

IN THE SUPREME COURT OF PAKISTAN
(Original Jurisdiction)

PRESENT :

Mr. Justice Iftikhar Muhammad Chaudhry, CJ
Mr. Justice Mian Shakirullah Jan
Mr. Justice Mahmood Akhtar Shahid Siddiqui
Mr. Justice Khilji Arif Hussain
Mr. Justice Tariq Parvez
Mr. Justice Amir Hani Muslim

SUO MOTU CASE NO. 24 of 2010

[Regarding Corruption in Hajj Arrangements in 2010]

HUMAN RIGHTS CASES NO.57701-P, 57719-G, 57754-P, 58152-P, 59036-S, 59060-P, 54187-P & 58118-K of 2010 AND 1291-K & 1292-K of 2011

[Applications by Abdul Rasheed & others]

On Court notice: Moulvi Anwar-ul-Haq
 Attorney General for Pakistan
 Mr. Amanullah Kanrani, A.G. Balochistan
 Mr. M. Azam Khattak, Addl. AG, Balochistan
 Syed Arshad Hussain Shah, Addl. A.G., KPK
 Ch. Khadim Hussain Qaiser, Addl. AG Punjab

For M/o Religious Hafiz Sher Ali, JS, HAJJ
Affairs

For FIA: Syed Tehseen Anwar Ali Shah, DG
 Mr. Muhammad Azam, Director Law

Date of hearing: 29.07.2011

ORDER

IFTIKHAR MUHAMMAD CHAUDHRY, CJ – The instant case relates to massive corruption in the Hajj arrangements for the Hajj 2010. A Committee of the Parliamentarians, namely, Moulana Muhammad Qasim, MNA, Chairman Standing Committee for Religious Affairs (National Assembly), Syed Muhammad Saleh Shah, Senator, Chairman Standing Committee for Religious Affairs (Senate), Pirzada Syed Imran Ahmad Shah, MNA, Mr. Bilal Yaasin, MNA and Dr. Khalid Mehmood Soomro was constituted by the Prime Minister who visited

Saudi Arabia so as to observe the Hajj arrangements. *Vide* letter dated 01.09.2010 the said Committee reported to the Prime Minister that corruption and malpractices were committed by the officials of the Ministry of Religious Affairs in the Hajj arrangements in the hiring of buildings for the Hujjaj. A copy of the letter was also sent to one of us (Chief Justice).

2. Senator Khalid Mehmood Soomro also requested this Court (Chief Justice) through electronic media in TV Programme "Duniya Mere Aage" relayed by a private channel to initiate probe into the matter. Likewise, prior to the request made by the Parliamentarians, a letter from H.E. Prince Bander Bin Khalid Bin Abdul Aziz al-Saud was also received by this Court alleging corruption and embezzlement in Hajj arrangements on the part of the officials responsible in hiring accommodation for the Hujjaj in regard to the buildings which were situated distantly from the Haram on exorbitant rates in place of buildings available on much less rent which were nearer/closer to the Haram. Giving importance to this letter as it was received from a highly respectable personality of brotherly country, on 29.10.2010 the following order was passed: -

"...This issue seems to be serious and may cause bad name for our Government. Call for comments from Secretary, Religious Affairs and this matter be also brought into the notice of Foreign Affairs."

3. Comments were also called from the Ministry of Foreign Affairs in this regard. It is important to note that as per news clippings titled "Hajj Accommodation Scam" published in the Daily Dawn dated 07.11.2010, a Senator demanded a 'House Committee' to probe into the allegations contained in the letter of the Saudi Prince, addressed to the Chief Justice about exorbitant rent being charged from Pakistani

pilgrims for their accommodations in Makkah. This news item further added that the issue has rattled many people and concerns have been expressed in both Houses of Parliament, therefore, Government must probe the matter to make the truth known to the people and take appropriate action if necessary and streamline the accommodation for them in future. Similarly, the 'Daily Nawa-i-Waqt' in its edition published on 10.11.2010 carried a report titled "*Hajj Intizam main honewali corruption*", alleging that the former DG, Hajj Rao Shakeel Ahmed was appointed to the office in violation of the rules, with a view to facilitate him in indulging in corruption. The said DG has a tainted past with corruption case pending against him in the Accountability Court, Lahore. The report further alleged that notwithstanding the fact of genuineness or otherwise of the Prince's letter, its contents are accurate, inasmuch as exorbitant rent has been charged from the pilgrims for providing them cheap accommodation located at a distance of 3 to 3 ½ KM from the Haram. The report bemoans of the corrupt practices being resorted to by the officials who were looking after the interest and welfare of the pilgrims.

4. The parliamentarians, print media and electronic media not only highlighted the corruption in regard to the hiring of buildings located distantly from 'Haram' at exorbitant rent and charging the pilgrims ostensibly at high rate of S.R.3600 demanded probe into the matter. This issue also published in largely circulated newspapers including Daily 'Dawn', The 'News International', 'Jinnah', 'Jang' and Daily 'Naw-e-waqt' with editorials.

5. During the Hajj, some of the Hujjaj submitted applications to Khalil-ur-Rehman Ramday, J., (as he then was) complaining ill

treatment during the Hajj. Mr. Ramday forwarded such applications to the Chief Justice with the following remarks:-

"A large number of persons came to me in Makkah Mukarramah and even in Mina complaining of grave mismanagement in the Hajj arrangements regarding the buildings hired in Makkah and Madina and the accommodation in Mina. The stories narrated were pathetic. Complaints were made even in writing. I appear to have misplaced those written complaints, but two of them are available with me, which I am placing before you for such action as may be deemed appropriate to eliminate the sufferings of thousands of Hajjis who collect pennies all their lives to perform Hajj and this is how the money earned by them through their blood and sweat is wasted."

6. Vide order dated 02.12.2010, the matter was ordered to be heard on the judicial side. In the meanwhile, the Court was informed during the hearing of the case that Rao Shakeel Ahmed, had been facing criminal proceedings in Reference No. 76 of 2007 pending adjudication before the Accountability Court No. II, Lahore wherein evidence of 18 out of 32 witnesses was recorded. Court was further informed that investigation in NAB case on the charge of assets beyond known sources of income was pending against him. The said investigation was pending since 2004 and at one stage, one investigating officer recommended for cancellation of the case on the ground that no case was made out, but the NAB Headquarter declined the recommendation and ordered for reinvestigation of the case. It is important to note that his name was also placed on the ECL at the time when he was selected out of a panel of three persons as DG Hajj. This fact was revealed to the Court by Mr. Khushnood Akhtar Lashari, the then Secretary Establishment, who placed on record summary of

the appointment of Rao Shakeel Ahmed as DG Hajj. According to the summary, his name was considered along with two other officers, namely, Mr. Nayyar Mahmood and Mr. Sajjad Haider Afzal by a Departmental Selection Committee for said appointment. It may not be out of context to observe that in the summary, it was categorically mentioned that two NAB cases were pending against Rao Shakeel Ahmed. However, the Prime Minister approved him to be appointed as Director General Hajj, Jeddah.

7. According to a report, which was filed by Mr. Nasar Hayat, the then Additional Secretary that Rao Shakeel Ahmed himself had applied to Federal Minister for Interior, Government of Pakistan, Mr. A. Rehman Malik for deletion of his name from the ECL. Interestingly, perusal of the letter indicates that on an SMS message by the Interior Minister, the name of Rao Shakeel Ahmed was removed from the ECL though cases were pending against him before NAB.

