements, as happened between 3.11.2007 to 15.12.2007 when so called amendments were made by the then Chief of Army Staff and there would be no supremacy of the Constitution or rule of law. Although this time again the Judges who had made oath under the PCO, 2007, notwithstanding passing of the order by the 7-Member Bench on 3.11.2007, granted validity to the unauthorized and unconstitutional actions of General Pervez Musharraf (Retd.) but no sooner the democratic Constitutional Order was restored after the General Election of 18.2.2008 the Judiciary, which was unconstitutionally sacked by the then Chief of Army Staff, was restored w.e.f. 22.3.2009. The challenge was thrown to the actions of 3.11.2007 by the Sindh High Court Bar Association and Nadeem Ahmad Advocate, when the Court examined the validity of such actions and while revisiting the judgment passed in Tikka Iqbal Muhammad Khan's case it was declared that the said judgment was *per incuriam* and ultimately vide short order dated 31.7.2009 the petitions were accepted followed by the detailed reasons, relevant paras therefrom have already been reproduced hereinabove. In the said reported case, as it has been observed earlier, no one came forward to defend the actions of 3.11.2007 including the Government or its own architect i.e. General Pervez Musharraf (Retd.). Detailed historical background of Constitutional deviations etc. find mentioned in the said judgment.

43. It is a matter of great satisfaction and encouragement for all the right men, who believe in the constitutionalism and are of the affirmed commitment that in our beloved country there should not be any rule except one under the Constitution, that is why the Parliament had not granted legitimacy or validity to the actions of 3.11.2007. In view of the past history and on plain reading of the constitutional

provisions relating to the Armed Forces i.e. Article 243, 244 and 245, discussed hereinbefore it is abundantly clear that Chief of Army Staff, who has been appointed by the President in consultation with the Prime Minister has no authority to hold the Constitution in abeyance, therefore, condonation has to be sought by adopting a legislative intervention, as per past practice, from the parliament. In absence of such validation, indemnification or legitimization, unconstitutional actions taken by a dictator would continue to charge not only to the person who had imposed Martial Law (Emergency) but also to others as well who had accepted new order imposed in the country beneficially. There is no cavil with the proposition that unconstitutional actions of General Pervez Musharraf (Retd.) taken on 3.11.2007 were declared unconstitutional on 31.7.2008 but still their consequences continue to exist because by no legislative intervention through Parliament, the legitimacy, indemnity or validity had been granted by the Parliament. It is to be seen that at the time of such unconstitutional Martial Law in the name of Emergency on 3.11.2007, the Parliament (National Assembly + Senate) was duly functioning until 15.11.2007 when the National Assembly completed its tenure but no legitimacy, validity or indemnity was obtained from the said parliament. However, after dissolution of National Assembly, elections were held on 18.2.2008 and new National Assembly commenced its functions from 3rd week of March, 2008 onward. Meanwhile, Eighteenth and Nineteenth Constitutional Amendments were made by the parliament in pursuance whereof legislative actions of the Eighth Constitutional Amendment and Seventeenth Constitutional Amendments were also considered and all those legislative instruments, which found to be contrary to the Constitution, were weeded out of the Constitution. Interestingly the question of granting validity, indemnity and legitimacy in respect of Seventeenth Constitutional Amendment was also thoroughly examined and the Parliament unanimously indemnified, legitimized and validated the oath made by the Judges, under the PCO and Oath Order, 2000 by inserting sub Article 3 of the Article 270AA, which reads as under: -

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

- (a) *Judges of the Supreme Court, High Courts and Federal Shariat Court who were holding the office of a Judge or were appointed as such, and had taken oath under the Oath of Office (Judges) Order, 2000 (1 of 2000), shall be deemed to have continued to hold the office as a Judge or appointed as such, as the case may be, under the Constitution, and such continuance or appointment, shall have effect accordingly.*
- (b) *Judges of the Supreme Court, High Courts and Federal Shariat Court who not having been given or taken oath under the Oath of Office (Judges) Order, 2000, (1 of 2000), and ceased to hold the office of a Judge shall, for the purposes of pensionary benefits only, be deemed to have continued to hold office under the Constitution till their date of superannuation."*

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

44. It is a matter of record that all the times when there was a constitutional deviation in the past by means of legislative intervention through Parliament, condonation, legitimacy and validation has been granted to all the actions including the actions of Judges holding the office immediately at the time of making oath and the dictators, instead of proceeding against for deviation on the allegations of abrogating or subverting or suspending or holding in abeyance the Constitution. Inasmuch as, at one stage i.e. during the regime of

General Zia-ul-Haq he was allowed to continue as President in uniform on the basis of Referendum. Article 41 was amended and vide clause (7) the result of Referendum was incorporated therein for the purpose of allowing him to continue in the office. Clause (7) of Article 41 inserted by means of P.O.No.14 of 1985, reads as under: -

"(7) Notwithstanding anything contained in this Article or Article 43, or any other Article of the Constitution or any other law, General Mohammad Zia-ul-Haq, in consequence of the result of the referendum held on the nineteenth day of December 1984, shall become the President of Pakistan on the day of the first meeting of Majlis-e-Shoora (Parliament) in joint sitting summoned after the elections to the Houses of Majlis-e-Shoora (Parliament) and shall hold office for a term of five years from that day; and Article 44 and other provisions of the Constitution shall apply accordingly."

