

IN THE SUPREME COURT OF PAKISTAN
(ORIGINAL JURISDICTION)

PRESENT:

MR. JUSTICE IFTIKHAR MUHAMMAD CHAUDHRY, CJ
MR. JUSTICE JAVED IQBAL
MR. JUSTICE MIAN SHAKIRULLAH JAN
MR. JUSTICE TASSADUQ HUSSAIN JILLANI
MR. JUSTICE NASIR-UL-MULK
MR. JUSTICE RAJA FAYYAZ AHMED
MR. JUSTICE MUHAMMAD SAIR ALI
MR. JUSTICE MAHMOOD AKHTAR SHAHID SIDDIQUI
MR. JUSTICE JAWWAD S. KHAWAJA
MR. JUSTICE ANWAR ZAHEER JAMALI
MR. JUSTICE KHILJI ARIF HUSSAIN
MR. JUSTICE RAHMAT HUSSAIN JAFFERY
MR. JUSTICE TARIQ PARVEZ
MR. JUSTICE MIAN SAQIB NISAR
MR. JUSTICE ASIF SAEED KHAN KHOSA
MR. JUSTICE GHULAM RABBANI
MR. JUSTICE KHALIL-UR-REHMAN RAMDAY

CMA NO. 2981 OF 2010

[REPORTS ALLEGING THAT GOVERNMENT IS
CONSIDERING WITHDRAWAL OF THE
NOTIFICATION OF RESTORATION OF JUDGES
DATED 16.03.2009]

IN

CONSTITUTION PETITION NO. 9 OF 2009

Sindh High Court Bar Association v. Federation of Pakistan

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On Court notice:

Moulvi Anwarul Haq
Attorney General for Pakistan

Mr. Mushtaq Ahmed Malik
Chairman PEMRA

Voluntary appeared:

Qazi Muhammad Anwar, Sr. ASC
President, Supreme Court Bar
Association

Malik Manzoor Hussain, Vice President,
Supreme Court Bar Association

Mr. Ahsanuddin Sheikh, Additional
Secretary, Supreme Court Bar
Association

Mr. Sanaullah Zahid, Finance Secretary,
Supreme Court Bar Association

Mian Abdul Quddus, President
Lahore High Court Bar Association

Syed Zulfiqar Abbas Naqvi, President,
High Court Rawalpindi Bench Bar
Association

Khan Afzal, Member, Executive
Committee, Pakistan Bar Council

Malik Ghulam Mustafa Kandwal,
Member, Punjab Bar Council

Malik Waheed Anjum, President, District
Bar Association, Rawalpindi

Mr. Jan Muhammad, ASC

Date of hearing:

15.10.2010

ORDER

IFTIKHAR MUHAMMAD CHAUDHRY, CJ. - Listed application has been placed before this Bench in pursuance of office note put up by Registrar on 14.10.2010. Necessity was felt for bringing into the notice of the Court about the events going on for the last few days i.e. the reports published in print media and also aired on electronic media, thus the Government of Pakistan is contemplating to withdraw notification/executive order dated 16.03.2009 restoring the Chief

Justice of Pakistan and other Judges of the Supreme Court of Pakistan and Chief Justices and Judges of High Courts. In view of the importance of the matter, it was considered to hear the Attorney General for Pakistan and after knowing his viewpoint, matter should be disposed of. It is not only in the recent past such information was passed on to print and electronic media, but prior to it as well, whenever judgment in some important case is pronounced by this Court, or the Court is seized of an important matter and is likely to decide the case, attempts are made to pressurize the judiciary by spreading news that since the Chief Justice and the Judges were restored in pursuance of an executive order, which has not yet been sanctified by the Parliament, therefore, all the concerned members of the judiciary must take note of it inasmuch as a similar statement was made by a highest constitutional functionary in the Parliament.

