IN THE SUPREME COURT OF PAKISTAN
(Review Jurisdiction)

PRESENT:

MR. JUSTICE IFTIKHAR MUHAMMAD CHAUDHRY, HCJ
MR. JUSTICE JAVED IQBAL
MR. JUSTICE SARDAR MUHAMMAD RAZA KHAN
MR. JUSTICE KHALIL-UR-REHMAN RAMDAY
MR. JUSTICE MIAN SHAKIRULLAH JAN
MR. JUSTICE TASSADUQ HUSSAIN JILLANI
MR. JUSTICE NASIR-UL-MULK
MR. JUSTICE RAJA FAYYAZ AHMED
MR. JUSTICE CH. IJAZ AHMED
MR. JUSTICE GHULAM RABBANI
MR. JUSTICE MUHAMMAD SAIR ALI
MR. JUSTICE MAHMOOD AKHTAR SHAHID SIDDIQUI
MR. JUSTICE JAWWAD S. KHAWAJA
MR. JUSTICE RAHMAT HUSSAIN JAFFERI

C.M.A. No.2745/2009 in C.R.P.No.Nil/2009 in Const.P.No.08/2009

Justice Khurshid Anwar Bhinder ...Applicant

Versus

Federation of Pakistan and another ...Respondents

C.M.A. No.2747/2009 in C.R.P.No.Nil/2009 in Const.P.No.09/2009

Justice Hasnat Ahmed Khan ...Applicant

Versus

Sindh High Court Bar Association, etc. ..Respondents

C.M.A. No.2748/2009 in C.R.P.No.Nil/2009 in Const.P.No.08/2009

Justice Zafar Iqbal Chaudhry and another ...Applicants

Versus

Federation of Pakistan and another ...Respondents

C.M.A. No.2750/2009 in C.R.P.No.Nil/2009 in Const.P.No.09/2009

Justice Syed Shabbar Raza Rizvi ...Applicant

Versus

Sindh High Court Bar Association, etc. ...Respondents

C.M.A. No.2776/2009 in C.R.P.No.Nil/2009 in Const.P.No.09/2009

Syed Sajjad Hussain Shah ...Applicant

Versus

Sindh High Court Bar Association, etc. ...Respondents

C.M.A. No.2779/2009 in C.R.P.No.Nil/2009 in Const.P.No.09/2009

Mrs. Yasmin Abbasi ...Applicant

Versus

Sindh High Court Bar Association, etc. ...Respondents

C.M.A. No.2782/2009 in C.R.P.No.Nil/2009 in Const.P.No.08/2009

Syed Sajjad Hussain Shah ...Applicant

Versus

Nadeem Ahmed Advocate and another ...Respondents

C.M.A. No.2788/2009 in C.R.P.No.Nil/2009 in Const.P.No.09/2009

Muhammad Ahsan Bhoon ...Applicant

Versus

Sindh High Court Bar Association, etc. ...Respondents

C.M.A. No.2790/2009 in C.R.P.No.Nil/2009 in Const.P.No.09/2009

Anwar-ul-Haq Pannu ...Applicant

Versus

Sindh High Court Bar Association, Sindh High Court, Karachi through its Secretary, etc. ...Respondents

C.M.A. No.2825/2009 in C.R.P.No.Nil/2009 in Const.P.No.09/2009

Syed Hamid Ali Shah ...Applicant

Versus

Sindh High Court Bar Association, etc. ...Respondents

C.M.A. No.4002/2009 in C.R.P.No.Nil/2009 in Const.P.No.09/2009

Barrister Jahanzeb Rahim ...Applicant

Versus

Federation of Pakistan through Ministry of Law, Justice & Human Rights, Islamabad, etc. ...Respondents

CRIMINAL ORIGINAL PETITION NO.90/2009
[Contempt matter regarding press statement made by Syed Zulfiqar Ali Bokhari]

For the applicant **(in C.M.A.No.2745/2009)**	:	Mr. Wasim Sajjad, Sr. ASC Mr. Ejaz Muhammad Khan, AOR
For the applicant **(in C.M.A.No.2747/2009)**	:	Mr. Farooq Amjad Meer, ASC
For the applicant **(in C.M.A.No.2748/2009)**	:	Malik Muhammad Qayyum, Sr. ASC
For the applicant **(in C.M.A.No.2750/2009)**	:	Dr. A. Basit, Sr. ASC Mr. G. N. Gohar, AOR
For the applicant **(in C.M.As.No.2776 & 2782/2009)**	:	Sheikh Zamir Hussain, Sr. ASC Mr. Ejaz Muhammad Khan, AOR Mr. Mahmoodul Islam, AOR(absent)
For the applicant **(in C.M.A.No.2779/2009)**	:	Dr. Khalid Ranjha, Sr. ASC Mrs. Yasmin Abbasi (In person) Mr. Mazhar Ali B. Chohan, AOR (absent)
For the applicant **(in C.M.A.No.2788/2009)**	:	Dr. Khalid Ranjha, Sr. ASC Mr. A.H. Masood, AOR (absent)
For the applicant **(in C.M.A.No.2790/2009)**	:	In person
For the applicant **(in C.M.A.No.2825/2009)**	:	Syed Ali Zafar, ASC Mr. G. N. Gohar, AOR
For the applicant **(in C.M.A.No.4002/2009)**	:	Syed Naeem Bokhari, ASC Mr. G. N. Gohar, AOR
For the Federation	:	Mr. Shah Khawar, Acting Attorney General for Pakistan
For the Sindh High Court Bar (On caveat)	:	Mr. Hamid Khan, Sr. ASC Mr. Rashid A. Rizvi, ASC Mr. M.S. Khattak, AOR
For Nadeem Ahmed, Advocate (On caveat)	:	Mr.Muhammad Akram Sheikh, Sr. ASC Ch. Muhammad Akram, AOR
On Court notice	:	Syed Zulfiqar Ali Bokhari (In person)
Date of hearing	:	13.10.2009

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JUDGMENT

JAVED IQBAL, J.- The above captioned applications for permission to file review petitions against judgment dated 31.7.2009 passed in Constitutional Petitions No.9 and 8 of 2009 have been

dismissed by means of short-order dated 13.10.2009 which is reproduced herein below for ready reference:-

> "For reasons to be recorded later, by majority of 13 to 1 (Sardar Muhammad Raza Khan, J dissenting), all these applications for permission to file review petitions against the judgment dated 31.07.2009 passed in Constitution Petitions Nos. 9 & 8 2009 are dismissed.
>
> 2. For reasons to be recorded later, we unanimously hold and direct as under:-
>
> (1) The notices issued under Article 204 of the Constitution read with sections 3 and 4 of the Contempt of Court Act, 1976 or any other enabling provisions of the relevant law, to the Judges who have expressed their regrets and repentance; by tendering unconditional apologies and affirming their remorse through withdrawal of the petitions filed by them and tendering of resignations, are discharged;
>
> (2) Similarly, as to the Judges who have already retired and have tendered unconditional apologies and have expressed their repentance and remorse, the notices issued to them are discharged.
>
> (3) As to the Judges, who are contesting notices, they shall be proceeded against separately along with the cases of those Judges, who have not filed replies and/or have prayed for grant of time;
>
> (4) The Judges of the Supreme Court and the High Courts, who tendered resignations after pronouncement of the judgment dated 31.07.2009 in deference thereto shall not be proceeded against;
>
> (5) The Judges who have tendered resignations, but have not filed replies to the notices, the process shall be repeated to them so as to file the replies within two weeks;
>
> (6) The Judges, who have neither tendered resignations nor have filed replies, are required to file replies within two weeks;

(7) Mr. Ahmed Raza Kasuri, ASC, has prayed for grant of four weeks' time to submit reply on behalf of Justice (Retd.) Abdul Hameed Dogar. Let the reply be filed within two weeks.

(8) Justice (Retd.) Muhammad Nawaz Abbasi has filed reply, which is not unconditional apology, therefore, his matter shall be proceeded along with other cases; and

(9) As far as Syed Zulfiqar Ali Bokhari is concerned, he has tendered unconditional apology and has thrown himself at the mercy of the Court, the notice issued to him is also discharged."

2. The reasons for the above reproduced short-order are as follows.

3. We may make it clear at the outset that we are not dilating upon the merits of the review petitions and we shall confine ourselves to the pivotal question which needs determination at first instance as to whether these review petitions are maintainable or otherwise? Before we could answer the said question, we intend to examine the respective contentions as agitated on behalf of the petitioners.

4. Mr. Wasim Sajjad, learned Sr. ASC entered appearance on behalf of Mr. Khurshid Anwar Bhinder in CMA No.2745 of 2009 and addressed the Court at length on the question of maintainability whose prime contention remained that no such decision could have been given without affording proper opportunity of hearing in violation of the well entrenched doctrine of *'audi alteram partem'* and the fundamental rights guaranteed in the Constitution coupled with the judicial precedents which ought to have been followed but were ignored. In order to substantiate his contention it is argued that it is a cardinal principle of law that no person should be condemned unheard and besides that the principle of *audi alteram partem* has also been jealously guarded by this Court. It is contended that the petitioner and all other

removed judges were neither impleaded as party in the above mentioned Constitutional Petitions nor any opportunity of hearing was afforded which resulted in serious miscarriage of justice. It is next contended that this Court has ample powers as conferred upon it under Article 188 of the Constitution of Islamic Republic of Pakistan, 1973 (hereinafter referred to as the Constitution) to hear the review petitions and besides that no bar whatsoever has been imposed in the provisions enumerated in Order XXVI of the Supreme Court Rules, 1980 and even otherwise the petitioner may not be knocked out on the basis of sheer technicalities in the absence of any restraints imposed by law. It is also argued that in Civil Petition No.8 of 2009, a specific prayer was made for removal of the Judges including the applicant, who were not appointed in consultation with the Hon'ble Chief Justice of Pakistan but in consultation with Abdul Hameed Dogar, J, who was not a constitutional consultee. The applicant was appointed as Additional Judge of the Lahore High Court, Lahore on 14.12.2007 and as permanent Judge of that Court on 12.12.2008. The order dated 03.11.2007 passed by a seven-member Bench of this Court restraining, *inter alia*, the Judges of the Supreme Court and High Courts from taking oath under any extra-constitutional set up, was set aside by an eight-members Bench *vide* order dated 06.11.2007. The applicant had no means to know that the latter order would be declared illegal and void at any time in the future. Further, the order dated 06.11.2007 got merged in the final order dated 19.11.2007, by which the Constitution Petition No. 73 of 2007 (Wajihuddin Ahmed v. Chief Election Commissioner) was dismissed. The order dated 03.11.2007 became alive on 31.07.2009 when a judgment was passed by a fourteen-member Bench. On 03.11.2007, the applicant was not a Judge but was a lawyer, therefore, the order dated 03.11.2007 was not applicable to him. It is further argued that in the matter of removal of a Judge of a

superior Court, Articles 4, 9 and 25 of the Constitution would be attracted. Access to justice had been made a fundamental right. The applicants had been deprived of their right to hold office, therefore, they had a right to be heard against their removal. By virtue of Article 2A of the Constitution, the Islamic principles would be attracted, and an affected person would be granted the right of hearing. It is next contended that the applicant was an aggrieved person within the contemplation of Order XXVI, Rule 1 of the Supreme Court Rules 1980, read with Order XLVII, Rule 1 of the CPC and had a right to file the review petition against the judgment of the Hon'ble Supreme Court, which adversely affected him. In order to substantiate his view as mentioned hereinabove the following case law has been referred to by Mr. Wasim Sajjad, learned Sr. ASC:-

> H. M. Saya & Company v. Wazir Ali Industries Limited (PLD 1969 SC 65), Custodian of Evacuee Property v. Saifuddin Shah (PLD 1981 SC 565), Muhammad Siddique v. Chief Settlement & Rehab Commr. (PLD 1965 SC 123), Fehmida Khatoon v. Addl. Dy. Commr. PLD 1975 Lah.942 at 949, Al-Jehad Trust v. Federation of Pakistan PLD 1996 SC 324 at 367, Faqir Ullah v. Khalil-uz-Zaman (1999 SCMR 2203) at 2212, Shivdeo Singh v. State of Punjab AIR 1963 SC 1909 at 1911, Noubahar v. the State 2002 SCMR 1218 at 1219, Muhammad Yaqub v. Saeed Shah PLD 1961 Kar. 656, Jhabba Lal v. Shib Charan (AIR 1917 ALL. 160), Kawdu v. Berar Ginning Co. (AIR 1929 NAG 185), 1986 CLC 1048, Muhammad Akram Sheikh v. Federation of Pakistan (PLD 1989 SC 229), Pakistan Muslim League (N) v. Federation of Pakistan (PLD 2007 SC 642 at 668).

5. Mr. Farooq Amjad Meer, learned ASC entered appearance in CMA No.2747/2009 on behalf of Mr. Justice Hasnat Ahmed Khan and adopted the arguments of Mr. Wasim Sajjad, learned Sr. ASC with the further submission that the applicant irrespective of his status enjoys the protection as afforded by Article 4 of the Constitution and at least a notice should have been given enabling him to defend himself as

an adverse order has been passed against him without affording proper opportunity of hearing. It is pointed out that notice was issued to General (Retd.) Pervez Musharraf and accordingly it should have been issued to the petitioner in the interest of justice, fair play and equity.

6. Malik Muhammad Qayyum, learned Sr. ASC entered appearance on behalf of Mr. Zafar Iqbal Chaudhry and Mr. Muhammad Akram Qureshi in CMA No.2748/2009 and adopted the arguments as canvassed at bar by Mr. Wasim Sajjad, learned Sr. ASC with the further submission that neither the opportunity of hearing was afforded to the petitioners nor they were impleaded as party and, therefore, no adverse order could have been passed against them as it would be in violation of the well entrenched principles of the law of natural justice. It is also contended that mere publication of the proceedings in the electronic and print media did not constitute sufficient notice in law. Non-issuance of notice to the applicant was against the very finding recorded by the fourteen-member Bench.

7. Dr. A. Basit, learned Sr. ASC entered appearance on behalf of Mr. Justice Syed Shabbar Raza Rizvi in CMA No. 2750/2009 and submitted that Mr. Justice Syed Shabbar Raza Rizvi has no grievance qua the judgment impugned which is historic one but a few lapses are there which need rectification. It was urged with vehemence that the judgment passed by seven Members Bench was not within the knowledge of Mr. Justice Syed Shabbar Raza Rizvi who was not available at Lahore on the day when the said order was passed and besides that it was never communicated by the Registrar concerned to the Hon'ble Judges. It is pointed out that Mr. Justice Syed Shabbar Raza Rizvi was in his village on Saturday when the said order was passed by the seven Members Bench of this Court. It is also pointed out that Supreme Court has unbridled powers under Article 188 of the Constitution as well as Order XXVI of the Supreme Court Rules and,

therefore, in the absence of any restraint imposed by any law the application may be allowed. It is also contended that this Court may exercise its power as conferred upon it under Article 187 of the Constitution. The learned counsel has relied upon case titled Zafar Ali Shah v. Pervez Musharraf, Chief Executive of Pakistan (PLD 2000 SC 869 at pages 1214, 1216). It is also contended that the celebrated judgment dated 31.07.2009 was required to be partially reviewed, in that, in Para 248, it was unequivocally laid down that the Judges, who made oath in violation of the order dated 03.11.2007 were guilty of the breach of the order. The said finding had pre-empted the power and jurisdiction of the Supreme Judicial Council. As a matter of fact, the Court, in such a proceeding, would record a tentative finding by using the words *"prima facie"*.

8. Mr. Anwar-ul-Haq Pannu appeared in person in CMA No.2790/2009 and adopted the arguments of Mr. Wasim Sajjad, learned Sr. ASC and Malik Muhammad Qayyum, learned Sr. ASC. He also reiterated the submission that the judgment impugned has been passed in violation of universally accepted principles of natural justice i.e. *audi alteram partem* and the petitioner has been condemned unheard without affording him proper opportunity of hearing causing serious prejudice against him.

9. Syed Ali Zafar, learned ASC entered appearance on behalf of Mr. Justice Syed Hamid Ali Shah in CMA No.2825/2009 and submitted that a person though not a party to a *lis* can file a review in view of the provisions as enumerated in Order XLVII CPC. It is next contended that no one should be condemned unheard and opportunity of proper defence being mandatory in nature required to be provided irrespective of the fact whether it has been provided by a particular statute or otherwise. It is pointed out that Order XLVII CPC makes it abundantly clear that any person considering himself to be aggrieved

may file a review petition and neither any embargo whatsoever has been imposed nor any condition laid down therein. It is also contended that in view of the provisions as enumerated in Article 188 of the Constitution this Court has ample powers to hear a person at any stage irrespective of the fact whether he remained a party in appeal or otherwise. In this regard, particular reference has been made to the powers of Suo Motu review jurisdiction as conferred upon this Court. Syed Ali Zafar, learned ASC also referred to Article 187 (1) of the Constitution which according to him can also be invoked for the redressal of the grievances of the petitioner. Besides that the provisions as enumerated in Order 33 Rule 6 of the Supreme Court Rules, 1980 have also been mentioned with the further submission that procedure should not be considered as a hindrance but justice should be done. It is also contended that the Constitution did not place any restriction on the power of the Supreme Court to review its earlier decisions or even to depart from them nor the doctrine of *stare decisis* would come in its way so long as review was warranted in view of the significant impact on the fundamental rights of the citizens or in the interest of public good. The learned counsel lastly submitted that access to justice was a fundamental right and a Judge, as much as a citizen, was entitled to approach the Court for the redress of his grievance. In support of the submission, the learned counsel placed reliance on the case of Mr. Justice Iftikhar Muhammad Chaudhry, Chief Justice of Pakistan v. President of Pakistan (PLD 2007 SC 578).

10. It is also mentioned that the order passed on 03.11.2007 by seven Members Bench of this Court on Saturday was never communicated or served upon the petitioner, hence the question of its violation does not arise and no conclusion can be drawn qua service/communication of said order on the presumption having no value in the eye of law. In order to substantiate the said version it is

pointed out that no punishment could be awarded without having a concrete proof qua service of the said order on the petitioner. It is also mentioned that presumption of knowledge of the order passed on the assertion that it was widely circulated in the media and communicated to the Registrar of the High Court has no legal footings in such like proceedings and it can not be equated to that of an effective service.

