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Form No: HCJD/C-121.

ORDER SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

I.C.A. No. 267 of 2015

Federation of Pakistan.
Vs
Rashid Ahmed, etc.

APPELLANT BY: Mr. Afnan Karim Kundi, A.A.G. for the Appellant.
RESPONDENT BY: Mr. Idrees Ashraf, Advocate for respondents.
DATE OF HEARING: **02-09-2015.**

ATHAR MINALLAH, J.- Through the instant Intra Court Appeal, the Federal Government has assailed the judgment dated 22-05-2015, passed by the learned Single Judge in chambers in W.P.No.1954/2014. The learned Single Judge in chambers allowed the Petition filed by the respondent No.1, and the notification dated 17-04-2014 was set aside.

2. The facts, in brief, are as follows:-

20-12-2012: The august Supreme Court passed an order in Constitution Petitions No.105/2012, 104/2012 and 117/2012, whereby one Mr. Abdul Jabbar was restrained from acting or representing himself as Chairman or Acting Chairman of the *Pakistan Electronic Media Regulatory Authority* (hereinafter referred to as the ***"Authority"***).

08-01-2013: The Director General of the Ministry of Information and Broadcasting sent a note to the Secretary of the

Ministry, recommending the names of seven potential candidates to be considered for appointment as Chairman of the Authority, on the ground that the Acting Chairman had been restrained from acting as such by the august Supreme Court vide order dated 20-12-2012. The names of three retired officials and four serving officials had been recommended. It is pertinent to mention that the respondent No.1 at that time was holding the post of Secretary Information and Broadcasting, and his name was also recommended at Sr.No.1 of the list of serving officers.

15-01-2013: The august Supreme Court, on 15-01-2013, explicitly observed that the position of the Chairman of the Authority "has to be filled by a person who fulfils the exceptional and stringent requirements prescribed in the PEMRA Ordinance 2002 (hereinafter referred to as the ***"PEMRA Ordinance"***) and not by a casual appointee." It was further observed and held that the 'appointment has to be made through an open and transparent process to ensure that the appointee meets the objective criteria' specified in the PEMRA Ordinance. It is pertinent to mention that the respondent No.1 was present before the Supreme Court when the order dated 15-01-2013 was passed. He has been marked

present, along with the officer who had initiated the note dated 08-01-2013.

08-01-2013: Pursuant to the note initiated by the Director General, the respondent No.1, in his capacity as Secretary Ministry of Information and Broadcasting, moved a summary for the appointment of the Chairman of the Authority. A panel of three persons was proposed, which included his name as well.

25-01-2013: The then Prime Minister of Pakistan advised the President to approve the appointment of respondent No.1 as Chairman of the Authority from amongst the recommended panel contained in para 5 of the summary.

26-01-2013: The then President of Pakistan gave his approval to the advice tendered by the Prime Minister.

26-01-2013: A notification was issued in exercise of powers conferred under Sections 6 and 7 of the PEMRA Ordinance, and the respondent No.1 was appointed as the Chairman of the Authority. The notification is signed by the officer who was present before the august Supreme Court when the order dated 15-01-2013 was passed, directing that the appointment of Chairman of the Authority must be through 'an open and transparent process'. The direction was obviously to be executed by the respondent no. 1

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and the Ministry of which he was the administrative head.

22-04-2013: A summary was moved recommending MP-I scale w.e.f 27-04-2013 in respect of the respondent No.1

20-05-2013: The Establishment Division opposed the proposal initiated by the Ministry of Information and Broadcasting, whereby it was recommended that the respondent No.1 be given MP-I scale w.e.f. 27-04-2013. It was unambiguously pointed out by the Establishment Division that neither had the post of Chairman of the Authority been advertised, nor had the respondent No.1 applied through the proper channel so as to ensure a transparent process.

09-09-2013: A summary was moved for the approval of the Prime Minister by the Secretary Ministry of Information, Broadcasting and National Heritage. Serious allegations were made against the respondent No.1 and it was highlighted that his appointment as Chairman of the Authority was made in violation of the prescribed rules. It was also stated that the appointment was in violation of the principles of transparency. The removal of the respondent No.1 as Chairman of the Authority was recommended. It was further recommended that a process be initiated for the appointment of a Chairman.

17-09-2012: The Prime Minister requested that the summary may be resubmitted with necessary clarifications.

02-10-2013: The summary was resubmitted to the Prime Minister. It was specifically highlighted that the appointment of the respondent No.1 was made in violation of the order of the august Supreme Court, dated 15-01-2013.

04-12-2013: The Prime Minister desired that a copy of the order of the august Supreme Court dated 15-01-2013 be placed on record.

09-12-2013: The order of the august Supreme Court dated 15-01-2013 and the summary pursuant to which the respondent No.1 was approved for appointment as Chairman PEMRA was placed on record for the consideration of the Prime Minister.