The said clause as substituted by item (2) to the Schedule annexed with the Legal Framework Order, 2002 (Chief Executive's Order No. 24 of 2002), is reproduced hereinbelow: -

"(7) The Chief Executive of the Islamic Republic of Pakistan-

(a) shall relinquish the office of Chief Executive on such day as he may determine in accordance with the judgment of the Supreme Court of Pakistan of the 12th May, 2000; and

(b) having received the democratic mandate to serve the nation as President of Pakistan for a period of five years shall, on relinquishing the office of the Chief Executive, Notwithstanding anything contained in this Article or Article 43 or any other provision of the Constitution or any other law for the time being in force, assume the office of President of Pakistan forthwith and shall hold office for a term of five years under the Constitution, and Article 44 and other provisions of the Constitution shall apply accordingly."

Later, by means of Seventeenth Constitutional Amendment proviso was added to the clause (7) and clauses (8) and (9) were inserted to Article 41. After said amendments it read as under: -

(7) The Chief Executive of the Islamic Republic of Pakistan-

(a) shall relinquish the office of Chief Executive on such day as he may determine in accordance with the judgment of the Supreme Court of Pakistan of the 12th May, 2000; and

(b) having received the democratic mandate to serve the nation as President of Pakistan for a period of five years shall, on relinquishing the office of the Chief Executive, notwithstanding anything contained in this Article or Article 43 or any other provision of the Constitution or any other law for the time being in force, assume the office of President of Pakistan forthwith and shall hold office for a term of five years

under the Constitution, and Article 44 and other provisions of the Constitution shall apply accordingly.

Provided that paragraph (d) of clause (1) of Article 63 shall become operative on and from the 31st day of December, 2004.

(8) Without prejudice to the provisions of clause (7), any member or members of a House of Majlis-e-Shoora (Parliament) or of a Provincial Assembly, individually or jointly, may, not later than thirty days from the commencement of the Constitution (Seventeenth Amendment) Act, 2003, move a resolution for vote of confidence for further affirmation of the President in office by majority of the members present and voting, by division or any other method as prescribed in the rules made by the Federal Government under clause (9), of the electoral college consisting of members of both Houses of Majlis-e-Shoora (Parliament) and the Provincial Assemblies, in a special session of each House of Majlis-e-Shoora (Parliament) and of each Provincial Assembly summoned for the purpose, and the vote of confidence having been passed, the President, notwithstanding anything contained in the Constitution or judgment of any court, shall be deemed to be elected to hold office for a term of five years under the Constitution, and the same shall not be called in question in any court or forum on any ground whatsoever.

(9) Notwithstanding anything contained in the Constitution or any other law for the time being in force, the proceedings for the vote of confidence referred to in clause (8) shall be regulated and conducted by the Chief Election Commissioner in accordance with such procedure and the votes shall be counted in such manner as may be prescribed by the rules framed by the Federal Government:

Provided that clauses (8) and (9) shall be valid only for the forthcoming vote of confidence for the current term of the President in office.

However, by means of Eighteenth Constitutional Amendment the clauses (7), (8) and (9) were omitted.

The qualification of General Pervez Musharraf (Retd.) to contest the election of the President to be held in 2007 was again challenged in Wajihuddin Ahmad's case and during pendency of the same under premature apprehension, instead of allowing the Court to pronounce the judgment, Martial Law in the name of Emergency Plus was declared on 3.11.2007, resultantly most of the Judges of the superior Judiciary were not allowed to continue to function. However, under the so called proclamation of Emergency and PCO, 2007 read with Oath Order, 2007 some of the Judges including the appellants, who both expressly and impliedly agreed that under the new dispensation i.e. proclamation of emergency and PCO, 2007 they ceased to hold their offices under the Constitution, as such, made fresh oath under the PCO, foregoing their earlier appointments under the Constitution of

