

YAHYA AFRIDI, J.:- Every judgment pronounced by the Supreme Court of Pakistan is a considered, solemn and final pronouncement on all points raised and decided in the case.¹ However, under Article 188 of the Constitution of the Islamic Republic of Pakistan, 1973 ("**Constitution**") read with Rule 1 of Order XXVI of the Supreme Court Rules, 1980 ("**Rules**") this Court is vested with the jurisdiction to review its judgment, in certain circumstances. The judicial consensus of this Court is that a judgment passed on an erroneous assumption of material facts, or without advertent to a provision of law or Constitution, or without noticing an undisputed construction of law and Constitution amounts to an error apparent on the face of the record, and thus justifies positive exercise of the review jurisdiction.²

2. After careful and cautious consideration of the directions of this Court to the officials of the Federal Board of Revenue ("**FBR**"), the Hon'ble Chairman and learned Secretary of the Supreme Judicial Council ("**Council**"), contained in paragraphs No. 4 to 11 of the short order dated 19.06.2020 ("**impugned directions**"), I find that the same have been made by us without appropriately considering the scope of the ouster clause of Article 211 of the Constitution and the relevant provisions of the Income Tax Ordinance, 2001 ("**Ordinance**"). These two crucial omissions on our part are the marked and distinct "errors apparent on the face of the record" and thus, warrant the positive exercise of the review jurisdiction of this Court.

3. To start with, we need to appreciate the exclusivity of the constitutional domain of the Council secured under Article 211 of

¹ Abdul Ghaffar v. Asghar Ali (PLD 1998 SC 363) [5-MB]; Government of Punjab v. Aamir Zahoor-ul-Haq (PLD 2016 SC 421) [5-MB]

² Muhammad Boota v. Member (Revenue) BOR (2010 SCMR 1049)

the Constitution, which expressly commands all courts, including this Court, not to interfere in the proceedings of the Council. The said ouster provision reads:

211. Bar of Jurisdiction.

The proceedings before the Council, its report to the President and the removal of a Judge under clause (6) of Article 209 shall not be called in question in any court.

No one can doubt the wide-ranging power vested in this Court under Article 184(3) or Article 187(1) of the Constitution, to issue appropriate directions, while disposing of a case. However, where the Constitution under Article 211 expressly forbids all courts, including this Court, not to interfere in the proceedings of the Council, then the authority of this Court under Article 184(3) or, for that matter, under any other Article of the Constitution, has to yield to such definite ouster.

4. The very essence of the ouster clause provided in Article 211 is to curtail the jurisdiction of the courts, including this Court, to protect and preserve the autonomy and supremacy of the “proceedings” of the Council against judicial interference. The term “proceedings” as used in Article 211, has been astutely elaborated in the case of *Iftikhar Muhammad Chaudhry v. President of Pakistan*³, wherein it was observed that the word “proceedings” does not stand alone or is unqualified in the said provision but stands restricted and qualified by three other words, “before the council”.⁴ Accordingly, the ouster of this Court’s jurisdiction applies to all proceedings that may take place before the Council. If the Council is to decide on whether or not it should exercise its *suo moto* powers, such a decision would be a “proceeding” before the Council and thus protected under Article 211 against any judicial intrusion. This constitutional protection exalts the position of the

³ PLD 2010 SC 61.

⁴ Ibid, para 67.

Council and establishes its legally lofted supremacy in matters relating to initiating and proceeding with inquiries against the Judges of the Superior Judiciary. And unless the very proceedings of the Council to proceed against a Judge of the Superior Judiciary is positively adjudged to be *coram non judice*, *mala fide* or without jurisdiction, Courts are to jealously maintain the constitutional independence of the Council.

5. In view of this constitutional mandate, any directions of this Court setting steps for the Council, and for that matter, for its Hon'ble Chairman and learned Secretary, to follow or to refrain from following and that too, without first adjudging its actions or inactions to be *coram non judice*, *mala fide* or without jurisdiction would amount to excessive exercise of jurisdiction by this Court under Article 184(3) and Article 187(1) of the Constitution. Such directions of the Court amount to usurping the exclusive constitutional jurisdiction vested in the Council under Article 209 and protected under Article 211 of the Constitution.