12-12-2013: The Special Secretary, Law and Justice Division, while referring to various judgments of the august Supreme Court, particularly the order dated 15-01-2013, concluded that the appointment of the respondent No.1 did not satisfy the parameters laid down by the august Supreme Court and, therefore, supported the proposal for the removal of the respondent No.1 as the Chairman of the Authority.

13-12-2013: The Prime Minister advised the President to approve the removal of the respondent No.1 as Chairman of the Authority on the ground that his appointment was void ab initio.

14-12-2013: The Prime Minister's advice was approved by the President.

16-12-2013: The notification regarding the removal of respondent No.1 as Chairman of the Authority was issued.

26-12-2013: The notification dated 16-12-2013 was set-aside by this Court by accepting the petition of the respondent No.1 i.e. W.P No.4606/2013, on the ground that proper opportunity of hearing was not afforded to the latter. It was further observed and held that the respondents i.e. the Federal Government, will have a right to proceed against the petitioner, if they deem proper, provided an opportunity of hearing is provided to the petitioner. The order of this Court was accepted by the respondent No.1, as he did not challenge the same.

06-02-2014: A *Show Cause Notice* was issued to the respondent No.1. It was, inter-alia, alleged that his appointment was made against the principles of transparency, particularly the order of the august Supreme Court dated 15-01-2013. Other serious allegations were also made against the respondent No.1.

13-02-2014: An interim reply to the *Show Cause Notice* was submitted by the respondent No.1. The respondent No.1 did not advert to the allegations relating to his appointment being in violation of the principles of transparency, particularly the order passed by the august Supreme Court dated 15-01-2013. Moreover, a list of documents was annexed and it was requested that the same may be provided to him.

26-02-2014: The Authorized Officer fixed the date for personal hearing. The documents requested were also secured so that they could be examined by the respondent No.1. The respondent No.1 did not appear on the date fixed for personal hearing.

06-03-2014: Another date for personal hearing was fixed. However, the respondent No.1 excused himself from appearing on the ground that W.P.No.314/2014 was pending before this Court. No injunctive order was passed in the said proceedings nor was the respondent no. 1 restrained from appearing before the authorized officer so as to avail the opportunity of hearing.

12-03-2014: The Authorized Officer submitted his report to the President. It was concluded that the appointment of the respondent No.1 as Chairman of the Authority was illegal and void ab initio and, therefore, his dismissal was recommended.

02-04-2014: The Ministry of Law, Justice and Human Rights submitted its opinion.

08-04-2014: The Attorney General of Pakistan submitted his opinion. The office of the Prime Minister submitted the case alongwith the report of the Authorized Officer for consideration of the President.

15-04-2014: The President's Secretariat requested the Prime Minister's office to process the matter pursuant to Article 48 of the Constitution of the Islamic Republic of Pakistan, 1973.

16-04-2014: The Prime Minister advised the President to approve the recommendations of the Authorized Officer contained in his report.

17-04-2014: The President approved the advice tendered by the Prime Minister.

17-04-2014: A notification regarding the dismissal of the respondent No.1 as Chairman of the Authority was issued.

24-04-2014: The respondent No.1 invoked the jurisdiction of this Court under Article 199 of the Constitution, by filing W.P.No.1954/2014, assailing the notification dated 17-04-2014.

22-05-2014: The learned Single Judge in chambers accepted the petition of the respondent No.1 and the notification dated 17-04-2014 was set-aside.

01-06-2015: The instant Intra Court Appeal has been filed by assailing the judgment dated 22-05-2015, passed by the learned Single Judge in chamber in W.P.No.1954/2014.

3. Mr. Afnan Karim Kundi, the learned Additional Attorney General, has argued that; the impugned judgment has been rendered against and in disregard of the relevant facts placed on record; the impugned judgment suffers from non-reading and misreading of facts; a detailed *Show Cause Notice* was issued to the respondent No.1; the learned Single Judge in chambers has not taken into consideration the correct interpretation of the expression "misconduct" under Section 7 of the PEMRA Ordinance; the expression "misconduct" has been defined and explained in Section 7 of the PEMRA Ordinance and includes conduct prejudicial to good order or unbecoming of a gentleman; the learned Single Judge in chambers has misinterpreted Section 7 by coming to the conclusion that the allegations mentioned in the *Show Cause Notice* did not pertain to the period when the respondent No.1 was performing his functions as the Chairman and, therefore, any action taken or order passed while holding the post of the Secretary, Ministry of Information and Broadcasting did not come within the ambit of "misconduct" as defined under Section 7; the appointment was maneuvered and made by the respondent No.1, in violation of the principles and law laid down by the august Supreme Court; the appointment was made on the basis of a summary moved by the respondent No.1 himself in his capacity as the Secretary, Ministry of Information and Broadcasting, particularly by