11. Syed Naeem Bokhari, learned ASC who entered appearance on behalf of Mr. Justice Jahanzeb Rahim, applicant in CMA No.4002/2009 referred to the case of M. H. Khondkar v. The State (PLD 1966 SC 140) and sought recusal of certain Members of the Bench on the ground of bias. It was contended that he would exercise his right to raise issue of bias and the Court must hear him instead of knocking him out of the Court. It was also submitted by Mr. Naeem Bokhari, learned ASC that his arguments may be heard in Chambers so that he could highlight certain important aspects having substantial bearing on merits of the case. It is also contended that petitioner could not have been condemned unheard without impleading him as a party or issuance of notice. It is contended that the judgment impugned is in violation of basic norms of principle of natural justice which resulted in serious miscarriage of justice and on this score alone the review petition preferred by the petitioner may be heard on merits and proper opportunity of hearing be afforded. The learned ASC also explained two cardinal principles of natural justice i.e. *"audi alterm partem"* and *"nemo judex* in *causa sua"*. The learned ASC has referred case of M.H. Khondkar *(supra)* to support his view point. It is argued with vehemence that the applicant was not a party to the judgment dated 31.07.2009, wherein it was concluded that the applicant had committed misconduct and his case was directed to be placed before the Supreme Judicial Council. He lastly submitted that the provisions of Rule 6 of Order XXVI of the Supreme Court Rules 1980, can be taken into consideration in

the instant case because the applicant was not represented at the hearing of the main case.

12. Sheikh Zamir Hussain, learned Sr. ASC entered appearance on behalf of Mr. Justice Syed Sajjad Hussain Shah in C.M.As. No.2776 & 2782 of 2009 and adopted the arguments of Mr. Wasim Sajjad, learned Sr. ASC, Malik Muhammad Qayyum, learned Sr. ASC and Mr. Farooq Amjad Meer, learned ASC with the further submission that the provisions as enumerated in Order XXVI Rules 1 and 6 of the Supreme Court Rules read with Article 188 of the Constitution can be pressed into service conveniently by allowing the civil miscellaneous application. It is also pointed out that no restriction whatsoever has been imposed in Order XXVI Rules 1 and 6 of the Supreme Court Rules and for the sake of arguments if presumably there is any hurdle that can be removed as technical knockout is not desirable and every *lis* should be decided on merits and in accordance with law. It is pointed out that the Supreme Court Rules are subservient to the Constitution and may not be considered as hindrance for imparting justice. It is also pointed out that rule can be relaxed in case of hardship which is discretion of this Court and it should be exercised as it would be in the interest of justice. It is also contended that the Supreme Court and the High Courts were the Courts of record. The principle of absolute justice and absolute fairness demanded that if the Court, while writing a judgment found that the judgment was going to affect someone, who was not heard notice would be issued to him, and generally it did the same thing. Article 188 of the Constitution conferred upon the Supreme Court substantive power of review. Though such power was subject to any act of Majlis-e-Shoora and the rules framed by the Supreme Court, but the constitutional power could not be curtailed by any subordinate legislation, and would

always prevail over the law/rules. The learned counsel has relied upon the case of Asad Ali v. Federation of Pakistan (PLD 1998 SC 161).

13. Dr. Khalid Ranjha, learned Sr. ASC entered appearance on behalf of Mrs. Justice Yasmin Abbasi in CMA No.2779/2009 and adopted the arguments of Mr. Wasim Sajjad, learned Sr. ASC with the further submission that Supreme Court Rules cannot curtail the Constitutional powers conferred upon this Court under Article 188 of the Constitution. Mrs. Justice Yasmin Abbasi also argued for herself and submitted that she was not aware of the restraining order of seven Members Bench by this Court passed on 3.11.2007 as it was never communicated to her by the Registrar concerned. It is submitted that oath was taken on 3.11.2007 in a good faith by following the prevalent precedents. It is submitted that non-communication of restraining order passed by seven Members Bench of this Court being a question of fact requires consideration and no conclusion can be drawn qua its service on the petitioner merely on the basis of presumption. It is also submitted that notice was given on 22.7.2009 to General (Retd.) Pervez Musharraf and accordingly all the affected persons including removed Judges should have been impleaded as party by issuance of notice which was not done resulting in serious miscarriage of justice. It is also pointed out that social justice as enunciated by Islam also requires that no person should be condemned unheard and proper opportunity of defence must be afforded which was not done in this case. It is time and again pointed out that on 3.11.2007 the order passed by seven Members Bench was never communicated to her. It is also contended that clause 3 of the Oath of Office (Judges) Order, 2000 provided that any person holding office of Judge of the Supreme Court or a High Court would not continue to hold office if he did not make oath within the time determined in that behalf. Accordingly, the Judges who did not make oath ceased to hold office. The matter came up before a twelve-

member Bench of the Supreme Court where it was held that the removal of the Judges under the Oath Order, 2000 was past and closed transaction. Therefore, even if she had got proper knowledge of the order dated 3.11.2007, she would have made oath otherwise, on the basis of the past practice, if she had not made oath on 3.11.2007, she would also have been deprived of office of Judge.

14. Mr. Muhammad Ahsan Bhoon entered appearance in person in CMA No.2788/2009 and requested that the grounds mentioned in the review petition may be considered as his arguments.

15. Mr. Rashid A. Rizvi, learned Sr. ASC entered appearance on behalf of caveat (Sindh High Court Bar Association) and strenuously controverted the view point as canvassed at bar by the learned Sr. ASC on behalf of applicants with the further submission that CMAs are not maintainable as the applicants were never impleaded as party and besides that they were neither necessary parties nor proper parties, hence the question of filing review petition against judgment dated 31.7.2009 does not arise. In order to substantiate his version it is argued that no Hon'ble Judge was involved in Constitutional Petitions No.9/2009 and 8/2009 and no question whatsoever regarding their eligibility, qualification or entitlement for appointment against the post of Judge was ever raised rather the prime question urged before the Hon'ble Court was that the purported act done by General (Retd.) Pervez Musharraf between 3.11.2007 to 16.12.2007 aimed at to suspend and amend the Constitution through several instruments were unconstitutional, invalid and without legal consequence and of the appointments of Judges of superior judiciary made on or after 3.11.2007 up-till 22.3.2009 without having consultation of Hon'ble Chief Justice of Pakistan were unconstitutional, invalid and without any legal consequence and the prime thrust was on the question whether PCO was a valid piece of legislation? He submitted that none of

the Judges were impleaded as party nor criticized in this regard and more so the judgment dated 31.7.2009 does not amount to any stigma regarding any of the Judges and hence re-hearing of the case would be nothing but an exercise in futility. The learned ASC further argued that entire superstructure raised on the foundation was based on the actions of General (Retd.) Pervez Musharraf taken between 3.11.2007 to 16.12.2007 which were declared unconstitutional, null and void and therefore, no one can claim and say that such a superstructure was Constitutional and legal. It is mentioned that none of the advocates on behalf of applicants has supported the PCO and subsequent action of General (Retd.) Pervez Musharraf. The learned Sr. ASC on behalf of caveat also referred to the provisions as enumerated in Order XXV Rule 9 of the Supreme Court Rules which, *inter alia*, provides that notice shall be served on all persons directly affected and on such other persons as the Court may direct but no such direction was ever issued by the Court. It is also contended that the judgment dated 31.7.2009 is a judgment in *rem* and, therefore, the applicants have no *locus standi* to make such petitions. In order to substantiate his version case titled Federation of Pakistan v. Qamar Hussain Bhatti (PLD 2004 SC 77) has been referred. Mr. Rashid A. Rizvi, learned Sr. ASC urged with vehemence that in the past Constitutional history no affected Judges have ever pleaded their cause for seeking service as a Judge which otherwise is neither desirable nor in accordance with the principles relating to morality and ethics. It is further argued that the applicants had not challenged PCO and the verdict given in case titled Tika Iqbal Muhammad Khan v. General Pervez Musharraf Chief of Army Staff (PLJ 2008 SC 446) rather supported the judgment of 31.7.2009 and once the judgment is supported no particular observation can be challenged or any prayer for its review can be made because the judgment has been supported in its entirety and had the applicants been aggrieved by the

judgment of 31.7.2009 they would have challenged it. The learned Sr. ASC also pointed out that Order XXVI Rule 1 of the Supreme Court Rules hardly renders any assistance to the case of applicants. The learned Sr. ASC has referred cases titled Pir Bakhsh v. Chairman, Allotment Committee (PLD 1987 SC 145 at 166), Ghulam Muhammad v. Saeed Ahmad (1986 CLC 1048), Federation of Pakistan v. Qamar Hussain Bhatti (PLD 2004 SC 77) in support of his above mentioned contentions.

16. Mr. Hamid Khan, learned Sr. ASC also entered appearance on behalf of caveat (Sindh High Court Bar Association) and supported the arguments as advanced by Mr. Rashid A. Rizvi, learned Sr. ASC with the further submission that the applicants were fully aware regarding the proceedings and they could have joined it at appropriate stage and before the pronouncement of judgment dated 31.7.2009. This was not done for the reasons best known to them. Mr. Hamid Khan, learned Sr. ASC also invited the attention of this Court to Order XXVI Rule 9 of the Supreme Court Rules and submitted that it cannot be interpreted in such a manner to infer that each party can file a separate review without having sufficient lawful justification which is lacking in this case. It is also argued that the appointments of certain Judges were declared unconstitutional and unlawful as a sweep and consequence of the judgment impugned and therefore, no one can claim as a matter of right that he is an aggrieved person as it would be against the fall out of judgment which is binding in its nature in view of the provisions as enumerated in Article 189 of the Constitution. It is also contended that no new principle whatsoever has been enunciated but on the contrary the well entrenched legal principles qua appointment of Judges in cases titled Al-Jehad Trust v. Federation of Pakistan (PLD 1996 SC 324) and Asad Ali v. Federation of Pakistan (PLD 1998 SC 161) have been followed. In case of enunciation of any new principle the applicants may

have some grievance but now they cannot be considered aggrieved in any manner. According to Mr. Hamid Khan, learned Sr. ASC the applicants are seeking review of the judgment delivered in cases titled Al-Jehad Trust, Asad Ali *(supra)* and Ghulam Hyder Lakho v. Federation (PLD 2000 SC 179) which cannot be allowed at this belated stage. It is also contended that case law mentioned by Mr. Wasim Sajjad, learned Sr. ASC cannot be made applicable as there is a difference between review and appeal which was not kept in view while referring to the case law. It is also pointed out that in case titled Al-Jehad Trust *(supra)* the affected Judges from Peshawar and Sindh were never impleaded as party and impleading of the applicants as a party would set a new precedent which would not be in consonance with the dictum laid down in the cases of Al-Jehad Trust, Asad Ali and Ghulam Hyder Lakho *(supra)* but rather it would be contrary and in violation thereof. It is also mentioned that individuals are not important but it is the national interest which is supreme and the same has been kept intact in the judgment dated 31.7.2009 which being historic one hardly needs any kind of review as each and every aspect of the controversy brought before the Court has been dilated upon and decided in a comprehensive manner. Mr. Hamid Khan, learned Sr. ASC further contended that some time we have to go by legally permissible presumption and argued that the order dated 03.11.2007 passed by learned seven Members Bench restraining all the Judges of superior Courts to take oath was in the knowledge of applicants and by no stretch of imagination it can be said that they remained unaware. It is contended that for the sake of arguments if their ignorance is accepted even then there could be no justification for their conduct after taking oath as they could have taken appropriate action in accordance with the order passed by seven Members Bench when it came to their knowledge which was not done and it speaks volumes about their conduct. The learned Sr. ASC also

contended that country remained in turmoil for a considerably long time and such instances must not be repeated again. For the first time in the history this has been checked by this Court in judgment dated 31.7.2009. Mr. Hamid Khan, learned Sr. ASC submitted in a categoric manner that it is not his case that no affected person can file a review who was not a party in the proceedings but the case of applicants cannot be equated to that of an ordinary case being very exceptional and in view of special circumstances and sweeping effects of the judgment. The controversy before the Court was in respect of the unconstitutional acts of General (Retd.) Pervez Musharraf from 3.11.2007 to 15.12.2007 and the judgment in Tika Iqbal Muhammad Khan's case *(supra)* validating the same were either to be upheld or declared unconstitutional. Whenever a judgment of this generality was passed, it would not be a few applicants who would be affected, rather innumerable others would be affected and the right of review cannot be conferred on each of them. Mr. Hamid Khan, learned Sr. ASC has also invited our attention to Article 112 of the Qanun-e-Shahadat, Order 1984. The learned Sr. ASC has referred the case law enunciated in Al-Jehad Trust v. Federation of Pakistan (PLD 1996 SC 324), Asad Ali v. Federation of Pakistan (PLD 1998 SC 161), Ghulam Hyder Lakho v. Federation of Pakistan (PLD 2000 SC 179), Hussain Bakhsh v. Settlement Commissioner (PLD 1970 SC 01), Jibendra Kishore etc v. Province of East Pak (PLD 1957 SC 09).

17. Mr. Muhammad Akram Sheikh, learned Sr. ASC entered appearance for caveat (Nadeem Ahmed, Advocate) and pointed out that law qua appointment regarding Judges has already been declared in case of Al-Jehad Trust *(supra)* wherein it was held that even the consultation with Hon'ble Acting Chief Justice of Pakistan was not constitutional and lawful. It is next contended that the CMAs are not maintainable as no rights whatsoever were accrued in favour of the

applicants and besides that foundation of their claim is not based on constitutional and valid grounds and as such right of hearing would not be available to them. Mr. Muhammad Akram Sheikh, learned Sr. ASC is also of the view that, however, the rights of aggrieved persons and individuals can be taken care of in view of the provisions as enumerated in Article 188 of the Constitution and Order XXVI of the Supreme Court Rules but the cases of applicants are absolutely distinguishable and hence the above mentioned provisions cannot render any assistance to their cause. It is pointed out that the powers as conferred upon this Court under Article 188 and the Rules made thereunder must be utilized for the benefit of the people of Pakistan and the doors for aggrieved persons should not be closed in view of the provisions of review as provided under the law. The learned Sr. ASC has relied upon cases titled Rustomji v. Offl. Liquidator (AIR 1919 Lahore 180), Muhammad Rafique v. Maryam Bibi (1996 SCMR 1867), Hameed Akhtar Niazi v. Secretary, Establishment Division (1996 SCMR 1185).

18. Mr. Shah Khawar, learned Acting Attorney General for Pakistan, entered appearance on behalf of Federation and submitted without any ambiguity that CMAs are not competent and all the actions taken by Chief of Army Staff were unconstitutional and *ab initio* void as declared by this Court in its judgment dated 31.7.2009 and in consequence thereof the Review petitions are not maintainable. It is also argued that notice was issued to General (Retd.) Pervez Musharraf. If he wished to join the proceedings, he could do that. Similarly, notice was also meant for all others concerned, who could join those proceedings. Clearly, ample opportunity was provided to all the applicants. In the light of Article 188 and rules, because they were not party to the proceeding before the Court, technically and legally they had no right to file review. The judgment of the fourteen-Member Bench had interpreted the Constitution and settled a principle of law, it had the force of law

and was binding upon all concerned and therefore no exception can be taken.

19. We have carefully examined the respective contentions as agitated on behalf of the parties in the light of relevant provisions of the Constitution, law and rules made thereunder. It is to be noted that there are two categories of Judges i.e. the first comprising those who were Judges of this Court or of any of the High Courts on 3.11.2007 and the second category is of those persons who were notified as Judges of this Court or of the High Courts between 4.11.2007 and 23.3.2009 on the basis of "consultation" with Abdul Hameed Dogar, J., purporting to act as Chief Justice of Pakistan. The need for classifying the applicants into the aforesaid categories will be apparent from the discussion below.

20. It is to be kept in mind that the judgment of 31.7.2009 has, in clear and unequivocal terms, declared the actions of 3.11.2007 taken by General (Retd.) Pervez Musharraf to be un-Constitutional and *void ab initio*. In none of the petitions before us, has any challenge been made against this declaration which is the foundation and bedrock of the judgment. The other aspects of the judgment naturally and logically flow as a consequence of such declaration. Once this premise is understood, the adjudication of the petitions before us becomes simple.

21. We first take up for consideration the case of the petitioners in the second category noted above. These petitioners were notified as Judges on the basis of *"consultation"* with Mr. Justice Abdul Hameed Dogar. For reasons which have been elaborately set out in the judgment sought to be reviewed, it is clear that Mr. Justice Dogar was not the Chief Justice of Pakistan. The petitioners in this category have not claimed or even remotely suggested that Mr. Justice Dogar was the Chief Justice of Pakistan. The most which has been urged by them is that he was the *de facto* Chief Justice of Pakistan and, therefore,

consultation with him was sufficient to fulfill the requirement of Article 193 of the Constitution. This contention is misconceived and wholly without merit. We need go no further than the case titled Al-Jehad Trust Vs. Federation of Pakistan and others (PLD 1996 SC 324) to debunk the argument. The ratio in the said precedent has been followed and reiterated in the cases titled Malik Asad Ali and others Vs. Federation of Pakistan and others (PLD 1998 SC 161) and Ghulam Hyder Lakho Vs. Federation of Pakistan (PLD 2002 SC 179). In the light of these precedents, there remains no doubt whatsoever as to the exact meaning of Article 193 of the Constitution viz. that none other than the Chief Justice of Pakistan and not even an Acting Chief Justice of Pakistan, who is a Constitutional functionary, can be the consultee in terms of the aforesaid Constitutional provision. It therefore follows (consistent with established precedent) that the persons comprised in the second category mentioned above were not Judges of the High Courts regardless of the fact that they purported to occupy such office. In the circumstances, we are not in any doubt that they do not possess *locus standi* to file the CMAs or review petitions, the sole object of which is to seek an order that they were validly appointed as Judges and are entitled to hold such office.