8. The then Minister for Hajj and Religious Affairs, Syed Saeed Kazmi, who is presently in custody, was also involved, in the Hajj Scam, he, therefore, appeared before this Court voluntarily along with his counsel. Another Minister of the Government, Mr. Azam Khan Swati, Minister for Science and Technology, who was complainant, in response to the notice also appeared before the Court and filed reply and undertook to furnish material connecting the officials with corruption. He was directed to appear before the FIA authorities where the case has been registered. The DG FIA Mr. Wasim Ahmed along with Director Law and different investigation officers did participate in the proceedings.

9. Since it was a high profile case relating to massive corruption, hue and cry was raised against it all over the country as well as abroad against the Minister of the Federal Government and other High Officials. The Members of the Parliament and the Hujjaj also started appearing before the Court during proceedings and joint application signed by 122 Hujjaj was also filed before this Court raising painful voice, highlighting the corruption and the miseries the pilgrims had to suffer during the Hajj. Keeping in view the prestige and honour of the country, and to ensure above the board accountability of the wrongdoers responsible for massive corruption, it was only possible if the investigation on the criminal side was carried out by appointing experienced officer as Investigating officer, having capability of dealing with the case, without being influenced by any authority. Therefore, it was pointed out to the DG, FIA that instead of investigating the case from grade 16 officer, who did not show any interest in the investigation, and his performance was unsatisfactory, should appoint some senior officer in order to see that investigation is carried out transparently, in accordance with law without caring status of the accused.

10. A perusal of the record suggests that on the dates of hearing, the affected Hujjaj one by one started submitting applications before this Court. In this behalf, one Muhammad Ali, a retired officer of grade 21, who performed Hajj 2010, narrated painful story of miseries he and his family members faced during the Hajj, particularly in respect of the events, which took place in Mina as well as in Makkah due to the acts and deeds of the functionaries responsible for making Hajj arrangements. He portrayed a sordid picture of events, which according to him had taken place for obvious reason of malpractice,

corruption and mismanagement on the part of the functionaries responsible in that behalf.

11. At this point of time, it transpired that the Ministry of Hajj had charged SR 700 from each Haji for providing them suitable accommodation in Mina and admittedly they were not provided accommodation despite collecting the rent from them. Therefore, by order dated 13.12.2010 the Secretary, Religious Affairs was directed to refund the amount of SR 700 to the said pilgrims and submit certificate to this effect before the next date of hearing. We may observe that in pursuance of the aforesaid directions, the Government of Pakistan had reimbursed an amount of 470 million rupees to about 25000 Hujjaj, which amount was charged from them towards rent but they were not provided accommodation and were made to suffer the agony of non-accommodation. On the said date, Mr. Wasim Ahmed, DG, FIA submitted report, which report was incorporated in the order of that date wherein it was stated as under: -

"11. Mr. Waseem Ahmed, Director General, FIA has submitted his report, concluding paras therefrom are reproduced herein below : -

"3. in the light of the facts brought on record the role of those, senior and junior, already under arrest needs to be probed further to ascertain their involvement in the corruption and mismanagement.

4. It seems from the facts and circumstances of the case that Secretary was having no control on the affairs of the Directorate General of Hajj, Jeddah. DG/Hajj appears to have assumed unchecked authority in all administrative and financial matters. The hiring procedure after repatriation of Shakeel Ahmed Rao, completed under the supervision of Secretary MORA, was also not in accordance with the policy. This reflects gross mismanagement and loses control on the part of Secretary MORA.

5. Incriminating evidence is yet to be collected from Saudi Arabia, especially, once Ahmad Faiz s/o Muhammad Shafi is arrested and interrogated.

6. Accurate determination of those involved in crime, both directly or indirectly hinges on the finding of the FIA team that is proceeding to Kingdom of Saudi Arabia, where all transactions took place, funds (ill-gotten money) were transferred/remitted and the concerned officials and private persons were located."

He further stated that Mr. Hussain Asghar, Director, FIA with the rank of DIG, Police has been appointed as head of the Investigating Team, who with his team is proceeding today to Saudi Arabia for conducting further investigation."

12. Mr. Hussain Asghar, Director FIA with the rank of DIG Police, was assigned the task to head investigation in the Hajj Scam. He took over the charge and accelerated the investigation by collecting evidence. During the course of investigation, he also visited Saudi Arabia. In addition to Mr. Hussain Asghar, another officer was associated to accelerate investigation. One of the Federal Minister was supporting the allegation of corruption against the other Federal Minister. This Court wanted to ensure that the investigation of the case must be conducted in a transparent manner and also desired that the facts be brought into the notice of the Prime Minister, who may personally look into the matter and ensure that the investigation is conducted without influence of any official against whom allegations of corruption and or corrupt practices have been leveled.

13. When the investigation was in progress and sufficient incriminating evidence was collected by the investigation team headed by Mr. Hussain Asghar, Syed Jawaid Ali Shah Bokhari, was posted as

Additional Director General, FIA, and the officers earlier assigned investigation were disassociated without assigning reason. Mr. Hussain Asghar who was heading the investigation team had started unfolding different aspects of the case and had collected sufficient material during investigation against influential persons, well placed in the Government. On appointment of Syed Jawaid Ali Shah Bokhari, he was assigned investigation but he disassociated himself for which his explanation was sought. His reply was to the effect that as his promotion was due in grade 22, therefore, he wanted to avail the chance. However, separate observations have been made against him directing the Government to initiate departmental proceedings against him as he had refused to perform his duties. We would not like to comment upon this aspect of the case at this stage as it might cause prejudice to the Mr. Jawaid Bukhai in the departmental proceedings pending against him.

14. As far as Hussain Asghar is concerned, he also appeared and had placed before the Court Notification of his transfer to Gilgit-Baltistan as Inspector General Police, therefore, explanation of Malik Muhammad Iqbal, DG FIA who had, in the meanwhile had taken over the charge, was sought. This Court was of the view that, he being a senior officer instead of ensuring to accelerate progress of the investigation in the right direction started hampering the investigation after taking over the charge and things had come to a stand still. After the transfer of Mr. Hussain Asghar, no progress in the investigation was made and the DG, FIA, was called upon to explain as to why in the mid of the investigation when the case was proceeding towards its

logical end, he spared and relieved Mr. Hussain Asghar without bringing into the notice of this Court.

15. The D.G, FIA, has stated that he had no objection if Mr. Hussain Asghar was re-posted to complete investigation and in this regard Malik Muhammad Iqbal, then D.G, FIA, had sent a letter for reposting of Mr. Hussain Asghar, but no response was received from the competent authority. On 10.6.2011, the then Secretary Establishment and D.G, FIA, appeared in Court and sought time to enable them to approach the competent authority for reposting of Mr. Hussain Asghar in the FIA. The case was adjourned and again on 25.7.2011 when it was taken up no progress was shown to have been made, therefore, on the said date, following order was passed: -

Iftikhar Muhammad Chaudhry, C.J. On the last date of hearing the following order was passed:

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".....The Secretary Establishment is present and confirmed about obtaining sparability report of the Officer from the Director General, FIA through Secretary Interior and on getting positive reply from him, he was posted out. However, both of them, i.e. the Secretary Establishment and the Director General, FIA stated that some time be given to them so that they may again approach the Competent Authority for re-posting of Mr. Hussain Asghar in the FIA. The case is adjourned. To be fixed after two weeks."

