

HCJD/C-121
JUDGMENT SHEET

ISLAMABAD HIGH COURT
ISLAMABAD

WRIT PETITION NO.1030/2015

SYED ZAFAR ALI SHAH

VERSUS

FEDERATION OF PAKISTAN

through Secretary, Ministry of Law, Justice and Parliamentary Affairs, Government
of Pakistan, Islamabad & 34 Others

Petitioner by : **Syed Zafar Ali Shah, Sr. ASC, in person.**

Date of Hearing : **09-04-2015.**

ATHAR MINALLAH, J.- The petitioner is a senior Member of the Bar of this Court as well as the Supreme Court. He is a former Senator and a Member of the ruling political party i.e. Pakistan Muslim League (N) (*hereinafter referred to as the 'PML-N'*). Through the instant petition various prayers have been sought, which are as follows.-

- a) To declare the respondents No.7 to No.35 as former Members of the National Assembly from the date of their resignation, on the ground that the said resignations were genuine and had been voluntarily tendered before the Speaker of National Assembly (*hereinafter referred to as the 'Speaker'*).
- b) To direct the Speaker to send the respective notifications, regarding the vacation of the seats of

respondents No.7 to 35, to the Election Commission of Pakistan.

c) To direct the Election Commission to announce the schedule of bye-elections on the vacant seats, pursuant to the resignations of the respondents No.7 to 35.

d) To restrain the Secretary National Assembly from issuing the salaries or any other financial benefits to the respondents No.7 to 35.

2. The facts as narrated in the petition and argued before us, in brief, are that Mr. Imran Khan, respondent No.7, had held a *Dharna (Sit in)* in August, 2014, demanding the resignation of the Prime Minister of Pakistan, namely, Mr. Muhammad Nawaz Sharif. Respondents No. 8 to 35 were duly elected from their respective constituencies or on reserved seats. The respondent no. 7 is the Chairman of the Pakistan Tehreek-e-Insaf (*hereinafter referred to as "PTI"*) while the other respondents had contested elections on the tickets awarded by the said political party. The respondent No.7 and other respondents had announced publically that they had tendered their resignations by addressing the same to the Speaker. Public announcements in this regard were made by the respondents, *inter alia*, through media and other means, that the resignations had been tendered. The respondents

No.7 to 35 are alleged to have refrained from attending the proceedings of the National Assembly for 40 consecutive days, which thereby made them liable to be proceeded against under sub Article 2 of Article 64. The Speaker had undertaken an inquiry but the respondents failed to appear before him individually. The petitioner is stated to have been astonished when he came to know on 05-04-2015 that the respondents No.7 to 35 will be attending the Session of the National Assembly on the following date, thereby retracting their respective resignations. Hence the jurisdiction of this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (*hereinafter referred to as the 'Constitution'*) has been invoked, seeking the prayers as mentioned above.

3. The petitioner appeared in person and contended that Article 64 of the Constitution is silent regarding the acceptance or rejection of the resignation tendered by a Member of the Parliament. It was forcefully argued that once the resignations had been tendered and the Members had absented themselves without leave of the House for 40 consecutive days of the sitting of the National Assembly, then their seats shall fall vacant. The learned counsel took us through the Rules of Procedure and Conduct of Business in the National Assembly 2007 (*hereinafter referred to as the "Rules"*), particularly Chapter-VI thereof, which relates to Leave of Absence, Resignation and Vacation of Seats in the Assembly, in support of his contention that the Speaker is not required to make any inquiry, as the facts and circumstances of the case

✓

clearly show that there was no doubt regarding the resignation being voluntary and genuine. He has further contended that the prayer sought in the instant petition would not come within the definition of the expression 'internal proceedings' for the purposes of Article 69 of the Constitution. He has relied on the cases of '*Mirza Tahir Beg v. Syed Kausar Ali Shah and others*' [PLD 1976 SC 504] and '*Abdul Razique Khan v. The Province of Sindh through the Chief Secretary, Government of Sindh, Karachi and 3 others*' [PLD 1994 SC 79].

4. We enquired from the learned counsel whether he had approached the political party, of which he is a member, regarding raising the issue on the floor of the house, or to resolve his grievance or address the same at an appropriate forum, for example in the Parliament. The petitioner has stated that as a member of the ruling party, he has made a representation, but no action has been taken pursuant thereto. It was also enquired as to whether it was appropriate for this Court to entertain the matter, when no order has been passed by the Speaker of the National Assembly, and also whether it would be appropriate for this Court to interfere in a matter which could best be resolved by the political forces within the confines of the Parliament? The learned counsel has stated that as a citizen, it is his right to invoke the jurisdiction of this Court, as the matter requires the interpretation of the Constitution.

5. We have heard the learned counsel at length and we hold and our opinion is as follows.-

6. From the arguments advanced by the petitioner and the averments made in the petition, two questions emerge for determination by this Court. Firstly, what is the nature of the grievance raised before us in the light of the facts and circumstances of the case, particularly the settled law regarding Article 64 of the Constitution, and whether the grievance placed before us is justiciable under Article 199 of the Constitution? The grievance of the petitioner, as we have understood, is that Article 64 does not envisage either the rejection or acceptance of a resignation tendered by a Member of the National Assembly, and that there is no doubt that the resignations were tendered voluntarily and genuinely and, therefore, the role of the Speaker has become ceremonial and he is under a duty to act mechanically by forwarding the same to the Election Commission of Pakistan (*hereinafter referred to as the "Commission"*). The matter placed before us essentially relates to Article 64 of the Constitution. The law is well settled by now as would be discussed later. For ease of reference Article 64 is reproduced below.-

"64. Vacation of seats.- (1) *A member of the [Majlis-e-Shoora (Parliament)] may, by writing under his hand addressed to the Speaker or, as the case may be, the Chairman resign his seat, and thereupon his seat shall become vacant.*

(2) A House may declare the seat of a member vacant if, without leave of the House, he remains absent for forty consecutive days of its sitting."