According to Mr. Wasim Sajjad, learned Sr. ASC, pursuant to acceptance of C.P. No.8 of 2009 the petitioners have been declared not to be Judges and soon after the judgment impugned the petitioners in CMA No.2745 of 2009 and the other persons falling in the second category were removed from their offices by means of Notification No. F.12(4)/2007-A.II-(Vol.II)(d) dated 2.8.2009. We have considered this argument advanced by learned counsel but find little force to commend it. Firstly, it is to be noted that the removal of the petitioners from the office being occupied by them was a direct consequence of the finding that the actions of General (Retd.) Pervez Musharraf taken on 3.11.2007

were void *ab initio* and secondly that the Notifications of those petitioners who were appointed Judges of the High Courts between 3.11.2007 and 23.3.2009 had not been issued after *"consultation"* with the Chief Justice of Pakistan as mandated by Article 193 of the Constitution. These findings enunciate a principle of law and are based on the interpretation of the relevant provisions in Part-VII of the Constitution including Article 193, *supra* relating to the Judicature. The same are binding in view of the provisions as envisaged in Article 189 of the constitution which, *inter alia*, provide that any decision of the Supreme Court shall, to the extent that it decides a question of law or is based upon or enunciates a principle of law shall be binding on all other Courts in Pakistan. The ultimate responsibility of interpreting the law of the land is that of the Supreme Court. (Maroof Khan v. Damsaz Khan NLR 1992 Civ. 97, Salah-ud-Din v. The State PLJ 1990 Cr.C. 270, Malik Muhammad v. Jan Muhammad 1989 CLC 776, Abdul Ghaffar Khan v. Saghir Ahmad Aslam PLD 1987 Lah. 358, Abdul Ghaffar Khan v. Saghir Ahmed Aslam PLJ 1987 Lah. 384, Abdul Ghaffar Khan v. Saghir Ahmed Aslam, etc 1987 LN 504, Roshan Ali v. Noor Khan PLD 1985 SC 228, Roshan Ali v. Noor Khan PLJ 1985 SC 370, Roshan Ali v. Noor Khan 1985 PSC 734, Muhammad Khan v. Sanaullah PLD 1971 S.C.324, Khalid Rashid v. State PLD 1972 Lah. 729, Ali Muhammad v. Mahmood-ul-Hassan PLD 1968 Lah. 329, Hashim v. State PLD 1963 Lah. 82). Where the Supreme Court deliberately and with the intention of settling the law, pronounces upon a question, such pronouncement is the law declared by the Supreme Court within the meaning of this article and is binding on all Courts in Pakistan. It cannot be treated as mere *obiter dictam*. Even *obiter dictam* of the Supreme Court, due to the high place which the Court holds in the hierarchy of courts in the country, enjoy a highly respected position as if it contains a definite expression of the Court's view on a legal principle, or the meaning of a

law. (M. Ismail & Sons v. Trans-Oceanic Steamship Co., Ltd PLD 1966 Dacca 296, Nagappa v. Ramchandra AIR 1946 Bombay 365, K.C.Venkata Chalamayya v. Mad. State AIR 1958 Andh-Par. 173, K.P. Doctor v. State of Bombay AIR 1955 Bom. 220, Bimla Devi v. Chaturvedi AIR 1953 All. 613). In the case of non-implementation of the judgment it will have to be found out as to who is responsible for not implementing it. Article 190 of the Constitution is a mandatory provision under which there is no alternative for the Executive but to act in aid of the Supreme Court. Persons identified as responsible for non-implementation of the judgment can be punished by the Supreme Court for contempt for disobedience of its judgment. (Al-Jehad Trust v. Federation of Pakistan PLD 1997 SC 84, Abdul Hameed v. Special Secretary, Education Schools 2007 SCMR 1593, Abdul Waheed v. Ramzanu 2006 SCMR 489, Nazar Abbas Jaffri v. Secretary to Government of the Punjab 2006 SCMR 606, Muhammad Sharif v. Settlement Commissioner 2007 SCMR 707, Shaukat Baig v. Shahid Jamil PLD 2005 SC 530). Such judgments, to the extent of the legal principle settled therein, are judgments in *rem*. Courts as also parties litigating in respect of matters covered by legal principles enunciated by the Supreme Court, can at best, distinguish the precedent of this Court but the Courts before which such litigation arises cannot disregard the legal principle so enunciated. This Court, however, by virtue of powers under Article 188 of the Constitution may review any judgment pronounced or any order made by it. In the present case, since there is no challenge made to the findings and declarations recorded in the judgment of 31.7.2009 in respect of the actions of 3.11.2007 and *"consultation"* in terms of Article 193 of the Constitution, the true meaning of the relevant Articles of the Constitution, has been laid down. Such enunciation affects not only the petitioners but others as well to lesser or greater degrees. To illustrate this point, the case of all

those litigants who have lost legal actions in the High Courts and in this Court between 4.11.2007 to 23.3.2009, can be taken note of. Such litigants are directly and adversely affected by the judgment of 31.7.2009. This is so because they have been prevented from agitating those matters on the ground that the Courts which rendered decisions against them were *coram non judice*. If the argument advanced on behalf of the petitioners is accepted, there will be no justification for not allowing each one of the said litigants from seeking review of the judgment of 31.7.2009 on the ground that they were not impleaded as parties or afforded an opportunity of hearing before affecting their rights to their detriment. Such losing litigants as aforesaid, have a much better case than the petitioners.

22. We next take up for consideration the cases set up by those petitioners who fall in the first category mentioned above. At the outset, it is to be stated that they too have not challenged the findings and the declaration recorded in the judgment of 31.7.2009 to the effect that the actions taken by General (Retd.) Pervez Musharraf on 3.11.2007 were un-Constitutional and void *ab initio*. In so far as the Hon'ble Judges who fall within the first category are concerned, their cases stand entirely on different footing and are distinguishable from the cases of Hon'ble Judges who were appointed in superior judiciary in violation of the Constitution and precedent law already discussed in preceding paragraphs. However, they have deliberately and knowingly violated the order of seven Members Bench and took oath not only in flagrant violation thereof but from Justice Abdul Hameed Dogar who was never and could have never been appointed as Chief Justice of Pakistan for the reasons mentioned in the judgment impugned. They have acted in a highly prejudicial, unconstitutional and contemptuous manner fully knowing the implications and consequences of non-compliance of the said order being mandatory in nature and binding upon them pursuant

to the provisions as enumerated in Article 189 of the Constitution which has been discussed in the preceding paragraphs. After having taken into consideration all the pros and cons of the issue it was held in the judgment impugned as follows:-

> (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."

It was their Constitutional, legal and moral duty to defend the Constitution but amazingly they took oath under the PCO having no Constitutional and legal sanctity. In such view of the matter to check such transgressions and blatant violation of the order passed by this Court, there was no escape but initiation of action under Article 209 of the Constitution and there is absolutely no lawful justification warranting interference in the judgment impugned. We are deliberately withholding our comments lest it may not prejudice the case of Hon'ble Judges in future before the Supreme Judicial Council.

23. In view of what has been stated herein above it is not necessary to discuss all the arguments advanced by Mr. Wasim Sajjad, learned Sr. ASC on behalf of applicant (Khurshid Anwar Bhinder in C.M.A. No.2745/2009) and adopted by learned counsel representing

other applicants, however, we are dilating upon some of the contentions to show that absolutely no case of review is made out and the petitions are not maintainable.

24. First of all we intend to deal with the prime contention of Mr. Wasim Sajjad, learned Sr. ASC that in view of the provisions as enumerated in Article 188 of the Constitution and Order XXVI of the Supreme Court Rules these CMAs are maintainable and the applicants cannot be knocked out on sheer technicalities which has always been considered undesirable. Article 188 of the Constitution is reproduced herein below for ready reference:-

> "188. **Review of judgments or orders by the Supreme Court.** The Supreme Court shall have power, subject to the provisions of any Act of (Majlis-e-Shoora (Parliament)] and of any rules made by the Supreme Court, to review any judgment pronounced or any order made by it".

25. A bare perusal would reveal that it has been couched in a very simple and plain language hardly necessitating any scholarly interpretation. It, *inter alia*, provides that the Supreme Court has power to review its judgment or order subject to the provisions of any Act of Parliament and any rule made by the Supreme Court itself. (The contention whether Supreme Court Rules, 1980 are subservient to the Constitution have been discussed in later part of this judgment) It is to be noted that no Act of Parliament whatsoever has been promulgated and thus it can reasonably be inferred that legislature does not want to restrict or impose any condition on the powers conferred upon this Court under Article 188 of the Constitution. In fact the words "subject to the provisions of any Act of (Majlis-e-Shoora/Parliament) and of any rules made by the Supreme Court" are indicative of the fact that indirectly the powers so conferred have been enhanced and there was absolutely no intention for curtailment of such powers conferred upon this Court under Article 188 of the Constitution. The point under

discussion has been examined by this Court in case titled Evacuee Trust Property Board v. Hameed Elahi (PLD 1981 SC 108) with the following observations:-

> "6. Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. Now, as we observed, "a litigant should not suffer on account of the mistakes or errors of the Court, and the corollary of this principle is that the Court should have the inherent power to correct its errors. The said rule only clarifies in terms that this Court has the inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court." There is no ambiguity about these words, and if the respondent's plea be true, he has brought his case within the meaning of the said rule.
>
> Additionally, the said rule was not framed for first time by this Court. It is almost verbatim reproduction of section 151 of the Civil Procedure Code and of section 561-A of the Criminal Procedure Code, and these two sections (which in turn are *in pari materia* with each other) have been part of our procedural laws for generations, so that there is no ambiguity about of our procedural laws for generations, so that there is no ambiguity about them, because they have been repeatedly construed by the superior Courts. Thus, for example, taking first, section 151 of the Civil Procedure Code, the Indian Supreme Court held in Keshardeo Chamaria v. Radha Kissen Chamaria and others (AIR 1953 SC 23) that a Court could in the exercise of its powers under section 151 re-call an order passed by it without notice to the parties concerned. Next, as to section 561-A of the Criminal Procedure Code this Court held in Gulzar Hassan Shah v. Ghulam Murtaza and 4 others (PLD 1970 SC 335) that a Court was competent under section 561-A to re-call an order passed by it without notice to the parties concerned. However, as this judgment was pronounced long after the rules of this Court had been framed in 1956, the case-law on section 561-A before 1950 would be more relevant. We say 1950 and not 1956, because the said rule was originally enacted as rule 6 of Order LIII of the Federal Court Rules of 1950. And on the

repeal of those rules of 1956, the same provision was re-enacted in the present rules as the said rule."

26. We are conscious of the fact the principles of CPC also need to be examined and thus the provisions as enumerated in Order XLVII Rule 1 of CPC would require consideration qua its application which is reproduced herein below for ready reference:-

> "1. **Application for review of judgment.-** (1) Any person considering himself aggrieved—
>
> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,
>
> (b) by a decree or order from which no appeal is allowed, or
>
> (c) by a decision on a reference from a Court of Small Causes,
>
> and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.
>
> (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review."

27. A bare perusal would reveal that the salient features of Order XLVII CPC are as under:-

> (i) discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by the petitioner at the time when the decree was passed or order made; or

(ii) on account of some mistake or error apparent on the face of the record; or

(iii) for any other sufficient reason. [2003 CLC 1355)

28. We have examined the salient features and grounds as enumerated in Order XLVII Rule 1 CPC and we are of the view in so far as these CMAs are concerned that neither there is discovery of new important fact nor some mistake or error has been pointed out and besides that no sufficient reasoning has been advanced on the basis whereof the principle as enunciated in Order XLVII Rule 1 CPC can be made applicable. It may not be out of place to mention here that *"sufficient cause" is not susceptible of an exact definition and no hard and fast rule can be laid down to cover all possible cases. Each case must be judged upon its merits and its peculiar circumstances. The words "sufficient cause" mentioned in O. XLVII, R.1 of the Code do not mean any and every cause but it means any reason sufficient on ground at least analogous to those stated in the rule. The view that the "sufficient grounds" need not necessarily be construed ejusdem generic with the words preceding cannot be accepted as laying down the correct law."* Suruj Mian v. Asst. Manager, Govt. Acquired Estate (PLD 1960 Dacca 1045). None of the grounds urged by the petitioners attracted the provisions as enumerated in Order XLVII CPC and thus CMAs cannot be declared competent. A similar proposition was examined in Yusuf Ali v. State (PLD 1971 SC 508) with the following observations:-

> "The right of review granted by Article 62 of the Constitution of 1962 is subject not only to the provisions of any Act of the Central Legislature but also to the provisions of any rules made by the Supreme Court and the Rules of the Court specifically provide by Order XXVI that "subject to the law and practice of the Court, the Court may review its judgment or order in a civil proceeding on grounds similar to those mentioned in Order XLVII, rule 1 of the Code and in a criminal proceeding on the ground of an error apparent

> on the face of the record". Where none of the grounds urged by the petitioner come within the ambit of this rule no valid ground could be said to have been made out for the review of the judgment." (Emphasis provided)

29. It may be mentioned that the words "any other sufficient reasons" used in Order XLVII Rule (1) (c) CPC means a reason sufficient on grounds at least analogous to those mentioned in a categoric manner in clauses (a), (b), and (c) of Rule 1 of Order XLVII CPC. "A review, as has been pointed out by this Court in the case of Lt. Col. Nawabzada Mohammad Amir Khan v. The Controller of Estate Duty Government of Pakistan, Karachi and another (PLD 1962 SC 335) is by its very nature not an appeal or a rehearing merely on the ground that one party or another conceives himself to be dissatisfied with the decision of this Court. It can only be granted for some sufficient cause akin to those mentioned in Order XLVII, rule 1 of the Code of Civil Procedure the provisions whereof incorporate the principles upon which a review can be granted." In this regard we are fortified by the dictum laid down in the following authorities:-

i) Chhaju v. Neki (AIR 1922 PC 112),

ii) Iftikhar Hussain Shah v. Azad Govt. of The State of J & K (PLD 1984 SC AJ&K 111),

iii) Muhammad Ghaffar v. State (1969 SCMR 10)

30. In our view decision once given cannot be reviewed subject to certain legal exceptions pursuant to the provisions as enumerated in Order XLVII Rule 1 CPC, scope whereof can neither be enlarged nor it can be farfetched in such a manner as argued by the learned ASCs for the petitioners in view of the language as employed in Order XLVII Rule 1 CPC its application would be only upto that limited extent and it cannot be unlimited. As mentioned above, the powers of review are not wide but definite and limited in nature. "It has to be confined to the four corners of the relevant rules or the phrase or for any other sufficient

reason even the review jurisdiction as visualized must be traced to Order XLVII which contains the prescribed conditions and limitations in terms of the requirement of the section and more so power to review is not an inherent power. On a proper consideration it will be found that the principles underlying the limitations mentioned in Order XLVII, rule 1, Civil Procedure Code, are implicit in the nature of review jurisdiction and cannot be equated to that of a technical obstruction." In this regard the case law as enunciated in the following cases can be referred:-

> Jalal Din v. Mohd. Akram Khan (PLD 1963 (WP) Lah. 596), Prahlad Krishna Kurne AIR 1951 Bom. 25, Hajee Suleman v. Custodian Evacuee Property (AIR 1955 Madhya Bharat 108, Rukan Din and others v. Hafiz-ud-Din and another (PLD 1962 Lah. 161), Mohd. Amir Khan v. Controller of Estate Duty PLD (1962 SC 335) Abdul Jabbar v. Collector of Central Excise and Land Customs Review Application No.15 of 1959 (Quetta) unreported considered.

31. Mr. Justice Pir Hamid (as he then was) while discussing the provisions as enumerated in Order XLVII Rule 1 CPC has opined that *"I for my part would be inclined to hold that a review is by its very nature not an appeal or a rehearing merely on the ground that one party or another conceives himself to be dissatisfied with the decision of this Court, but that it should only be granted for some sufficient cause akin to those mentioned in Order XLVII, rule 1 of the Code of Civil Procedure, the provisions whereof incorporate the principles upon which a review was usually granted by Courts of law in England. The indulgence by way review may no doubt be granted to prevent remediable injustice being done by a court of last resort as where by some inadvertence an important statutory provision has escape notice which, if it had been noticed, might materially have affected the judgment of the Court but in no case should a rehearing be allowed upon merits*." (Emphasis provided). (Muhammad Amir Khan v. Controller of Estate Duty PLD

1962 SC 335, Young v. Bristol Aeroplane Company Limited (1944) 1 K B 718, Gower v. Gower (1950) 1 A E R 804 distinguished).

32. Mr. Justice Ghulam Mujaddid Mirza (as he then was) has also examined the provisions as enumerated in section 114 CPC and Order XLVII Rule 1 CPC in the light of dictum laid down in H. M. Saya & Co. Karachi v. Wazir Ali Industries Ltd. Karachi and another (PLD 1969 SC 65) as under:-

> "2. I called upon Mr. K. H. Khurshid, learned counsel for the petitioners to first convince me as to how this petition was competent when the petitioners were not a party to the writ proceedings. Learned counsel submitted that as the petitioners had been adversely affected by the order of this Court dated the 5th of December 1973, they are, therefore, aggrieved persons and hence have a *locus standi* to file this petition in the present form. Learned counsel relied on PLD 1971 SC 130, in order to prove that the petitioners were aggrieved persons but in my view this authority would not be of much help to him because in this case the question examined was as to who would be the person aggrieved within the ambit of Article 98 of the late Constitution of Islamic Republic of Pakistan whereas in the instant case the petitioners have to bring their case within the purview of Order XLVII, rule 1, C.P.C. Learned counsel tried to avail of section 114, C.P.C. which deals with the power of review and argued that the words "any person considering himself aggrieved" were wide enough to include even those persons who initially were not a party to the proceedings but at a later stage were affected by an order adverse to their interest. My attention was invited to Order XLVII, rule 1, C.P.C. and it was submitted that even in this provision the above mentioned words have been repeated, and the learned counsel, therefore, emphasized that these words would cover the case of even a stranger, the only essential requisite being that he must consider himself to be an aggrieved person, the test for which, according to the learned counsel would be subjective. Reliance was also placed on H.M. Saya & Co., Karachi v. Wazir Ali Industries Ltd. Karachi and another (PLD 1969 SC 65) with special reference to the following observations:-

There can be no dispute that the only party which was adversely affected by the order of ad interim injunction was respondent No.1. We are satisfied that Saya & Co., deliberately omitted to make them parties with the intention of avoiding a contest. They knew fully well that the relief sought were really directed against Wazir Ali Industries Limited, and their bankers. A stranger to a suit or a proceeding is not prohibited by the Code of Civil Procedure from filing an appeal from an order passed therein. It is true that there is no express provision permitting such party to prefer an appeal against such an order. This omission, however, cannot be understood to amount to prohibition. The Court ought not to act on the principle that every procedure is to be taken as prohibited unless it is expressly provided for. To give such a meaning to the omission would result in grave injustice. The facts of this case are clear example in point. The Court should proceed on the principle that every procedure which furthers administration of justice is permissible even if there is no express provision permitting the same. Section 96 of the Civil Procedure Code deals with appeals from decrees and section 104 deals with appeals from orders. These provisions do not in terms say who is entitled to prefer an appeal. The Code, however, lays down that it is the decree or the order that has to be appealed against. If the decree or order appealed from adversely affects a person he should be permitted to challenge the same in appeal even if he was not made a party to the original suit for proceeding."

and it was argued that the principle laid down in this case was fully applicable to the present petition and hence not only that the petition was competent but also that the order dated the 5th of December 1973, of this Court deserves to be reviewed.