2. *It appears that compliance has not been made so far as a result whereof no progress in the investigation of the Hajj scam case is being made as no responsible or serious officer has been posted. Undoubtedly this Court has time and again politely expressed its desire that a person who is capable to deliver should be posted to carry out the*

investigation but it seems that orders of this Court are being flouted intentionally.

3. Under the circumstances we direct the Secretary, Establishment Division, that he should immediately, during the course of the day, issue transfer orders of Mr. Hussain Asghar as Director FIA enabling him to resume his duty as such and continue to investigate the case otherwise he should appear and face the proceedings for non-compliance of the order. In the meanwhile, he shall also put up the list of the officers available at that time when Mr. Hussain Asghar was posted as I.G. Gilgit Baltistan because it seems that in order to disassociate him from the present proceedings he was posted out on taking a report about the sparability from the DG FIA who also dishonestly gave the report knowing well that Mr. Hussain Asghar is conducting investigation of an important case in which not only the pilgrims have been looted but it has also brought a bad name to the country. It is important to note that after Mr. Hussain Asghar was posted out no further progress has been made in the case.

4. On the issuance of the notification during the course of the day DG FIA is directed to provide him every cooperation and assistance alongwith his team which was already conducting the investigation.

5. Adjourned for tomorrow i.e., 26.07.2011.

16. Under the above circumstances, Secretary Establishment forwarded a summary for the reposting of Mr. Hussain Asghar and as the needful was not done, therefore, he was asked to comply with the Court order by issuing the Notification. Accordingly, he obeyed the judicial order and issued the Notification of transfer of Mr. Hussain Asghar on 26.07.2012¹, but it seems that so far he had not reported to the FIA Headquarter as according to the learned Attorney General for Pakistan no direct contact had been established so far with him

except information collected from the documents from the Chief Secretary, Gilgit-Baltistan that the said administration had declined to relieve him without provision of replacement.

17. The learned Attorney General for Pakistan in this respect has placed on record following report dated 28.7.2011:-

“REPORT ON BEHALF OF DIRECTOR GENERAL FIA

Respectfully Sheweth:

In continuation of previous report submitted on 27.07.2011, the following steps have been taken in pursuance of the directions given by the apex Court on 28.07.2011 : -

- i. ADG Mr. Muhammad Manzoor tried to contact from his cell number 0321-9480003 with Mr. Hussain Asghar on his cell phone number 0345-3056663 & 0355-5550161 but the same were not responding.
- ii. DIG HQ Gilgit Baltistan Police was contacted to know about IGP (Mr. Hussain Asghar). He informed that the IGP was in Skardu but he is having no contact with him. The DIG however, Faxed a copy of the Service Department, Government of Gilgit Baltistan Notification dated 26.07.2011 addressed to IGP, containing directions that “the Chief Minister Gilgit Baltistan has verbally directed you not to relinquish the charge of IG Police Gilgit Baltistan without approval of the competent authority (Chief Minister, GB) and without provision of your replacement”
(Annex-A)
- iii. DIG HQ was asked to establish contact with IGP and inform him about the orders of Hon’ble Supreme Court of Pakistan, dated 27.07.2011. He was also asked to communicate with SP Skardu for locating Mr. Hussain Asghar and deliver the message to IGP by utilizing wireless communication network.

- iv. The copies of the orders of Hon'ble Supreme Court of Pakistan dated 27.7.2011 have separately been faxed to the Chief Secretary, Government of Gilgit Baltistan (fax no.05811-920144) and the Inspector General Police G.B. (fax no.05811-930015) for immediate compliance **(Annex- C & D)**.
- v. Director General FIA gives an assurance to the apex court that as and when Mr. Hussain Asghar reports for duty in FIA, the investigation of Hajj Scam cases will be handed over to him and the investigation team, already working with him, will be re-attached with the officer. He will also be facilitated in all manners to carry out the investigation of the Hajj Scam cases.

Sd/-
Syed Tahsin Anwar Ali Shah
Director General/FIA
28.07.2011"

18. Interestingly in compliance with the order of this Court Mr. Sohail Ahmed, the then Secretary Establishment, who issued notification of transfer of Mr. Hussain Asgar, was made OSD vide notification dated 26.7.2011, copy of which has been placed on record which reads as follows:-

"Mr. Sohail Ahmed, a BS-22 officer of Secretariat Group, presently posted as Secretary, Establishment Division, is transferred and posted as OSD, Establishment Division, with immediate effect and until further orders."

19. This Court is of the view that if a civil servant like Mr. Sohail Ahmad, who had stood for supremacy of the Constitution and Rule of Law has obeyed the judicial order, he could not have been penalized by making him O.S.D. It is well settled that placing an officer as OSD is tantamount to penalizing him because the expression 'OSD' is not known to either the Civil Servant Act, 1973 or the Civil Servant's Appointment Promotion and Transfer Rules, 1973. We may deal with

this aspect of the case in subsequent part of this order. On 27th July, 2011 all these facts were incorporated in the order, which is self explanatory, therefore, the same is reproduced herein below: -

“Syed Tehseen Anwar Ali Shah, DG FIA has appeared and states that the orders passed by this Court dated 25.07.2011 and 26.07.2011, pursuant to which Establishment Division has issued Notification on 26th July, 2011, transferring Mr. Hussain Asghar from the office of Inspector General, Gilgit Baltistan to Director, FIA enabling him to conduct investigation of the Hajj scam case, shall be fully implemented. According to him the investigation team which was headed by Mr. Hussain Aghar earlier has also joined him in investigation. He, however, further states that Mr. Hussain Asghar so far has not reported to the FIA Headquarters. The DG FIA has submitted that he was out of station i.e. in Karachi and has reached last night and could not contact Mr. Hussain Asghar. He, however, ensures that Mr. Hussain Asghar will reach Islamabad immediately on relinquishing the charge and shall take over the charge of the Director FIA either by air if any flight is available or he could be asked to reach Islamabad by Road.

2. In view of the above, we postponed the hearing of the case for this purpose till tomorrow to see whether Mr. Hussain Asghar has assumed the charge as Director FIA in compliance with the orders of this Court dated 25.07.2011 and 26.07.2011.

3. It has been reported in the Electronic and Print Media that Mr. Sohail Ahmed, Secretary Establishment has been removed from his office and has been made OSD. This development has taken place soon after the issuance of the Notification by him transferring Mr. Hussain Asghar from the office of the Inspector General of Police Gilgit Baltistan to Director FIA to enable him to continue the investigation of the Hajj corruption scam. In fact the Secretary Establishment in compliance with the orders of this Court, has issued the notification of transfer of Mr. Hussain Asghar as Director FIA.

4. We may observe that prior to passing of the orders on 25th and 26th July, 2011, the observations were made by this Court at times requiring the Competent Authority to transfer and post Mr. Hussain Asghar as Director FIA to enable him to conduct the investigation in Hajj Scam case which case has not only brought bad name to the country but also reveals that senior government officials and influential persons are involved in the scam who have pocketed huge amounts. After the transfer of

Mr. Hussain Asghar to the Gilgit, the investigation in the scam had come to a stand still. Despite repeated efforts, Mr. Hussain Asghar, who was previously conducting the investigation and has made break through was not brought back as Director, FIA as a result whereof this Court was left with no option but to pass the orders in exercise of its Constitutional Jurisdiction. During the course of proceedings on 26th July, 2011, it has also been revealed that Mr. Sohail Ahmed, Secretary Establishment had floated a summary to the Competent Authority regarding transfer of Mr. Hussain Ashgar, as Director FIA but no action was taken on it by the Competent Authority.