7. Pursuant to Clause (2) of Article 67 of the Constitution, the President has made Rules of Procedure and Conduct of Business in the National Assembly 1973 (*hereinafter referred to as the 'Rules'*). The Rules were unanimously adopted by the National Assembly on 5th August 1992. Chapter-VI relates to the procedure of Leave of Absence, Resignation and Vacation of Seats in the Assembly. Rule 43 explicitly deals with resignation of seat and the same is as follows.-

"43. Resignation of seat.- (1) *A member under clause (1) of Article 64 may, by writing under his hand addressed to the Speaker, resign his seat.*

(2) *If,-*

(a) a member hands over the letter of resignation to the Speaker personally and informs him that the resignation is voluntary and genuine and the Speaker has no information or knowledge to the contrary; or

(b) the Speaker receives the letter of resignation by any other means and he, after such inquiry as he thinks fit, either himself or through the National Assembly Secretariat or through any other agency, is satisfied that the resignation is voluntary and genuine, the

Speaker shall inform the Assembly of the resignation:

Provided that if a member resigns his seat, when the Assembly is not in session, the Speaker shall direct that intimation of his resignation specifying the date of the resignation be given to every member immediately.

(3) The Secretary shall, after the Speaker satisfies himself that the letter of resignation is voluntary and genuine, cause to be published in the Gazette a notification to the effect that the member has resigned his seat and forward a copy of the notification to the Chief Election Commissioner for taking steps to fill the vacancy thus caused.

(4) The date of resignation of a member shall be the date specified in writing by which he has resigned or if no date is specified therein the date of receipt of such writing by the Speaker."

8. The above provisions have been considered and interpreted by the august Supreme Court in a chain of judgments and, therefore, it would be beneficial to discuss the principles and law enunciated and laid down therein, so as to determine the nature of the grievance raised before us and whether interference by this Court, in exercise of its extraordinary discretionary jurisdiction, is warranted.

9. In the case of '*Mr. A. K. Fazalul Quader Chaudhury v. Syed Shah Nawaz & others*' [PLD 1966 SC 105], the apex court, while considering the provisions of the Constitution of Pakistan, 1962, interpreted the duty of the Speaker in the case of resignation tendered by a Member of the National Assembly. In the said case a Member was alleged to have tendered his resignation which he had later denied. The Speaker, after receiving the resignation, caused a notification to be published declaring that the Member had resigned from the seat in the National Assembly. The *vires* of the notification was challenged before the High Court of West Pakistan. The High Court did not accept the plea of the respondent that by addressing the letter to the President he had not intended to resign. However, the petition was allowed on a different ground i.e that the resignation was not tendered in the manner as required by Article 107 of the Constitution of Pakistan, 1962. The august Supreme Court, nevertheless, held that it was the bounden duty of the Speaker to have taken all the documents into consideration and thereafter construe the same so as to form an opinion or arrive at the conclusion whether the Member had intended to resign.

10. In the case of '*Mirza Tahir Beg v. Syed Kausar Ali Shah and others*' [PLD 1976 SC 504], a resignation was alleged to have been addressed and sent to the Speaker by a Member of the Punjab Provincial Assembly. It was alleged that the resignation had been obtained under coercion. The Speaker in this case had taken the stance that he was under the impression that his duty was no more than to

merely transmit the resignation to the Chief Election Commissioner, and it was for the latter to do the rest. The relevant portions of the judgment are reproduced as follow.-

"Needless to say that the Speaker in a parliamentary form of Government holds an office of highest distinction and has the sole responsibility cast on him of maintaining the prestige and the dignity of the House and each and every member composing the House. It is precisely for this reason that the Constitution has ordained that a resignation by a member is effective only when it is "addressed" to the Speaker: it was not intended to be an idle formality. To relinquish a parliamentary seat by resignation is a grave and a solemn act. By and large our political institutions are fashioned on the pattern of those obtaining in England and it is a settled principle of parliamentary law in England that a member of Parliament after he is duly chosen, cannot relinquish his seat by unilaterally resigning his membership. In order to evade this restriction a member who wishes to relinquish his seat, accepts office under the Crown which legally vacates his seat. This is enough to underline the gravity of the matter. (See May's Parliamentary Practice, 18th Edn., p. 45)."

"A fortiori in a case where the genuineness or validity, of resignation is challenged or ex facie is doubtful, the Speaker shall be under a duty to enquire into the matter, before he allows the resignation to take effect. This is notwithstanding that the resignation takes effect automatically once it reaches the Speaker for it is implicit in the provision that the resignation is genuine and

voluntary and was intended to reach the Speaker. This interpretation accords with the dictates of justice, equity and good conscience. The Courts have always presumed the existence of such implicit power in the appropriate authority."

"On the above analysis therefore, I have no doubt in my mind that Speaker had the right and duty under the Constitution to satisfy himself as to the genuineness and the validity of the resignation by a member, before it is allowed to take effect. As a necessary corollary of that, the Speaker will have to make proper enquiry, if there appears anything tending to create any doubt with regard thereto. What will be the magnitude of the enquiry or whether, in a particular case, any such enquiry will at all be necessary, will depend on the facts of each case and it is not possible nor even desirable to lay down a criterion for general application. For example, if in the instant case, the appellant had himself appeared and presented his resignation to the Speaker and there was nothing to show that it was involuntary, then there is hardly any need for an enquiry. If on the other hand the resignation is not presented personally, but is sent through a messenger, as in the instant case, then Speaker will have to further satisfy himself that the transmission is by an authorized person."