1973. The effect of ceasing to hold office shall be discussed later. Again turning towards the question of seeking indemnification by the dictators, as it has referred hereinbefore, time to time it had become a persisting practice. We regret to observe that the Parliament instead of adhering to constitutional provisions like Article 6 etc. with a view to ensure that in future no one should deviate from the constitutional provisions, should uphold the Constitution being member of Armed Forces as per command of Article 244 of the Constitution and refrain in engaging themselves in any political activities whatsoever and serve honestly and faithfully in Pakistan Army, Navy or Air force etc. were rewarded/ compensated/indemnified as few examples have been quoted hereinbefore. Undoubtedly general public/masses being the subject of the Constitution are always interested in their welfare. At times they express no grievance when Military takes over, except when political forces mobilize them, but as far as chosen representatives are concerned, they were not oblivious of their duties as they had also taken oath to preserve, protect and defend the Constitution. But in the past practice is other way around out. However, the dictator, who held the Constitution in abeyance on 3.11.2007 for the purpose of achieving the object of contesting the election in uniform, succeeded in his nefarious designs as he got elected in uniform as President of Pakistan. Unfortunately, the chosen representatives exercised their right of vote in his favour and elected him as President of Pakistan in uniform, notwithstanding that petition was pending before the Court in the case of Wajihuddin Ahmad's case in which his qualification to contest the election in uniform was under examination. Interestingly, challenge was thrown to his candidatures at the touchstone of Article 41, which was also amended by the dictator previously.

45. No sooner the Judges of the superior Courts were sacked and only those Judges were allowed to continue in the office who had agreed to make oath under the PCO, 2007, those Judges of the Supreme Court constituted a Bench who in view of alleged amendment in the Constitution made by the General Pervez Musharraf (Retd.) declared him to be the President of Pakistan. On having obtained this verdict he made oath in uniform and continued to be the President of Pakistan for a further period of five years, till he resigned from the said

office. This is a painful constitutional history. One can imagine that how a person who was interested to grab the constitutional powers, not only deleted some of the provisions of the Constitution to achieve his object but also destroyed the whole Institution of Judiciary, which is one of the most important pillar of the State under the scheme of trichotomy of powers.

46. It is also significant to note that the Courts as well as the Parliament unfortunately had been privy to the deviations of the Constitution, mostly relying on the law of State necessity and the maxim of *Salus Populi Est Saprema Lex*, in the cases of State v. Dosso (PLD 1958 SC 533), Begum Nusrat Bhutto v. Chief of Army Staff (PLD 1997 SC 657), Zafar Ali Shah v. Pervez Musharraf, Chief Executive of Pakistan (PLD 2000 SC 869) and Tikka Iqbal Muhammad Khan v. Federation of Pakistan (PLD 2008 SC 25 and 178) but the judgment delivered by the superior Courts, referred hereinabove, had never been considered as good law and after the pronouncement of the judgment in Sindh High Court Bar Association's case (ibid) as well as by passing Eighteenth and Nineteenth Constitutional Amendments, stood nullified as in both these constitutional amendments all those insertions in the Constitution, which were found to be not sustainable at the touchstone of the Constitution have been separated as a result whereof no legitimacy, validation or indemnity has been granted to the actions of the then Chief Army Staff during the period from 3.11.2007 to 15.12.2007. Consequently the Judges who had taken the oath under PCO and Oath Order, 2007 continued to cease to hold their offices.

47. It has been vehemently contended by the learned counsel appearing for the appellants that in the Sindh High Court Bar Association's case proclamation of Emergency, PCO and Oath Order, 2007 was declared to be unconstitutional, ultra vires, illegal and of no legal effect. Reference in this behalf has been made to paragraphs No.21 & 22 of the said judgment time and again to emphasis that in respect of appellants directions have already been made that they should be proceeded against under Article 209 of the Constitution and in the judgment in Khurshid Anwar Bhinder's case this Court has not varied the directions of proceeding against the Judges who have violated the order dated 3.11.2007 to proceed under Article 209 of the

Constitution. In view of the judgment of this Court in the Sindh High Court Bar Association's case (ibid) whereby all these actions were declared illegal, the Parliament while making Eighteenth and Nineteenth Constitutional Amendments, in deference to the Court's order had not taken up this issue, might be leaving it to the Court to deal with the affairs of such Judges. Reference had to be made to the stand taken by the Federal Government in respect of the status of the appellants in response to the directions of this Court, which has been reproduced hereinabove, that they are the Judges who are liable to be dealt with under Article 209 of the Constitution as it was observed in the short order dated 31.7.2008. However, in the detailed judgment delivered on 30.9.2009 observations were made for initiating action against the Judges who violated the order dated 3.11.2007 passed by 7-Member Bench of this Court. Subsequently vide order dated 5.10.2009 they were also ordered to be proceeded under the Constitution, which has already been reproduced hereinabove, in pursuance whereof notices under Article 204 of the Constitution were issued. As a result of the judgment in the Sindh High Court Bar Association's case whereby it was held that Mr. Justice (R) Abdul Hameed Dogar had never been the Chief Justice of Pakistan, therefore, all appointments of the Judges of the Supreme Court and the High Courts made in consultation with him during the period when he unconstitutionally held the said office from 3.11.2007 to 21.3.2009 (both days inclusive) were declared to be unconstitutional, void ab-initio and of no legal effect, as such those Judges ceased to hold the office forthwith. The persons (the Judges of Supreme Court and the High Courts), who resigned from their offices were never proceeded under Article 209 of the Constitution because they were not the Judges as per the mandate of the Constitution. Similarly a good number of the Judges, whose details have already been mentioned, tendered their resignations either immediately after passing of the order dated 31.7.2008 or subsequently when the notices were issued to them for violating the order dated 3.11.2007 including Justice (R) Syed Zahid Hussain, who initially opted to contest the violation of order dated 3.11.2007 and were appellants before this Court.