5. Needless to observe that this Court is of the considered view that once a judicial order is passed, it has binding effect on the Executive as well as Judicial functionaries in terms of Articles 5 and 190 of the Constitution of Islamic Republic of Pakistan. Therefore, the attention of Mr. Sohail Ahmed, Secretary Establishment was drawn towards these Constitutional provisions, non-compliance of which would have exposed him liable to contempt proceedings. This fact finds place in our order passed in the earlier part of the day on 26.07.2011. However, Mr. Sohail Ahmed, Secretary Establishment has complied with the order after tea break when the Court assembled for further hearing and placed the copy of the notification in terms of order of this Court. The language of the notification clearly speaks this fact that the notification was issued in compliance with the orders of this Court which act on his part was in discharge of his Constitutional commitment as required under Article 190 of the Constitution. Such officer cannot be penalized inter alia on the ground that he issued the notification in violation of the rules. The Secretary Establishment has issued the notification in compliance with the order of this Court dated 25.07.2011 and 26.07.2011. If such officer is made OSD it will not send a good message to the country.

6. We have already expressed at number of times that transfer and posting is the domain of the Executive Authority; however, keeping in view the peculiar facts and circumstances of the case, instead of passing orders ourselves, we had send the issue of transfer/reposting of Mr. Hussain Asghar as Director FIA to the Government through Attorney General for Pakistan but it did not work. Under these circumstances, we examined the administrative orders ourselves in exercise of the powers of Judicial Review and have passed the orders on 25.07.2011 and 26.07.2011, which have resulted in making Mr. Sohail Ahmed as OSD. It is not only Mr. Sohail

Ahmed, Secretary Establishment, who had suffered for obeying the lawful orders and if such acts are allowed to continue, it will have serious impacts on the officials/authorities and will send message to them that if they comply with orders of Supreme Court without seeking prior approval of the Competent Authority, they will be posted out or they shall be proceeded against departmentally. Moreover, it would discourage upright, honest and committed officers as well. Therefore, under these circumstances, this Court cannot leave such officers at the mercy of the Executive to deal with them in a manner they like. There is no cavil that the Executive has to exercise powers under the Rules but such discretion has to be exercised judiciously as has been spelt out in the case of Tariq Aziz-ud-Din: In re. (2010 SCMR 1301).

7. The manner in which Mr. Sohail Ahmed, Secretary Establishment has been penalized persuade us to have strong reasons to believe that it was an act designed to frustrate the orders of this Court. The immediate reaction shown by the Competent Authority was not called for, because Mr. Sohail Ahmed has obeyed the judicial order, which he was bound under the Constitution, which is a sacred document and every authority in the country is bound to follow it; if any authority makes a departure from any of its provisions, it is likely to lead to chaos in the country which may lead to serious consequences. Such an eventuality ought to be avoided by all persons in authority. Under the Constitution, if this Court passes orders, it should be complied with and no approval of any authority in Executive is required for its implementation. The rules or even statutes, which are subordinate to the Constitution could not place bar on the authority of this Court to seek the enforcement of its orders.

8. However, when we enquired from the Attorney General from Pakistan as to whether he had seen the notification under which Mr. Sohail Ahmed, Secretary Establishment has been made OSD, he has stated that he came to know about it only through Electronic media and newspapers. We may note here that the Registrar of this Court has also placed a note for our perusal, indicating the events which took place after the issuance of the notification of transfer of Mr. Hussain Asghar.

9. At this stage, we have asked the learned Attorney General for Pakistan, in whose presence this order has been dictated, to contact the Competent Authority and convey the above order and also ensure that Mr. Sohail Ahmed be reinstated as Secretary Establishment and the notification/ order

of his being posted as OSD be withdrawn. The Attorney General shall submit the report in writing in this behalf i.e. whatever he has communicated to the Competent Authority and the reply he has received in response thereto.

10. We postponed the hearing till 11.30 a.m. today for compliance of the above order.

11. When the matter is taken up again after 11.30 a.m. the learned Attorney General for Pakistan has placed on record the copy of the Notification No.F.No.41/335/2009-E-I, dated 26th July, 2011 in pursuance whereof Mr. Sohail Ahmed, Secretary Establishment was made OSD with immediate effect and until further orders. He has informed that the Chief Executive/Prime Minister of Pakistan was out of town and no sooner he arrived back to Islamabad, he had gone to attend the Cabinet meeting already scheduled for today, therefore, he could not establish contact with him. He, however, had spoken to the Principal Secretary to the Prime Minister and had asked him to bring to the notice of the Prime Minister the observations made by this Court today in the order passed in Court, who has assured that he will convey him. Since the case is being adjourned, we asked the learned Attorney General for Pakistan that he should personally meet with the Prime Minister today along with certified copies of the order passed by this Court and explain him the intrinsics of the Constitutional and legal provisions along with the observations made herein above and that whatever reaction he gives should be reduced in writing and be placed before us tomorrow. The learned Attorney General shall also produce before us the relevant file including the summary on the basis of which the notification referred to herein before has been issued.

12. The learned Attorney General has also informed that the DG FIA has been deputed by him to contact Mr. Hussain Asghar, enabling him to come back and resume the charge of Director FIA, therefore, he has gone to his office to implement the directions, which were passed in his presence in the Court.

Put up on 28.07.2011 for further hearing."

20. The judiciary including the High Courts and the Supreme Court is bound to protect and preserve the Constitution as well as to enforce fundamental rights conferred by the Constitution either individually or collectively, in exercise of the jurisdiction conferred

upon it either under Article 199 or 184(3) of the Constitution. We are fully cognizant of our jurisdiction, it is one of the function of the judicial functionaries to decide the matters strictly in accordance with the Constitution and law. We are conscious of our jurisdiction, and exercise the same with judicial restraint. But such restraint cannot be exercised at the cost of rights of the citizens to deny justice to them. The scheme of the constitution makes it obligatory on the part of superior Courts to interpret constitution, law and enforce fundamental rights. There is no cavil with the proposition that ultimate arbiter is the Court which is the custodian of the Constitution, as it has been noted herein before and without repeating the same, this Court had initiated proceedings in the instant case as is evident from the detailed facts and circumstances noted hereinabove to ensure that corruption and corrupt practices by which the Hujjaj were looted and robbed has brought bad name to the country. On account of intervention of this Court some relief has been granted to the Hujjaj as the Government on directions of the Court had paid SR 700 to each Haji. It was the result of a competent, honest and upright Director FIA who was heading the investigation team which was unearthing material against the culprits.

21. As noted hereinabove, initially the Court was not approached by the Hujjaj but by the Parliamentarians themselves and we ourselves through the learned Attorney General for Pakistan had asked the Prime Minister to look into the matter which was of highly sensitive nature. This indicates that instead of passing appropriate orders against anyone this Court exercised restraint.

22. Since the evidence was collected and the actual accused persons were likely to be brought to book and the investigation was

going on, when in the mid of the stream, a competent officer who was already working in the FIA, and was not transferred under the direction of this Court, was disassociated from investigation and was transferred.