11. The august Supreme Court dilated on the interpretation of the expression 'resignation' in the case of '*Dr. Muhammad Munir-Ul-Haq and others v. Dr. Muhammad Latif Chaudhry and others*' [1992 SCMR 2135] and held as follow.-

"There is no dispute about the proposition advanced by the respondent No.1 that a resignation has to be intentional and voluntary and as defined in Black's Law Dictionary it means "formal renouncement or relinquishment of an office. It must be made with intention of relinquishing the office accompanied by the act of relinquishment". It is also correct that the totality of the circumstances have to be taken into consideration for drawing a conclusion whether the resignation tendered was voluntary or not."

12. In the case of *'Mian Muhammad Nawaz Sharif v. President of Pakistan and others'* [PLD 1993 SC 473] a full bench of the august Supreme Court held that not only is the resignation required to be addressed to the Speaker, but that it should be intended to be passed on to the Speaker of the Assembly. The procedure for submitting a resignation by Members of the National Assembly has been described on page-817 as follows.-

"(i) The resignation should be in writing under his hand and should be addressed to the Speaker.

(ii) the resignation may be delivered by the member personally or through any other means.

(iii) If the letter of resignation is delivered personally, then the Member should inform the Speaker that the resignation is voluntary and genuine.

- (iv) *If the resignation is delivered by any other means, then the Speaker shall make inquiry into the genuineness of the resignation and ascertain whether it is voluntary or not.*
- (v) *The Speaker after satisfaction that the resignation is genuine and voluntary, shall inform the National Assembly and then the seat shall be declared vacant.*
- (vi) *The date of resignation of a member shall be the same as specified in the letter of resignation or if no date has been given, then the date of receipt by the Speaker.”.*

After elucidating the above procedure, it has been held as follows.-

“...To that extent there may be some disciplinary justification for obtaining and holding such resignation, but in order to make it valid and effective besides complying with the procedure laid down, it should be voluntary, genuine and should be intended to vacate the seat. Resignation is a voluntary act of a member or person submitted with the intention to relinquish, relieve or quit the particular post or position and to vacate the same. It cannot be a two-way traffic or an act to use it for any purpose liked by any third person. The resignations obtained by any person politically or officially in authority or not from the members and delivery to a third party other than the person

authorised to receive them, with the intention to achieve political gains and create a ground for dissolution of the Assembly can neither form basis for such action nor be justified by any principle of law, morality and ethics."

"...The Constitution has thus cast onerous duty on the Speaker to make inquiry into the genuineness and voluntary nature of the resignation and also that it has come through an authorized person, if not submitted personally. The Speaker can neither refuse to discharge this duty nor can any authority bypass him. The solemnity and sanctity attracted to the resignation by a member of the National Assembly shall be eroded if it is made in contravention of the provisions of the Constitution and the rules and furthermore if they are intended not to vacate the seat, but for any other purposes, ulterior, oblivious or clandestine. Such letters of resignation which do not have any validity or sanction under law can hardly be accepted muchless by a person of high position like the President to assess the confidence the members have in the Assembly and also to assess a situation whether the Government can be run in accordance with the Constitution."

13. In the case of '*Abdul Razique Khan v. The Province of Sindh through the Chief Secretary, Government of Sindh, Karachi and 3 others*' [PLD 1994 SC 79], the august Supreme Court was considering the effectiveness of the resignation purportedly tendered by a Member

of the Sindh Assembly, who also happened to be its Speaker, and in the facts and circumstances of the case it was held and observed as follows.-

"The comments reproduced from the written statement of the Acting Speaker clearly show that the inquiry which was anticipated and which was withholding action on the resignations already submitted was with regard to determination whether these resignations were voluntary or genuine. Just by comparing the signatures and holding it to be of the appellant, it could not be deduced that the resignations were voluntary and genuine in the sense of being intended to be resignations. Therefore, the inquiry which was required, which was anticipated, which had in any case to take place under the law never took place at the hands of the Acting Speaker. Anybody receiving the resignation has a duty to ascertain personally whether it is signed by the man resigning whether it is voluntary and whether it is intended to act as a resignation. Unless all the three requirements of the resignation are satisfied it is dangerous in the political milieu in which we are living to give effect to such resignations. Mere prolonged absence of the person resigning, his non-appearance after notice or his absence from the proceedings even after notice could not prove these requirements. Unless these are positively proved, the resignations cannot be given effect to as resignations. The Rules of Procedure drawn up by the National Assembly in the matter of dealing with resignations are fairly exhaustive and consistent with the law laid down by the Supreme Court of Pakistan in the cases of Mr. A.K. Fazalul Quader Chaudhury PLD 1996 SC 105 and Mirza Tahir Beg PLD 1976 SC 504."

14. It would also be pertinent to refer to the relevant portion of a judgment of the Madras High Court in the case of '*A. Sudarsana Rao v. J. A. Christian Pillai and others*' [AIR 1924 Madras 396], and the same is as follows:

"The contention before me is that the petitioner resigned his office of Honorary Magistrate on 21-9-22 and that though it was accepted on 17-10-22, he ceased to be a Honorary Magistrate from 21-09-22. Paine on Elections, page 201, shows that without acceptance, resignation amounts to nothing and the person resigning remains in office. To resign is not a matter of right..."