48. It is important to note that the situation prevailing at the time of pronouncement of the judgment in the Sindh High Court Bar

Association's case and in Khurshid Anwar Bhinder's case was further changed during pendency of the contempt proceedings against the appellants and others, when the Parliament had not granted validation to proclamation of Emergency, PCO, 2007 and Oath Order, 2007 as is evident from the amended provision of the Constitution under Article 270AA (3) reproduced hereinabove.

49. After having taken oath under the PCO, 2007 which never got validation from the Parliament, now they cannot take advantage of omissions and commissions done by them in accordance with the well known principle enshrined in maxim nullus commodum capere potest de injuria sua propria, which means that "no man can take advantage of his own wrong". In the case of Mian Muhammad Saeed v. The Province of West Pakistan (PLD 1964 SC 572), applying the said principle, it was held that the petitioners in trying to undo the transactions of sale and to get back their property were in fact attempting to take advantage of their own fraud. In the case of Union of India v. Major General Madan Lal Yadav (AIR 1996 SC 1340) = [(1996) 4 SCC 127], it was held as under: -

"It is obvious that the respondent had avoided trial to see that the trial would not get commenced. Under the scheme of the Act and the Rules, presence of the accused is a pre-condition for commencement of trial. In his absence and until his presence is secured, it becomes difficult, nay impossible, to proceed with the trial of the respondent-accused. In this behalf, the maxim nullus commodum capere potest de injuria sua propria-meaning no man can take advantage of his own wrong-squarely stands in the way of avoidance by the respondent and he is estopped to plead bar of limitation contained in Section 123(2). In Broom's Legal Maximum [10th Edn.] at page 191 it is stated "it is a maxim of law, recognized and established, that no man shall take advantage of his own wrong; and this maxim, which is based on elementary principles, is fully recognized in Courts of law and of equity, and, indeed, admits of illustration from every branch of legal procedure. The reasonableness of the rule being manifest, we proceed at once to show its application by reference to decided cases. It was noted therein that a man shall not take advantage of his own wrong to gain the favourable interpretation of the law. In support thereof, the author has placed reliance on another maxim frustra legis auxilium quorrit qui in legem committit. He relies on Perry v. Fitzhowe [8 Q.B. 757]. At page 192, it is stated that if a man be bound to appear on a certain day, and before that day the obligee put him in prison, the bond is void. At page 193, it is stated that "it is moreover a sound principle that he who prevents a thing from being done shall not avail himself of the non-performance he has occasioned". At page 195, it is further stated that "a wrong doer ought not to be permitted to make a profit out of his own wrong". At page 199 it is observed that "the rule applies to the extent of undoing the advantage gained

where that can be done and not to the extent of taking away a right previously possessed".

..... The respondent having escaped from lawful military custody and prevented the trial from being proceeded with in accordance with law, the maxim *nullus commodum capere potest de injuria sua propria* squarely applies to the case and he having done the wrong, cannot take advantage of his own wrong and plead bar of limitation to frustrate the lawful trial by a competent GCM. Therefore, even on the narrow interpretation, we hold that continuation of trial from March 2, 1987 which commenced on February 25, 1987 is not a bar and it is a valid trial."

Above principle was applied by the Indian Supreme Court in another case Eureka Firbes Limited v. Allahabad Bank decided on 3 May, 2010 wherein it has been held that the maxim *Nullus commodum capere potest de injuria sua propria* has a clear mandate of law that a person who by manipulation of a process frustrates the legal rights of others should not be permitted to take advantage of his wrong or manipulations. The said principle has also been allowed in Mian Allah Bakhsh v. Fazal Karim (PLD 1969 Quetta 13), Khairpur Textile Mills Ltd. v. Central Board of Revenue (PLD 1976 Kar. 164), Muhammad Zargham Eshaq Khan v. University of Engineering and Technology, Lahore (PLD 1988 Lahore 191), Zahira Habibullah H. Sheikh v. State of Gujarat [(2004) 4 SCC 158], State of Behar v. Kalyanpur Cements Ltd [(2010)3 SCC 274], , Giles v. California, [554 U.S. 353 (2008)], Puttick V. Attorney-General and Another Reported at: [(1980) Fam. 1], Loyal Protective Ins. Co. V. Shoemaker (Oklahoma Supreme Court Decisions) [1936 Ok 491, 63 P.2d 960, 178 Okla. 612], Findon v. Parker (11 M. & W. 680), Daly v. Thompson (10 M. & W. 309) and Supreme Court of New South Wales' decision in Richard Shorten v. David Hurst Constructions [(2008) NSWSC 546].