23. This Court is of the considered view that a democratic system must prevail in the Country which aspect has been highlighted in the case of Sindh High Court Bar Association's Case (PLD 2009 SC 879) wherein all the actions of the military dictator were declared unconstitutional besides the elections held in February, 2008 was also under threat of being declared illegal were validated to promote will of the electorate. Justice Abdul Hameed Dogar, who was not recognized as lawful Chief Justice but the oath he administered to the President of Pakistan was declared valid by this Court in order to save the system by holding *inter alia* as under: -

189. Referring to the holding of general elections of February, 2008, the swearing in of the elected members and the formations of the governments at the Federal and, the Provincial levels', the learned Attorney General for Pakistan submitted that the people had spoken and the mandate so given by them needed to be respected, therefore, any declaration by the Court, which would, in any way, affect the democratic system would not be in the interest or welfare of the people. In a somewhat similar situation, in Asma Jilani's case, the Court held as under: -

"The National Assembly has met and ratified the assumption of power by the new President who is an elected representative of the people and the leader of the majority party in the National Assembly as now constituted."

190. We make it clear that the present decision is confined to the questions in issue before this Court, namely, the constitutionality of Proclamation of Emergency, PCO No. 1 of 2007 and Oath Order, 2007, etc. It is noteworthy that the elections of 18th February, 2008 were held after dissolution of the National Assembly and Provincial Assemblies on completion of their term of five years under the Constitution. Accordingly, in pursuance of the said

elections, Assemblies came into existence and governments at the Federal and Provincial levels were formed. Further, the elections were held after the revocation of emergency and not during the currency of PCO No. 1 of 2007. The fact that the initial announcement regarding holding of elections may have been made under an instrument issued by General Pervez Musharraf in pursuance of the actions of 3rd November, 2007 in no way affects the process whereby elections were held and the people of Pakistan expressed their will. Nor are the elections affected by Article 6 of the Revocation of Proclamation of Emergency Order, 2007 which purported to provide that the general elections to the National Assembly and Provincial Assemblies would be held as scheduled, and thereafter the National and Provincial Assemblies would meet on the dates to be specified by the President for the election of Speaker and Deputy Speaker and for transaction of such other business as the President may specify, in no way, affects the validity of the general elections. We, -therefore, hold that the elections of 18th February, 2008 were held in accordance with the Constitution and the law. This Court acknowledges and respects the mandate given by the sovereign authority i.e. the electorate to the democratically, elected government on 18th February, 2008 and would continue to jealously guard the principle of trichotomy of powers enshrined in the Constitution, which is the essence of the rule of law.

191. This Court hopes that all institutions, on the well known principles of good governance, and without transgressing their constitutional bounds, will endeavour to eradicate corruption and selfenrichment, and will devote themselves to the service of the people. Needless to add that the Courts will, at all times, remain vigilant in this behalf and will always come to the rescue of any beleaguered citizen or class of citizens whenever and wherever an occasion 'arises.

192. In any case, it is made clear that any declaration made in this judgment shall not, in any manner, affect the holding of the general elections, formation of governments and the swearing in of the elected representatives of the people, viz. President, Prime Minister, Parliament, Provincial Governments, or anything duly done by these institutions in the discharge of their functions. However, any validation whether with retrospective effect or otherwise, shall remain subject to judicial review on the well recognized principles of ultra vires, non-conformity with the Constitution or violation of the Fundamental Rights or on any other available ground.

24. A perusal of above paragraphs from the case of Sindh High Court Bar Association's Case makes it clear that as the people of this country had voted, their elected representatives should not be disqualified and declared the Parliament as validly elected. The oath of the President was also saved by making observation noted hereinabove to avoid chaos and anarchy in the country. Not only for the present but for the all times to come it was observed that henceforth there shall be no extra constitutional dispensation and the Judges of the Superior Courts were bound down not to take oath under any other dispensation. Relevant paragraph therefrom is reproduced herein below: -

In the Code of Conduct prescribed for the Judges of the Superior Courts in terms of Article 209(8) of the Constitution, a new clause shall be added commanding that no such Judge shall, hereinafter, offer any support in whatever manner to any unconstitutional functionary who acquires power otherwise than through the modes envisaged by the Constitution and that any violation of the said clause would be deemed to be misconduct in terms of the said Article 209 of the Constitution;

25. It is important to note that above para has been incorporated in the code of conduct by the Supreme Judicial Council and Judges of the Supreme Court and the High Courts are bound by the same.

26. Subsequent thereto while in 18th Constitutional Amendment Article 6 was amended almost incorporating the same provisions and later on so many occasions in the judgments this Court

expressed that except the rule of law and the Constitution no other system is acceptable.

27. The power of judicial review which was exercised in the case of Sindh High Court Bar Association (*supra*) has been accepted by the Government as it has not supported the actions of 3rd November, 2007. As far as Parliament is concerned, we have also admired it as a body, which for the first time in the history of the country did not validate the actions taken on 3rd November, 2007, whereas in the past the situation had been different. A number of judgments can be cited for assuming jurisdiction and exercise of power of judicial review available to this Court under the Constitution, to which we need not make reference here, but going through the same one can well understand that this Court has always been enjoying the jurisdiction of judicial review against administrative actions of the executive which is a settled law by now. If any reference is required, right from Madison up to the case of Sindh High Court Bar Association, there are chain of authorities where the Supreme Court has assumed jurisdiction of judicial review, which even otherwise is the final arbiter of disputes in order to maintain check and balance. For these reasons, the independence of the judiciary has been guaranteed and the very preamble of the Constitution provides that the people of Pakistan and the independence of judiciary shall be fully secured. The judiciary cannot compromise at any cost its independence as guaranteed under the Constitution, as such compromises would lead us to the situation of the last so many years. It is for the first time the judiciary asserted its authority and as a result thereof the democratic system is prospering in the country. In the case of Dr. Mubashir Hasan v. Federation of Pakistan (PLD 2010 SC 265) whereby NRO was declared

to be illegal, unconstitutional and void ab initio, this Court has exercised its constitutional jurisdiction of judicial review.

28. At times, present case was fixed for the purpose of seeking implementation of the order, but we postponed in order to ensure that the democratic system under the Constitution must prevail and avoid chaos. However, when the cases of massive corruption, not only one, but so many came for hearing, therefore, this Court in the exercise of its constitutional jurisdiction had enforced fundamental rights of the citizens under Articles 4, 9, 14 and 25 of the Constitution. It is quite heartening to observe that even the worthy Parliamentarians had also approached this Court, like in the case of Rental Power Projects where one of the sitting Ministers namely, Makhdoom Syed Faisal Saleh Hayat had approached the Court. Likewise, Ms Marvi Memon, MNA, approached this Court in the matter of Breach of embankments of rivers in floods causing damages. Similarly, Khawaja Muhammad Asif MNA brought the case of OGDCL, all of them acknowledge power of judicial review of this Court. In matters of the steal Mills, LPG case, National Police Foundation, NICL, Hajj arrangements and RPPs are under consideration including the Bank of Punjab case where, in exercise of the power of judicial review for the enforcement of fundamental rights millions of rupees have been recovered which were being looted by government officials and others. Undoubtedly, whenever the Court will notice that there is corruption or corrupt practices, it would be very difficult to compromise or digest it because the public money of the country cannot be allowed to be looted by any one whatsoever status he may have.