15. It is further relevant to refer to the case of '*Muhammad Naeem Akhtar and 2 others v. The Speaker, Sindh Provincial Assembly*' [1992 CLC 2043]. The said judgment has been cited with approval by the august Supreme Court in PLD 2012 SC 774. The Sindh High Court in the said judgment examined the provisions of Article 64 and articulated the principles relating to the role of the Speaker in accepting or declining to accept resignation of Members of the Assembly as follows.-

"Clause (1) of Article 64 of the Constitution does not require acceptance of the resignation by the Speaker for the resignation to become effective and as a consequence the seat becoming vacant but from this it does not follow that the Speaker has no role at all to play in this exercise of resignation."

In case the Speaker has any doubts about the genuineness or voluntary nature of the resignation received by him, or he receives information from the concerned member or on his behalf that the resignation was not genuine or had not been given voluntarily, the Speaker was then required to hold an inquiry to satisfy himself as to the genuineness or voluntary nature of the resignation and if in such inquiry he finds that the resignation was not genuine or voluntary, he would record such finding, in which event resignation would become ineffective and the member would continue to retain his seat.

In case the Speaker had no reason to doubt the genuineness or voluntary nature of the resignation received by him and he also does not receive any intimation either before the receipt of the resignation or within reasonable time of such receipt from the concerned member or on his behalf that the resignation was not genuine or voluntary or that it was not to be acted upon, there would be no requirement for the Speaker to hold any inquiry and the resignation in such a situation would become effective with the consequence of the seat falling vacant.

(g) If the petitioners wanted to back down or retract from their resignations, they should have given a public statement or written a letter to the Speaker to that effect declaring that the resignations are no longer valid and should not be acted upon."

16. Lastly, we may refer to two other judgments of the Supreme Court relating to the contempt and subsequent disqualification of a member of the National Assembly, who also happened to be the leader of the House and thus the Prime Minister at the time. The first case relates to the contempt proceedings decided by seven Honourable Judges of the Supreme Court in *suo moto* case No.04/2010 [PLD 2012 SC 553]. In this case the august Supreme Court, in line with its consistent view, had left the matter to be decided by the Speaker under Article 63(2) of the Constitution, after sentencing a member of the National Assembly for having committed contempt. The full court of the august Supreme Court, having regard to the principle of separation of powers, left the matter of disqualification to the Speaker, pursuant to the powers vested under Article 63(2) of the Constitution. Pursuant to the said judgment, the Speaker gave her decision and the same was challenged before the Supreme Court, culminating in the judgment titled '*Muhammad Azhar Siddiqui and others v. Federation of Pakistan and others*' [PLD 2012 SC 774]. The Supreme Court followed the principles, and affirmed the *ratio decidendi* laid down in the earlier judgment of '*Ayatullah Dr. Imran Liaquat Hussain v. Election Commission of Pakistan*' [PLD 2005 SC 52] besides citing with approval the case of '*Khawar Intezar Muhammad Khan v. Federation of Pakistan*' [1995 MLD 1903]. The said judgments had been delivered in the context of determining the role of the Speaker under Article 63(2) of the Constitution. The principles enunciated in the two judgments unambiguously elucidate that it is the exclusive domain of the Speaker to apply his/her own mind judiciously,

and after taking into consideration the relevant provisions on the subject, to decide as to whether any question as to the nature of the disqualification has arisen, which may justify making reference to the Chief Election Commissioner. However, in consideration of the facts and circumstances in the case of Mohammad Azhar Siddique (*Supra*) the Supreme Court held that as there was a determination by way of a final judgment delivered by the apex Court, therefore, giving effect thereto was binding on the Speaker under Article 190 of the Constitution. This is the only exception in our judicial jurisprudence to the settled rule that it is the exclusive domain of the Speaker to independently and judiciously apply his or her mind, and decide the matter after taking the relevant matters into consideration. It is noted that despite the peculiar facts and circumstances of this case, the august Supreme Court followed its consistent view that the role of the Speaker is not to act mechanically, but to apply his/her own mind independently and judiciously in accordance with law. Furthermore, the Supreme Court unequivocally reaffirmed its commitment to the doctrine of separation of powers by observing as follows.-

"The principle of trichotomy of powers upon which the scheme of the Constitution is based, envisages three organs of the State, namely, Legislation, Executive and Judiciary, each of whom has to perform its functions within its domain. In line with the said principle, this Court has always performed its functions strictly remaining within the area of its jurisdiction and shown utmost respect to the other organs of the State by not intruding upon the domain

reserved for them. In Al-Jehad Trust v. Federation of Pakistan (PLD 1996 SC 324) the august Supreme Court held as under:-

"There is no cavil with the proposition that the Legislature has to legislate; the Executive has to execute laws and the Judiciary has to interpret the Constitution and laws. The success of the system of governance can be guaranteed and achieved only when these pillars of the State exercise their powers and authority within their limits without transgressing, into the field of the others by acting in the spirit of harmony, cooperation and coordination. So far the powers of the Judiciary are concerned, we are exactly going to do that and we are going to interpret the relevant provisions of the Constitution within the limits prescribed so that the provisions are harmonized and the Constitution becomes workable."

17. It is obvious from the above precedent law that for a resignation to take effect under Article 64 of the Constitution, it is not enough that the member has written it under his or her name addressed to the Speaker. The crucial test, or mandatory pre requisite for the seat to become vacant on resignation, is the fulfilment of the Constitutional duty of the Speaker to be satisfied that three factors are established; firstly, that it is tendered voluntarily, secondly, it is genuine and lastly, that the member actually intended to relinquish, relieve or quit the post, position or seat and thereby vacate the seat. It is also not enough that the member who has tendered the resignation makes public announcements in this regard, or presents him or herself in mass before the Speaker. The Speaker is under a Constitutional duty to undertake an

inquiry personally to satisfy himself regarding the three factors or requirements in each case independently. The aforementioned three requirements are to be "proved positively" to the satisfaction of the Speaker. Furthermore, if before the inquiry is concluded, or/and the Speaker has not passed any order, nor achieved the level of satisfaction so required for giving effect to the resignation, the member retracts by communicating in any manner, whether in writing or through conduct, such as by making a public announcement, or attending the sittings of the National Assembly, then the resignation written and addressed to the Speaker becomes ineffective as it is no more valid and no further order or action would be required.