3. I have very carefully gone through this decision and find that the law laid down by the Supreme Court is only with regard to the appellate proceedings, whereas the scope of review is much different and the review jurisdiction is substantially and materially different to the appellate jurisdiction, because it can be only utilized on the specific grounds mentioned in Order XLVII, rule 1, C.P.C. (Emphasis provided). In this connection it would be worthwhile to reproduce in *extenso* rule 1 of Order XLVII, C.P.C. which is to the following effect:-

> "(1) Any person considering himself aggrieved-
> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,
> (b) by a decree or order from which no appeal is allowed, or
> (c) by a decision on a reference from a Court of Small Causes,
>
> and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him may apply for a review of judgment to the Court which passed the decree or made the order."
>
> The important words to be noted in this connection are "desires to obtain a review of the decree passed or order made". These words leave no room for doubt that the remedy of review could be availed of only by a person who initially was a party to the proceedings in which either a decree had been passed or an order had been made against him, otherwise the very essence of the grounds on which a review would be competent, would be rendered ineffective. It is, therefore, obvious that a stranger to the proceedings would not be permitted to avail of the grounds on which a review petition would be competent. I, therefore, do not agree with the contention of the learned counsel that a wider interpretation of the words "any person considering himself aggrieved" would be the only proper and reasonable interpretation. On the other hand, I find that these words would have to be read and interpreted in the light of the main rule and when so done in my view their operation would be restricted and would cover the case of only those persons who initially were party to the proceedings." (Emphasis provided). (Qaim Hussain v. Anjuman Islamia PLD 1974 Lah. 346).

33. We have no reason to disagree with the said conclusion which also finds support from the case titled Muhammad Rafiq v. Marium Bibi (1996 SCMR 1867). In the said case "*the petitioners filed review petition for review of the Court's order dated 25.11.1991 passed in C.A.No.87 of 1987 and C.A.No.698 of 1990. The petition was returned*

to the petitioners with the observation that the review was placed before the Acting Chief Justice and his Lordship has been pleased to pass the following order:---

> *"Parties not before this Court when the judgment was passed cannot be permitted to file a review petition. This review petition cannot be entertained."*

The petitioners, therefore, submitted an application for reconsideration under Order V, Rule 2 of the Supreme Court Rules which was heard by a Bench of three Judges (Mr. Justice Dr. Nasim Hasan Shah, C.J., Mr. Justice Saleem Akhtar and Mr. Justice Manzoor Hussian Sial) and held that "we do not think this is a fit case for reconsideration of the earlier order refusing to entertain the review petition."(Order dated 14.2.1994 passed in C.M.A. No.1-L of 1992). *In the case of Lt. Col. Nawabzada Muhammad Amir Khan v. The Controller (PLD 1962 SC 335) it was held that even if there be material irregularity but there is no substantial injury consequent thereon, the exercise of power of review to alter the judgment would not necessarily be required as the irregularity must be of such a nature as converts the process from being one in aid of justice to a process that brings about injustices. In the same case it was held that to permit a review on the ground of incorrectness would amount to granting the Court the jurisdiction to hear appeals against its own judgments. In the case of Raja Prithwi Chand Lal Chodhry v. Sukhraj Rai and others (AIR 1941 FC 1) it was observed that the Federal Court will not sit as a Court of Appeal from its own decisions nor will it entertain applications to review on the ground only that one of the parties in the case conceives himself to be aggrieved by the decision and that the Federal Court will exercise its power of review for the purpose of rectifying mistakes which have crept in.*(Emphasis provided). *In the case of Syed Muhammad Zaki v. Maqsood Ali Khan (PLD 1976 SC 308) it was observed that merely because a decision of case is erroneous per se is not a ground to justify*

its review for what would seriously impair the finality attaching to the judgment of this Court which allowed the apex of the judicial system, but if there be found a material irregularity in the decision which converts the process from being one in aid of justice to a process which brings about injustice, or if the decision is in conflict with the law of the land then it would be the duty of the Court to mend the error." It is well settled by now that "*where the decision sought to be reviewed is a conscious and deliberate decision for which full reasons are given in the impugned judgment. The petitioner may or may not agree with those reasons. But where a conscious and deliberate decision had been made with regard to the nature of orders which it was empowered to pass under a provision of law only because another view with regard thereto was canvassed could not and did not constitute a ground for review."* (Muhammad Saifullah Khan v. Federation of Pakistan PLD 1990 SC 79).

34. The CMAs have been argued in oblivion of the fact that "*right of appeal and review are not analogous as an appeal is, review is not the continuation of same proceedings, a person not party to proceeding has no right to file review. The two sub-rules of R.1 read together lead to this conclusion. Sub-rule (2) begins with the words "party who is not appealing. Sub-rule (1), no doubt, begins with the words "any person considering himself aggrieved." But R.(1), read as a whole persuade to take the view that a the words "a party who is not appealing" cannot be kept confined to sub-r (2) alone and cannot but we read in sub-r (1) also for the sake of consistency, so that the expression "person" in the opening words of sub-r(1) can only mean a person who is a party in the concerned suit or proceeding. A person who is a stranger to a suit or proceeding cannot be a person aggrieved by the decision in the suit or proceeding."* (Emphasis provided). (Khan Muhammad v. Injuman Islamia 1987 CLC 1911).

35. On the touchstone of the criterion as laid down in the above mentioned cases we are firmly of the view that allowing the review applications would not be in aid of justice and besides that the judgment impugned is not in conflict with the Constitution or law of the land in any manner and hence no lawful justification is available for its review as it has protected, preserved and defended the Constitution being supreme law of the land.

36. After having discussed Article 188 of the Constitution, Order XXVI Rule 1 of the Supreme Court Rules and Order XLVII Rule 1 CPC, now we intend to discuss the point as canvassed at bar that the Supreme Court Rules are subservient to the Article 188 of the Constitution by which unbridled powers qua review has been conferred upon this Court. In order to appreciate the said point of view it seems proper to examine the provisions as enumerated in Article 188 of the Constitution from another angle to determine i.e. the legal status of the Supreme Court Rules. The language as employed in Article 188 of the Constitution is very plain and simple and there is absolutely no confusion on the basis whereof different interpretation could be made. "A fundamental principle of constitutional construction has always been to give effect to the intent of the framers of the organic law and of the people adopting it. As has been aptly observed, "the pole star in the construction of a Constitution is the intention of its makers and adopters." When the language of the statute is not only plain but admits of but one meaning, the task of interpretation can hardly be said to arise. It is not allowable to interpret what has no need of interpretation. Such language best declares, without more, the intention of the law-givers, and is decisive of it. The rule of construction is "to intend the Legislature to have meant what they have actually expressed". It matters not, in such a case, what the consequences may be. Therefore if the meaning of the language used in a statute is unambiguous and is in

accord with justice and convenience, the Courts cannot busy themselves with supposed intentions, however admirable the same may be, because, in that event they would be travelling beyond their province and legislating for themselves. But if the context of the provision itself shows that the meaning intended was somewhat less than the words plainly seem to mean then the Court must interpret that language in accordance with the indication of the intention of the Legislature so plainly given." (Shah Jahan Begum v. Baloch PLD 1975 Lahore 390, Faiz Muhammad v. Soomar PLD 1972 Karachi 459), Abdul Hameed v. Municipal Committee PLD 1973 Lahore 339). It may be kept in view that "the first and primary rule of construction is that the intention of the Legislature must be found in the words used by the Legislature itself. If the words used are capable of one construction only then it would not be open to the Courts to adopt any other hypothetical construction on the ground that such hypothetical construction is more consistent with the alleged object and policy of the Act." (Ahmad Hassan v. Govt. of Punjab 2005 SCMR 186). The judicial consensus seems to be that "*the essence of law lies in its spirit, not in its letter, for the letter is significant only as being the external manifestation of the intention that underlies it. Nevertheless in all ordinary cases the Courts must be content to accept the litera legis as the exclusive and conclusive evidence of the sententia legis. They must, in general, taken it absolutely for granted that the Legislature has said what it meant, and meant what it has said. Ita scriptumest is the first principle of interpretation. Judges are not at liberty to add to or take from or modify the letter of the law simply because they have reason to believe that the true sententia legis is not completely or correctly expressed by it. That is to say, in all ordinary cases grammatical interpretation is the sole form allowable. It is no doubt true that the felt necessities of the times must, in the last analysis, affect every judicial determination, for the law embodies the story of a nation's development*

through the centuries and it cannot be dealt with as if it contains only axioms and corollaries of a book of mathematics. A Judge cannot stand aloof on chill and distant heights. The great tides and currents which engulf the rest of men, do not turn aside in their course and pass the Judge by. But at the same time, the Judge must remember that his primary function is to interpret the law and to record what the law is. He cannot allow his zeal, say, for social or agrarian reform, to overrun his true function. He does not run a race with the Legislature for social or agrarian reform. His task is a more limited task; his ambition a more limited ambition. Of course in this process of interpretation he enjoys a large measure of latitude inherent in the very nature of judicial process. In the skeleton provided by the Legislature, he pours life and blood and creates an organism which is best suited to meet the needs of society and in this sense he makes and moulds the law in a creative effort. But he is tied by the basic structure provided by the Legislature which he cannot alter and to appeal to the spirit of the times or to the spirit of social or agrarian reforms or for the matter of that any other reform for the purpose of twisting the language of the Legislature is certainly a function which he must refuse to perform.

The words of a statute must, prima facie, be given their ordinary meaning. We must not shrink from an interpretation which will reverse the previous law; for the purpose of a large part of our statue law is to make lawful that which would not be lawful without the statute, or, conversely, to prohibit results which would otherwise follow. Judges are not called upon to apply their opinions of sound policy so as to modify the plain meaning of statutory words but where, in construing general words the meaning of which is not entirely plain there are adequate reasons for doubting whether the Legislature could have been intending so wide an interpretation as would disregard fundamental principles, then we may be justified in adopting a narrower construction. At the same time, if the

choice is between two interpretations the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result". (Ahmad Hassan v. Govt. of Punjab 2005 SCMR 186). The above mentioned principles of interpretation have been followed in the following authorities:-

> Viscountess Rhonda's Claim, (1922) 2 AC 339, p.365 by Viscount Birkenhead, LC; Jurisprudence at p.152, 11th Edn.; Motilal v. L.T. Comr, AIR 1951 Nag. 224, 225; Thakorelal Amritlal Vaidya v. Gujarat Revenue Tribunal AIR 1964, Guj. 183, 187; Maxwell in Interpretation of Statues, p.7 10th Edn. Satyanarain v. Buishwanth AIR 1957 Pat. 550, 554; Nokes v. Doneaster Amalgamated Collieries (1940) AC, pp. 1014, 1022; Kanai Lal v. Parannidhi 1958 SCR 360; 367 AIR 1957 SC 907; 910-11; Municipal Board, Rajasthan v. S.T.A.Rajasthan AIR 1955 SC 458, 464; Bootamal v. Union of India, AIR1962 SC 1716, 1718, 1719; Sirajul Haq v. S.C. Board AIR 1959 SC 205; (1857) 6 HL Cas 61; 26 Lt. Ch. 473; 1901 AC, at pp. 102, 107 Collector of Customs, Baroda v. Digvijayasinhji and others Mills AIR 1961 80 1549, 1551; Shri Ram v. State of Maharashtra, AIR 1961 SC 674, 678; AIR 1950 SC 165, 168; Madan Lal v. Changdeo Sugar Mills, AIR 1958 Bom. 491, 495; AIR 1954 SC 749; (1955) 1 SCR 829, 836-7; AIR 1955 SC 376, 381; AIR 1955 SC 504; Kanai Lal v. Parannidhi 1958 SCR 360, 367, AIR 1957 SC 907, 910-11; Municipal Board, Rajasthan v. S.T.A. Rajasthan AIR 1955 SC 458,464; Jamat-i-Islami v. Federation of Pakistan PLD 2000 SC 111; Muhammad Iqbal v. Government of Punjab PLD 1999 Lah. 109, Province of East Pakistan v. Noor Ahmad PLD 1964 SC 451, Collector of Sales Tax v. Superior Textile Mills Ltd. PLD 2001 SC 600; Shujat Hussain v. State 1995 SCMR 1249; Province of Punjab v. Munir Hussian Shah 1998 SCMR 1326; Interpretation of Statues 7th Edn. 1984 by Dr. Tahir Mahmood; understanding Statutes Canons of Construction, 2nd Edn. By S.M. Zafar; The Interpretation of Statutes by M.

Mahmood and Craies on Statues Law, 7th Edn. by S.G.G. Edgar.

37. In view of the above discussed principles of interpretation it seems immaterial to discuss whether Supreme Court Rules are subservient to Article 188 of the Constitution for the simple reason that the main object to enact Article 188 of the Constitution was to enhance the power of review conferred upon this Court and in order to achieve this object it has been provided specifically in the Article itself that such power would be subject to "any rules made by the Supreme Court" meaning thereby that it was entirely left to this Court that how and in what manner such power is to be regulated and exercised. We are conscious of the fact that "it cannot be said that an unlimited right of delegation is inherent in the legislative power itself. This is not warranted by the provisions of the Constitution and the legitimacy of delegation depends entirely upon its being used as an ancillary measure which the Legislature considers to be necessary for the purpose of exercising its legislative powers effectively and completely. The Legislature must retain in its own hands the essential legislative functions which consist in declaring the legislative policy and laying down the standard which is to be enacted into a rule of law, and what can be delegated is the task of subordinate legislation which by its very nature is ancillary to the statute which delegates the power to make it." (Ahmad Hassan v. Govt. of Punjab 2005 SCMR 186). There is no denial of the fact that Courts are creatures of the Constitution; they derive their powers and jurisdictions from the Constitution and must confine themselves within the limits set by the Constitution but it hardly needs any elucidation that it is the right of the judiciary to interpret the Constitution and determine as to what a particular provision of the Constitution means or does not mean even if it is a provision seeking to oust its own jurisdiction. In this regard reference can be made to the

case of Federation of Pakistan v. Saeed Ahmad PLD 1974 SC 151), Pak. v. Saeed (PLJ 1974 SC 77). A line of distinction is to be drawn between statutory rules made by the executive pursuant to an Act or an Ordinance and statutory rules made by the Supreme Court pursuant to the mandate of Constitution as conferred upon it under Article 188 of the Constitution. In the former case we are mindful of the fact that *"statutory rule cannot enlarge the scope of the section under which it is framed and if a rule goes beyond what the section contemplates, the rule must yield to the statute. The authority of executive to make rules and regulations in order to effectuate the intention and policy of the Legislature, must be exercised within the limits of mandate given to the rule making authority and the rules framed under an enactment must be consistent with the provisions of said enactment. The rules framed under a statue, if are inconsistent with the provisions of the statute and defeat the intention of Legislature expressed in the main statue, same shall be invalid. The rule-making authority cannot clothe itself with power which is not given to it under the statute and thus the rules made under a statute, neither enlarge the scope of the Act nor can go beyond the Act and must not be in conflict with the provisions of statute or repugnant to any other law in force."* The said principle of interpretation has been followed in the under mentioned cases:-

> Ahmad Hassan v. Govt. of Punjab 2005 SCMR 186, Institute of Patent Agents v. Lackwood (1894) AC 347, 359, 360, 364, 365; Cf. London Traffic Act, 1924, S. 10(3), Land Realization Co. Ltd. v. Postmaster-General (1950) 66 TLR (Pt.1) 985, 991 per Romer, J. (1950) Ch. 435), 1951 SCR 747, Harilal v. Deputy Director of Consolidation 1982 All LJ 223, Chief Inspector Mines v. K.C. Thapar AIR 1961 SC 838, 845, Narasimha Raju v. Brundavanasaha AIR 1943 Mad. 617, 621, Aribam Pishak Sharma v. Aribam Tuleswar Sharma AIR 1968 Manipur 74, Quoted James, LJ in Ex parte Davies (1872) 7 Ch. A. 526, 529. "New Sindh", AIR 1942 Sindh 65, 71, Barisal Cooperative Central Bank v. Benoy Bhusan AIR 1934 Cal.537, Municipal

Corporation v. Saw Willie AIR 1942 Rang. 70, 74, Hazrat Syed Shah Mustarshid Ali Al-Quadari v. Commissioner of Wakfs AIR 1954 Cal.436, Shankar Lal Laxmi Narayan Rathi v. Authority under Minimum Wages Act 1979 MPLJ 15, M.P. Kurmaraswami Raja AIR 1955 Mad. 326, K. Mathuvadivela v. RT Officer AIR 1956 Mad. 143, Kashi Prasad Saksena v.State of U.P. AIR 1967 All. 173, PLD 1975 Azad J&K 81, PLD 1966 Lah. 287, Shanta Prasad v. Collector, Nainital 1978 All. LJ 126, Dattatraya Narhar Pitale v. Vibhakar Dinka Gokhale 1975 Mah. LJ 701, Narayanan v. Food Inspector, Calicut Corporation 1979 Ker LT 469, Ganpat v. Lingappa AIR 1962 Bom. 104,105, Adarash Industrial Corporation v. Market Committee, Karnal AIR 1962 Punj. 426, 430 by Tek Chand, J, Devjeet v. Gram Panchayat AIR 1968 Raj LW 231, Shri Synthetics, Ltd, Ujjain v. Union of India 1982 Jab LJ 279, 1982 MPLJ 340, Central Bank of India v. Their Workmen AIR 1960 SC 12, Barisal Cooperative Central Bank v. Benoy Bhusan AIR 1934 Cal.537, 540, Rajam Chetti v. Seshayya ILR 18 Mad. 236, 245, Raghanallu Naidu v. Corporation of Madras AIR 1930 Mad. 648, Pakistan v. Aryan Petro Chemical Industries (Pvt.) Ltd. 2003 SCMR 370, Ziauddin v. Punjab Local Government 1985 SCMR 365, Hirjina Salt Chemicals (Pak) Ltd. v. Union Council Gharo 1982 SCMR 522, Mehraj Flour Mills v. Provincial Government 2001 SCMR 1806, Collector of Sales Tax v. Superior Textile Mills Ltd. PLD 2001 SC 600.