29. The jurisdiction of this Court is always exercised judiciously and with judicial restraint. All those cases which are quoted

hereinabove clearly indicate that in the matter of exercise of power of judicial review in Pakistan we have not travelled so far as is the position in the neighboring country. By now, the parameters of the Court's power of judicial review of administrative or executive action or decision and the grounds on which the Court can interfere with the same are well settled. Indisputably, if the action or decision is perverse or is such that no reasonable body of persons, properly informed, could come to or has been arrived at by the authority misdirecting itself by adopting a wrong approach or has been influenced by irrelevant or extraneous matters the Court would be justified in interfering with the same. [*Commissioner of Income Tax v. Mahindra* (AIR 1984 SC 1182)]. The exercise of constitutional powers by the High Court and the Supreme Court is categorised as power of judicial review. Every executive or administrative action of the State or other statutory or public bodies is open to judicial scrutiny and the High Court or the Supreme Court can, in exercise of the power of judicial review under the Constitution, quash the executive action or decision which is contrary to law or is violative of Fundamental Rights guaranteed by the Constitution. With the expanding horizon of Articles dealing with Fundamental Rights, every executive action of the Govt. or other public bodies, if arbitrary, unreasonable or contrary to law, is now amenable to the writ jurisdiction of the Superior Courts and can be validly scrutinised on the touchstone of the Constitutional mandates. [*Common Cause, A Regd. Society v. Union of India* (AIR 1999 SC 2979)]. In the case of *Union Carbide Corporation v. Union of India* [AIR 1992 SC 248 = 1991 SCR (1) Supl. 251], the Court while taking up the issues of healthcare and compensation to the victims, supervised the distribution of the money among the victims of Bhopal

gas tragedy and monitored the hospitals set up to treat the victims. In Vishaka v. State of Rajasthan [AIR 1997 SC 3011] = [(1997) 6 SCC 241], the Court laid down guidelines to make the workplace safer for women making a grievance redressal mechanism in all private and public offices mandatory. In the case of Vineet Narain v. Union of India (AIR 1998 SC 889), commonly known as *Hawala case*, the Supreme Court of India had taken over the charge of CBI to ensure transparent investigation into corruption and corrupt practices under its own supervision. In the case of Zahira Habibullah Sheikh v. State of Gujarat [(2006) 3 SCC 374], the Court reopened several cases and set up a special investigation team where the police deliberately botched up the probe to help perpetrators of the post Godhra mob violence against Muslims in 2002, including overseas investigations into the Sohrabuddin fake encounter case of 2005 whereby several senior police officers and key politicians were put in the dock. In the case of Rubabbuddin Sheikh vs State Of Gujarat [(2010) 2 SCC 200] petitioner wrote a letter to the Chief Justice of India complaining about the killing of his brother in a fake encounter and disappearance of his sister-in-law at the hands of the Anti Terrorist Squad (ATS) Police (Gujarat) and Rajasthan Special Task Force (STF). Taking notice of this letter, the Court forwarded it to the Director General of Police, Gujarat to take further action. The CID (Crime) conducted an enquiry and the statements of a number of witnesses, including the petitioner, were recorded. The learned Attorney General for India submitted that in view of the serious nature of the offence in which some highly placed police officials of the State of Gujarat were alleged to be involved, orders may be immediately passed directing the CBI to take charge of the investigation and report to this Court. The CBI Authorities were

directed to investigate all aspects of the case relating to the killing of the deceased including the alleged possibility of a larger conspiracy. The report of the CBI Authorities was directed to be filed in the Court when the Court would pass further necessary orders in accordance with the said report, if necessary. Ultimately, it was held that accusations were directed against the local police personnel in which high police officials of the State were involved. Therefore, it was directed that if investigation was allowed to be carried out by the local police authorities, all concerned including the relatives of the deceased may feel that investigation was not proper and in the circumstances it would be fit and proper that the petitioner and the relatives of the deceased should be assured that an independent agency should look into the matter and that would lend the final outcome of the investigation credibility. In the case of Center for Pil v. Union of India [Appeal arising out of SLP (C) No. 24873 of 2010 decided on 16.12.2010], the Court ordered probe into a mega crore scam against the sitting Telecom Minister. In the case of Center for Pil v. Union of India [Writ Petition (C) No. 348 of 2010, decided on 03.03.2011], the Court quashed the illegal appointment of P J Thomas as Central Vigilance Commissioner because of a charge-sheet pending against him in Kerala. The Court also laid down guidelines for future appointments to this post. In the case of Radhy Shyam v. State of UP (Civil Appeal No. 3261 of 201, decided on 15.04.2011), the Supreme Court quashed Government's notification to acquire land for the planned industrial development in District Gautam Budh Nagar through Greater Noida Industrial Development Authority, which appeared to be a device to grab the land of the poor farmers. In the case of Nandini Sundar v. State of Chattisgarh [Writ Petition (Civil) No. 250 of 2007

decided on 05.07.2011], the Court disbanded and disarmed Special Police Officers involved in anti-Naxal operations in many states. Thus, the Supreme Court of India has been monitoring public distribution system, treatment at hospitals and conservation of forests for more than two decades. It also set up a judicial commission to examine the public distribution system and directed the Government to provide more facilities in the poorer districts.

30. Our own judgment in the case of Bank of Punjab v. Haris Steel (PLD 2010 SC 1109) highlights the jurisdiction and powers of this Court. Relevant paras therefrom are reproduced hereinbelow: -

"26. In questioning the jurisdiction of this Court, Mr. Irfan Qadir, the learned Prosecutor General for the NAB submitted, as has been noticed above, that this Court had no jurisdiction to control investigation of a criminal case and the reason offered by him in support of the said submission was that such a control over the Investigation of a criminal case by this Court could be "PREJUDICIAL TO THE ACCUSED." The only judgment cited by him to buttress his said plea was the case of Malik Shaukat Dogar and 12 others v. Ghulam Qasim Khan Khakwani and others (PLD 1994 SC 281).

28. Therefore, the dictum laid down in Khawaja Nazir's case was not applicable to the present situation and seeking its application to the facts and circumstances of the present case was misplaced. While we are on the subject, we would like to refer to a judgment of this Court delivered in the case of Advocate. General Sindh v. Farman Hussain and others PLD 1995 SC 1 which judgment was then cited with approval in a recent judgment of this Court, namely, Zahid Imran and others v. The State and others (PLD 2006 SC 109). The principle which had been highlighted in the said judgments was that they/approach of a Court of law while dealing with criminal matters had to be dynamic keeping in view the facts and circumstances of each case and also the surrounding situation obtaining in the country. In view of the facts and circumstances of the present case summarized above, it would have been felonious and unconscionable on the part of this Court if it had refused to intervene to defend the fundamental rights of such a large section of the public and leaving it only to the concerned officials of the NAB

who had done nothing at all in the matter for almost TWO YEARS; who had remained only the silent spectators of this entire drama and had only witnessed the escape of the accused persons to foreign lands. It is to check and cater for such kind of gross negligence, non-feasance and malfeasance that the framers of the Constitution had obligated the High Court under Article 199 and this Court under Article 184(3) of the Constitution to intervene in the matter exercising their power to review administrative and executive actions. This is then what the Constitution had expected of this Court through its Article 184(3) and this is exactly what this Court had done.

29. It may be mentioned here that in order to ensure peace in a society, the laws are required to keep pace with the changing times and as has been noticed above with reference to the case of Advocate-General, Sindh (supra) even the approach of the courts has to be dynamic keeping in view the ever-changing ground realities. It was for this very reason that even in the matter of investigations, a role was carved for the courts by addition of subsection (6) in section 22-A of the Cr.P.C. through the Amending Ordinance No. CXXXI of 2002 of which provisions, the learned Prosecutor-General appears to be ignorant. A reference may also be made to a judgment delivered by a 17 Member Bench of this Court in Mubashir Hasan's case (PLD 2010 SC 265) especially to the discussion on the question of investigation as contained in para 102 thereof

30. Investigation, therefore, means nothing more than collection of evidence. Needless to say that it is evidence and evidence alone which could lead a court of law to a just and fair conclusion about the guilt or innocence of an accused person. It is, therefore, only an honest investigation which could guarantee a fair trial and conceiving a fair trial in the absence of an impartial and a just investigation would be a mere illusion and a mirage. It is, hence, only a fair investigation which could assure a fair trial and thus any act which ensures a clean investigation which is above board, is an act in aid of securing the said guaranteed right and not in derogation thereof. However, before we part with this aspect of the matter, we may add that if the learned counsel had cared to go through various orders passed by this Court in the main Constitution Original Petition No.39 of 2009, he would have discovered that the said orders were restricted only to ensuring that the investigating agency did what it was required by law to do; did it honestly, fairly and efficiently; did not sleep over the matter as it had done for almost TWO YEARS and that not a word had been said by this Court about what evidence to collect and what evidence not to collect or about the worth or veracity of the collected evidence."