18. It would also not be out of context to look at the scope and meaning of the two expressions i.e 'genuine' and 'voluntary' which have to be positively proved to the satisfaction of the Speaker. 'Genuine' has been defined in Black's Law Dictionary, 8th Edition as *(Of a thing) authentic or real; something that has the quality of what it is purported to be or to have <the plaintiff failed to question whether the exhibits were genuine> (Of an instrument) free of forgery or counterfeiting <the Bank teller could not determine whether the signature on cheque was genuine>. Likewise the definition in the 4th Edition is, 'As applied to notes, bonds, and other written instruments, this term means that they are truly what they purport to be, and that they are not false, forged, fictitious, simulated, spurious, or counterfeit'. 'voluntary' has been defined as " Done by design or intention <voluntary act>, 'unconstrained*

*by interference; not impelled by outside influence; spontaneous; acting of oneself Without valuable consideration; gratuitous'. The scope and meanings are expansive and, therefore, determines the heavy bar of duty on the Speaker in reaching the level of satisfaction required to give effect to the resignation, thereby depriving the actual stake holders of the seat in the National Assembly, i.e the people of the concerned constituency. This becomes even more important, as highlighted in the precedent law, when the resignations have been given in mass by Members belonging to a particular political party. It is for this reason that the august Supreme Court has laid stress in *Abdul Razique Khan v. The Province of Sindh, supra*, that 'unless all the three requirements of the resignation are satisfied it is dangerous in the political melieu in which we are living to give effect to such resignations'.*

19. The nature of the political arena is such that while the member may have individually written his resignation addressed to the Speaker, coupled with announcing it publically, yet may not have intended to actually relinquish or quit the seat. Such reasons may be countless and unfathomable. Our political history is replete with such instances as affirmed and reflected in the cases referred to above. Mass resignations have been handed over to please the leader of a political party, or it may also have been tendered as an expression of protest without actually intending to completely relinquish ties with the seat against which the people had elected the Member. It is settled law that the Constitution has, therefore, clearly vested these powers in the

Speaker, and to his or her satisfaction pursuant to undertaking an inquiry. If the Speaker has not attained the level of satisfaction required, the resignations will remain ineffective. Even if the Speaker has expressed his satisfaction that the resignations were not intended to be voluntary or genuine, or that the member had not intended to relinquish his or her seat, the judicial review of such opinion formed by the Speaker and his satisfaction will remain beyond the pale of jurisdiction of this Court under Article 199 of the Constitution. Similarly, if the member retracts during the inquiry undertaken by the Speaker and before the latter gives effect thereto, the resignation becomes automatically ineffective. In such an eventuality, no direction by way of issuing a writ of mandamus can be issued in exercise of powers vested by this Court under Article 199 of the Constitution, as there is no law which requires the Speaker to give effect to an instrument which has become ineffective. It would be otherwise if the seat falls vacant due to the action or order of the Speaker, which has been taken or passed without lawful authority or jurisdiction. This fine distinction will be discussed in the following paragraphs. The "satisfaction" of the Speaker in refusing to give effect to a resignation can neither be made the subject of a judicial review by this Court in exercise of its jurisdiction under Article 199 of the Constitution, nor may be substituted by an opinion or satisfaction of its own. The Court does not merely consider the Member who is holding a seat, but simultaneously has to protect and guard the interests of its constituents who may be adversely affected by giving effect to the resignation, even though the Speaker is not satisfied that such an event

took place. There is no force in the argument of the petitioner that the Speaker has no role, as it is not in consonance with settled law as discussed above.

20. In order to understand and appreciate the genesis of the above principles, particularly the onerous duty imposed on the Speaker under Article 64 of the Constitution, to exercise extreme care and caution before giving effect to a resignation, it would be relevant to examine the scheme of the Constitution and the law relating to filling a seat of the National Assembly and the vacation thereof. Article 50 of the Constitution provides that the Majlis-e-Shoora (*hereinafter referred to as the 'Parliament'*) shall consist of the President and two Houses, respectively known as the National Assembly and the Senate. Article 51 provides for the composition of the National Assembly and the manner in which its 342 seats are to be filled. 272 seats, divided amongst provinces and other specified areas, fall under the category known as general seats. The general seats are filled by members from each constituency through election by direct and free vote in accordance with law, while the sixty seats reserved for women or the minorities are filled in the manner as provided under Article 51(6) of the Constitution. The qualifications and disqualifications for membership of the Parliament are provided in Articles 62 and 63 of the Constitution. The vacation of a seat is to take effect under Article 64. Likewise Chapter 2 of Part IV of the Constitution provides for the elections for filling the seats in the respective Provincial Assemblies. Part VIII of the Constitution i.e. Articles

213 to 226, specifically relate to elections. The Election Commission of Pakistan has been established as a constitutional entity, *inter alia*, to organize and conduct the elections and to make such arrangements as are necessary for ensuring that the election is conducted honestly, justly, fairly and in accordance with law and that corrupt practices are guarded against. Article 222 provides that subject to the Constitution, the Parliament may make laws, *inter alia*, for the conduct of elections and election petitions; the decision of doubt and dispute arising in connection with elections. Article 225 places a constitutional bar to the effect that no election to a House or a Provincial Assembly shall be called in question except by an election petition presented to such tribunal and in such manner as may be determined by the Act of Parliament. Article 59 exclusively relates to the Senate.