6. To sum up, it would be safe to state that this Court did not have the jurisdiction to issue the impugned directions to the Council to consider initiating, or otherwise, an inquiry against the Petitioner Judge based on the "information" received from the tax officials of the FBR. If the instructions of the Court to the Council to consider the report of the tax officials, as vehemently argued by the contesting respondents, are not strictly considered or taken as "directions" to the Council, even then the same has the effect of making this Court a "complainant", and not the "adjudicator" in the matter. Similarly, if this Court issues directions to the contrary, that is, refraining the Council from considering

"information" obtained, this Court would then too be exceeding its mandated constitutional jurisdiction.

7. Another important aspect that escaped the notice of this Court, while issuing the impugned directions to the tax officials was that the impugned directions, in effect, created a parallel regime alien to the scheme envisaged under the Ordinance. The Ordinance provides an intricate mechanism for the tax authorities to proceed in various matters relating to taxpayers, which range from procedural guidelines, specific timelines and jurisdiction available to the concerned authorities, while at the same time, it also provides protection to the person being assessed, adhering to the settled principles of 'due process' and 'natural justice'.

8. This Court has, in the judgment under review, passed binding directions to the tax officials to proceed in a set manner, overlooking the provisions of the Ordinance relating to taking cognisance of "definite information"; scrutiny of information and assessment of income tax returns; and territorial jurisdiction.⁵ Moreover, in making the impugned directions, we also lost sight of the procedure provided in the Ordinance, as to how tax officials are: (i) to proceed against a tax filer that has undeclared income and assets or mis-declared the same and within what time period; (ii) to determine the source of funds for purchasing the undeclared assets, whether generated in Pakistan or in some foreign country; and (iii) above all, to which tax year the undeclared local assets or source of funds and the undeclared foreign assets and source of funds are to be added to and assessed.⁶

⁵ Section 209 of the Ordinance.

⁶ Section 111 of the Ordinance.

9. With the force and guidance of the impugned directions of this Court, and that too, against persons not party in the constitution petitions, expecting the probe by the tax authorities to abide by the “due process” provided under the Ordinance, would be a far cry. In the circumstances of the case, the matter of probe against the spouse and children of the Petitioner Judge should, I think, best have been left to the concerned tax authorities to proceed under the Ordinance, without any specific directions. By giving directions to the tax authorities to proceed with the matter on the basis of a procedure and timeline foreign to the Ordinance, this Court has ultimately subdued the procedure prescribed under the Ordinance by expanding its role, inadvertently, as ‘legislator’ rather than ‘adjudicator’.

10. Much was argued from both sides about whether Mrs. Sarina Faez Isa, who was not a party to the proceedings, was provided with a fair “hearing” befitting the bare threshold to suffice the principles of natural justice, before her case was referred to the tax authorities. One should not expect a consensus of a ten-member Bench on this factual controversy, as to whether Mrs. Sarina Faez Isa was provided with a fair “hearing”, and that too, based solely on her informal statement made while addressing the Court *via* video link on 18.06.2020. Therefore, in these review proceedings, it would be appropriate to remain focused on the core issues involved in the constitution petitions, and not be distracted by the factual controversy, as to whether Mrs. Sarina Faez Isa was provided with a fair and adequate opportunity to be heard before directing the tax officials to scrutinise her foreign assets. For, when a Court sits to review its own judgment or order, it does not hear a new case but only reconsiders its decision on the issues involved in

the case already heard and decided, within the limits of its review jurisdiction.

11. Another error that crept in while making the impugned directions is the distraction from the fundamental issue of alleged misconduct of the Petitioner Judge *qua* the non-disclosure of foreign assets of his spouse, in his wealth statement, filed with the income tax returns under Section 116 of the Ordinance. Though this was the main controversy, the impugned directions directed the tax officials to proceed against the spouse and children of the Petitioner Judge regarding the subject foreign properties, instead of directing the tax officials to proceed against the Petitioner Judge to determine his liability, if any, in accordance with the Ordinance. Under the Ordinance,⁷ when a tax filer fails to furnish adequate justification for an asset, the same is then deemed as the tax filer's asset procured through unexplained income chargeable to tax, and the tax is charged accordingly by adding that income under the head "Income from other Sources". Thus, in case the spouse and children of the Petitioner Judge fail to adequately justify the sources of fund for purchasing the foreign assets, the same would be deemed even then, under the Ordinance, to be owned by them, and not by the Petitioner Judge. Our concern, in the constitution petitions, wherein the impugned directions have been given, was with respect to the independence of the judiciary and the accountability of the judges in the context of alleged misconduct of the Petitioner Judge, which has, in my opinion, been detracted from, by making the impugned directions against his family members.