31. We have all respect for the Parliament and the Executive as we know that the Parliament has to legislate the law and

Constitution to confer jurisdiction upon the superior courts to interpret it. The Parliament is not only making laws but at the same time has amended the constitutional provisions by bringing 18th and 19th Constitutional Amendments by deleting amendments made by military dictator. This Court has never declared that the Parliament is not empowered to legislate law at the same time.

32. We may observe that this Court has initiated present proceedings at the instance of the Parliamentarians and public at large to ensure that the corruption and corrupt practice committed in the Hajj arrangements should be unearthed. Mr. Hussain Asghar who was already working as Director in the FIA was not asked to be transferred to the FIA. In fact it was D.G, FIA, who assigned him investigation of the case considering him a person of integrity, professionalism, upright and honest not likely to compromise his integrity and undoubtedly he has made a lot of progress. Muhammad Iqbal, D.G, FIA, has admitted his omission by sparing him and that is why he has sent letters to competent authority for bringing him back so that he may complete the task of investigation assigned to him. It was not a case where the Court was of the opinion that he should be posted back. Transfer and posting is not within the domain of the Court, but under exceptional circumstances stated hereinabove and in exercise of the powers conferred on this Court by the Constitution to ensure that the money looted from the Hujjaj is recovered and the persons/officials responsible for bringing bad name to the country are brought to book so that it may serve as a deterrent orders of the nature are passed.

33. Hussain Asghar Director FIA was performing his functions independently, whereas the investigation of the case was conducted by him under the supervision of the Court, on such facts and

circumstances his reposting on the same assignment would in no way create any problem. This Court passed an order on 27.07.2011 for his reposting in pursuance thereof notification was issued by the Secretary Establishment Mr. Sohail Ahmed, who has neither committed any wrong nor has deviated from the rules nor has abused his power in any manner, on the contrary has obeyed the orders of this Court. If such a straight forward and upright senior officer or an officer like Hussain Asghar is penalized then it would amount to discouraging such officers, who would be obeying the orders of this Court. Such an act on the part of the competent authority would be violative of the Articles 3 and 5(2) of the Constitution. It is a settled law that no officer can be posted as OSD. This aspect has been highlighted in the Estacode at serial No. 23 under the caption "Procedure for Creation of Posts of Officer on Special Duty (O.S.D.) and Making Appointments thereto. The relevant conditions are reproduced below: -

- (1) Government Servants (member of a regularly constituted service or otherwise permanent) waiting for posting orders;
- (2) Deputation of a government servant (member of a regularly constituted service or otherwise deputed) for duty or course of instruction or training in Pakistan or training abroad, for a period exceeding two months, in accordance with the instructions contained in the Ministry of Finance O.M. No. 3005-EG1/52, dated 7.5.1952 (Annex);
- (3) For doing work of a special nature, e.g. examination and/or implementation of reports of Commissions/Committees, etc.
- (4) For overcoming technical difficulties.

34. Admittedly, the case of Sohail Ahmed does not fall in any of the above categories. When we refer to Article 3 of the Constitution,

we are clear in our minds that the State shall ensure the elimination of all forms of exploitation and the gradual fulfillment of the fundamental principle, from each according to his ability to his work. There was no complaint of whatsoever nature against Mr. Sohail Ahmed except that he had obeyed the order of this Court in terms of various Articles of the Constitution. In the case of Shah Nawaz Marri v. Government of Balochistan [2000 PLC (C.S.) 533], the appointment of OSD has been discussed as under: -

"Now turning towards the main question of posting an officer as O.S.D., we are inclined to hold that this term is absolutely extraneous to section 10 of the Balochistan Civil Servants Act, 1974 read with Balochistan Civil Servants (Appointment, Promotion and Transfer) Rules, 1979. For the sake of convenience of intervening period for posting from one place to the other place, such practice is permissible as Government of Balochistan has itself expressed while furnishing queries called for which have already been re-produced hereinabove, therefore, we declare that in future the Government officers should not be placed for a longer period than 30 days as OSD and their services may be utilised in the best interest of public instead of allowing them to remain sitting idle and getting the service benefits without performing their duty."

In the case of Sajjad Ahmad Javed Bhatti v. Federation of Pakistan

(2009 SCMR 1448) this Court has held as under: -

"7. However, at times, civil servants are also made O.S.D. or kept without any posting, in case they have become persona non grata. Therefore, the posting of such officers as O.S.D. for considerably long period is deprecated by the Courts. See the case of Lt.-Col. (R) Abdul Wajid Malik (supra). It may be unfair and unjust to keep a government servant on tenterhooks without getting any work from him. The right to work is a valuable right of a person as visualized by Article 3 of the Constitution of Islamic Republic of Pakistan, a provision meant to ensure social and economic justice to the people of Pakistan.

8. This Court in the case of Pakistan and others v. Public at large and others PLD 1987 SC 304 observed that right to work was very valuable right which could not be denied: The Supreme Court of India in the case of P.K. Chinnasamy v. Government of Tamil Nadu and others AIR 1988 SC 78 also took the view that:-

"In a democratic polity as ours, the bureaucracy work as the pivot for running the administration. So

far as the State is concerned, matters of policy and the ultimate responsibility for running the administration is obviously of the apex body--the council of Ministers and the Executive Head--the Governor. It cannot be lost sight of that every public officer is a trustee and in respect of the office he holds and the salary and other benefits which he draws, he is obliged to render appropriate service to the State. The scheme postulates that every public officer has to be given some posting commensurate to his status and circumstances should be so as to render commensurate service in lieu of the benefits received by him from the State. If an officer does not behave as required of him under the law he is certainly liable to be punished in accordance with law but it would ordinarily not be appropriate to continue an officer against a post and provide no work to him and yet pay him out of Consolidated Fund.

We direct the respondent-Government of Tamil Nadu to give an appropriate posting to the appellant within one month from today and once he is given such posting, he must be assigned normal official work to be discharged by him as contemplated under the rules and procedure in respect of the post the appellant is assigned. We hope and trust that the appellant shall be given a proper assignment commensurate to his position in the service and the State Government in its action would exhibit no bias or mala fides. We make it clear that we have not examined the correctness of such allegations as we are sure given an opportunity the State Government would exhibit ideal conduct as an employer and establish by its conduct that the allegations were baseless."

10. In the case of *Langston v. AUEW* 1974 WLR 185, he (Lord Denning) expressed his opinion as follows:-

"We have repeatedly said in this Court that a man has a right to work which the Courts will protect. See *Nagle v. Fielden* (1966) 2 QB 633 and *Hill v. C.A. Parsons and Co. Ltd.* (1972) Ch. 305.