50. We have considered the stance taken on behalf of some of the appellants that by taking oath under the PCO read with the Oath Order, 2007 their appointment under the Constitution was not affected, particularly when they had taken oath under the Constitution on its revival on 15.12.2007. No doubt, earlier they were appointed in terms of the Constitution and made oath under the Constitution. But on 03.11.2007, they made oath under the PCO wherein it was, *inter alia*, provided that all persons who immediately before the commencement of the PCO were in office as Judges of the Supreme

Court, the Federal Shariat Court or a High Court, shall be governed by, and be subject to, the Oath Order, and such further Orders as may be passed from time to time whereas the Oath Order, *inter alia*, provided that (a) a person holding office immediately before the latter Order as a Judge of the Supreme Court, the Federal Shariat Court or a High Court shall cease to hold office with immediate effect; (b) a person who is given, and does make oath in the form set out in the Schedule, before the expiration of such time from such commencement as the President may determine, or within such further time as may be allowed by the President, shall be deemed to continue to hold the office of a Judge of the Supreme Court, the Federal Shariat Court or a High Court, as the case may be; (c) a Judge of a Superior Court appointed after the commencement of the said Order shall, before entering upon office, make oath in the form set out in the Schedule; and (d) the Judges of the superior Courts including Chief Justices shall cease to hold office on and from 3rd November 2007 and only such Judges shall continue to hold office who made oath under PCO No. 1 of 2007 read with Oath Order, 2007. Thus, all the Judges including the appellants, who opted to make oath under the said dispensation accepted that they ceased to hold office the moment the said instruments were promulgated, i.e. 03.11.2007. Admittedly, under PCO, 2007 appointment was not under the Constitution. They deviated not only from their appointments, but also from their oath. Mere making of fresh oath under the Constitution on its revival would make no difference. Notably, there is a remarked distinction between the oath under the Constitution, and the oath under the PCO/Oath Order. In the former case, one takes oath to perform one's functions in accordance with the provisions of the Constitution, whereas in the latter, one commits oneself to abide by the provisions of the PCO/Oath Order and the orders passed from time to time by the person issuing the said instruments. A Constitutional document is not an ordinary legislative instrument, rather it is the supreme law of the land, being an accord among the people. It is an instrument for running the affairs of the country. It governs the rights and obligations of the citizens. Even a child born today is a subject of the Constitution. Thus, appellants in presence of oath made under the

Constitution accepted oath under PCO, 2007 and in this way violated their oath under the Constitution in letter and spirit.

51. A bare perusal of the Article 270AA (ibid) shows that the actions of 03.11.2007 including the appointments of the appellants have not been validated, affirmed or condoned by the Parliament in the Eighteenth Constitutional Amendment. The validation or condonation of the said actions given in Tikka Iqbal Muhammad Khan's case was undone by this Court in Sindh High Court Bar Association's case wherein not a single act or action of General Pervez Musharraf (Retd.) was validated or condoned. Everything done by General Pervez Musharraf (Retd.) during the period of the purported Proclamation of Emergency from 03.11.2007 to 15.12.2007 was declared to be unconstitutional and illegal. Even the actions pursuant to his actions of 03.11.2007 were accorded the same treatment. It may be advantageous to reproduce hereinbelow Para 176 of the judgment in Sindh High Court Bar Association's case, wherein it was held as under: -

"176. It has already been held that Abdul Hameed Dogar, J, and other Judges who made oath, or were appointed, in violation of the order dated 3rd November, 2007 passed by a seven - member Bench of this Court in Wajihuddin Ahmed's case were not even de facto Judges, inter alia, on the ground that the actions taken by General Pervez Musharraf from 3rd November, 2007 to 15th December, 2007, including the appointments and/or oaths of such Judges, were mala fide as the same were taken by him for his own benefit, and did not fall within the scope of his authority under the Constitution and the law and in any case, they were not taken in the interest of the State, or for the welfare of the people."

52. Now it is well settled that as far as the superior Courts are concerned, they have no jurisdiction or authority to legitimize, validate any action which is based on extra constitutional steps, may be for any reason because under the constitutional dispensation no such expediency is permissible nor it should be applied in future. However, we have no cavil with the proposition that as far as Parliament is concerned, it enjoys jurisdiction to legitimize any such action. In this behalf an ordinary legislation i.e. Act of Parliament promulgated in respect of matters, which have been mentioned in the Federal Legislative list, while exercising jurisdiction under Article 70 of the Constitution can be amended or repealed by the Act of Assembly of