⁷ Section 111 of the Ordinance.

12. In view of the above deliberations, I find that the impugned directions affecting the rights of Mrs. Sarina Faez Isa, her son and daughter, have been passed by this Court in excess of jurisdiction, and are, therefore, recalled. Consequently, the “superstructure” of subsequent proceedings, actions, orders and reports built on the legally faulty “foundation” of the impugned directions would fall and have no legal effect on the rights and obligations of Mrs. Sarina Faez Isa, her son and daughter.

13. As for the effect of the above declaration *qua* the allegation of misconduct against the Petitioner Judge, suffice it to state that it does not diminish or dilute the constitutional authority of the Council to consider, on its own motion, an “information” received from “any source”, whatever it may be, including the “information” contained in the report received from the tax official, for deciding to initiate an inquiry, or otherwise, into the conduct of the Petitioner Judge. In this regard, we should not lose sight of clause 5 of Article 209 of the Constitution, which clearly provides that “information from any source” can form the basis of an inquiry by the Council against a Judge of the Superior Judiciary. The legal significance and practical implication of the insertion of the word “any” prefixing the word “source” in clause 5 of Article 209 of the Constitution has, in fact, expanded the pool from which the Council may obtain “information” to initiate an inquiry into the conduct or capacity of a Judge of the Superior Judiciary. To interpret the word “any” used in clause 5 of Article 209 of the Constitution in a manner that would dilute the authority of the Council and restrict the information it can or cannot consider would amount to defeating the very command of the Constitution. Therefore, the Council, “on information” emanating from “any

source" can proceed, on its own motion, with an inquiry into the capacity or conduct of any Judge of the Superior Judiciary. The decision on the question, whether to commence the inquiry or otherwise, is a matter that is within the exclusive domain of the Council. This Court, or for that matter any other Court, lacks the jurisdiction to restrict this vast authority vested in the Council by the Constitution - the supreme law of the land.

14. Before concluding, I think it is proper to make clear that the present order, by no means, seeks to curtail the lawful authority of the President, the Council and the tax officials to proceed against any Judge of the Superior Judiciary, including the Petitioner Judge, in accordance with law as mandated by Article 4 of the Constitution. We cannot champion the rule of law if we breed complacency in judicial accountability, a feature that seeks to uphold and bolster the rule of law. Thus, it is important to ensure that there are no artificial impediments to ensuring accountability of judges, provided accountability is pursued in accordance with law. This exposition of authority, in particular, of the tax officials, however, should in no way detract them from their statutory duty to remain steadfast in ensuring the confidentiality of the information of a tax filer as mandated under section 216 of the Ordinance which, as noted in the judgment under review, was blatantly breached in the case of Mrs. Sarina Faez Isa: the tax officials on the unlawful directions issued by the Chairman ARU, Barrister Shahzad Akbar with the concurrence of the Federal Law Minister, Dr. Farogh Naseem, breached the statutory confidentiality of Mrs Sarina Faez Isa's tax returns. I feel constrained to observe that allowing the said delinquents to continue in such important positions of authority by the worthy

Prime Minister, and that too after this Court has unanimously declared their actions to be in violation of the Constitution and law, particularly the provisions of section 216 of the Ordinance entailing penal consequences,⁸ belies the most elementary principles of “good governance”, and expose the worthy Prime Minister’s complicity in the commission of the said violations.

15. As far as Civil Review Petition No.296 of 2020 is concerned, that is, in my view,⁹ not maintainable, as the *locus standi* of the Petitioner Judge to invoke the original jurisdiction of this Court under Article 184(3), as well the review jurisdiction therein, stands eclipsed till he holds the office of a Judge of the Supreme Court of Pakistan; for he owes an obligation under clause 8 of Article 209 of the Constitution to observe the Code of Conduct issued by the Council for Judges of the Superior Judiciary, that, *inter alia*, requires him to avoid being involved in litigation, for himself or even on behalf of others, which includes public interest litigation under Article 184(3) of the Constitution. The object is to avert any chance of a Judge of the Superior Judiciary being placed in a position, where his conduct may be seen as unbecoming of a Judge, glimpses of which were seen during the proceedings of the present review petitions.