21. In order to provide for the conduct of elections to the National Assembly and the Provincial Assemblies and to guard against corrupt and illegal practices and other offences related to or in connection with the elections, the legislature has enacted the Representation of Peoples Act, 1976 (*hereinafter referred to as the 'Act of 1976'*). Similarly the Senate (Election) Act, 1975 (*hereinafter referred to as the 'Act of 1975'*) has been enacted to provide for the conduct of elections to the Senate and for matters connected there with. Both these laws comprehensively cover the conduct of elections and provide for a scheme to resolve election disputes. Section 52 of the Act of 1976 and Section 34 of the Act of 1975 provides that no election can be called in

question except by an election petition made by a candidate for that election. The contents of the petition have to be precise. Under Section 63 of the Act of 1976 an election petition is liable to be dismissed if there is non compliance with the provision of Section 54 or Section 55. While in case of the Act of 1975 similar provisions are contained in Section 44 thereof. The non compliance is fatal and the august Supreme Court has consistently held that the provisions are mandatory as no power or jurisdiction is vested in the Tribunal to dispense with or cure such non compliance. It is further noted that it is settled law that the burden of proof in election matters for establishing corrupt or illegal practices, inter alia, rigging, under the two Statutes has been placed at par with the burden of proof in a criminal case. Not every person but only one of the candidates to the concerned seat may challenge the election of a returned candidate and the elections will be set aside or declared void if he is able to prove the allegations beyond a shadow of doubt and the returned notified candidate is entitled to the benefit of doubt. Affirming the law laid down in PLD 1957 SC 91, the Supreme Court held in '*Saeed Hassan v. Pyar Ali and 7 others*'[PLD 1976 SC 6] as follows.-

"While agreeing with the proposition that the analogy of a criminal trial would hold good in the matter of a corrupt or illegal practice which must be affirmatively proved to the exclusion of a reasonable hypothesis consistent with the non commission of a corrupt practice and the benefit of doubt must go to the person against whom a corrupt or illegal practice is alleged--"

Reliance in this regard is also placed on the cases of '*Ram Singh and others v. Col. Ram Sing*' [AIR 1986 SC 3], '*Syed Qutub Ahmed v. Syed Faisal Ali Subzwari and others*' [2007 CLC 1682], '*Dr. Abdul Sattar Rajpar v. Syed Noor Muhammad Shah and 8 others*' [2005 YLR 937], '*Capt. Syed Muhammad Ali v. Salim Zia*' [1999 CLC 1026].

22. In other words, the law relating to elections, filling of seats in the Assemblies or setting aside the elections provides for highly stringent requirements, particularly for declaring an election void and resultantly allowing the seat to fall vacant. We may pose a question to ourselves, as to why such a high bar has been prescribed under the special laws for matters having the consequence of vacation of a seat? Why have the framers of the Constitution and the legislature made it so difficult, stringent and challenging for removing a returned candidate once he has filled the seat against which he had been elected by the constituents?

23. The reason for examining the election laws in the context of the instant petition was to discover the intention of the framers of the Constitution and the legislature for placing such a high bar by imposing an onerous duty on the Speaker to ensure satisfaction regarding the three requirements, already discussed above, before giving effect to the resignations. Why is such sanctity attached to exercising extreme care and caution in any proceedings which may have the effect of vacation of a seat in the National Assembly? Why is it so essential to uphold the

sanctity of elections by drawing an analogy with the principles of criminal law in establishing an allegation beyond a shadow of doubt? The Constitution and the law unambiguously intend and envisage that once a person has been elected and duly notified, and has filled a seat in the Parliament, then the vacation of the seat is neither taken for granted nor such a consequence can take effect if there is doubt that the cause is not clearly established. The answer is simple. A Member of the National Assembly filling a seat is not just an individual, nor the actual stakeholder of this exalted and revered position. He or she acts on behalf or as an agent for the hundreds and thousands of constituents who are the real occupants and claimants of the seat. The sanctity attached to the elections, particularly the stringent requirements to be fulfilled before it would lead to the vacation of a seat, is based on one solemn universal principle, that the 'will of the people is sacrosanct'. The 342 Members of the National Assembly are elected by the eligible voters and, therefore, they represent the 180 million people of Pakistan. The National Assembly and Senate seats are in fact not merely to be filled casually and occupied by individuals, each one of them represents the will and aspirations of the people. Vacation of the seat, for any reason, whether under Article 64 or for corrupt or illegal practice, inevitably has the effect of depriving the actual stake holders, the people of the constituency, of their rights, without affording them an opportunity of due process. We are afraid that the bye elections are not a panacea to a wrongful vacation of seat or an erroneous setting aside of the election. A wrongful, erroneous, doubtful or questionable vacation of a seat in the National Assembly, or setting

aside of an election, violates the sanctity attached to the Parliament, and above all undermines the 'will of the people'. The wrongful vacation of a seat cannot be compensated through bye elections, and it is for this reason that the bar of standard has been kept so high for the satisfaction of the Speaker regarding the three requirements, so as to exclude any doubt lest the will of the people of the concerned constituency be wrongfully undermined and resultantly adversely affect their fundamental rights. The law leans in favour of keeping the seats filled once the returned candidate has been notified. This also explains the distinction earlier discussed relating to a situation when the resignation has been given effect wrongfully and the other when the Speaker is either not satisfied that the resignation has been tendered voluntarily and was intended to quit or relinquish the seat, or it becomes ineffective having been retracted. The former eventuality may entitle an aggrieved person, either a constituent or the concerned member, to invoke the jurisdiction of this Court, while in the case of the latter there would be no //s justifiable as discussed earlier.