concealing that the august Supreme Court had held and observed in its order dated 15-01-2013 that the appointment is to be made in a transparent and open manner; reasonable opportunity of hearing was afforded but was deliberately avoided and refused by the respondent No.1; the power of the Federal Government to proceed against the respondent No.1 was held valid by the Islamabad High Court in its judgment dated 26-12-2013, passed in W.P No.4606/2013; the *Show Cause Notice* and opportunity of hearing was in pursuance of the said order of this Court in W.P.No.4606/2013 and yet the respondent No.1 preferred to show his defiance by refusing to avail the said opportunity afforded to him; the interim reply filed by the respondent No.1 to the *Show Cause Notice* was evasive, as he obviously could not justify his appointment in violation of the order of the august Supreme Court dated 15-01-2013 and the principles and law laid down in various judgments, inter-alia, "Muhammad Ashraf Tiwana and others vs. Pakistan and others", ***2013 SCMR 1159*** and "Muhammad Yasin vs. Federation of Pakistan and others", ***PLD 2012 SC 132***; the learned Single Judge in chambers did not appreciate that there was nothing on record to establish malafide; the order dated 26-12-2013, passed in W.P.No.4606/2013 was complied with and a reasonable opportunity afforded to the respondent No.1 but he did not avail the same willfully and for malafide reasons; it has been erroneously assumed that the respondent No.1 was given only seven days to respond to the *Show Cause Notice* and, therefore, the same was insufficient; the respondent No.1, besides being given an opportunity to submit a written reply to the *Show Cause Notice,* was afforded an opportunity of a personal hearing on 26-02-2014 and 06-03-2014, while the impugned notification was issued on 17-04-2014; the defiance of the respondent No.1 is evident from his conduct as he did not avail the reasonable opportunity afforded to him nor did he make any attempt between 06-02-2014 till 17-04-2014 to defend the serious allegations raised against him in the

Show Cause Notice; the record requested by the respondent No.1, though not relevant, was yet made available for his examination, but he preferred not to avail the said opportunity.

4. Mr. Idrees Ashraf, ASC, appeared on behalf of the respondent No.1 and argued that the post of the Chairman of PEMRA is a statutory appointment created by the PEMRA Ordinance; the post of Chairman PEMRA has a fixed term for four years and he or she can only be removed on the grounds listed in Section 7 of the PEMRA Ordinance; an explanation of Section 7 of the PEMRA Ordinance provides that the expression misconduct, inter-alia, includes conduct prejudicial to good order or unbecoming of a gentleman; the misconduct has to relate to acts, omissions or conduct during the period when a person is appointed as Chairman PEMRA; the alleged acts, omissions or conduct mentioned in the *Show Cause Notice* do not relate to the respondent No.1 in his capacity as Chairman PEMRA and, therefore, are outside the scope of Section 7 of the PEMRA Ordinance; it is evident from the notification, whereby the respondent No.1 was appointed Chairman PEMRA, that the competent authority had approved his appointment on the advice of the Prime Minister pursuant to Section 6 of the PEMRA Ordinance; the respondent No.1 had neither appointed himself as the Chairman PEMRA nor can he be proceeded against under the PEMRA Ordinance; neither at the time of his appointment nor the filing of the instant petition did the petitioner suffer from any disqualification prescribed in respect of the office of the Chairman PEMRA; the learned Single Judge in chambers has correctly interpreted the provisions of the PEMRA Ordinance; the notification dated 17-04-2014 was issued without affording the respondent No.1 with a reasonable opportunity to defend himself against the allegations made in the *Show Cause Notice*; the appointment of the respondent No.1 has not been challenged, nor has any writ

of quo-warranto been filed and, therefore, this Court is not vested with suo moto powers to go beyond the prayer sought by the respondent No.1 in his petition i.e. W.P.No.194/2014; the impugned judgment is in accordance with law and no legal infirmity has been pointed out so as to justify any interference.

5. The learned Additional Attorney General and the learned counsel for the respondent No.1 have been heard and the record perused with their able assistance.

6. The questions which emerge from the pleadings and the arguments raised by the learned Additional Attorney General and the learned counsel for the respondent No.1 for our consideration are, firstly, whether the allegations mentioned in the Show Cause Notice constituted misconduct, particularly within the meaning of the expression "misconduct" as incorporated in the Explanation of Section 7 of the PEMRA Ordinance; secondly, whether a reasonable opportunity of hearing was afforded to the respondent No.1 and the requirements of due process were satisfied, and thirdly, whether in the facts and circumstances of the instant appeal it would not be just and proper for the process of the appointment of the Chairman of the Authority to go ahead pursuant to the directions given by the august Supreme Court vide order dated 19-08-2015, passed in C.P.No.105/2012 and C.P.No.104/2014. The directions of the Supreme Court in para 2 (b) & (c) of the order are as follows:-

> *"(b) Until the said ICA is decided, the government may proceed with a rigorous and transparent process for filling the position Chairman PEMRA in line with the principles of law laid down in the cases*

titled ***Muhammad Yasin vs. Federation of Pakistan*** *(PLD 2012 SC 132) and* ***Muhammad Ashraf Tiwana vs. Pakistan*** *(2013 SCMR 1159).*

(c) The process of appointing the Chairman PEMRA shall be completed within 30 days positively."