The Supreme Court Rules are on a higher pedestal and promulgated on the basis of mandate given by the Constitution itself and not by the Government, object whereof was to enhance the power of review as conferred upon Supreme Court under Article 188 of the Constitution.

38. Now we intend to discuss the question as to whether issuance of notice to the applicants was mandatory? Before we could answer this question, another question would arise here at this juncture as to whether the former question needs any reply for the simple reason that it has been dilated upon, discussed and determined in a comprehensive manner in the judgment impugned, relevant portion whereof is reproduced herein below for ready reference:-

"146. However, we did not issue notices to the concerned Judges of the Supreme Court and High Courts who made oath in violation of the order dated 3rd November, 2007 passed by a seven-member Bench of this Court in *Wajihuddin Ahmed's case,* as also the Judges who were appointed in consultation with Abdul Hameed Dogar, J, *inter alia,* on a consideration of the law laid down in *Supreme Court Bar Association's case* where this Court examined the question of issuance of notice in a somewhat similar situation with reference to the law laid down in the cases of *Al-Jehad Trust and Asad Ali (supra) and Ghulam Hyder Lakho v. Federation of Pakistan* (PLD 2000 SC 179). It was held that the principle of natural justice would not be violated if no notices were issued to the concerned Judges. Relevant portion from the judgment is reproduced below:-

> "32. This brings us to the next common contention that the senior Judges of the Lahore High Court were condemned unheard and even in these petitions notices have not been issued to them. It is rather unnecessary to consider the contention as we have already held that the recommendations of the judicial consultee are not justiciable. Be that as it may, the contention is misconceived. The recommendations in questions were manifestation of subjective satisfaction of the judicial consultee, therefore, the principle of natural justice 'audi alteram partem' was not attracted. Moreover, the contention in essence is identical with contentions Nos.(iv) and (vii) raised in the case of Ghulam Hyder Lakho which read as under:-
>
> "(iv) That the petitioners were de-notified or the appointments were nullified by the Government without hearing them and as such the action of Government nullifying their appointments as Judges of the High Court offended against the principles of natural justice."
>
> "(vii) That the removal of the petitioners from the office of Judges of the High Court in the above manner amounted to a stigma and as such the petitioners were entitled to be heard."

The above contentions were held to be devoid of force as is evident from the following observations at page 196 of the judgment:--

> "In these circumstances, we are inclined to hold that where the Chief Justice of the High Court concerned and the Chief Justice of Pakistan do not recommend a particular incumbent for confirmation or appointment as a Judge of the High Court and these recommendations are accepted by the President/Executive the same cannot be brought under challenge in the Court on the ground that the

> incumbent was not heard before making such recommendations."
>
> 33. As regards the question of notices we are of the considered view that issuance of notices to the concerned Judges will do more harm than good. This question was considered in the Judges' case also and it was clearly held at page 534 of the judgment that the principle of natural justice is not violated if notice is not issued to the concerned Judges. The observations in Asad Ali's case at page 327 of the judgment are also relevant which read as under:-
>
> > "It must be borne in mind that Judges of superior Courts by their tradition, maintain high degree of comity amongst themselves. They are not expected to go public on their differences over any issue. They are also not expected to litigate in Courts like ordinary litigant in case of denial of a right connected with their offices. Article VI of the Code of Conduct signed by every Judge of the Superior Courts also enjoins upon them to avoid as far as possible any litigation on their behalf or on behalf of others. Therefore, in keeping with the high tradition of their office and their exalted image in the public eye, the Judges of superior Courts can only express their disapproval, resentment or reservations' on an issue either in their judgment or order if the opportunity so arises....."

39. In the light of what has been reproduced herein above, the only inescapable conclusion would be that issuance of notice was not necessary. We may point out that some of the petitioners have taken the plea that they were unaware of the Supreme Court order of 3.11.2007. They have, therefore, contended that the finding in the judgment of 31.7.2009, which holds that they had knowledge of the order amounts to denial of the rule of natural justice and as a consequence they will be prejudiced in the proceedings to be initiated under article 209 of the Constitution. On this point, it may be noted that the petitioners are silent as to when the petitioners got knowledge of the order and what they did thereafter to show respect and obedience to the same. It is an admitted feature of the case that the judgment impugned has not been challenged and what is claimed is re-hearing in the interest of natural justice in oblivion of the fact that all the questions required to be re-

heard have been dealt with in the judgment impugned after having taken into consideration each and every aspect of the controversy. The provision qua review in fact is not meant for getting the matter re-heard. In this regard reference can be made to case titled Abdul Hamid Saqfi v. Service Tribunal of Pakistan (1988 SCMR 1318). No doubt that the petitioners are dissatisfied but this does not constitute a valid ground for review. (Nawab Bibi v. Hamida Begum 1968 SCMR 104, Abdul Majeed v. Chief Settlement Commissioner 1980 SCMR 504, Rashid Ahmed v. Irshad Ahmed 1968 SCMR 12). We may make it clear that a mere desire for rehearing of the matter does not constitute a valid cause and sufficient ground for the grant of review. In this regard we are fortified by the dictum laid down in the following authorities:-

> Abdul Hameed Saqfi v. Service Tribunal of Pakistan (1988 SCMR 1318), Ali Khan v. Shah Zaman (1980 SCMR 332), Abdul Majeed v. Chief Settlement Commissioner (1980 SCMR 504), Maqbool Ahmed Tabassum v. The State (1980 SCMR 907), Zulfiqar Ali Bhutto v. The State (PLD 1979 SC 741), Nawab Bibi v. Hamida Begum (1968 SCMR 104), Muhammad Najibullah Khan v. Govt. of Pakistan (1968 SCMR 768), Muhammad Ghaffar v. The State (1969 SCMR 12), Ghulam Fatima v. Settlement Commissioner (1969 SCMR 5), Feroze Din v. Allah Ditta (1969 SCMR 10).

40. It is also an admitted legal position that “reversing an action taken initially without issuing a show-cause notice was not a principle of universal application. Undoing of such an act was also refused where the facts leading to the impugned action were uncontrovertible and admitted and where despite a prior hearing, the results could and would not have been any different. Reliance is placed on the following authorities:-

> S.L.Kapoor v. Jagmohan and others AIR 1981 SC 136, Muhammad Ishaq v. Said-ud-Din PLD 1959 Kar. 669,

Abdul Haq Indhar and others v. Province of Sindh and others 2000 SCMR 907."

Besides the reasoning as given above, it may not be lost sight of that the applicants were never made respondents in Const. Petition No.9 of 2009 and Const. Petition No.8 of 2009 and no specific relief whatsoever was sought against them in person. The removal of the applicants is fall out of the judgment impugned which cannot be questioned individually.

41. No stricture was passed qua their eligibility, integrity, entitlement, qualifications and besides that their removal from the office of Judges does not amount to be a stigma and therefore, the doctrine of *'audi alteram partem'* argued with vehemence cannot be pressed into service which otherwise is not universally recognized due to certain limitations. Let us examine the doctrine itself which was referred to time and again by the learned ASC on behalf of petitioners. *"In Seneca's Medea, it is said: "a judge is unjust who hears but one side of a case, even though he decides it justly". Based on this, has been developed "Audi alteram partem" as a facet of natural justice".* (Seneca Medea 4 BC-AD 65). *'Audi alteram partem' means hear the other side; hear both sides. Under the rule, a person who is to decide must give the parties an opportunity of being heard before him and fair opportunity to those who are parties in the controversy for contradicting or correcting anything prejudicial to their view."* (emphasis provided). (Union of India v. Tulsiram Patel AIR 1985 SC 1416 at p.1460). The petitioners were admittedly not a party in the main controversy. *"Since the audi alteram partem rule is intended to inject justice into the law, it cannot be applied to defeat the ends of justice, or to make the law lifeless, absurd, stultifying, self-defeating or plainly contrary to the common sense of the situation. 'Audi alteram partem' rule as such is not cast in a rigid mould and judicial decisions establish that it may suffer situational modifications."* (Emphasis provided). (Maneka Gandhi v. Union of India

AIR 1978 SC 597). It may not be out of place to mention here that by now it is well established that *"where a right to a prior notice and an opportunity to be heard before an order is passed would obstruct the taking of prompt action, such a right can be excluded. Thus, the rule may be discarded in an emergent situation where immediate action brooks no delay to prevent some imminent danger or injury or hazard to paramount public interests."* (Swadeshi Cotton Mills v Union of India AIR 1981 SC 818, (1981) 51 Comp Cas 210 SC, (1981) 2 SCR 533. Note: Decisions in Maneka Gandhi v Union of India AIR 1978 SC 597, (1978) 1 SCC 248, Mohinder Sindh Gill v The Chief Election Commissioner AIR 1978 SC 851, (1978) 1 SCC 405, Union of India v Tulsiram Patel AIR 1985 SC 1416, (1985) 3 SCC 398. The *'audi alteram partem'* rule would be excluded, if importing the right to be heard has the effect of paralyzing the administrative process or the need for promptitude or the urgency of the situation so demands. (Pearlberg v Varty (Inspector of Taxes), [1971] 1 WLR 728 (CA), [1971] 2 All ER 552 (CA). A *prima facie* right to opportunity to be heard may be excluded by implication in the following cases:-

(i) **When an authority is vested with wide discretion**
(H.W.R. Wade & C.F. Forsyth: Administrative Law, 7th Ed., at p.391
H.W.R. Wade & C.F. Forsyth: Administrative Law, 7th Ed., at p.392)

(ii) **When the maxim 'expressio unius est exclusio alterius' is involved**
(Colquhoun v Brooks 21 QBD 52 at p. 62
Humphrey's Executor v. United States (1935) 295 US 602)

(iii) **Where absence of expectation of hearing exists**
(Y.G. Shivakumar v B.M. Vijaya Shankar (1992) 2 SCC 207, AIR 1992 SC 952)

(iv) **When compulsive necessity so demands**
(Union of India v. W.N.Chadha (supra)

(v) **When nothing unfair can be inferred**
(Union of India v. W.N.Chadha (supra)

(vi) **When advantage by protracting a proceeding is tried to be reaped**
(Ram Krishna Verma v State of U.P. (1992) 2 SCC 620, AIR 1992 SC 1888).

(vii) **When an order does not deprive a person of his right or liberty**

(Indian Explosive Ltd. (Fertiliser Division), Panki, Kanpur v State of Uttar Pradesh (1981) 2 Lab LJ 159)

(viii) **In case of arrest, search and seizure in criminal case**
(Union of India v W.N. Chadha 1993 Cr LJ 859, 1993 Supp (4) SCC 260, AIR 1993 SC 1082)

(ix) **In case of maintaining academic discipline**
(1992) 2 SCC 207)

(x) **In case of provisional selection to an academic course**
(S.R. Bhupeshkar v Secretary, Selection Committee, Sarbarmathi Hostel, Kilpauk, Medical College Hostel Campus, Madras AIR 1995 Mad 383 (FB)

(xi) **In case of enormous malpractices in selection process**
(Biswa Ranjan Sahoo v Sushanta Kumar Dinda (1996) 5 SCC 365, AIR 1996 SC 2552)

42. It must not be lost sight of that in the above mentioned "exclusionary cases, the *'audi alteram partem'* rule is held inapplicable not by way of an exception to fair play in action but because nothing unfair can be inferred by not affording an opportunity to present or meet a case." (Maneka Gandhi v Union of India AIR 1978 SC 597, (1978) 1 SCC 248. vide also Mohinder Singh Gill v The Chief Election Commissioner AIR 1978 SC 851, (1978) 1 SCC 405. The doctrine of *'audi alteram partem'* is further subject to *maxim nemo inauditus condemnari debet contumax'*. Therefore, where a person does not appear at appropriate stage before the forum concerned or is found to be otherwise defiant the doctrine would have no application. It is also to be kept in view that "application of said principle has its limitations. Where the person against whom an adverse order is made has acted illegally and in violation of law for obtaining illegal gains and benefits through an order obtained with mala fide intention, influence, pressure and ulterior motive then the authority would be competent to rescind/withdrawn/cancel such order without affording an opportunity of personal hearing to the affected party. Said principle though was always deemed to be embedded in the statute and even if there was no such specific or express provision, it would be deemed to be one of the parts of the statute because no adverse action can be taken against a

person without providing right of hearing to him. Principle of audi alteram partem, at the same time, could not be treated to be of universal nature because before invoking/applying the said principle one had to specify that the person against whom action was contemplated to be taken prima facie had a vested right to defend the action and in those cases where the claimant had no basis or entitlement in his favour he would not be entitled to protection of the principles of natural justice." (Nazir Ahmad Panhwar v. Govt. of Sindh thr. Chief Secy. Sindh 2009 PLC (CS) 161, Abdul Haque Indhar and others v. Province of Sindh through Secretary Forest, Fisheries and Livestock Department, Karachi and 3 others 2000 SCMR 907 and Abdul Waheed and another v. Secretary, Ministry of Culture, Sports, Tourism and Youth Affairs, Islamabad and another 2002 SCMR 769). It has been elucidated in the detailed reasoning of the judgment of 31.7.2009 how the order passed by a seven Member Bench of this Court has been flagrantly violated. Besides that the applicants had no vested right to be heard and furthermore they have acted illegally and in violation of the order of seven Member Bench for obtaining illegal gains and benefits which cannot be ignored while examining the principle of *'audi alteram partem'.*

43. Now let us discuss the concept of natural justice which has been addressed repeatedly by almost all the learned counsel on behalf of the applicants. In India, the concept of natural justice was discussed in the case of "Swadeshi Cotton Mills v. Union of India (AIR 1981 SC 818) and R.S. SARKARIA, J, speaking for himself and on behalf of D.A. DESAI, J, observed:

> *'The phrase is not capable of a static and precise definition. It cannot be imprisoned in the straight-jacket of a cast-iron formulae. Historically, "natural justice" has been used in a way "which implies the existence of moral principles of self-evident and unarguable truth", "Natural justice" by Paul Jackson, 2nd Edn.,*

> *page 1. In course of time, judges nurtured in the traditions of British Jurisprudence, often invoked it in conjunction with a reference to "equity and good conscience". Legal experts of earlier generations did not draw any distinction between "natural justice" and "natural law". "Natural Justice" was considered as "that part of natural law which relates to the administration of justice".'*

In Maclean v. The Workers' Union, MAUGHAM, J. observed that justice, and with it 'natural justice', is in truth an elaborate and artificial product of civilization which varies with different civilisations. BLACK, J in Green v Blake remarked that 'natural justice' understandably meant no more than 'justice' without the adjective. But what is 'justice'? It is a question which has been asked for thousand of years by distinguished scholars and men of eminence. Socrates asked it 2000 years ago, and never got a satisfactory answer. LORD DENNING said:

> *'Justice isn't something temporal-it is eternal-and the nearest approach to a definition that I can give is, "Justice is what the right thinking members of the community believe to be fair."*(Emphasis provided)

44. It is also well acknowledged by now that *"rules of natural justice are principles ingrained into the conscience of men. Justice being based substantially on natural ideals and human values, the administration of justice here is freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. Rules of natural justice are not embodied rules. Being means to an end and not and end in themselves, it is not possible to make an exhaustive catalogue of such rules. "The principles of natural justice", said SIR RAYMOND EVERSHED, MR, "are easy to proclaim, but their precise extent is far less easy to define."* (Swadeshi Cotton Mills v Union of India AIR 1981 SC 818, (1981) 51 Comp Cas 210 SC, (1981) 2 SCR 533., Abbott v. Sullivan [1952] 1 KB 189, [1952] 1 All ER 226), [1929] 1 Ch 602; [1929] All ER Rep 468, [1948] IR 242, 'Constitutional Developments in Britian',

BY LORD DENNING as published in The Fourteenth Amendment, [A Century in American Law and Life], Centennial Volume, Edited by Bernard Schwartz) The concept of natural justice is a combination of certain rules i.e. *'audi alteram partem'* (nobody should be condemned unheard) and discussed in depth in preceding paragraphs and *'nemo judex in re sua'* (nobody should be a Judge in his own case or cause) application whereof is to be decided by the Court itself in accordance with the fact, circumstances, nature of the case vis-à-vis the law applicable on the subject. It squarely falls within the jurisdictional domain of the Court concerned whether it would be necessary to embark upon the concept of natural justice and whether it would be inevitable for the just decision of the case. The Court is not bound to follow such rules where there is no apprehension of injustice. It can be said with certainty that the concept of natural justice is flexible and it cannot be rigid because it is the circumstances of each case which determine the question of the applicability of the rules of natural justice. "There are a number of cases in India in which the flexibility of the rules of natural justice has been upheld. In New Parkash Transport Co. Ltd. v. New Sawarna Transport Co. Ltd., the Supreme Court observed that rules of natural justice vary with varying constitutions of statutory bodies and the rules prescribed by the legislature under which they have to act, and the question whether in a particular case they have been contravened must be judged not by any preconceived notion of what they may be but in the light of the provision of the relevant Act. While natural justice is universally respected, the standard vary with situations contacting into a brief, even post-decisional opportunity, or expanding into trial-type trappings. As it may always be tailored to the situation, minimal natural justice, the bares notice, 'littlest' opportunity, in the shortest time, may serve. In exceptional

cases, the application of the rules may even be excluded." A few other important cases which may be referred to are as under:-

> Suresh Koshy George v University of Kerala AIR 1969 SC 198, (1968) 2 SCWR 117, Union of India v Col. J.N. Sinha AIR 1971 SC 40, (1971) 1 SCR 791, A.K. Kraipak v Union of India AIR 1970 SC 150, (1970) 1 SCR 457, (1969) 2 SCC 262, (1969) 1 SCA 605, Swadeshi Cotton Mills v Union of India AIR 1981 SC 818, (1981) 2 SCR 533, (1981) 51 Comp CAs 210 (SC), J. Mahapatra & Co. v State of Orissa AIR 1984 SC 1572, (1985) 1 SCR 322, Smt. Maneka Gandhi v Union of India AIR 1978 SC 597, (1978) 1 SCC 248. AIR 1957 SC 232, Mohinder Singh Gill v The Chief Election Commissioner, New Delhi AIR 1978 SC 851, (1978) 1 SCC 405, S.L. Kapoor v Jagmohan AIR 1981 SC 136, (1980) 4 SCC 379, Union of India v Tulsiram Patel AIR 1985 SC 1416, (1985) 3 SCC 398).