2. On 14.10.2010 when after 8.00 p.m. private TV channels aired this news, a denial was also issued from the office of Prime Minister, saying that there is no truth behind the said news and the Government has no such intention to withdraw the notification of restoration of Judges. But contrary to it, the news item flashed in various private TV channels, including AAJ, GEO, ARY, etc., was to the effect that the Government of Pakistan, in consultation with one of the leading lawyers of the country and the Law Minister, had taken the decision to withdraw the notification. As has been pointed out hereinbefore, that it is not for the first time that such a news/rumour has been spread, but it so happens whenever a high profile case is being heard by the Court. It may not be out of context to note here that before and after 13.10.2010, when the case pertaining to the hearing of the review petition filed by the Federation of Pakistan in the

case of Dr. Mubashir Hasan, judgment of which was announced on 16.12.2009, such news items were being discussed everywhere all around. Therefore, to impress upon the constitutional functionaries of State in the country that what has already been decided on 31.07.2009 in the case of Sindh High Court Bar Association v. Federation of Pakistan (PLD 2009 SC 879), Moulvi Anwarul Haq, Attorney General for Pakistan was served with a notice along with the copy of CM Application under consideration, wherein the facts noted hereinabove have been mentioned categorically. The relevant paragraph from the judgment of this Court in Sindh High Court Bar Association's case was also reproduced. Learned Attorney General for Pakistan appeared in Court and when questioned by the Court that after the judgment in the Sindh High Court Bar Association's case, what authority is left with the Government or any of its functionaries to withdraw the restoration order of the judiciary, he could not answer it satisfactorily despite the fact that we called upon him to clarify his position as well as the position of the Federation to whom he represents as the Chief Law Officer. Anyhow, he sought time to obtain a statement from the constitutional head of the Government, i.e. Chief Executive (Prime Minister) to clarify the position. At his request, case was postponed till 11.30 a.m. In the meanwhile, from his office a message was communicated to the Registrar that the Prime Minister was busy in some meeting, therefore, he would be in a position to place a statement on record at 12.30 p.m.

3. The Court again assembled at 12.45 p.m. and when the learned Attorney General for Pakistan was clarifying his position, he could not answer except saying that he has established a contact with the Secretary to the Prime Minister who shall be informing him after

some time. Again, some time was consumed in further deliberation with him and ultimately he came out with a statement that case be postponed for tomorrow, i.e. 16.10.2010 (Saturday). Whatever has been pointed hereinabove clearly indicates that the Government or any of its constitutional heads is reluctant to make the statement and is trying to find time for one or the other reason. The anxiety of the Bench at this stage, underpins its constitutional mandate and resolve to defend, protect and preserve the Constitution of Pakistan. The judiciary, which is one of the most important organs of the State, cannot be allowed to be throttled in such a manner.

4. This is not for the first time that the judiciary has to pass an order. Even in the month of November 2007, when a high profile case (Wajihuddin Ahmed v. Chief Election Commissioner of Pakistan) was under consideration on 02.11.2007, an application was submitted by Mr. Aitzaz Ahsan, learned Sr. ASC appearing for the petitioner wherein he had informed about the purported action, which the then Government was contemplating to take to sack the judiciary, but his application was kept on record because Malik Muhammad Qayyum, the then Attorney General for Pakistan, who was appearing in the Court, made a statement at the bar that there was no such thing as was being apprehended by the learned counsel for the petitioner, but his apprehension proved to be correct, as on 03.11.2007 (Saturday), "emergency plus" was imposed in pursuance whereof all the members of the judiciary except few who agreed to take oath under the PCO, were made dysfunctional, but such unconstitutional and illegal order was nipped in the bud immediately through a restraint order passed by a 7-Member Bench, which was circulated widely to all and sundry, informing them that no action shall be taken nor any Judge shall take

oath under the PCO as Chief Justice or Judge of High Court, and ultimately matter came to an end when the judiciary sacked by the then Government was restored on 16.03.2009 by an executive order/notification issued by the Government.