24. We now revert to considering whether there is any question requiring our intervention under Article 199 of the Constitution. What emerges from the facts admitted in the petition, or argued before us, and publically known are that, PTI announced protests and held sit-ins (Dharna) on the Constitutional Avenue in front of the Parliament; during the protest the Members of National Assembly elected on the tickets of PTI, pursuant to the party policy, had tendered mass

resignations in their respective hand writings, by addressing the same to the Speaker; some Members later informed the Speaker of their intention to retract, the others refused to appear before the Speaker individually, as required by the latter for his satisfaction that each had resigned voluntarily, that the resignations were genuine and that they actually intended to relinquish or quit their respective seats; negotiations, in the meanwhile, were initiated between the political party in power i.e. PML (N) and PTI with the assistance of other political parties in the Parliament, and the disputes were resolved by the promulgation of an Ordinance; pursuant to the said Ordinance the Honourable Chief Justice of Pakistan has constituted a three member Commission; consequently, PTI publically announced to retract the resignations and attend the session of the Parliament, while the inquiry undertaken by the Speaker had neither been concluded nor had any order been passed by him; this fact came to the knowledge of the petitioner through the media and consequently respondents No. 7 to 35 attended and participated in the Joint Session of the Parliament. Is there any matter to be adjudicated, or would such adjudication be justifiable in the light of the admitted facts and the law discussed above? As discussed above in detail, and in the light of the settled law, the resignations have become ineffective and ceased to be valid as, admittedly, before the Speaker could complete his inquiry and satisfy himself regarding the three essential requirements for giving effect, the respondents No.7 to 35 publically announced retraction of the resignations and have attended the proceedings. Assuming that the

Speaker had passed an order expressing his satisfaction that the resignations were not to take effect, the matter would still have been out of the pale of jurisdiction of this Court, nor would the petition have been maintainable under Article 199 of the Constitution.

25. Lastly, we will consider whether the matter placed before us is justiciable on the touch stone of the doctrine of political question? It is settled law that political questions are out of the scope of jurisdiction of this Court under Article 199 of the Constitution. It has been consistently held that as a rule political questions, as far as possible, should not be decided by Courts and ought to be left for consideration to the authority vested with such power under the Constitution, and particularly to the wisdom of the Parliament. It is further noted that such rule is not absolute and the Courts do not refuse to exercise its jurisdiction of judicial review if the aggrieved person demonstrates that the question raised, though having political content, involves a legal or constitutional issue. Reliance is placed on PLD 2015 Islamabad 7 and PLD 2012 Lahore 515. The Honourable Justice Hamood-ur-Rehman, Chief Justice of Pakistan, as he then was, has aptly observed in the case of "*The State Vs. Zia-ur-Rehman & others*" (P.L.D. 1973 S.C. 49), *that while exercising the power of judicial review, the judiciary claims no supremacy over the other organs. Even where it declares a legislative measure unconstitutional and void, it does not do so because the judicial power is superior in degree or dignity of the legislative power; but because the constitution has vested it with the*

power to declare what the law is in the cases which come before it. It merely enforces the Constitution where it comes in conflict with it. It is the Court's duty to see that the Constitution prevails". It is equally settled law that a direction cannot be issued to the legislature nor its wisdom can be made subject of the judicial review. Reliance is placed on the cases of '*Pir Sabir Shah v. Shah Muhammad Khan, Member Provincial Assembly, N.W.F.P. and another*' [PLD 1995 SC 66], '*Mr. A. K. Fazalul Quader Chaudhury v. Syed Shah Nawaz and others*' [PLD 1966 SC 105], '*Al-Jehad Trust through Habibul Wahab Al-Khairi, Advocate and 9 others v. Federation of Pakistan through Secretary, Ministry of Kashmir Affairs, Islamabad and 3 others*' [1999 SCMR 1379] and '*Asif Ali Zardar v. Federation of Pakistan and others*' [PLD 1999 Karachi 54]. What then are the limits of justiciability of any question raised before this Court on the touchstone of the doctrine of political question? In the United States the origin of the political question doctrine goes back to the opinion of Chief Justice Marshall in the case of '*Marbury v. Madison*' [5 US 137 (1803)]. The doctrine was finally encapsulated in the judgment of the United States Supreme Court in '*Baker v. Carr*' [369 US 186 (1962)]. In this case, while delivering the opinion of the Court, Justice Brennan outlined six factors that presents the test for determining whether a matter is a political question or not, and the same are as follows.-

- i. A textually demonstrable constitutional commitment of the issue to a coordinate political department; or
- ii. a lack of judicially discoverable and manageable standards for resolving it; or

- iii. the impossibility of deciding without an initial policy determination of a kind clearly for non judicial discretion; or
- iv. the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;
- v. or an unusual need for unquestioning adherence to a political decision already made;
- vi. or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

26. In 2012 in the case of '*Zivotofsky versus Clinton*' [132 S. Ct 1421 (2012)] Chief Justice Roberts of the US Supreme Court reaffirmed the first two of the six factor test in *Baker versus Carr*, supra, by stating that a political question exists "where there is a textually demonstrable constitutional commitment of the issue to a co ordinate political department; or a lack of judicially discoverable and manageable standards for resolving it". The six factor test formulated in *Baker's* case, supra, has not been over ruled, rather the first two factors have been reasserted and reaffirmed. The doctrine of political question is based on the foundation of the theory of trichotomy of powers, also known as separation of powers between the three distinct organs of the State. The framers of our Constitution have also clearly demarcated and distinguished the respective functions, powers and jurisdiction of the