45. The concept of *audi alterum partem* cannot be invoked in view of the peculiar circumstances of the case as it would be an aid to and violation of the Constitution, which can never be the object of natural justice.

We have already held in the judgment impugned that:

> "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."

46. As mentioned above all appointments made in the superior judiciary have been declared to be unconstitutional, void *ab initio* and of no legal effect and such appointees shall cease to hold office forthwith. In such view of the matter as rightly pointed out by Mr. Rashid A. Rizvi, learned Sr. ASC that any super structure subsequently built on the basis of such void orders passed under the garb of PCO did not possess any legal sanctity and besides that it is well settled by now that Constitutional jurisdiction cannot be invoked in aid of injustice. It is noteworthy that the courts have refused to intervene and the judicial consensus is that *"where the grant of relief would amount to retention of ill-gotten gains or would lead to injustice or aiding the injustice,"* as such the question of the applicability of natural justice does not arise and in support thereof various cases can be cited which are as under:-

Government of N.W.F.P. v. Muzaffar Iqbal and others 1990 SCMR 1321, Hussain Bakhsh and others v. Settlement

Commissioner and others PLD 1969 Lah. 1039, Pakistan Gum and Chemicals Ltd. v. Chairman, Karachi Municipal Corporation PLD 1975 Kar. 495, Yousaf Ali v. Muhammad Aslam Zia PLD 1958 SC 104, Khuda Bakhsh v. Khushi Muhammad PLD 1976 SC 208, Conforce Ltd. S. Ali Shah PLD 1977 SC 599, Mazhar Hussain Khan v. Government of West Pakistan 1983 SCMR 40, Muhammad Swaleh's case PLD 1964 SC 97, Yousaf Ali Mullah Noor Bhoy v. The King PLD 1949 PC 108, Muhammad Fazil v. Chief Settlement Commissioner PLD 1975 SC 331, Sharif Ahmad Hashmi v. Chairman, Screening Committee 1978 SCMR 367, Raunaq Ali v. Chief Settlement Commissioner PLD 1973 SC 236, Chittagong Chamber of Commerce and Industry v. C.S. Ltd PLD 1970 SC 132, PLD 1973 SC 236, Begum Shamsun Nisa v. Said Akbar Abbasi and another PLD 1982 SC 413, Gul Muhammad v. Additional Settlement Commissioner 1985 SCMR 491, Nazim Ali and others v. Mustafa Ali and others 1981 SCMR 231, Wali Muhammad and others v. Sheikh Muhammad and others PLD 1974 SC 106, Meraj Din v. Director, Health Services 1969 SCMR 4, Tufail Muhammad v. Muhammad Ziaullah Khan PLD 1965 SC 269, Azmat Ali v. Chief Settlement and Rehabilitation Commissioner PLD 1964 SC 260, Province of the Punjab v. S. Muhammad Zafar Bukhari PLD 1997 SC 351, Nawab Syed Raunaq Ali and others v. Chief Settlement Commissioner and others PLD 1973 SC 230, Reg v. Eastbourne Corporation (1900) 83 LTR 338, The Queen v. The Eastern Counties Railway (1843) 12 LJR 271, The Queen v. Lord Newborough (1869) LR 4 QB 585) Khiali Khan v. Nazir PLD 1997 SC 304, Raunaq Ali v. Chief Settlement Commissioner (PLD 1973 SC 236), Muhammad Baran v. Member (Settlement and Rehabilitation), Board of Revenue PLD 1991 SC 691, Engineer-in-Chief Branch v. Jalauddin PLD 1992 SC 207, Manager, Jammu and Kashmir State Property in Pakistan v. Khuda Yar PLD 1975 SC 678, Allah Ditta v. Barkat Ali 1992 SCMR 1974, Vulcan Company (Pvt.) Ltd. v. Collector of Customs PLD 2000 SC 825, Nawab Syed Raunaq Ali and others v. Chief Settlement Commissioner and others PLD 1973 SC 236, The Chief Settlement Commissioner, Lahore v. Raja Muhammad Fazil Khan and others 1975 SC 331 at 350, Syed Nazim Ali and others v. Syed Mustafa Ali and others 1981 SCMR 231, Wali Muhammad and others v. Sakhi Muhammad and others

PLD 1974 SC 106, Tufail Muhammad and others v. Raja Muhammad Ziaullah and others PLD 1965 SC 269, Khaili Khan v Haji Nazir and others PLD 1997 SC 304, Abdul Haq Indhar and others v. Province of Sindh and others 2000 SCMR 907, Farzand Ali v. Province of West Pakistan PLD 1970 SC 98, Muhammad Shoaib v. Govt. of NWFP 2005 SCMR 85.

47. It is well settled by now that "the object of the establishment and the continued existence of the Courts of law is to dispense and foster justice, and to right the wrongs. This purpose can never be completely achieved unless the injustice done was undone and unless the Courts stepped in and refused to perpetuate what was patently unjust, unfair and unlawful. It is for this reason that the Courts have never permitted their judicial powers to be invoked or used for retention of illegal and ill-gotten gains. Nor have the Courts ever opted to exercise their powers in aid of injustice or to grant any relief to persons with unclean hands or for protecting the unethical or underserved benefits". We cannot render any help to the applicants who were admittedly the consequent beneficiaries of the said unconstitutional, illegal and unethical actions. *"There is no gain reiterating that superior Courts are not expected to act in aid of injustice and to perpetuate the illegalities or put a premium on ill-gotten gains."*

48. We are afraid that the Objectives Resolution relied upon by Mr. Wasim Sajjad, learned Sr. ASC may not render any assistance to the case of applicants for the simple reason that no interpretation of any Article of the Constitution repugnant to the Islamic provisions has been made in the judgment impugned. The Objectives Resolution remained a subject of discussion in various judgments and the judicial consensus seems to be that *"while interpreting the Constitution, the Objectives Resolution must be present to the mind of the Judge and where the language of the Constitutional provision permits exercise of*

*choice, the Court must choose that interpretation which is guided by the principles embodied therein. But that does not mean, that Objectives Resolution is to be given a status higher than that of other provisions and used to defeat such provisions. One provision of the Constitution cannot be struck down on the basis of another provision. The Objectives Resolution made substantive part of the Constitution provides a new approach to the constitutional interpretation since the principles and provisions of the Objectives Resolution have been placed in the body of the Constitution and have now to be read alongwith the other provisions of the Constitution. While interpreting the provisions of the Constitution and the law the Supreme Court observed that the provisions contained in Article 2-A read with Objectives Resolution have also been kept in mind in the sense that any doubt, major or minor, has been resolved in such a manner so as to advance the dictates of justice as well as the rule that justice not only should be done but it should seem to have been done. The last mentioned principle is enshrined as much in the Islamic jurisprudence as in any other juridical system. It may also be clarified that had a need arisen to further rely on Article 2-A of the Constitution so as to give effect to the Objectives Resolution treating the right to obtain justice as a very important substantive part of our entire Constitutional set up as well as the Constitution itself, the court would have done it."*Ghulam Mustafa Khar v. Pakistan)* (PLD 1988 Lah. 49), Khar v. Pakistan (NLR 1988 Civ. 35), Malik Ghulam Mustafa Khar v. Pakistan etc (KLR 88 Cr. C 128), Farhat Jaleel (Miss) v. Province of Sindh (PLD 1990 Kar. 342), Mrs. Resham Bibi v. Elahi Sain (PLD 1991 SC 1034), Mirza Qamar Raza v. Tahira Begum (PLD 1988 Kar. 169), Bank of Oman Ltd. v. East Trading Co. (PLD 1987 Kar. 404).

49. The judgment impugned is neither in violation of the Objectives Resolution as enumerated in Article 2-A of the Constitution nor is repugnant to any principle of Qur'an and Sunnah. We are afraid

the Objectives Resolution would not render any help to the case of the applicants because the main purpose of insertion of Article 2-A in the Constitution was the enforcement of Qur'an and Sunnah within the framework of the principles and provisions of the Objectives Resolution through Courts of law. (Shaukat Hussain v. Rubina PLD 1989 Kar 513, Qamar Raza v. Tahira Begum PLD 1988 Kar 169, Habib Bank Ltd v. Muhammad Hussain PLD 1987 Kar. 612, Muhammad Sharif v. MBR Punjab PLD 1987 Lah. 58).

50. It is worth mentioning that in the judgment impugned it has been declared that PCO was not a valid piece of legislation, therefore, the entire structure raised on it was bound to fall alongwith it. In such view of the matter no person can prefer review with the plea that he was deprived of the benefit which had accrued to him by the said illegal construction. It is also to be kept in view that electronic and print media had widely published the proceedings and judgment impugned and all the applicants were aware that they were deriving their legitimacy under the garb of judgment delivered in Tika Muhammad Iqbal Khan's case *(supra)* and thus it was incumbent upon them to have approached this Court for impleadment. They had no other legitimacy and no legal right to hold the office of Judges of superior courts once the dictum as laid down in Tika Muhammad Iqbal Khan's case *(supra)* has been set aside and would be too late in the day to take the plea that they were unaware and should be afforded proper opportunity of hearing.

51. By no stretch of imagination it can be believed that order dated 3.11.2007 was not within their knowledge. It was held at page 183 of the judgment impugned that the entire world 'knew' about the order dated 3.11.2007 which was appreciated not only in the country but at global level hence the plea of ignorance is not tenable. In the same wake of events it has been observed that notice was issued both

in general as well as in specific terms as is indicative from paragraphs No. 145 and 261 of the judgment impugned wherein it was made abundantly clear that any one interested in the proceedings was at liberty to join the same and thus all the aggrieved and affected persons could have approached the Court which was not done by the petitioners. As mentioned herein above, the above notice was specific for General (Retd.) Pervez Musharraf and it was general for anyone interested in the proceedings which negates the version of petitioners that no notice was given to them. The question as to the issuance of notice was mandatory which was only issued to General (Retd.) Pervez Musharraf has been examined and we are of the view that such a contention is devoid of merit because General (Retd.) Pervez Musharraf was a person responsible for violating the Constitution by means of action taken on 3.11.2007 and therefore proper opportunity of hearing was afforded to him to put forward his defence. The petitioners do not assail the judgment in respect of the treatment it gives to those actions. They, therefore, are not on the same footing as General (Retd.) Pervez Musharraf but their grievances are altogether different in nature. It may be correct upto the extent that no notice was served individually and by name which was not felt necessary in view of the peculiar circumstances of the case and for the reasons discussed earlier. It is also not believable that the order dated 3.11.2007 was not within their knowledge which was widely published in print and electronic media and the petitioners being members of higher judiciary cannot remain ignorant as their entire fate was revolving around the PCO and the Oath Order hence the question of lack of knowledge does not arise. We fully subscribe to the view of Mr. Hamid Khan, learned Sr. ASC that the houses of people were being raided, many arrest has been taken place, some had gone to hiding, whole of the country was at turmoil and it was not an isolated matter but it affected the entire country which was

completely paralyzed. In such a situation how the petitioners could remain ignorant qua the order passed on 3.11.2007. The presumption of knowledge of the order can be validly drawn.

52. After having discussed the relevant provisions of law qua review and various judicial pronouncements, we are of the view that no yardstick can be fixed that by whom review can be filed and therefore, no restriction can be made on an ordinary litigant for the redressal of his genuine grievances subject to circumstances of the case. After having a careful perusal of all the review petitions it can be inferred safely that no grievance whatsoever was expressed against the judgment impugned whereby all the actions of General (Retd.) Pervez Musharraf taken w.e.f. 3.11.2007 to 15.12.2007 were declared unlawful and unconstitutional. It is worth mentioning that the petitioners were also not defending the dictum laid down in Tika Muhammad Iqbal Khan's case *(supra)* rather they were aggrieved of the fall out of the judgment impugned declaring their appointments as invalid. It is, however, to be noted that this principle was never evolved at first occasion and rather the law laid down in the cases of Al-Jehad Trust and Asad Ali *(supra)* was followed and re-affirmed. In our view it was not the first occasion as mentioned herein above that the validity or otherwise of the appointment of a person as a Judge of the superior Court was examined. How a declaration can be given that the appointment of the petitioners were not unconstitutional and illegal as it would be in contravention of the law laid down in Al-Jehad Trust and Ghulam Hyder Lakho's case *(supra)*. The impugned judgment had only re-affirmed the well entrenched legal proposition finally decided in the above referred two cases.

53. We may clarify once again that the powers as conferred upon this Court under Article 188 of the Constitution, Rule XXVI of the

Supreme Court Rules, 1980 and Order XLVII CPC can be invoked in suitable cases as this Court had a prerogative and privilege to do so if found in the interest of justice, fair play and equity. An ordinary litigant must not be prejudiced by the observation made herein above in a peculiar backdrop and scenario already discussed at length in preceding paragraphs.

54. Mr. Wasim Sajjad and other counsel representing the petitioners have not been able to satisfy us as to the implication of a judgment in *rem* which binds parties and non-parties alike as opposed to a judgment in *personam* which only affects the parties to a lis. The cases of Pir Bakhsh Vs. Chairman Allotment Committee (PLD 1987 SC 145) and Hameed Akhtar Niazi Vs. Secretary, Establishment Division (1996 SCMR 1185) have established the distinction between judgments in *rem* which apply to all regardless of whether they were parties or not and a judgment in *personam* which does not bind non-parties. It would be appropriate to mention here at this stage that the judgment of 31.7.2009 sought to be reviewed was a judgment in *rem* enunciating a legal principle. It, therefore, had the status of conclusiveness and finality and no person can be allowed to challenge it merely for the reason that he was not a party in the case and had not been heard.

55. In fact the judgment impugned has been considered in the country as well as on global level as a triumph of democratic principles and a stinging negation of the dictatorship. It is the first instance of the Supreme Court stating in a categoric, loud and abundantly clear manner that military interventions are illegal and will hardly find any colluder in future within the judiciary. The impugned judgment provides much needed redress as it will render considerable help in blocking the way of adventurers and dictators to creep in easily by taking *supra* Constitutional steps

endorsed, supported and upheld under the garb of the principle of necessity in the past which will never happen again. Had our superior judiciary followed the path of non-PCO Judges, the course of Pakistan's political and judicial history would have been different. The verdict has been appreciated by all segments of society for being issue oriented rather than individual specific and therefore, no individual including the petitioners should be aggrieved. The judgment impugned would encourage future justices to take the firm stand against usurpers. The judgment impugned being in the supreme national interest hardly needs any justification for review. The review applications being not maintainable are accordingly dismissed. These are the reasons for our short-order dated 13.10.2009.

Chief Justice

Judge Judge

Judge Judge Judge

Judge Judge Judge

Judge Judge Judge

Judge Judge

Islamabad the
13th October, 2009
Iqbal Naseer

NOT APPROVED FOR REPORTING

56. **Sardar Muhammad Raza, J.–** The background, the circumstances and detailed introduction has already been furnished by my Honourable brother Mr. Justice Javed Iqbal. Suffice it to say that the learned Judges of High Courts, affected by our judgment dated 31.7.2009 in Constitutional Petitions No.8 and 9 of 2009, through applications in hand, seek permission to get the judgment reviewed, on the ground, inter alia, that they had been condemned unheard. Majority held, through short order dated 13.10.2009, that the Reviews are not maintainable. With my humble comprehension of law and justice, I happened to dissent with the majority view.

57. Mr. Wasim Sajjad, learned Senior ASC was the first to initiate. His elaborate arguments were followed by rest of learned counsel, among whom, Shaikh Zameer Hussain, Malik Muhammad Qayyum, Mr. Khalid Ranjha, Syed Ali Zafar, Syed Naeem Bokhari and Dr. A. Basit, added their finishing notes. The caveat contentions were supported by Mr. Rashid A. Razvi, Mr. Hamid Khan, Mr. Muhammad Akram Sheikh; Mr. Shah Khawar, being the Acting Attorney General.

58. The learned counsel on either side seem to have agreed on one thing that the review jurisdiction is exercised by the Supreme Court under (i) Article-188 of the Constitution, (ii) Order XXVI of the Supreme Court Rules, 1980, and (iii) Order XLVII of the CPC, all taken together. I would like to dilate upon Article-188 of the Constitution and Order XXVI of the Supreme Court Rules, 1980 and would not rely upon Order XLVII because as per Rule-9(ii) substituted by the Federal Adoption of Laws Order, 1975 (P.O 4 of 1975), Order XLVII, CPC is not applicable to the Supreme Court.