that Province. Whereas, by amending the constitutional provisions under sub Article 6 of Article 239 of the Constitution, there is no limitation whatever on the Majlis-e-Shoora (Parliament) to amend the provisions of the Constitution. As far as insertion of any constitutional provision is concerned, it is also deemed to be amending already existing provision of the Constitution. After the regime of General Zia-ul-Haq, Parliament inserted Article 270A, wherein Presidential Orders etc. were affirmed. Whereas by means of Seventeenth and Eighteenth Constitutional Amendments, Article 270AA and 270C were inserted/amended allowing the Judges who made oath under the PCO and Oath Order, 1999 read with Oath Order, 2000 to continue in the office of the Judges, implication whereof has already been discussed hereinabove, therefore, avoiding repetition it is held that in pursuance of the above said amendments in the Constitution, no protection or validation has been granted to the appellants who had made oath under the PCO, 2007 read with Oath Order, 2007. This situation had arisen after passing of Eighteenth Constitutional Amendment. As it has been pointed out hereinabove that not only the appellants are the Judge who presently have no constitutional protection to continue in the office but there are so many others, detail of which has already been mentioned, who were removed from the office without being proceeded against under Article 209 of the Constitution.

53. Syed Ali Zafar, learned counsel contended that proceedings for contempt of Court cannot be issued against the Judges of the High Courts in view of the principle that against the Judges writ cannot be issued. Reliance in this behalf was made to Malik Feroze Khan Noon v. The State (PLD 1958 SC 333), Jamal Shah v. Election Commission (PLD 1966 SC 1) and Mujeebur Rehman Shami's case (supra). He further submitted that in State of Rajasthan v. Prakash Chand (AIR 1998 SC 1344), it was held that a Judge of the superior court had immunity from contempt and the reason was that one needs to maintain independence of the judiciary. Reference was also made to Hyat Mahomed v. Shaikh Mannu (AIR 1927 Calcutta 290), Ramadhin v. Emperor (AIR 1927 Oudh 59), and Harish Chandra's case (supra).

54. The facts and circumstances which have been noted hereinabove have to be examined in juxtaposition with the facts and

circumstances of the judgments relied upon by Sheikh Zameer Hussain, Sr. ASC as well as Syed Ali Zafar, ASC. Detailed study of these judgments indicates that there is no comparison between the facts of these cases and the facts of the instant case. In none of those judgments any of the Judges intended to be proceeded against for contempt for deviation from the Constitutional Provisions, whereas, in the instant case, the appellants instead of showing allegiance to Pakistan and to preserve and protect the Constitution in terms of the oath, opted to be obedient to one man rule, essentially without any constitutional authority. If such practice is followed or allowed to be followed, there will be no end to the Constitutional deviations by the mighty persons; like one who has a gun in his hand and sitting on horse's back, capable of driving the herd of sheep according to his command, not considering anyone as human beings or persons having rights under the Constitution. And no sooner the mischievous object of self service is achieved by show of force, allegedly the situation would be reversed as to the position prevailing prior to such deviation. Then it would not be the rule of law but the rule of Martial Law.

55. In view of above elaborated discussion notwithstanding the observations of the learned 4-Member Bench of this Court about initiating proceedings of contempt of Court against the Judges of the Superior Courts, it is added that contempt proceedings have been initiated against the appellants and others in view of the peculiar circumstances essentially for supporting the unconstitutional actions, deeds, omissions and commissions committed by the then Chief of Army Staff, *prima facie* instead of obeying to the judicial order of the Supreme Court dated 3.11.2007 as it has been held in the Sindh High Court Bar Association's case. And as validation, legitimacy has not been granted to the unconstitutional acts of 3.11.2007 by the Parliament including protection to the appellants to deviate from the constitutional appointment and oath, therefore, it is held that from the date of passing of Eighteenth Constitutional Amendment dated 20.4.2009 they are no more Judges of the High Courts under the Constitution, thus no immunity is available to them either.

56. The plea of Sheikh Zamir Hussain, learned Sr. ASC that the actions of the appellants be condoned, would tantamount to once

again reverting back to the doctrine of necessity, which has already been buried vide judgment in Sindh High Court Bar Association's case and if such concession is extended to them, other beneficiaries, who are responsible directly or indirectly for violation of the Constitution, shall also be benefited, therefore, the plea is declined.

57. The proposition of Mr. Ali Zafar, learned counsel that writ cannot be issued by Judges against other Judges need not be discussed in view of the conclusion drawn hereinabove, that appellants had already been declared not to be the Judges of the High Courts and secondly, there is difference between issuing the writ by the Judges against each others and to issue the Contempt proceedings for willful flouting or disregarding the order dated 03.11.2007 in respect whereof 14-Member Bench in the case of Sindh High Court Bar Association (ibid) has held as follows: -

"131. On a perusal of the aforesaid excerpts from the print and the electronic media, we are left with no manner of doubt that the order dated 3rd November, 2007 passed by a seven - member Bench of this Court in Wajhuddin Ahmed's case was widely covered both in the electronic and print media. The fact that the said order came fully in the knowledge of all Judges of Supreme Court and High Courts by means of the coverage in the electronic and print media is in line with the law laid down in the case of Pakistan Lawyers Forum v. Federation of Pakistan (PLD 2004 Lah. 130) wherein the following parameters for the purpose of taking judicial notice of press reports, quoted with approval by this Court in the case of watan Party (supra) were laid down:

(i) Where direct evidence is not available;

(ii) Where it is sought to be proved that a person has notice of the contents of the newspaper report;

(iii) Where it is sought to be shown that a person is an author or otherwise responsible for the statement or article published in a newspaper, which is to be used against him;

(iv) In cases of defamation; and

(v) If the issue/occurrence is rather old and eyewitnesses are either wanting or less reliable.