7. The *Pakistan Electronic Media Regulatory Authority Ordinance No-XIII of 2002* (hereinafter referred to as the "PEMRA Ordinance") has been enacted to regulate electronic media in Pakistan. The *Pakistan Electronic Media Regulatory Authority* (hereinafter referred to as the "Authority") was established under Section 3 of the Ordinance. Section 3 (2) provides that the Authority shall be a body corporate having perpetual succession and a common seal with powers subject to the provisions of the PEMRA Ordinance; Section 4 provides for the functions of the Authority by making it responsible for regulating the establishment and operation of all broadcast media and distribution services in Pakistan, established for the purpose of international, national, provincial, district, local or special target audiences. Sub-section (2) of Section 4 provides that the Authority shall regulate the distribution of foreign and local TV and radio channels in Pakistan. The Authority is, therefore, one of the most important statutory regulatory authority, and the efficient and effective discharge of its obligations is inextricably linked with the fundamental rights guaranteed under Articles 19 and 19-A of the Constitution of the Islamic Republic of Pakistan 1973 (hereinafter referred to as the "Constitution").

8. Section 6 of the PEMRA Ordinance provides that the Authority shall consist of a Chairman and twelve members to be appointed by the President of Pakistan. Sub-section (2) of Section 6 of the PEMRA Ordinance prescribes

the qualifications for a person to be appointed as the Chairman, and provides that he or she shall be an "eminent professional of known integrity and competence, having substantial experience in media, business, management, finance, economics or law". Section 7 prescribes a fixed term of four years for holding the office of the Chairman, unless removed earlier for misconduct or physical or mental incapacity. The retirement age for the Chairman is sixty five years. An Explanation has been incorporated in section 7, which defines or explains the meaning of the expression "misconduct". The Explanation provides that misconduct means conviction for any offence involving moral turpitude and includes conduct prejudicial to good order or unbecoming of a gentleman.

9. It is obvious from the above, that exceptional and stringent requirements have been prescribed as qualifications for a person to be appointed as the Chairman of the Authority. Once a person has been appointed as the Chairman, a fixed term of four years has been provided under the PEMRA Ordinance. However, during the fixed term of the tenure, the Chairman may be removed on three grounds i.e misconduct, physical incapacity or mental incapacity. The expression "misconduct", as defined in the Explanation to Section 7 of the PEMRA Ordinance, has expansive meanings and connotations. By incorporating the expression "conduct prejudicial to good order or unbecoming of a gentleman", the legislature obviously intended and expected that the person holding the position of the Chairman of the Authority shall practice or demonstrate the highest standards of conduct. Conduct "unbecoming of a gentleman" enormously increases the expectation and threshold of conduct of a person holding the post of Chairman. Thus, any act or omission not expected from a "gentleman" will fall within the meaning of 'misconduct' as per Explanation incorporated in

section 7 of the PEMRA Ordinance. The attributes of a 'gentleman' includes being chivalrous, courteous and honorable. Likewise, conduct prejudicial to good order would, inter alia, include acts and omissions which would undermine the authority of the office of the Chairman or be in violation of the stringent qualifications prescribed as eligibility for being appointed to the said office. Integrity is an essential qualification for the purposes of being considered and appointed to the post of the Chairman. A person whose appointment is illegal or who allows the illegal process to continue, and thereafter accepts the appointment in violation of law, obviously renders him or herself disqualified from holding the statutory post. Continuing to hold the post in such circumstances would tantamount to be prejudicial to good order. Moreover, it is an essential attribute or characteristic of a 'gentleman' to be honorable and act as such. Would then a 'gentleman' hold the post as the Chairman of the Authority if his or her appointment is made in violation of law, particularly in defiance to explicit directions of the august Supreme Court? Would such conduct not be prejudicial to good order and thus fall within the ambit of misconduct? A person who has been appointed as Chairman in violation of the law, and then continues to hold the post, undoubtedly brings his or her conduct within the fold of 'misconduct', as such an act or omission is not only prejudicial to good order, but is indeed conduct unbecoming of a gentleman. A gentleman is obviously not expected to hold the post of Chairman, if the process through which he or she was selected and thus appointed was neither transparent nor open or otherwise illegal or void. An obligation to demonstrate high standards of etiquettes, moral and ethical values, expected from a gentleman, is obvious from the language of section 7 of the PEMRA Ordinance. We, therefore, hold that a person would be liable to be removed for misconduct under section 7 of the PEMRA Ordinance if he or she is holding the post of the Chairman illegally, whether the illegality is due