16. In summation of the above discourse, my considered opinion on the essential issues raised in the present review petitions are that:

- i. This Court cannot pass any direction that would, in essence, prompt or pre-empt the Council to proceed in a certain manner or refrain it to proceed in any manner as it would, in fact, amount to judicial intervention in the “proceedings

⁸ See Judgment of Umar Ata Bandial J, paras 85 and 136(x); Judgment of Maqbool Baqar J, para 65; Judgment of Syed Mansoor Ali Shah J, paras 38 and 81(ii); Judgment of Yahya Afridi, J., paras 47 and 52.

⁹ See my view recorded in detail in my minority judgment delivered on 23 October 2020 in Constitution Petition No. 17/2019 of the Petitioner Judge.

before the Council", and thereby offend the express mandate of Article 211 of the Constitution, unless the very "proceedings" are determined to be *coram non judice, mala fide* or without jurisdiction, which has not been established in the case in hand;

- ii. The impugned directions of this Court to the Council to consider the Report of the tax officials amounts to judicial interference in the "proceedings before the Council", and thus violates the autonomy and supremacy of the "proceedings" of the Council against judicial interference envisaged under Article 211 of the Constitution;
- iii. The Council is, however, on its own motion, competent to consider or refuse to consider "information" received from "any" source, be it the Report of the tax officials, to determine whether to inquire or not inquire into the conduct of the Petitioner Judge or otherwise;
- iv. The impugned directions to the tax officials to inquire into the affairs of the spouse and children of the Petitioner Judge, setting out the manner and the timeframe in which they are to proceed, violate and are alien to, the provisions of the Income Tax Ordinance, 2001, and have subdued the procedure prescribed thereunder;
- v. The President and the Council have the authority, and are free to proceed against any Judge of the Superior Judiciary, including the Petitioner Judge for alleged misconduct, in accordance with Article 209 of the Constitution;
- vi. The tax officials are competent to proceed against the Petitioner Judge or any other Judge of the Superior Judiciary, serving or retired, his spouse or/and children, without fear or favour, in relation to his or her tax affairs only in accordance with the provisions of the Income Tax Ordinance, 2001 and not otherwise on the basis of unlawful directions;
- vii. Section 216 of the Income Tax Ordinance, 2001, commands confidentiality of the information of a tax filer, and breach thereof exposes the delinquent to penal consequences under sections 198 and 199 of the Ordinance. Such consequences are attracted in the present case to those giving the unlawful directions, namely, Chairman ARU, Barrister Mirza Shahzad Akbar with the concurrence of the Federal Law Minister, Dr. Farogh Naseem; the tax officials executing the unlawful directions in breach of section 216 of the Ordinance; and finally, the worthy Prime Minister, who despite clear and

unanimous finding of misdoings of the named delinquents by this Court, retained them in positions of authority, thereby blatantly exposed himself to complicity in the commission of the said violation.

- viii. The Petitioner Judge or any other serving Judge of the Superior Judiciary lacks the *locus standi* to invoke the original jurisdiction of this Court under Article 184(3), as well as the review jurisdiction therein, as their right to invoke the same stands eclipsed, till they hold the office of a Judge of the Superior Judiciary, essentially to avert a position where their conduct may be seen as unbecoming of a Judge, as ordained in Code of Conduct issued by the Council for Judges of the Superior Judiciary.

17. These are the detailed reasons for my short order dated 26.04.2021, which read:

For the reasons to be recorded later, all review petitions except C.R.P. No. 296 of 2020, are allowed and the directions contained in paragraphs No. 4 to 11 of the order dated 19.06.2020 and detail judgment dated 23.10.2020 passed in Constitution Petition No. 17 of 2019 and other connected petitions are recalled. Consequently, all the subsequent proceedings, actions, orders and reports made in pursuance of the said directions are declared to be of no legal effect and/or consequences.

Judge