In these days an employer, when employing a skilled man, is bound to provide 'him with work. By which I mean that the man should be given the opportunity of doing his work when it is available and is ready and willing to do it. A skilled man takes a pride in his work. He does not do it merely to earn money. He does it so as to make his contribution to the well being of all. He does it so as to keep himself busy and not idle. To my mind, therefore, it is arguable that in those days a man has, by reason of implication in the contract, a right to work. That is, he has a right to have the opportunity of doing his work when it is there to be done."

35. In the case of Lt. Col. (R.) Abdul Wajid Malik v. Government of the Punjab (2006 S C M R 1360) it has been held as under: -

"12. We have also examined the concept of OSD in depth. It is well-settled by now that ordinarily a Government employee should not be posted as OSD except under the compelling circumstances, exigency of service and in the public interest but the tenure of such posting should not be more than thirty days. We are conscious of the fact that being purely administrative matter it falls within the jurisdictional domain of Competent Authority to exercise its right in the interest of the public but it must not be lost sight of that the posting of an employee as OSD would also be an extra burden on Government exchequer but such an employee receives salary without rendering any service which cannot be afforded."

36. Similarly, in the case of Saleemullah Khan v. Federation of Pakistan (2004 SCMR 690), it was held as under: -

"The petitioner, however, placed on record a list of senior officers who were being continued as Officers on Special Duty (O.S.D.) in the Establishment Division for interminable period without assigning to them any responsibilities. This is a pathetic state of affairs. It is high time that the issue is properly addressed by the Federal Government. The Attorney-General for Pakistan shall take up the matter with the Establishment Division which shall immediately undertake an exercise to review the cases of all such officers in order to consider the suitability for their further posting. The Federal Government may also like to evolve a policy for periodic review of such cases."

In Syed Ajmal Hussain Bokhari v. Commissioner (1997 PLC (C.S.) 754), it was held that there was a common practice prevalent both in Federal and Provincial Governments to keep the civil servants without posting as a measure of punishment for considerably long periods by making them OSDs, etc., without getting normal work, which is a fraud on the statute and abuse of executive power and could not be countenanced and was required to be discontinued by the Government forthwith.

37. In the light of the above, a civil servant cannot be made OSD if the competent authority is not satisfied with his performance, though the authority has the power to order his transfer but he cannot be penalized as has been done in this case. In the case of Zahid Akhtar v. Government of Punjab (PLD 1995 SC 530), it has been held that the normal period of posting of a Government servant at a station, according to Rule 21 of the Rules of Business is three years, which has to be followed in the ordinary circumstances, unless for reasons of exigencies of services a transfer before expiry of the said period becomes necessary in the opinion of the competent authority. In the case of Abid Hussain v. Ajaib Ali Shah Naqvi [2004 PLC (C.S.) 1036], the civil servant was performing his duties efficiently and to the satisfaction of the Department, but his transfer was got approved from the Prime Minister in violation of law, therefore, his transfer orders were set aside on the ground that the Prime Minister (of AJK) neither relaxed the Government policy nor mentioned any compelling reasons which prevailed with him in ordering the transfer. In Gobardhan Lal v. State of UP [2000 (2) AWC 1515 = 2000 (87) FLR 658], it has been held that transfers and postings of Government servants is in the discretion of the senior officer of the concerned department, who has to pass such orders on administrative grounds only and not for political, or other extraneous consideration.

38. The discretionary powers vesting in an authority are to be exercised judiciously and in reasonable manner. In the case of Tariq Aziz-ud-Din: in re (2010 SCMR 1301), it has been held that the authorities cannot be allowed to exercise discretion at their whims, sweet will or in an arbitrary manner; rather they are bound to act fairly, evenly and justly. Reference may also be made to the cases of

Abid Hussain v. PIAC [2005 PLC (CS) 1117], Abu Bakar Siddique v. Collector of Customs (2006 SCMR 705), Walayat Ali v. PIAC (1995 SCMR 650). It is an unwritten rule of the law, constitutional and administrative, that whenever a decision-making function is entrusted to the subjective satisfaction of a statutory functionary, there is an implicit obligation to apply his mind to pertinent and proximate matters only, eschewing the irrelevant and the remote. [Smt. Shalini Soni v. Union of India {(1980) 4 SCC 544}].

39. Now, the question is whether re-posting of Mr. Hussain Asghar, who was already working in FIA as requested by DG, FIA in his two letters and has been waiting for the order by the competent authority, if allowed to conduct investigation of the case in which influential and high-ups are involved as is evident from the facts stated hereinabove would paralyze the Government or would it depict its resolve to conduct investigation in a corruption case in a transparent and fair manner? The Government functionaries make transfers and postings of hundreds of thousands of Government servants from time to time, but no interference is shown to have been made by any of the judicial functionaries in the same as it is not within their domain. However, when a transfer is made contrary to the relevant rules and against the public interest and without allowing the officer to complete his tenure, the Court is empowered to examine such administrative action by applying the principle of judicial review. Similarly, former Secretary Establishment Mr. Sohail Ahmed who followed the dictates of Article 5(2) read with Article 190 of the Constitution by obeying order of the Court cannot be penalized by placing him as OSD. However, placing his services against the same post or where he has been made OSD or posting him against any other position commensurate with his

status as held in Abdul Wajid Malik's case (supra) is within the domain of the competent authority, but allowing him to continue as OSD is contrary to the policy as well as the law laid down by this Court discussed hereinabove keeping in mind that he had not completed his tenure as Secretary Establishment and no disciplinary proceedings were pending against him nor it is alleged anywhere that he has been made OSD in the public interest because no reaction of the competent authority has been filed despite our repeated observations.

40. Thus, for the foregoing reasons, we hold and direct as under: -

- (1) The Notification dated 26th July, 2011 issued by the Secretary Establishment Division, Government of Pakistan, whereby Mr. Hussain Asghar, presently posted as Inspector General, Gilgit-Baltistan under Kashmir Affairs and Gilgit-Baltistan Division, was transferred and posted as Director, FIA under Ministry of Interior in pursuance of the order of this Court dated 25th July, 2011 passed in the instant case, shall be implemented in letter and spirit by the Government, i.e. the Secretary Interior and Secretary Establishment by adopting all appropriate measures;
- (2) The Notification No. F. 41/335/2009-E-I dated 26th July, 2011, placing Mr. Sohail Ahmed as OSD is not sustainable in law. However, it is the prerogative of the competent authority to post him either as Secretary Establishment or give him any other assignment commensurate with his status, performance, ability and work etc., as early as possible, but not later than a period of 7 days from the date of receipt of this order. If no order of his posting and transfer is passed on or before the stipulated period, the aforesaid Notification placing him as OSD shall cease to have effect and he shall be deemed to be Secretary Establishment until otherwise transferred and posted elsewhere by the competent authority;

- (3) The DG, FIA shall take all necessary steps to ensure that no sooner Mr. Hussain Asghar reports for duty, the investigation team working earlier with him will be provided to him and shall be extended all the facilities so that he can complete investigation of mega corruption in Hajj arrangements. In the meanwhile, DG, FIA shall also submit report for our perusal after every 7 days of the progress in the investigation of the case.

41. The case is adjourned to date in office.

IFTIKHAR MUHAMMAD CHAUDHRY, CJ

MIAN SHAKIRULLAH JAN, J.

TARIQ PARVEZ, J.

KHILJI ARIF HUSSAIN, J.

MAHMOOD AKHTAR SHAHID SIDDIQUI, J.

AMIR HANI MUSLIM, J.

ISLAMABAD,
July 29, 2011

APPROVED FOR REPORTING