5. It is equally important to note that all the actions taken by the then President as Chief Executive commencing from 03.11.2007 to 15.12.2007, including the Proclamation of Emergency, issued by General Pervez Musharraf, as Chief of Army Staff, as he then was on 03.11.2007, the Provisional Constitution Order No. I of 2007, issued by him on the same date in his said capacity, the Oath of Office (Judges) Order, 2007 issued by him also on the same day, and Proclamation of Emergency and Provisional Constitutional Orders issued by him subsequent thereto, etc., came up for consideration before a 14 – Member Bench of this Court in the Sindh High Court Bar Association's case. The Government of Pakistan was represented by the Attorney General for Pakistan who made a categorical statement not to support or endorse any of those actions of the then Chief of Army Staff/President of Pakistan, inasmuch as after the elections, which were held on 18.02.2008, the sitting Parliament had also not confirmed/endorsed/authenticated any of his such actions or instruments. Details of the same shall be reproduced hereinafter: -

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

- (1) The present democratic government had never accepted extra-constitutional promulgation of Orders and/or any other repressive measures. The respect for judiciary had always been hallmark of its ideology and judicial process was resorted to by their leaders even in the most trying circumstances. The verdict in *Tikka Iqbal Muhammad Khan's case* was affirmed in review by a 13 – member Bench of the Supreme Court whereby the acts of 3rd November 2007 were validated on the principles of state necessity and *salus populi est suprema lex*, which even otherwise ceased to exist on revival of the Constitution on 15th December 2007."

6. In the meanwhile, on the petitions filed by the Sindh High Court Bar Association and others, the actions of imposing the Emergency and sacking the Judges of the superior judiciary including Chief Justice and Judges of the Supreme Court and Chief Justices and Judges of High Courts, etc., were considered, and the Court in its judgment dated 31.07.2009, pronounced a unanimous verdict, holding therein that all the actions taken by the then Chief of Army Staff/President were unconstitutional. It also included the sacking of the members of the superior judiciary. A detailed discussion has been made in the said judgment. For convenience, Paragraphs 21 and 22 with items (i) to (v) are reproduced below: -

"21. The Proclamation of Emergency issued by General Pervez Musharraf as the Chief of Army Staff (as he then was) on November 3, 2007; the Provisional Constitution Order No.1 of 2007 issued by him on the same date in his said capacity; the Oath of Office (Judges) Order of 2007 issued by him also on the same date though as the President of Pakistan but in exercise of powers under the aforesaid Proclamation of Emergency and the Provisional Constitution Order No.1 of 2007; The Provisional Constitution (Amendment) Order, 2007 issued by him likewise on 15.11.2007; the Constitution (Amendment) Order, 2007 being President's Order No.5 of 2007 issued on November 20, 2007; the Constitution (Second Amendment) Order, 2007 being the President's Order No.6 of 2007 issued on 14th December, 2007; the Islamabad High Court (Establishment) Order 2007 dated 14th December 2007 being the President's Order No.7 of 2007; the High Court Judges (Pensionary Benefits) Order, 2007 being President's Order No.8 of 2007; the Supreme Court Judges (Pensionary Benefits) Order, 2007 being President's

Order No.9 of 2007 dated 14th December, 2007 are hereby declared to be un-constitutional, *ultra-vires* of the Constitution and consequently being illegal and of no legal effect.

22. As a consequence thereof: -

i) the Chief Justice of Pakistan; the Judges of the Supreme Court of Pakistan; any Chief Justice of any of the High Courts and the Judges of the High Courts who were declared to have ceased to hold their respective offices in pursuance of the afore-mentioned alleged judgments or any other such judgment and on account of the instruments mentioned in Para 21 above, shall be deemed never to have ceased to be such Judges, irrespective of any notification issued regarding their reappointment or restoration;

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

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

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

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

iv) the Judges of the Supreme Court of Pakistan, if any, the Chief Justices of the High Court, if any, and the Judges of any of the High Courts, if any, who stood appointed to

the said offices prior to 3.11.2007 but who made oath or took oath of their respective offices in disobedience to the order passed by a Seven Member Bench of the Supreme Court of Pakistan on 3.11.2007 in C.M.A.No.2869 of 2007 in Constitution Petition No.73 of 2007, shall be proceeded against under Article 209 of the Constitution. The Secretary of the Law Division of the Government of Pakistan shall take steps in the matter accordingly;

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

v) any judgments delivered or orders made or any decrees passed by any Bench of the Supreme Court or of any of the High Courts which comprised of or which included the afore-described Judges whose appointments had been declared *void ab initio*, are protected on the principle laid down in MALIK ASAD ALI'S CASE (PLD 1998 SC 161)."