59. A close perusal of Article-188 of the Constitution and Order XXVI of the Supreme Court Rules, 1980 would indicate that both these provisions commence with the words “the Supreme Court shall have power”. Similar are the words in Order XXVI that “the Court may review its judgment or Order”. This makes it abundantly clear that the Supreme Court has wide, rather, *suo moto* powers to review its judgments or orders provided the grounds for such review are available. Order XLVII, CPC, according to the Supreme Court Rules, are referable only to the extent of the grounds, not the ones mentioned in the Order but similar to those mentioned therein. The Rules, therefore, provide a much wider ambit for review than that mentioned in Order XLVII. Once again I may mention that except for the similarity of grounds, nothing can be borrowed from Order XLVII, CPC so as to restrict the jurisdiction of the Supreme Court for the simple reason that nothing mentioned in Order XLVII CPC is applicable to the Supreme Court.

60. The above conclusion leads to further analogy that even filing of application by a person is not necessary. If, at all, an application is filed by any person feeling aggrieved, it may be considered as an information furnished for the Supreme Court to exercise its powers under Article-188 of the Constitution. I have purposely mentioned Article 188 of the Constitution and avoided the Supreme Court Rules because any jurisdiction, original or appellate, exercised by the Supreme Court under the provisions of the Constitution (Article-184(3) – 188) cannot be limited, abridged, curtailed or restricted even by the Supreme Court itself, under its rule making power. I fully agree on this point with Sheikh Zamir Hussain, learned counsel for one of the applicants that in order to do complete justice under Article-4, 25, 187 and 188, the

Supreme Court should rather assume jurisdiction instead of refusing to do justice. *Malik Asad Ali's case* (PLD 1998 SC 161).

61. It was contended that the applicants have no locus standi to get the judgment in question reviewed. This argument makes room for discussion as to whether the applicants (the judges of superior judiciary) are the aggrieved persons, in view further of a phenomenon, as to whether the judgment in question was in rem or in personam. In order to determine as to who is the person aggrieved, I would be referring to the case law produced by the learned counsel on either side. Before that, I may emphatically express my belief that no previous authority is required on any of the points involved. If this Bench of 14 Honourable Judges of the Supreme Court consider a view to be based on natural justice, fair play and good conscience, it can render a favourable verdict which by itself would be the strongest of rulings to be followed by all concerned as a source of relief for teeming millions. I would, thus, refer to the authorities only to satisfy those, who believe in letters.

62. Far back in the year 1917, in *Jhabba Lal's case* (AIR 1917 Allahabad 160), Mr. Walsh, J. of Allahabad described the person aggrieved as "not the one who is disappointed of a benefit, which he might have received if some other order had been made. He must be a man, who has suffered a legal grievance, a man against whom the decision has been pronounced, which has wrongfully deprived him of something or wrongfully refused him something or wrongfully affected his title to some something". In the instant case, the applicants claimed, and rightly so, that through the judgment in question, they have wrongfully been deprived of the status and their right and title to such status has wrongfully been affected.

63. It was also argued that the applicants are not the persons aggrieved, because they were not a party to the case in

which the judgment is pronounced. In *Kawdu's case* (AIR 1929 Nagpur 185(d), a Director of the company was considered an aggrieved person, though he was not a party to the original case. I have already observed that under Article-188 of the Constitution, the Supreme Court has wide powers to review its judgment, in order to prevent miscarriage of justice, without having regard to any intriguing technicalities. Similar view seems to have been taken by a five member larger Bench of the Indian Supreme Court in *Shiv Deo Singh's case* (AIR 1963 SC 1909), where nothing in Article-226 of the Indian Constitution was considered precluding a High Court from exercising the powers of review, which inheres in every Court of plennary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. In this case review of a person, not a party to the proceedings, was allowed with remarks that "Khosla, J. (of the High Court) did what the principles of natural justice required him to do". Khosla, J. had reviewed his own order on the application of a person, who was not a party to the earlier one.

64. Coming to the case law of our own country, the learned counsel placed reliance on *H.M Saya & Company's case* (PLD 1969 SC 65), where it is observed that even a stranger to suit can file an appeal. To my mind, this verdict is extremely important because, if a stranger can file an appeal, he can file a review as well on the same analogy. In the instant case, the entertainment of review is all the more important, because the judgment in question is that of the Supreme Court against which not appeal is provided. Obviously, an aggrieved person can file nothing, but a review on a very strong ground that he was not a party and was not heard. The restriction prevailing in the mind of the learned opposite counsel might not have been damaging, had the order under review been passed either by the Civil Court or by the

District Court or the High Court because any aggrieved person could have filed an appeal. If such principle is applied to the judgment of the Supreme Court, it would tantamount to absolutely barring the remedy to persons who have certainly been condemned unheard. *Fahmida Khatoon's case* (PLD 1975 Lahore 942) is though a single Bench judgment of Lahore High Court yet numerous rulings have been mentioned and discussed therein; holding that even a stranger, without being a party, can file a review, even under Order XLVII, Rule-1, CPC.

65. To be treated in accordance with the law, and to be heard by any forum, likely to decide some matter against him, is the fundamental and inalienable right of a citizen. Any violation thereof would be a violation of Article-4 & 25 of the Constitution. In this behalf, I would like to refer, with credit, to a judgment rendered by a seven member Bench of this Court in case of *Pakistan Muslim League* (PLD 2007 SC 642) which, with pleasant coincidence, happened to be authored by my honourable brother, Javed Iqbal, J., who also is the author of majority judgment in the instant case. In this case, with reference to Article 184 (3) of the Constitution, it was under consideration as to whether it was necessary that the person invoking relevant jurisdiction should be an aggrieved party. This Court held that it is not necessary for the purpose involved in the said case. Presently, the case of the applicants is on a better footing because they are most certainly the aggrieved party.

66. After having discussed the law produced in the case of Pakistan Muslim League, supra, the Honourable author Judge observes in view of judicial consensus that;

> "(i) that while interpreting Article 184(3) of the Constitution the interpretative approach should not be ceremonious observance of the rules or usages of the interpretation but regard should be had

to the object and purpose for which this Article is enacted i.e. the interpretative approach must receive inspiration from the triad of provisions which saturate and invigorate the entire Constitution namely the Objectives Resolution (Article 2-A), the fundamental rights and the directive principles of State policy so as to achieve democracy, tolerance, equity and social justice according to Islam.

(ii) That the exercise of powers of Supreme Court under Article 184(3) is not dependent only at the instance of the "aggrieved party" in the context of adversary proceedings. Traditional rule of *locus standi* can be dispensed with and procedure available in public interest litigation can be made use of, if it is brought to the Court by a person acting *bona fide*.

(iii) .....

(iv) That under Article 184(3) there is no requirement that only an aggrieved party can press into service this provision. Supreme Court can entertain a petition under Article 184(3) at the behest of any person.

(v-vii) .....

(viii) That the language of Article 184(3) does not admit of the interpretation that provisions of Article 199 stood incorporated in Article 184(3) of the Constitution. Therefore, this Court while dealing with a case under Article 184(3) of the Constitution is neither bound by the procedural trappings of Article 199 ibid, nor by the limitations mentioned in that Article for exercise of power by High Court in a case." (Emphasis provided).

Though the discussion aforementioned refers to Article 184(3) yet the principles of prudence, interpretation and assumption of jurisdiction, in order to do complete justice, are fully in consonance with what I feel in the instant case with reference to Article 187-188 of the Constitution.

67. *Faqirullah's case* (1999 SCMR 2203) is another example of doing justice by invoking review jurisdiction. In this case, despite State being the protector of the rights of complainant in criminal cases, was present yet on the review application of complainant, who was not a party in the original case, he was heard and, no less a judgment of acquittal was set aside and the accused sentenced to death. This Court maintains the practice of imparting ultimate justice throughout. It should not be departed from in the instant cases.

68. I am of the firm view that, for the Supreme Court to exercise its powers under Article 188 of the Constitution and Order XXVI of the Supreme Court Rules, it is not at all necessary for the applicant/petitioner to be a party in the judgment under review. Such inferences are drawn, if at all, from Order XLVII of the CPC, which is not applicable to the Supreme Court. Rather, in cases where complete justice was needed to be done, even strangers were entertained in review matters under Order XLVII, CPC.

69. The instant applications are further contested on the ground that our judgment sought to be reviewed was judgment in rem and conclusive against world and thus could not be challenged by the individuals. Mr. Rashid A. Razvi placed reliance on *Pir Bukhsh's* case (PLD 1987 SC 145). After having gone through the above ruling and also having reconsidered our own judgment in question, I believe that the judgment in totality is not in rem. So far as our declaration with regard to the Proclamation of Emergency, the Enforcement of Provisional Constitution Order and Oath of Office (Judges) Order, 2007 is concerned, it can be dubbed as judgment in rem, but so far as the fall out thereof with regard to the applicants is concerned, it is in personam, especially because such judges were not a party and could have been impleaded in view of the prospective results of our principal findings. The amends can be made only by hearing them now at this stage.

70. Quite forcefully, it was alleged that this Court in *Al-Jehad Trust's case* (PLD 1996 SC 324) had not impleaded many judges despite the fact that they were eventually affected. No doubt *Al-Jehad Trust's case*, Supra, has been extensively relied upon in our judgment in question, but this aspect of *Al-Jehad Trust's case*, where also the Judges were condemned unheard, is not at all

enviable. It was admitted at the Bar that judges of some High Courts were even issued notice in *Al-Jehad Trust's case*, but it is equally undeniable that many affected were not made party. Should we, in the circumstances, feel bound by an action, where the judgment operated in rem for those who were not impleaded and in personam for those who stood impleaded. This course of action adopted in that case was also not judicial and should not be followed as a precedent, especially by a Bench of as many as 14 Judges. To my mind, even in *Al-Jehad Trust's* case, the Court was not sure, whether it is going to pronounce a judgment in rem or in personam. To some, it impleaded, to others, it did not, thereby, condemning them unheard. If such a precedent is followed once again, as was followed in our judgment in question, and is placed reliance upon even to deny hearing in the review petitions, it would not be a judgment in rem, but a "condemnation-in-rem".

71. It was further argued in the light of the case of ***Hameed Akhtar Niazi*** (1996 SCMR 1185) considering the judgment to be one in rem, that the benefit thereof was extended to those people as well, who were not a party. I think this judgment, rather, serves my view point. In the judgment aforesaid, benefit of one verdict was given to all universally and not that the people were condemned universally. The ruling aforesaid was beneficiary and not jeopardizing and hence, cannot be pressed into service. Assuming for the sake of arguments that our judgment in question was a judgment in rem, which I do not believe it was, how on earth it was inferred that such judgment cannot be challenged by a person or persons who were not a party to it, but seriously and adversely affected thereby. There is every likelihood that if heard in review, the applicants might be able to influence the Court to change its decision concerning the applicants. It all depends upon the hearing of the case and, for the sake of doing

ultimate justice, I hold the view that the review petitions be heard on merit.

72. A judgment cannot be called one in rem when questions of fact being a deciding factor and being variously relevant and applicable to the affectees involved, has differently and specifically been pleaded in defence.

73. Now I come to the most important aspect of the case concerning the principle of *audi alteram partem*. The applicants claimed that they have been condemned un-heard. That they have not been a party to the constitutional petitions No.8 & 9/2009; that they were not even issued notice to appear and answer the charges before taking the drastic action against them and that the review petitions filed by them are the first and last chance that they are likely to avail. If not given a chance to be heard, the principle of *audi alteram partem* would stand violated, not once but thrice.

74. The centuries old concept of *audi alteram partem* is nothing but a principle of due process embodied clearly and expressly in Article 4 of our constitution. The principle which now has become of universal acceptance is a wide ranging guarantee of procedural fairness in the judicial process. Giving the defendant his day in the Court is of the essence of principle of justice as also of natural justice. Guarantee of due process refers to procedure that protects the people against arbitrary treatment. Essential elements of due process in "Methew Vs. Albridge" were laid down as follows:-

i) Adequate notice of charges or basis for action;
ii) A neutral decision maker;
iii) An opportunity to make an oral presentation to the decision maker
iv) An opportunity to present evidence;

v) An opportunity to controvert and cross-examine the evidence;

vi) The right to have a counsel;

75. In his book "Judicial Review of Public Action" Mr. Justice Fazal Karim has elaborately discussed the principle of due process associating the same with human rights. He further goes on to refer to Section 24-A of the General Clauses Act and concludes that the concept of "fairness" has received legislative recognition and confirmation through its insertion in the General Clauses Act. According to the learned author, Section 24-A of the Act embodies, by necessary implication, the principles of natural justice, which include the right of hearing before an impartial Tribunal. In the case of Fisher Vs. Keen (1878) 11 Ch.D.353, it was observed that persons who decided upon the conduct of others, they are not "to blast a man's reputation forever, to ruin his prospects for life, without giving him an opportunity of either defending or palliating his conduct". The jurists have gone to such an extent of holding that the defect created by an absence of hearing cannot be cured by a second and subsequent hearing because the original decision is a nullity.

76. The concept of *audi alteram partem* based on the principle of natural justice is Centuries old. *Audi alteram partem* applies to "Everyone who decides Anything". The history quite laboriously is traced by a five member larger bench of Supreme Court of India in Tulsi Ram's case (AIR 1985 SC 1416). The expression 'natural law', was largely used in the philosophical speculation of the Roman Jurists and was intended to denote a system of rules and principles for the guidance of human conduct which, independently of enacted law or of the systems peculiar to any one people, might be discovered by rational intelligence of man and would be found to grow out of and conform to his

nature, meaning by that word his whole mental, moral and physical constitution. This principle was opposed by those who believed natural justice, with reference to its terminology, as the law of jungle that prevailed widely on earth. From the clash of those theories, if there was any help to be found or any hope to be discovered, it was only in a law based on justice and reason which transcended the laws and customs of men, a law made by someone greater or mightier than those men who made these laws and established these customs. Such a person could only be a divine being and such a law could only be "natural law" or "the law of nature", so just that it could be binding on all mankind. It was not the law of nature in the sense of the law of jungle. With the passage of time, the natural justice happened to be considered as part of the law of God.

77. Natural justice fulfills the requirements of substantial justice and the natural sense of what is right and wrong. Many writers have dubbed it as "fundamental justice", "fair play in action" and a "duty to act fairly". Ormond, LJ in Lewis Vs. Heffer (1978) I WLR 1061.1076 have found the phrase of natural justice to be "a highly attractive and potent phrase".

78. Maugham, J., in Maclean Vs. Workers Union (1929) 1 Ch. 602, 624) held a different view and considered natural justice to be a law of jungle and of might is right. He summed up with the observation that, "the truth is that justice is a very elaborate conception, the growth of many centuries of civilization; and even now the conception differs widely in countries usually described as civilized". Some jurists following Maugham L. J., were of the opinion that "the principle of natural justice are vague and difficult to ascertain". This fallacious view was well rebutted by Lord Reid in Ridge Vs. Baldwin (1964) AC 40, in the following words:-

> "In modern times opinions have sometimes been expressed to the effect that natural justice is so vague as to be practically meaningless. But I would regard these as tainted by the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore it does not exist. The idea of negligence is equally insusceptible of exact definition, but what a reasonable man would regard as fair procedure in particular circumstances and what he would regard as negligence in particular circumstances are equally capable of serving as tests in law, and natural justice as it has been interpreted in the courts is much more definite than that. It appears to me that one reason why the authorities on natural justice have been found difficult to reconcile is that insufficient attention has been paid to the great difference between various kinds of cases in which it has been sought to apply the principle". (Emphasis supplied)

79. The whole discussion boils down to the conclusion that justice should not only be done but should manifestly be seen to be done. In Bosweel's case (1605) 6 Co.Rep.48b, 52a), it was beautifully held that;

> "He who shall decide anything without the other side having been heard, although he may have said what is right, will not have done what is right."

The principle of natural justice has now received international recognition by being enshrined in article 10 of the Universal Declaration of Human rights adopted and proclaimed by the General Assembly of the United Nations by resolution 217A (III) of December 10, 1948. It was further recognized by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 14 of the International Covenant on Civil and Political Rights adopted by the General Assembly Resolution 2200A (XXI) of December 16, 1966, having come into force on March 23rd, 1976.

80. The outcome of the short history of *audi alteram partem* narrated hereinbefore, as applicable to the present judicial

systems of the whole world, is put in a nutshell by the Supreme Court of India in the case of *Tulsi Ram* Supra, as follows:-

> ".....*audi alteram partem* rule, in its fullest amplitude means that a person against whom an order to his prejudice may be passed should be informed of the allegations and charges against him, be given an opportunity of submitting his explanation thereto, have the right to know the evidence, both oral or documentary, by which the matter is proposed to be decided against him, and to inspect the documents which are relied upon for the purpose of being used against him, to have the witnesses who are to give evidence against him examined in his presence and have the right to cross-examine them, and to lead his own evidence, both oral and documentary, in his defence....."

81. Coming to the learned discourse of my honourable brother in the majority view, the reliance was placed on the assertions of Mr. Rashid A. Razvi and Mr. Hamid Khan, learned counsel for the caveators that the applicants were not a party to Constitution Petitions No.8 & 9 of 2009 and hence have no locus standi to file a review, not maintainable in turn. This argument, I have already mentioned, is derived from Order XLVII of the CPC which, as observed earlier, is not applicable. It was further alleged that the applicants, not being a party, no relief was claimed against them. Such argument makes the review petitions all the more necessary to be heard. If the actions challenged in the Constitution Petitions were those of General Pervez Musharraf, taken in between 3.11.2007 and 16.12.2007, and if this Court deemed it necessary to issue notice to General Pervez Musharraf, it was rather obligatory to issue notices to the applicants, if any possible action was intended to be taken against them as a fallout of any declaration.

82. Mr. Hamid Khan's assertion that the applicants were aware of the hearing of Constitution Petitions and that they could have applied for becoming a party, was also approved in the

majority judgment. I do not subscribe to the view so taken because it assumes that the applicants had a knowledge of what is happening in this Court and that they ought to have had the knowledge as to what was going to happen, concerning them. It is a settled principle of law that any knowledge outside the Court does not fall within the purview of knowledge. If the argument is considered valid, it would mean that in proceedings in rem (as it is called by the opposite side), the public at large, even if in thousands, should themselves come to the Court and apply for impleadment. This is neither advisable nor practicable. The simple rule of justice is that, whosoever is likely to be affected, notice should be issued to him or them by the Court itself. This was precisely done by this Court qua General Pervez Musharraf, but the applicants were ignored.