Even CMA No. 2874 of 2007 was moved by the Federation in Wajihuddin Ahmed's case on 6th November, 2007 seeking clarification regarding the order dated 3rd November, 2007 passed by a seven-member Bench of this Court in the said case stating, inter alia, therein that certain news items had appeared in the newspapers that after issuance of Proclamation of Emergency, PCO No. 1 of 2007 and Oath Order, 2007, "some of the former Judges, reportedly seven

in number including the then Chief Justice" had passed some order restraining, inter alia, the Judges of the Supreme Court and High Courts, including Chief Justices from making oath under PCO or any other extra-constitutional step. Thus, all the Judges knew that a restraint order had been passed by the Supreme Court and also that Abdul Hameed Dogar, J, and some other Judges had made oath in violation of the said order. In fact, all and sundry in the length and breadth of the country knew about it. All such Judges, therefore, willfully violated the order dated 3rd November, 2007 passed by a seven - member Bench of this Court in Wajihuddin Ahmed's case."

58. Now turning towards the plea of the learned counsel for the parties relating to non-availability of the detailed reasons, which ought to have been followed after the short order dated 02.02.2011 passed by the Bench seized with the matter. There is no cavil with the proposition that the detailed reasons have not been issued by the Bench, however, it is now well settled that in absence of the detailed reasons, short order has to be considered as an order of the Court. In Benazir Bhutto v. President (PLD 1998 SC 388), it was held that the short order, when speaking, i.e. when it contained specific directions, had to be acted upon without waiting for detailed reasons. A short order duly recorded, signed and pronounced in court would be fully operative. Also refer State v. Asif Adil (1997 SCMR 209), Ghulam Hyder Lakho, High Court of Sindh Karachi v. Federation of Pakistan (PLD 2000 SC 179), Dr. Agha Ijaz Ali Pathan v. State (2010 SCMR 322), Wafi Associates (Pvt.) Limited v. Farooq Hamid (2010 SCMR 1125), Wisram Das v. SGS Pakistan (Pvt.) Ltd. (2010 SCMR 1234) and Basar v. Zulfiqar Ali (2010 SCMR 1972). Accordingly, we have not been persuaded to agree with learned counsel for the appellants. Although answer to the arguments of the learned counsel is available in the judgments cited above but independently it would also be seen that appellants who now have been declared to be no more Judges of the High Courts, have been summoned for facing the trial, which could not be completed till the final decision of these appeals. Essentially, if their appeals succeed no prejudice is likely to be caused to them, notwithstanding the fact that the reasons have not been recorded, but if their appeals fail and they are arrayed before the Bench of this Court for proceedings of contempt of Court, the reasons already recorded would cause prejudice their cases. Under the scheme of the contempt of Court Ordinance, 2003, there are three types of contempt of Court

namely, Civil Contempt, Criminal Contempt and Judicial Contempt. Prima facie to establish any kind of these contempt proceedings, factual aspect of the case have to be gone into thoroughly. The law makers wisely had not emphasized for definite conclusion on factual aspects before issuing notice of contempt in terms of section 3 of the Contempt of Court Ordinance, 2003. It is always prima facie opinion of the Court, which is to be formulated to ascertain as to whether or not the contempt has been committed. It is to be noted that to formulate a prima facie opinion, the Court is not required to consider all the facts in depth rather it has to satisfy itself whether there exists an arguable case. Reference of section 17 which relates to the proceedings may not be out of context. According to its sub section (3) if after giving the alleged contemner an opportunity of preliminary hearing the Court is prima facie satisfied that the interest of justice so requires, it shall fix a date for framing of charge in open Court and proceed to decide the matter either on that date, or on a subsequent date or dates, on the basis of affidavits or after recording evidence. A perusal of order dated 02.02.2011 suggests that hearing of arguments continued for a period spreading over 4 months and on the basis of the same the order was passed, whereby the appellants and others were directed to face trial because for a fair trial without any prejudice i.e. pre-determination of facts and circumstances are not called for.

59. Dr. Abdul Basit, learned counsel raised question that under the Eighteenth and Nineteenth Constitutional Amendments the Contempt of Court Ordinance 2003 has not been protected. This argument is not available to him for the reasons that this Court has already held in In re: SUO MOTU CASE NO.1 OF 2007 (PLD 2007 SC 688) that the Contempt of Court Ordinance, 2003 (No.V of 2003) was accorded permanence by means of Article 270AA incorporated in the Constitution by the Seventeenth Constitutional Amendment. It is to be further added that in Eighteenth Constitutional Amendment all laws including President's Orders, Acts, Ordinances, etc. made between 12.10.99 and 31.12.2003 to be in force until altered, repealed or amended by the competent authority including the Contempt of Court Ordinance, 2003 have been protected.