to the reason that the person did not fulfill the stringent criterion and qualifications prescribed by the legislature, or the process of selection leading to the appointment was in violation of the settled law. Such a person cannot claim a right to hold the post and, therefore, his status would be that of a usurper and in such circumstances acting to be or holding himself out as the Chairman will constitute misconduct. We, therefore, have not been able to persuade ourselves to concur with the proposition that the acts or omissions on the part of the respondent. No. 1 and his role during the process leading to his illegal and void appointment as the Chairman, accepting the appointment despite the directions of the august Supreme Court vide order dated 15-01-2013 and thereafter holding the said post, would not fall within the ambit of misconduct in terms of section 7 of the PEMRA Ordinance. The 'misconduct' stems from holding the post, having been illegally appointed through a process which is in violation of the settled law. The expression 'misconduct' in section 7 of the PEMRA Ordinance, therefore, would include an allegation of holding the post of the Chairman illegally, or if the appointment was made through a process in violation of the settled law.

10. The law relating to the appointment of positions such as Chairman of the Authority and in the case of other statutory regulatory authorities is by now well settled. The question was considered and the principles and law in this regard have been elucidated by the august Supreme Court in "Muhammad Yasin Vs. Federation of Pakistan through Secretary, Establishment Division", ***PLD 2012 Supreme Court 132*** and "Muhammad Ashraf Tiwana and others vs. Pakistan and others", ***2013 SCMR 1159***. In the case of Muhammad Yasin supra the august Supreme Court laid down the test for examining the validity of the appointment process. The three-pronged test elucidated in the said judgments is as follows:-

"(a) whether an objective selection procedure was prescribed;

(b) if such a selection procedure was made, did it have a reasonable nexus with the object of the whole exercise, i.e. selection of the sort of candidate envisaged in the relevant provision of the statute. ;

(c) if such a reasonable selection procedure was indeed prescribed, was it adopted and followed with rigour, objectivity, transparency and due diligence to ensure obedience to the law."

11. The above test has explicitly laid down that the selection procedure ought to have a reasonable nexus with the object of the whole exercise for the purposes of selecting the most suitable person possessing the prescribed qualifications, and that the selection procedure is adopted and followed with rigour, objectivity, transparency and due diligence. Though the facts in the case of Muhammad Yasin supra related to the appointment of the Chairman under the Oil and Gas Regulatory Authority Ordinance, 2002, nevertheless in paragraph 3 of the said judgment, amongst other statutory regulatory bodies, the Authority has been specifically mentioned. Emphasizing the obligation to maintain the autonomy of the statutory regulatory authorities, the august Supreme Court has held that 'Such autonomy is only possible when appointment in key positions in these regulators are made in a demonstrably transparent manner; that is, by ensuring compliance with the checks which the Ordinance lays down for such appointments". It has been further observed that " there is an obligation thus imposed on the Executive to make appointments based on a process which is manifestly and demonstrably fair, even though the law may not expressly impose such a duty." The law was affirmed in the later case of Muhammad Ashraf

Tiwana supra. It is, therefore, settled law that the discretion of the Executive is circumscribed by the merit based criteria prescribed in the respective statutes to be achieved through a demonstrably open and transparent process. In order to achieve the criteria there ought to be sufficient publicity, so as to ensure that eligible and interested candidates may have the opportunity to apply, compete and be considered for the appointment in the light of the objective selection procedure. The transparency and integrity of the process is of utmost importance. In the words of the august Supreme Court, it is inevitable for the validity of the appointments made to key positions in various regulatory authorities, established under respective statutes, that there be due diligence, rigour and transparency in the selection process. This principle was also unambiguously reiterated and referred to by the august Supreme Court in its order dated 15-01-2013, passed in C.P.No.105/2012 and 104/2012, by holding that the appointment to the post of the Chairman PEMRA ought to be made through a transparent and open process. The said order was passed in the presence of the respondent No.1 as his attendance is duly recorded therein. We inquired from the respondent No. 1 who was present before us, whether an open and demonstrably transparent selection process had been initiated for appointment of the Chairman? Whether the process was given wide publicity? The answer was in the negative. There was no selection process as prescribed in the law discussed above, rather a note was initiated by an officer subordinate to the respondent no. 1 and the summary was prepared and sent by the latter to the competent authority. He had proposed three names including his own. Interestingly, the respondent no. 1 has stated in his interim reply to the show cause notice that the then Minister in charge had directed him to include his name in the proposed panel. It is, therefore, an admitted position that the appointment was not made through adopting a demonstrably open and transparent selection procedure and thus the settled law as discussed above was violated,