three organs, namely, the executive, the judiciary and the legislature. The doctrine of political question, therefore, guides a Court in ensuring that the Constitution is enforced and implemented as intended by its framers. The Court can neither encroach upon nor usurp the powers clearly vested in the other organs, nor allow others to do so. The Court itself is a creation of the Constitution and derives its powers there under, and has been entrusted with the function of jealously guarding the scheme of separation of powers as envisaged by the framers. The judiciary, as an organ, has been empowered to interpret the Constitution and the laws, and applying such interpretations to the matters brought before us. It is our Constitutional duty to give effect to the intention of its framers by ensuring that if a matter has been in any measure committed by the Constitution to another branch, then we jealously guard the power of that branch in its exercise, and refuse to interfere unless it could explicitly be shown that the respective organ has exceeded whatever authority has been committed to it. In the instant case Article 64 (1) has unequivocally committed the power of giving effect to the resignation of a Member of the National Assembly to the Speaker and, therefore, on the touchstone of the doctrine of political question the matter would not have been justiciable even if the Speaker had expressed his satisfaction through an order that the resignations were not to take effect. Likewise, any action or inaction under Article 64 (2) would not be justiciable on the touchstone of the said doctrine and also under Article 69 of the Constitution, being in the nature of formal proceedings of the House.

27. The prayer at serial number (i) assumes that the resignations of respondents No.7 to 35 were voluntary and genuine, and a declaration has been sought in this regard as well. Neither can this Court usurp the powers vested in the Speaker by the Constitution, nor make him go through the rigours of adducing evidence in the Court, inevitably expressing our lack of respect for the office of the Speaker and the representative forum of the people of Pakistan i.e the National Assembly. This is clearly hit by the doctrine of political question. The prayers and the petition have become infructuous as, admittedly, before the Speaker could conclude the inquiry the resignations have been retracted, and have thus become ineffective and no more valid, as has already been held.

28. Based on what has been discussed above, neither is the petition maintainable, nor does any matter placed before us require our intervention in the exercise of the powers and jurisdiction vested in this court under Article 199 of the Constitution. The petition is accordingly dismissed in limine.

29. Before parting with this judgment we would like to note that the petitioner is a highly respectable Member of the Bar, with enviable credentials. His spirit and *bonafides* reflected from his endeavours in safeguarding, protecting and upholding the Constitution are unquestionable. We hope that the settled law and principles as

discussed above will satisfy his conscience. While we appreciate his zeal for protecting the Constitution, at the same time we expect that he would appreciate that just as the Courts jealously guard their own Constitutional role, a duty is also owed by him, as a Member of the Bar, to likewise respect and uphold the role assigned by the Constitution to the other two organs. Expecting this Court to encroach upon the powers or jurisdiction manifestly committed to the legislature or the executive shall tantamount to violating the unambiguous intention of the framers of the Constitution, evident by incorporating the principle of separation of powers between the organs. We have been informed that PTI is the third largest party in the National Assembly and almost 70 million eligible citizens had voted and sent respondents No.7 to 35 to fill the seats on their behalf. It would be unjust and unfair if the mandate of these 70 million is brushed aside in such casual manner as has been argued by the petitioner.

30. The people of Pakistan have been made to suffer for a long time by depriving them of their fundamental right to govern through democratic dispensation. The long spells of undemocratic regimes, at the expense of usurping the rights of the people of Pakistan through tyranny and despotism, has caused this country irreparable consequences. The greed for power of an elitist minority shattered the cherished dreams of the founding forefathers, who had achieved a free homeland through enormous sacrifices. The success of their nefarious designs was possible only by undermining and destroying the essence of

the doctrine of separation of powers, as it was the only formidable hurdle in their path. The first Constituent Assembly, of which our great founder and Quaid Mohammad Ali Jinnah was the first President, was mercilessly sent packing, and with great respect and humility, it also left a scar on us i.e the judiciary. The institutions which represented the will of the people were not allowed to take root. Even today, sixty eight years after the creation of Pakistan, the institutions which epitomise the will of the people are in a nascent phase, weak and struggling. The rule of law is firmly embedded in the supremacy of the Constitution, which in turn upholds the doctrine of separation of powers. Institutions, particularly the three organs, the legislature, the judiciary and the executive, have to rise to the occasion and walk an extra mile by sacrificing their respective institutional egos, demonstrating grace and ensuring that the principle of separation of powers is not only respected but enforced in its true spirit. This requires statesmanship and grace, not only at an individual level but more so at the level of institutions. The political forces have demonstrated maturity in the recent past by uniting against the enormous challenges facing the people of Pakistan. The innocent martyrs of Army Public School forced them to unite but after that they have shown wisdom in making a declaration of being at war and building consensus as reflected from the document known as the National Action Plan. It is time to learn from the past and move forward by ensuring the supremacy of the Constitution and by respecting the domain of each organ of the State. No institution, including the judiciary, can absolve itself from the scars left by the past. Commitment to the

Constitution and a strict and solemn respect for the separation of powers between the three organs is the only path which will lead the nation to a bright, strong and prosperous future. The Constitution, therefore, has to be made workable and that can only be achieved if the separation of powers is not only respected but jealously guarded. This Court expects that at this juncture of our history the political forces would settle their grievances in the political forums rather than taking the precious time of the *bonafide* litigants awaiting justice to be dispensed expeditiously. We also expect that the political forces will strive to create harmony and refrain from undermining the prestige of the Parliament, a symbol of unity of the Federation and the peoples' will. Parliament deserves utmost respect because the 342 Members occupy the seats on behalf of the people of Pakistan.

31. The office is directed to send a copy of this order to the Speaker, National Assembly through Special Messenger.

(AAJMER FARDOQ)
JUDGE

(ATHAR MINALLAH)
JUDGE

Announced in the open Court on 13-04-2015

Judge

Judge

Approved for reporting.

Blue slip added
*Luqman Khan/