60. Now turning towards the next point agitated by Dr. Abdul Basit, learned Sr. ASC that the order dated 03.11.2007 was not communicated to them in accordance with the law and the settled procedure. In this behalf reliance was placed on Sadiq Leghari's case (PLD 2002 SC 1033). It was also argued that before the passing of the order dated 3.11.2007, the premises of the Supreme Court were taken over by the Army. Perhaps it was not possible to communicate the order to the appellants and others, thus no proceedings of contempt of Court in such situation can continue against them.

61. Mr. Raza Kazim submitted that the order of 03.11.2007, of which he was totally supportive, was divisible into various parts. There were human dimensions. Implications of the order were that it has been applied in various cases, and may be done in future as well. There may be many reasons. Classification should be made in the ideals. It is important not to classify into one group as enemies in haste, as betrayers, they were not only Judges, but also human beings with certain feelings, just as the Sitting Judges had certain feelings, connected to their functions that they did not stand by them when they ought to have. There was bitterness. In the moment of glory of this court, though they were seven, but 18 million people stood with them whereas the appellants were less clear, less strong, the weaker, the confused and might have erred. But certainly the said Judges were not enemies of the other Judges and did not have different kind of conscience. Whatever this Court decides, they would be bowing before it because it was an institution. They were people whom one should not cut off and it was burden of the Sitting Judges to separate the human beings from the institution.

62. Mr. Raza Kazim, further argued that for the first time a classification was made on the issue of contempt, one violating the letter of the law, and the other for violating the spirit of the law. In the case of the appellant, the question would arise whether he violated the letter or spirit of the order or both? As far as the question of violation of the letter of the order was concerned, it was a question of fact, but the violation of the spirit was a mixed question of law and fact. There was no evidence, not a single witness examined. There were only inferences. An accuser had to prove the accusation and not the

accused. It is also to be established whether in fact there has been violation and appellant violated the order in letter and spirit.

63. Dr. Khalid Ranjha, Sr. ASC further submitted that the appellant had shown allegiance to the orders passed by this Court and he would have the first to abide by the order if it was brought to his notice as per proper procedure. Before holding appellants guilty or issuing notices, the Courts was required to apprise itself whether the order dated 03.11.2007 was in fact conveyed to the Chief Justice. It was a first of its kind in history, therefore, it ought to be handled with care for the interest of future generations even though it was said selfishly.

64. We have considered above respective pleas of the learned counsel. In our opinion these aspects of the case along with others are required to be decided on the basis of evidence, which will be produced before the Bench seized with the contempt cases, therefore, need not be discussed at this stage, lest it may cause prejudice to either of the party.

65. As a result of above discussion appeals are disposed of as follows: -

- (1) The appellants and others constitutionally are not holders of the office as Judges of the High Courts in absence of validation, rectification and legitimization of unconstitutional acts, deeds, omissions and commissions of the then Chief of Army Staff, General Pervez Musharraf (Retd.) whereby he imposed the martial law in the name of Emergency on 3.11.2007, which continued upto 15.12.2007 and the appellants because of making oath under PCO, 2007 read with Oath Order, 2007 ceased to hold the office because the PCO and the Oath Order, 2007 have been declared unconstitutional in Sindh High Court Bar Association's case and by legislative interference in Eighteenth and Nineteenth Constitutional Amendments no validation has been provided to such unconstitutional actions, omissions and commissions.
- (2) The appellants, however, shall cease to hold office of the Judges of the High Court w.e.f. the date of passing of

Eighteenth Constitutional Amendment. The Secretary Law, Government of Pakistan is hereby directed to issue necessary notifications that they ceased to hold the office w.e.f. the said date.

- (3) As far as appellants and others are concerned, they shall be entitled for the service and pensionary benefits upto 20.4.2010 when Eighteenth Constitutional Amendment was passed. However, if ultimately they are found to be guilty for the contempt of court by this Court, their cases for affecting the recovery of pensionary benefits in future shall be dealt with accordingly.
- (4) As appellants and others are not Judges of the High Courts, therefore, they cannot claim immunity for holding their trial for contempt of Court under Article 204 of the Constitution read with relevant laws.

66. Subject to above observations impugned judgment dated 2.2.2011 is maintained and the cases for contempt of Court against the appellants shall be placed before respective Bench for further proceedings.

Iftikhar Muhammad Chaudhry, CJ.

Javed Iqbal, J.

Mian Shakirullah Jan, J.

Tassaduq Hussain Jillani, J.

Sarmad Jalal Osmany, J.

Amir Hani Muslim, J.

Announced in open Court at Islamabad,
On 18th May, 2011.

Chief Justice

Approved For Reporting