12. Next is the question as to whether the principles of procedural fairness, or in other words the doctrine of audi alteram partem had been violated in the instant case. There is no cavil that the principles of natural justice are embedded in the fundamental right guaranteed under Article 10-A of the Constitution of the Islamic Republic of Pakistan 1973 as an integral part of due process. However, we need to be examine whether the mandatory requirements of due process or natural justice had been fulfilled in the instant case. In this regard, it would be pertinent to refer to two judgments of the august Supreme Court. In the case of "The University of Dacca through its Vice Chancellor and another Vs. Zakir Ahmed" reported as ***PLD 1965 Supreme Court 90***. The august Supreme Court after examining the case law observed and held as follows:-

> *"What these principles of natural justice are it is not possible to lay down with any exactness, for, they have been variously defined in various cases, as was pointed out by the Judicial Committee in the case of the University of Ceylon v. Fernando Tuker, L. J., said in Russel v. Duke of Norfolk (1) "the requirements of natural justice must depend on the circumstances of the case, the nature of the enquiry, the rules under which the Tribunal is acting, the subject-matter that is being dealt with, and so forth." Nevertheless, the general consensus of judicial opinion seems to be that, in order to ensure the "elementary and essential principles of fairness" as a matter of necessary implication, the person sought to be affected must at least be made aware of the nature of the allegations against him, he should be given a fair opportunity to make any relevant statement putting forward his own case and "to correct or*

controvert any relevant statement brought forward to his prejudice." Of course, the person, body or authority concerned must act in good faith, but it would appear that it is not bound to treat the matter as if it was a trial or to administer oath or examine witnesses in the presence of the person accused or give him facility for cross-examining the witnesses against him or even to serve a formal charge sheet upon him. Such a person or authority can obtain information in any way it thinks fit, provided it gives a fair opportunity to the person sought to be effected to correct or contradict any relevant statement prejudicial to him. In other words, "in order to act justly and to reach just ends by just means" the Courts insist that the person or authority should have adopted the above "elementary and essential principles" unless the same had been expressly excluded by the enactment empowering him to so act."

13. A Bench consisting of thirteen Hon'ble Judges of the august Supreme Court in the case of "Justice Khurshid Anwar Bhinder Vs. Federation of Pakistan" reported as ***PLD 2010 SC 483*** examined various precedent law relating to the doctrine of audi alteram partem. In paragraph 41 of the judgment the august Supreme Court has referred to circumstances wherein, prima-facie, the right of the opportunity to be heard may be excluded by implication. In paragraph 42, it has been held as follows:-

"It must not be lost sight of that in the above mentioned "exclusionary cases, the 'audi alteram partem' rule is held inapplicable not by way of an exception to fair play in action but because nothing unfair can be inferred by not

affording an opportunity to present or meet a case." (Maneka Gandhi v Union of India AIR 1978 SC 597, (1978) 1 SCC 248. Vide also Mohinder Singh Gill v The Chief Election Commissioner AIR 1978 SC 851, (1978) 1 SCC 405. The doctrine of 'audi alteram partem' is further subject to maxim nemo inauditus condemnari debet contumax.' Therefore, where a person does not appear at appropriate stage before the forum concerned or is found to be otherwise defiant the doctrine would have no application. It is also to be kept in view that "application of said principle has its limitations. Where the person against whom an adverse order is made has acted illegally and in violation of law for obtaining illegal gains and benefits through an order obtained with mala fide intention, influence, pressure and ulterior motive then the authority would be competent to rescind/withdrawn/cancel such order without affording an opportunity of personal hearing to the affected party. Said principle though was always deemed to be embedded in the statute and even if there was no such specific or express provision, it would be deemed to be one of the parts of the statute because no adverse action can be taken against a person without providing right of hearing to him. Principle of audi alteram partem, at the same time, could not be treated to be of universal nature because before invoking/applying the said principle one had to specify that the person against whom action was contemplated to be taken prima facie had a vested right to defend the action and in those cases where the claimant

had no basis or entitlement in his favour he would not be entitled to protection of the principles of natural justice."(Nazir Ahmed Panhwar v. Government of Sindh through Chief Secretary Sindh 2009 PLC (C.S) 161, Abdul Haque Indhar and others v. Province of Sindh through Secretary Forest, Fisheries and Livestock Department, Karachi and 3 others 2000 SCMR 907 and Abdul Waheed and another v. Secretary, Ministry of Culture, Sports, Tourism and Youth Affairs, Islamabad and another 2002 SCMR 769). It has been elucidated in the detailed reasoning of the judgment of 31-7-2009 how the order passed by a seven Member Bench of this Court has been flagrantly violated. Besides that the applicants had no vested right to be heard and furthermore they have acted illegally and in violation of the order of seven Member Bench for obtaining illegal gains and benefits which cannot be ignored while examining the principle of 'audi alteram partem'."