83. Mr. Hamid Khan further contended that in our judgment dated 31.7.2009, reliance is placed upon the case of *Al-Jehad Trust* and *Malik Asad Ali,* supra and if the review petitions are heard, the applicants might allege to set the aforesaid rulings aside. I have already referred to *Al-Jehad Trust's* case and firmly believe that this Bench is not bound to follow every act taken in that case as gospel. The fact that the Judges from the province of Sindh and NWFP were not made party to the above referred case, is not at all enviable aspect of *Al-Jehad Trust case*. This Bench consisting of 14 Honourbale Judges could have avoided to follow *Al-Jehad Trust case,* so far as the question of condemnation of certain citizens was concerned, especially when such citizens happened to be the judges of superior judiciary.

84. It was further accepted in majority judgment that in our judgment in question, the void actions of General Pervez Musharraf and void declarations in Tikka Iqbal case were set aside; that it was a national act, which cannot be set aside in

review. This argument is totally misplaced because it might be advanced when the review petitions are heard. At the moment, we are stuck up in the problem as to whether the review petitions should at all be heard or not. Wittingly or unwittingly, the remarks have come for the third time, concerning the merit of the review petitions and such remarks have condemned the applicants for the third time.

85. The argument that the hearing of the review petitions would be an exercise in futility, is also not valid because such exercises are mostly undertaken by this Court regardless of what the outcome of review petition would be. How the results of review petitions could be assessed or visualized at the present moment. The majority view has decided this aspect as well without the applicants being heard in review petitions. At this juncture, Mr. Muhammad Akram Sheikh, learned counsel for the caveator was last to be heard. He stated that power of Court is not a charity, but bound to be used for the benefit of the citizens. I agree with the learned counsel that power of Court should always be used for the benefit of citizens, and those citizens who were Judges of the superior judiciary, if condemned unheard, must be heard in review. Mr. Sheikh, while speaking from the deep recesses of his mind and heart, at the end submitted that “he was not in favour of closing the door of justice to any one”. So do I.

86. The matters alluded to above and the points yet to be heard in the review petitions have already been decided in para No.21 of majority judgment, pre-determining that if heard, a contrary view cannot be taken. Whether a contrary view can be taken or not, is possible to be judged only after when the review petitions are heard. Does it require to be reaffirmed that this aspect of *Al-Jehad Trust’s case*, if found violative of the principles

of natural justice, could not be set aside or differed from, by a Bench of 14 Honourable Judges of this Court?

87. In majority judgment (para-22), it is remarked that the applicants, in their review petitions have not challenged the declaration of this Court in main judgment that the actions of General Pervez Musharraf were void *ab initio* and hence it be presumed that the applicants accepted the fallout thereof. I humbly disagree with this view as well because if that part of our judgment is not challenged, it does not mean that the fallouts are accepted. Had those been accepted by the applicants, there was no sense in filing the review petitions. Such remarks in para-22 are also made with reference to the review petitions, which are never heard as yet. In para-22, page-25, the merits of review are rejected on the very basis of our own judgment which is under review and which reviews we have not yet heard.

88. A review, under the law, can be allowed if sufficient grounds are established. Such grounds are dispelled in para 28 and 29 of the judgment without hearing the petitioners on merits. I may recall that no technicalities of Order XLVII, CPC can be brought under consideration, the order being not applicable to the Supreme Court, except for the grounds mentioned therein. Moreover, the grounds also could be adhered to only when review petitions are heard. In para 32, with reference to the judgment of Honourable Mr. Justice Ghulam Mujaddid Mirza, it was observed that the Supreme Court had laid down a law (PLD 1969 SC 65), regarding appeals and that there is a lot difference between appellate and review jurisdiction. I remember having discussed this matter in the earlier part of the judgment and have tried to equate appellate jurisdiction with the review jurisdiction, especially when the order under review is that of the Supreme Court, against which no appeal lies, except to the God Almighty. I

have a firm faith and belief that the matter in hand should not be left to Almighty Allah because His retribution and requital is, no doubt delayed but certainly not outrageous.

89. The applicants through the majority judgment are denied hearing of review on the analogy that by doing so, the finality attached to the judgment of the apex court would be eliminated. I do not agree with this view as well because had it been so, there would have been no justification for the legislature to provide Article 188 in the Constitution and no occasion for the Supreme Court to make a provision of Order XXVI in the Rules. Judgments of the Supreme Court are occasionally reviewed. If the factum of finality is of prime consideration, the judgment in review can, rather, be the one which becomes final. In para 35 of the majority judgment, it was after all mentioned that "any other view possible" could not be taken even if the review petitions are heard. At the cost of repetition, I may say that it is tantamount to rejecting the review petitions without hearing them, whereas, the fact of the matter is that if a judgment is reviewed, it is always the other view which is taken. In para 38, it was observed that a rule making authority cannot clothe itself with the power, which is not given to it under the statute. I also believe in the same concept of law that rule making power cannot step beyond the legislation and on the same analogy, this Court under its rule making power, cannot curtail its own power, widely given by Article 187 and 188 of the Constitution.

90. Repeatedly it was argued that the applicants have not been issued notice in main Constitution Petitions No.8 & 9 of 2009, decided on 31.7.2009, because they happened to possess the status of Judges. In this behalf, the majority seems to be of the view, approved and taken from *Al-Jehad Trust's case* as follows:-

> "It must be borne in mind that Judges of superior Courts by their tradition, maintain high degree of comity amongst themselves. They are not expected to go public on their differences over any issue. They are also not expected to litigate in Courts like ordinary litigant in case of denial of a right connected with their offices. Article VI of the Code of Conduct signed by every Judge of the Superior Courts also enjoins upon them to avoid as far as possible any litigation on their behalf or on behalf of others. Therefore, in keeping with the high tradition of their office and their exalted image in the public eye, the Judges of superior Courts can only express their disapproval, resentment or reservations' on an issue either in their judgment or order if the opportunity so arises....." (Emphasis provided)

91. The above view seems also to be prevailing all over when, with reference to the review applications and present applications of the Judges, it was seriously objected to as to why, being Judges, they had mentioned that through our judgment, they happened to loose their service. The use of word 'service' regarding their assignments and status was considered to be below their dignity. With utmost respect and with utmost effort at my command, I could not reconcile with this paradoxical logic that, on the one hand the Judges are considered so honourbale and so exalted that even issuance of notice to them in a very crucial matter is considered below their dignity and, on the other hand, they are issued contempt notices in utter disregard of their status as well as the principle of comity among Judges. For a long time, they have been hearing the cases of millions of litigant public; they have been awarding decrees, recording convictions, imposing sentences and redressing the grievances of the people (which actions we have safeguarded in our judgment dated 31.7.2009) and for a long time they have been addressed by the learned counsel and the litigant public as "my lord", but at the present, they are issued contempt notices, insulted and

humiliated in Court to such an extent that one of the advocates among audience, uninvitedly and uninterruptedly stands up, pointing out his finger at Mr. Justice Syed Zulfiqar Ali Bukhari and proclaiming in the open Court, *"isko saza do – isko zaroor saza do – isko exemplary punishment do"*. This act has shocked me so much as if that counsel was pointing his finger at us. In view of the dignity attached to their high offices and the exalted image that the public have about the Judges of superior judiciary, I am of the firm opinion and hold that the contempt proceedings against the Judges be not initiated and if so, the notices be withdrawn.

92. If heard in review petitions, it is not necessary that they be able to persuade this Court to recall its judgment, concerning the actions of General Pervez Musharraf, but there is likelihood that they might persuade this Court to take lenient view against them and to follow the principle of condonation by keeping in view the centuries old principle of comity among judges. But that too is subject to the hearing of the cases. The majority judgment is of the view that even if we hear the cases, we would not resort to any second opinion. This is tantamount to condemning the applicants for the third time and I am afraid, the theory of judgment in rem might not turn out to be of condemnation in rem.

93. Getting support from *Monika Gandhi's case* (AIR 1978 SC 597), my honourable brother maintained the view that where the right to prior notice and an opportunity to be heard before an order is passed, would obstruct the taking of prompt action, such a right can be excluded. The relevant observation of the Supreme Court of India in the aforesaid case is reproduced as follows:-

> "Since the *audi alteram partem* rule is intended to inject justice into the law, it cannot be applied to defeat the ends of justice, or to make the law lifeless, absurd, stultifying, self-defeating or plainly contrary to the common sense of the situation. *'Audi alteram partem'* rule as such is not cast in a rigid mould and judicial decisions establish that it may suffer situational modifications."

Accordingly, it was observed that the principle of *audi alteram partem* can be applied to achieve the ends of justice and not to defeat them. I am spellbound to answer to such reasonings. Being a member of the Bench in the original case, I personally could not see any urgency involved for which a drastic action of ignoring *audi alteram partem* be resorted to. Do we mean to say that, had the applicants/Judges been issued notice and had they been heard during the main case and even if they are heard in review petitions, it would lead to defeat the ends of justice, making the law lifeless, absurd, stultifying, self-defeating or plainly contrary to the commonsense of the situation. At least, I am not aware of any commonsense of the situation that would have lead to injustice, had the applicants been heard. If not heard earlier, they must be heard now in the review petitions.

94. An undeniable hard fact cannot be forgotten that every word reduced into black and white by the Supreme Court is a command of law. Consitutionally, such verdict is bound to be followed by all the Courts and by generations of the people. We should avoid holding a view of such nature that tomorrow, even a Civil Judge might stand up and quote the Apex Court in order to shun the concept of *audi alteram partem* and resultantly commit injustice. I wish, we had followed the quotations of Lord Denning, *"Justice isn't something temporal-it is eternal-and the nearest approach to a*

definition that I can give is, Justice is what the right thinking members of the community believe to be fair". If a just end is to be achieved, it must be through just means.

95. Numerous paragraphs of our judgment dated 31.7.2009 are referred to by my honourable brother in support of the view that review petitions have no merit. This also, to my mind, is not a fair approach because those very portions of our judgment are sought to be reviewed and unless we hear the applicants in review, we cannot justify our own views under review. Again it was observed that the principle of natural justice cannot be applied where "the grant of relief would amount to retention of ill-gotten gains or lead to injustice or aiding the injustice". At the cost of repetitions, I am constrained to say that this again is a verdict given about review petitions, which are never heard. Numerous substantial points have already been answered in the judgment, which could have only been answered after hearing the applicants in review. The applicants are demanding no better opportunity than the one given by notice to General Pervez Musharraf. Any denial, therefore, to the applicants would be a discrimination, violating the provisions of Article 25 of the Constitution.

96. In paragraph 55, it was remarked that the one sought to be reviewed, was a landmark judgment in impeding the future path of any dictator. In relation to the aforesaid object it was, no doubt, an important judgment in judicial history of the country, but another equally important aspect thereof is that it practically damaged none except the weakest of the strata. The fallouts ought to have been equal. Such discrimination can only be made amends for through the hearing of review petitions filed by the applicants.

97. Consequent upon what has been discussed, I hold that the Supreme Court has unfettered powers under Article 187-188 of the Constitution read with Order XXVI of the Supreme Court Rules to do ultimate justice for which review petitions are absolutely maintainable. The applications in hand are hereby accepted and the review petitions entertained for full hearing by the Court.

(Sardar Muhammad Raza)
Judge

Islamabad,
13th October, 2009.
APPROVED FOR REPORTING
Sadaqat

CH. IJAZ AHMED, J.- I have had the benefit and privilege of going through the judgment recorded by my learned brother Mr. Justice Javed Iqbal and generally agree therewith. In view of the importance of the case, I deem it prudent to add few words in support thereto. The petitioners, through instant petitions, have sought review of judgment dated 31.7.2009 passed by this Court in Constitution Petition No.9/2009 and Constitution Petition No.8/2009 and thereby seek opportunity of being heard for modifying or recalling or setting aside only the consequential order of the judgment which affects them. The judgment has declared the imposition of emergency as illegal and unconstitutional and as a consequence thereof its offsprings get affected. The petitioners being offsprings concede that emergency was unconstitutional but challenged the consequential order on the plea that it was passed without granting opportunity of hearing to the affectees. The argument in essence is that cutting of roots of undesirable tree is valid but thereafter pruning of its branches is invalid.

2. The doctrine of natural justice is not only to secure justice but to prevent miscarriage of justice. It is, therefore, for the courts to articulate from case to case what is involved in the concept of natural justice in a particular situation. The courts do not like the idea of confining the rules of natural justice within any rigid formula.

3. The reliefs claimed in Petitions Nos. 9 & 8 are of general nature and are against the State and no particular relief is claimed against any individual party, therefore, beneficiary of consequential order is not entitled to any hearing before striking such order.

4. The courts only insist on fair play in action. Fairness does import an obligation to see that no body can take benefits of any acts which were passed by the authorities beyond the parameters of the Constitution. A ship and its sailors swim and sink together. Hence, when the hazardous ship of emergency is drowned then its sailors cannot claim immunity as the fair play demands equal treatment.

JUDGE

RAHMAT HUSSAIN JAFFERI, J-. I have had the privilege of going through the judgment recorded by my learned brother Mr. Justice Javed Iqbal and generally agree therewith. However, I like to express my opinion with regard to the filing of review application by stranger under Order XLVII Rule 1, CPC. The Lahore High Court in the case of "*Qaim Hussain v. Anjuman Islamia* **(PLD 1974 Lahore 346)**" appearing at page 34 of the judgment observed that a stranger, who is not a party to the suit cannot file such application. In order to appreciate the point, the provisions of Section 114 and Order XLVII of CPC are required to be examined. The Section 114, CPC reads as under:-

> "***Sec.114. - [Review. - (1)*** *Subject as aforesaid, any person considering himself aggrieved.—*
>
> *(a) by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred,*
> *(b) by a decree or order from which no appeal is allowed by this Code, or*
> *(c) by a decision on a reference from a Court of Small Causes, may apply for a review of judgment to the Court which passed the decree or made the order,*

> *and the Court may make such order thereon as it thinks fit.*
>
> ***(2)*** *Nothing contained in sub-section (1) shall apply to a review of any judgment pronounced or any order made by the Supreme Court].”*

A bare reading of the Section reveals that right to apply for review has been given to “any person” but subject to condition that he should be aggrieved by a decree or order of the Court. The phrase “any person” means a person, no matter who or a person of any kind. Words “a person” appearing in Section 12(2), CPC has been defined as a person not party to the suit by this Court in the cases of “*Muhammad Yousaf v. Federal Government* **(1999 SCMR 1516)** and *Ghulam Muhammad v. M. Ahmad Khan* **(1993 SCMR 662)**”. Thus there is no restriction placed under Section 114, CPC to debar any person other than the parties to the suit to file review application.

2. The rules contained in the First Schedule of Code of Civil Procedure are enabling provisions for the advancement of justice, therefore, they are required to be consistent with the provisions of the enactment. The said rules cannot enlarge or reduce the scope of relevant Sections of CPC. In the case of Qaim Hussain *(supra)* it appears that scope of the Section has been reduced which in my humble view is not permissible. A detailed and valuable discussion has been made in the judgment of my learned brother on the consistency of rules with the enactment and observed that statutory rules cannot enlarge the scope of the Section under which it is framed and if a rule goes beyond what the Section contemplates, the rule must yield to the statute.

3. A perusal of Order XLVII which has already been reproduced in the judgment would show that in sub-rule 1 the words “any person” have been used which are also appearing in Section 114, CPC whereas in sub-rule 2 instead of using the words “any person” the Framers of rules have used the words “a party”. This departure is a significant one which clearly demonstrates that the Lawmakers did not intentionally use the words “a party” in sub-rule 1, so as to make it in consonance with Section 114, CPC. In my humble view all the grounds mentioned in sub-rule 1 of Order XLVII, CPC for review of the decree or order would be available to the parties of the suit whereas the last two grounds: (i) on account of mistake or error apparent on the face of record or (ii) for any other sufficient reason would appear to be available to the persons who are not parties to the suit. If the meaning of “any person” is restricted to the parties of the suit then it will negate the

words “any person” appearing in Section 114, CPC which in my humble view would not be the intention of the Framers of rules. Therefore, I am of the view that the words “any person” would not only include the parties to the suit but also other persons.

4. It is further pointed out that under sub-section 2 of Section 114, CPC the sub-section 1 thereof has been excluded from application before this Court. Therefore, Section 114(1), CPC would not be applicable before this Court and so also the rules framed thereunder viz. Order XLVII. Nevertheless, Order XXVI Rule 1 of Supreme Court Rules, 1980 shows that only reference has been made to the grounds mentioned in Order XLVII Rule 1, CPC. The said Rule reads as under:-

> *“1. Subject to the law and the practice of the Court, the Court may review its judgment or order in a Civil proceeding on grounds similar to those mentioned in Order XLVII, rule I of the Code and in a criminal proceeding on the ground of an error apparent on the face of the record.”*

5. Thus for the purpose of review of judgment or order of this Court, only the grounds mentioned in order XLVII Rule 1 of CPC can be taken into consideration and not the Order itself or Section 114, CPC. However, the grounds may be other than the grounds mentioned above as the word “similarity” has been used, which has enlarged the scope from the above provisions of CPC.

Sub-rule 6 of Order XXVI of Supreme Court Rules, 1980 deals with entertaining and hearing of review application, which is as under:-

> *“6. Except with the special leave of the Court, no application for review shall be entertained unless it is drawn by the Advocate who appeared at the hearing of the case in which the judgment or order, sought to be reviewed, was made. Nor shall any other Advocate, except such Advocate, be heard in support of the application for review, unless the Court has dispensed with the requirement aforesaid.”*

The above provision clearly shows that the Advocate, who had appeared at the hearing can draw the review application and be heard in support of the said application. Thus it refers to the party. Reference is invited to “*Muhammad Rafique v. Maryam Bibi* **(1996 SCMR 1867)**”. However, the Court has also *suo motu* powers to review the judgment or order on its own or on receipt of any information through any source in any manner either written or oral. The person supplying information can be treated as informer and if the Court finds that the information is such where any of the grounds for review is attracted then the matter can be heard to do complete justice.

Judge