7. On having gone through the above Paragraphs, there should not be any ambiguity in the mind of anyone that the Judges of the superior judiciary had never been sacked/deposed in pursuance of the Proclamation of Emergency, the PCO and Oath of Office (Judges) Order, 2007, as is evident from Paragraph 22 (i) above. Not only this, the appointment of Mr. Justice Abdul Hameed Dogar as Chief Justice of Pakistan was declared unconstitutional, holding that the office of Chief Justice of Pakistan never fell vacant on 03.11.2007. Suffice to observe that the executive order passed was an acknowledgement of the factual and legal position, i.e. that the order passed by the then President was unconstitutional and void ab initio. If now the said order is attempted to be withdrawn, it will be tantamount to throttling one of the important pillars of the State, namely, the judiciary, thereby subverting the Constitution in terms of Article 6. As has been noted hereinabove, particularly in view of the fact that when matter has finally been clinched/decided in view of the judgment in Sindh High

Court Bar Association's case (*supra*), no functionaries of the Government, including the head of the State or head of the Government or any of their other functionaries can take any steps for withdrawing the executive order/notification of restoration of Judges, which otherwise is non-existent in view of the above judgment.

8. In the light of the above, we direct: -

- (i) All the constitutional and State functionaries and administrative heads in the country to ensure that no action *qua* initiation of proceedings concerning withdrawal of the executive order (order of "restoration of Judges") dated 16.03.2009, status whereof has already been determined by this Court in its judgment in Sindh High Court Bar Association's case (*supra*), is taken, intentionally or otherwise, by any of the functionaries as noted hereinabove, and all the constitutional and administrative heads/ functionaries are restrained/refrained from doing so;
- (ii) The Government of Pakistan/Prime Minister to conduct an inquiry through an appropriate responsible functionary that if the statement of the former that no such action was being contemplated was true, then how this news in the print and electronic media was spread, and who was responsible for it because we feel that it is the primary duty of the Government to look into it and unearth such persons who are taking such steps or spreading such news, which are causing panic, sensation and anguish throughout the country, since last night. The members of the Bar Associations throughout the country have also started agitating the matter. The senior representatives have appeared in Court and have taken serious exception to the steps, which the Government was reportedly contemplating to take in this behalf;
- (iii) The Attorney General for Pakistan, present in Court, to communicate immediately this order to all concerned, and send compliance report to the Registrar of this Court in the course of the day.

(iv) This report must be placed before the Court on the next date of hearing. We may point out here that it is already 1.37 p.m., when we are dictating this order in the Court, but no statement from the office of the Chief Executive/Prime Minister, denying the news items published in the print media and aired on the private TV channels has been placed before us.

9. The case is adjourned for 18.10.2010, enabling the authorities/functionaries to put up report and statements, if desired, as has been pointed out by the learned Attorney General for Pakistan.

IFTIKHAR MUHAMMAD CHAUDHRY, CJ.

JAVED IQBAL, J.

MIAN SHAKIRULLAH JAN, J.

TASSADUQ HUSSAIN JILLANI, J.

NASIR-UL-MULK, J.

RAJA FAYYAZ AHMED, J.

MUHAMMAD SAIR ALI, J.

MAHMOOD AKHTAR SHAHID SIDDIQUI, J.

JAWWAD S. KHAWAJA, J.

ANWAR ZAHEER JAMALI, J.

KHILJI ARIF HUSSAIN, J.

RAHMAT HUSSAIN JAFFERI, J.

TARIQ PARVEZ, J.

MIAN SAQIB NISAR, J.

ASIF SAEED KHAN KHOSA, J.

GHULAM RABBANI, J.

KHALIL-UR-REHMAN RAMDAY, J.

Islamabad,
15 October 2010

APPROVED FOR REPORTING