14. The august Supreme Court quoted with approval from various commentaries, including the Constitutional Development in Britain, authored by Lord Denning and the relevant portion is reproduced as follows:-

"The concept of natural justice is a combination of certain rules i.e. 'audi alteram partem' (nobody should be condemned unheard) and discussed in depth in preceding paragraphs and 'nemo judex in re sua' (nobody should be a Judge in his own case or cause) application whereof is to be decided by the Court itself in accordance with the fact,

circumstances, nature of the case vis-à-vis the law applicable on the subject. It squarely falls within the jurisdictional domain of the Court concerned whether it would be necessary to embark upon the concept of natural justice and whether it would be inevitable for the just decision of the case. The Court is not bound to follow such rules where there is no apprehension of injustice. It can be said with certainty that the concept of natural justice is flexible and it cannot be rigid because it is the circumstances of each case which determine the question of the applicability of the rules of natural justice." There are a number of cases in India in which the flexibility of the rules of natural justice has been upheld. In New Parkash Transport Co. Ltd v. New Sawarna Transport Co. Ltd., the Supreme Court observed that rules of natural justice vary with varying constitutions of statutory bodies and the rules prescribed by the legislature under which they have to act, and the question whether in a particular case they have been contravened must be judged not by any preconceived notion of what they may be but in the light of the provision of the relevant Act. While natural justice is universally respected, the standard vary with situations contacting into a brief, even post-decisional opportunity, or expanding into trial-type trappings. As it may always be tailored to the situation, minimal natural justice, the bares notice, 'littlest' opportunity, in the shortest time, may serve. In exceptional cases, the application of the rules may even be excluded."

15. It is, therefore, obvious that the principles of natural justice are flexible and not rigid. The determination of the application of these principles depends on the circumstances of each case, and various factors may be taken into consideration for this purpose, such as the nature of the enquiry, the subject matter being dealt with, whether anything unfair can be inferred if the opportunity is not afforded, whether there is no apprehension of injustice etc. However, depending on the facts and circumstances of each case, it would be sufficient if the 'elementary and essential principles of fairness' have been fulfilled. Therefore, in a given situation it may be sufficient if the person affected has been made aware of the nature of the allegations, has been afforded a fair and reasonable opportunity to defend the allegations and to controvert any statement made against him or her. Not in every case would it be mandatory to examine witnesses in the presence of the person against whom allegations have been made, or to afford him or her an opportunity for cross examination. If a person who has been afforded a fair opportunity, which satisfies the requirements of the elementary and essential principles of fairness, does not appear or fails to avail the opportunity, or is otherwise defiant, then he or she may not be able to raise a grievance relating to violation of the principles of natural justice, as they would have no application in the given circumstances. In exceptional cases the application of the doctrine of 'audi alteram partem' may even be excluded.

16. We may now examine the facts of the instant appeal in the light of the above discussion. The respondent no. 1 at the time of initiating the summary for appointment of Chairman of the Authority and accepting the appointment as such was posted as Secretary, Ministry of Information and Broadcasting. Being the administrative head of the Ministry, he had an onerous duty to, inter alia, ensure that the selection procedure for, and the consequent appointment as Chairman of the Authority was made strictly in accordance with the settled law. Without

adopting the selection procedure in accordance with the law laid down and principles enunciated by the august Supreme Court in the cases of Mohammad Yasin and Mohammad Ashraf Tiwana supra, a subordinate of the respondent no. 1 initiated a note. The same subordinate, in disregard of the principle of a 'demonstrably open and transparent' procedure, proposed seven names to be considered for appointment of the Chairman. Based on the said note, the respondent no. 1 appears to have selected three names from the proposed list of seven and moved the summary for consideration of the competent authority. The respondent no. 1 had also proposed himself along with two others. The explanation given for proposing his name finds mention in his interim reply, dated 13-02-2014, to the show cause notice, dated 06-02-2014, which is to the effect that "My name was included on the specific verbal instructions of the then Minister for Information---". It was thus admitted that the name of the respondent no. 1 was included amongst the three proposed names on the 'dictation' of the then Minister for Information instead of adopting an open and transparent process. Para 6 of the show cause notice, dated 06-02-2014, alleged that the respondent no.1 had 'deliberately violated the direct and specific order dated 15-01-2013 of the Hon'ble Supreme Court passed in Constitution Petition No. 104/2012 and 105/2012'. It would be pertinent to mention that the said order was passed in the presence of the respondent no. 1 and being the Secretary, Ministry of Information, it was his duty to strictly implement the direction in the said order that the appointment of the Chairman of the Authority 'has to be made through an open and transparent process to ensure that the appointee meets the objective criterion'. Instead of replying to the said serious allegation made in para 6, the respondent no. 1 sought refuge by asking for documents and an opportunity to produce witnesses and cross examine some persons. It was an obvious attempt to delay and avoid the proceedings, as neither any documents were required to be submitted in order to reply to the allegation in para 6 of the show cause notice,

nor was any person to be examined as a witness in this regard. The allegation in para 6 essentially questioned the legality of the appointment of the respondent no. 1 as the Chairman. The statement made by the respondent no. 1 in his written interim reply to the show cause notice that his name was included amongst the three proposed names on the verbal 'dictation' of the Minister is an obvious admission that the process was neither open nor transparent and, therefore, the appointment made was in violation of the law laid down in the cases of Mohammad Yasin and Mohammad Ashraf Tiwana supra, and in particular the directions passed by the Supreme Court in the presence of respondent no. 1 vide order dated 15-01-2013.

17. The respondent no. 1, in response to our query, had admitted before us that an open and transparent process had not been conducted, as neither were the applications invited through an advertisement, nor were the proposed names selected or short listed through such a process. The appointment of respondent no. 1 was void and illegal, as admittedly it was not made through an open and transparent process, and as such was in violation of the settled law and the directions of the Supreme Court. It was, therefore, a misconduct on part of the respondent no. 1 within section 7 of the PEMRA Ordinance to continue to hold the post of the Chairman, as his appointment was illegal and void having been made in violation of the law and principles laid down and enunciated by the august Supreme Court. Moreover, the respondent no. 1 as the Secretary, Ministry of Information and Broadcasting was responsible to ensure that the law enunciated by the august Supreme Court and its orders are strictly implemented and enforced. He not only recommended his own name in violation of the law laid down by the august Supreme Court but defied the unambiguous directions of the apex court passed in his presence vide order dated 15-01-2013. He accepted the appointment pursuant to notification dated 26-01-2013 and thereafter continued to

hold the post of the Chairman in disregard to the order of the Supreme Court dated 15-01-2013 and by doing so committed misconduct within the meaning of the explanation incorporated in section 7 of the PEMRA Ordinance. The holding of the post of the Chairman in violation and defiance to explicit directions of the august Supreme Court was not only contemptuous in nature but indeed amounted to conduct prejudicial to good order and unbecoming of a gentleman.

18. There is also no force in the argument that the notification dated 17-04-2014 was issued in violation of the principles of due process or natural justice. The show cause notice dated 06-02-2014 was issued pursuant to the judgment dated 26-12-2013, passed by a Single Judge in chambers in WP No. 4606 of 2013. The said show cause notice had sufficient details to make the petitioner aware of the nature of the allegations. Reasonable time was afforded to submit a reply. The time was sufficient for the respondent no. 1 to have at least replied to the allegation mentioned in para 6 of the show cause notice, which neither required examination of any document or witness. The Authorized Officer twice gave opportunities of personal hearings i.e on 26-02-2014 and 06-03-2014 respectively. The respondent no. 1 refused to avail the reasonable opportunities extended to him on frivolous grounds. He excused himself by stating that a petition was pending before the Islamabad High Court and, therefore, he could not appear. The notification was issued on 17-04-2014 i.e. after more than two months for the date of issuance of the *Show Cause Notice* and no attempt was made by the respondent no. 1 to approach the Authorized Officer and avail the opportunity to defend the serious allegations mentioned in the show cause notice. He deliberately and voluntarily did not avail the opportunities extended to defend himself against the allegations. There was an obvious defiance on his part. The most crucial allegation is in para 6 of the show cause notice and the same is admitted that the appointment was not made through an open and transparent

process, thus not only violating the explicit directions of the Supreme Court vide order dated 15-01-2013 but also the law laid down in the judgments of Mohammad Yasin and Mohammad Ashraf Tiwana supra. In the facts and circumstances of the case, we are satisfied that the elementary and essential principles of fairness were fulfilled so as to meet the requirements of natural justice. The conduct of the respondent no. 1 in defying and refusing to avail the opportunities afforded to him obviously does not entitle him to raise a grievance of violation of the principles of natural justice. Nothing unfair can be inferred in the circumstances nor is there any apprehension of injustice. It will be just and proper for the competent authority to proceed with the appointment of Chairman PEMRA pursuant to the directions of the august Supreme Court vide order dated 19-08-2015, passed in C.P.No.105/2012 and C.P.No.104/2014.

19. For the above reasons, we allow the instant appeal and set aside the impugned judgment dated 22-04-2015.

(SHAUKAT AZIZ SIDDIQUI)
JUDGE

(ATHAR MINALLAH)
JUDGE

Approved for reporting.

JUDGE

JUDGE

*Asif Mughal/**